



**Law
Commission**
Reforming the law

Product Liability

Consultation Paper



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Consultation Paper 279

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Topic of this consultation: We are conducting a review of product liability law, which governs who may be held liable for damage caused by defective products and how those harmed can obtain compensation.

Geographical scope: This consultation applies to the law of England and Wales.

Duration of the consultation: We invite responses from 8 October 2026 to 14 January 2027.

Responses to the consultation may be submitted using an online form at: <https://consult.justice.gov.uk/law-commission/product-liability/>. Where possible, it would be helpful if this form was used.

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After the consultation: We will analyse the responses to the consultation, which will inform our final recommendations for reform to Government, which we will publish in a report.

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Glossary

Closed-source (or proprietary) software	Software whose use, modification and redistribution are permitted only on terms prescribed by its owner.
Component product	A product that is integrated into or interconnected with another product, whether physically, digitally or otherwise.
Connected product	A product that incorporates software and connectivity, enabling it to exchange data with other devices, systems or services, and whose functionality may depend in whole or in part on that connectivity.
Consumer(s)	In the context of this consultation paper, a person or persons who use, interact with, or may be affected by a product. It extends beyond consumers who have purchased a product, encompassing all natural persons who suffer harm as a result of a defective product.
Core participant	A natural or legal person who, whether through its own conduct or that of another person whose conduct it controls, or could have controlled: (1) played a significant role in bringing a product to the UK market; (2) received a direct or indirect financial benefit (or otherwise acted in the course of business and/or with a view to profit); (3) had direct or indirect control over, or a decisive ability to influence, the product's manufacturing or distribution process; and (4) is not a producer, own-brander, importer, fulfilment service provider, or authorised representative of any such person.
Development risks defence	A defence provided for in section 4(1)(e) of the Consumer Protection Act 1987, whereby a defendant is not liable for a defect in a product if the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in their products while under their control.

Digital manufacturing file	Digital files containing the functional information necessary to produce a tangible product by enabling the automated control of machinery or tools.
Direct victim	A person who suffers damage directly caused by the defective product.
Entitled level of safety	Related to the meaning of defect; under section 3(1) of the Consumer Protection Act 1987, there is a defect in a product if its safety “is not such as persons generally are entitled to expect”.
Fulfilment service provider	Any person offering, in the course of their business, at least two of the following services: (i) warehousing; (ii) packaging; (iii) addressing; and (iv) dispatching of a product, without having ownership of that product, excluding postal services, parcel delivery services and freight transport services.
General-purpose AI (“GPAI”)	AI which displays significant generality and is capable of performing a wide range of distinct tasks or fulfilling a variety of purposes.
Importer	Any person who has imported a product into the UK to supply it to another.
Indirect victim	A person who suffers damage arising as a result of the physical or psychiatric injury, the physical imperilment, or the death of the direct victim caused by a defective product
Latent personal injury / latent harm	Personal injury that does not become apparent until some time after the event or exposure that caused it. We also use the term, “latent harm”.
Long-stop period	A provision in section 11A(3) of the Limitation Act 1980, under which any right to bring a claim for damage caused by a defect in a product is automatically extinguished after ten years from the relevant time. “Relevant time” is defined later in the glossary.
Manufacturer	A term used by the European Union in the New Directive, which is broadly equivalent to “producer” under section 1(2) of the Consumer Protection Act 1987
Medically recognised / recognisable psychiatric illness	Harm that goes beyond mental distress, reflecting the principle that a threshold level of psychological injury must be met before damages are recoverable.
Open-source software	Software where the source code is made available and may generally be used, modified and redistributed by others,

	typically at no cost, depending on the terms of the particular open-source licence.
Own-branding	Any person who, by putting their name or trademark on a product, has held themselves out to be the producer of the product.
Presentation of risk	The manner in which instructions and warnings concerning risks associated with a product are presented.
Preventative measures	Measures taken by a person to avert a risk of personal injury caused by a defective product (in other words, to prevent personal injury from arising).
Producer	Under section 1(2) of the Consumer Protection Act 1987, any person who manufactured, won, abstracted, or carried out an industrial or other process in relation to a product. We provisionally propose changes to the definition in Chapter 3.
Relevant time	A defined term in section 4(2) of the Consumer Protection Act 1987. The “relevant time” varies depending on the nature of the product and the defendant. For any product other than electricity: (1) where the defendant is a producer, own-branding or importer in line with section 2(2) of the Consumer Protection Act 1987, the relevant time is when that person supplied the product to another; (2) in any other case, such as where the defendant is a supplier, the relevant time is when the product was last supplied by a producer, own-branding or importer.
Substantial modification	Under our provisional proposals, any modification of a product made by a person after the relevant time where the modification: (1) changes such product’s original performance, purpose or type; and (2) as a result, either: (a) changes what persons generally are entitled to expect in relation to such product for the purposes of section 3(1) of the

	Consumer Protection Act 1987 on “defect”; or (b) changes the nature of the risk, creates a new risk or increases the level of risk, of the product causing damage. “Relevant time” is defined above in this glossary.
Supply	A defined term in section 46 of the Consumer Protection Act 1987. “Supply” includes, among other things, selling, hiring out or lending goods.

Abbreviations

1985 Directive	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.
ECtHR	European Court of Human Rights
CJEU	Court of Justice of the European Union
CPA	Consumer Protection Act 1987
Initial Scoping Questionnaire	The Initial Scoping Questionnaire we issued, available on our project page at https://lawcom.gov.uk/project/product-liability/ .
Law Commissions' 1977 Report	Liability for Defective Products (1977) Law Com No 82; Scot Law Com No 45
New Directive	Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC (Text with EEA relevance).

All websites referenced in this document were last accessed on 6 October 2026.

Chapter 1: Introduction

BACKGROUND

- 1.1 The existing product liability regime in England and Wales was established in the 1980s. The regime is set out in Part 1 of the Consumer Protection Act 1987 (the “CPA”), which implements the 1985 European Product Liability Directive (the “1985 Directive”).¹ Its central objective is to provide a strict liability regime which balances consumer protection² with support for business, innovation and growth. It does so by alleviating claimants of the burden of proving fault, whilst affording defendants a number of specific defences to avoid liability, as well as providing a ten-year long-stop that extinguishes claims not brought within that time.
- 1.2 The CPA was introduced nearly 40 years ago. Since then, the range of products available to consumers, particularly in the context of digital technologies, has expanded significantly. The advent of online platforms has also transformed how products are marketed and purchased. The product liability regime has not kept pace with these developments. In addition, it has not always provided a clear or straightforward route to compensation.
- 1.3 Against this background, the existing product liability regime may leave injured individuals without adequate protection, create uncertainty for manufacturers and other liable parties as to their potential liability, and expose insurers to unforeseen risks. A wide range of stakeholders, including specialist lawyers, law firms, industry and consumer groups have expressed concerns that the regime requires reform. These issues are not unique to this jurisdiction. The European Union has recently reformed its product liability framework in response to similar challenges (the “New Directive”).³
- 1.4 The Law Commission has been asked to consider the existing product liability regime to determine what reforms are needed to ensure that it remains fit for purpose and is adapted to the digital age.⁴ As set out in our Terms of Reference, the review examines whether the regime provides a clear and efficient framework for addressing harm caused by defective products. This requires consideration of how best to protect

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 L 210 of 07.08.1985, p 29.

² In this consultation paper, we use “consumer” to refer to persons who use, interact with, or may be affected by a product. It extends beyond consumers who have purchased a product, encompassing all natural persons who suffer harm as a result of a defective product.

³ Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/274/EEC, Official Journal L 2024/2853 of 18.11.2024. This repeals the 1985 Directive.

⁴ We discuss our specific Terms of Reference from para 1.57 below. They are reproduced in full at Appendix 1.

consumers⁵ and secure access to redress, while supporting innovation and growth, providing businesses with the legal certainty needed to manage risks and liabilities, and promoting responsible business practices. Achieving an appropriate balance between these objectives, particularly in the context of emerging technologies such as artificial intelligence (“AI”), is a central focus of our review.

- 1.5 This consultation paper outlines the historical development of product liability law, explains the current legal framework, and identifies potential shortcomings. It also sets out our provisional proposals for reform and invites consultees’ views on them. A shorter summary document is available on our website.⁶

CONTEXT AND DEVELOPMENT OF PRODUCT LIABILITY LAW IN ENGLAND AND WALES

- 1.6 In this introduction, we begin by outlining the historical development and broader legal context of product liability law in England and Wales, in order to frame the analysis in subsequent chapters. We consider the limitations of the pre-CPA legal landscape, the domestic and societal pressures that prompted reform, and the parallel evolution of product liability regimes at the European level. We then turn to the framework introduced by the CPA as the domestic implementation of the 1985 Directive, before briefly considering the aims of the New Directive in order to situate the discussion within its wider international context.

The development of product liability law in England and Wales

Redress for defective products in England and Wales before the CPA

- 1.7 Prior to the enactment of the product liability regime under the CPA, individuals injured by defective products in England and Wales could seek redress through contract law, the tort of negligence, and statutory remedies contained in the Consumer Protection Act 1961.

Contract law

- 1.8 Redress for defective products was primarily available in contract law under the Sale of Goods Act 1893, the provisions of which are now contained in the Sale of Goods Act 1979. The Act implies terms into contracts for the sale of goods, requiring that goods correspond with their description,⁷ be of merchantable quality, and reasonably fit for their intended purpose.⁸ These protections were significant in imposing strict liability, relieving purchasers of the need to prove negligence on the part of the seller.⁹

⁵ “Consumer” refers in this consultation paper to persons who use, interact with, or may be affected by a product. It extends beyond consumers who have purchased a product, encompassing all natural persons who suffer harm as a result of a defective product.

⁶ Law Commission, *Product liability*, <https://lawcom.gov.uk/project/product-liability/>.

⁷ Sale of Goods Act 1893 and Sale of Goods Act 1979, s 13.

⁸ Sale of Goods Act 1893 and Sale of Goods Act 1979, s 14.

⁹ *Frost v Aylesbury Dairy Co Ltd* [1905] 1 KB 608; *Jackson v Watson & Sons* [1909] 2 KB 193; *Priest v Last* [1903] 2 KB 148; *Wren v Holt* [1903] 1 KB 610.

- 1.9 However, reliance on these implied terms was limited. Liability for personal injury or death could for a time be contractually excluded,¹⁰ and enforcement was confined to parties in contractual privity,¹¹ leaving non-purchasers without a remedy. This was illustrated in *Daniels v White*,¹² where the seller was liable to the purchaser for supplying defective lemonade, but the purchaser's spouse, who had also been injured, had no contractual claim as she was not a party to the contract.

Tort law – negligence

- 1.10 Compensation for harm caused by defective products was also available through the tort of negligence, which is grounded in a duty to take reasonable care to avoid causing harm.¹³ In *Donoghue v Stevenson* and subsequent case law,¹⁴ manufacturers were recognised as potentially liable for damage resulting from defects in products. The courts later confirmed that liability in negligence extended to the various participants in the supply chain, enabling consumers to seek redress from third parties even in the absence of a contractual relationship.¹⁵
- 1.11 However, the wider scope of potential defendants in negligence is tempered by the need to prove fault,¹⁶ namely that the manufacturer has failed to meet an objective standard of care. This burden can be difficult to discharge in practice, as injured parties often have limited information about the production process, and therefore struggle to obtain the evidence needed to demonstrate that a particular defect or feature resulted from a lack of care.¹⁷

Consumer Protection Act 1961

- 1.12 In addition to these avenues of redress available in contract and negligence, the Consumer Protection Act 1961 introduced a statutory remedy for consumer protection. Specifically, it empowered the Secretary of State to prescribe standards relating to the composition, content, warnings, and instructions of goods, and rendered breaches of

¹⁰ Simon Whittaker (ed), *The Development of Product Liability* (2014) p 68.

¹¹ Privity of contract is the common law doctrine that only the parties to a contract can be bound by it and enforce it. A contract generally cannot confer rights or impose obligations on a person who is not a party to that contract.

¹² [1938] 4 All ER 258.

¹³ A Tettenborn and M Jones, *Clerk & Lindsell on Torts* (24th ed 2023) para 7-06.

¹⁴ *Donoghue v Stevenson* [1932] AC 562; *Evans v Triplex Safety Glass Co Ltd* [1936] 1 All ER 283; *Grant v Australian Knitting Mills Ltd* [1936] AC 85; *Daniels v White* [1938] 4 All ER 258. See also Liability for Defective Products (1975) Law Commission Working Paper No 64; Scottish Law Commission Memorandum No 20, para 18.

¹⁵ *Fisher v Harrods Ltd* [1966] 1 Lloyd's Rep 500. The Law Commissions previously summarised this case in Liability for Defective Products (1975) Law Commission Working Paper No 64; Scottish Law Commission Memorandum No 20, para 19.

¹⁶ *Daniels v White* [1938] 4 All ER 258.

¹⁷ Eg, in *Daniels v White* [1938] 4 All ER 258, the claimants also claimed against the manufacturer in negligence, but these claims failed because they could not prove that the defect in the lemonade was due to the manufacturer's negligence.

such regulations actionable as breaches of statutory duty by any person harmed, including consumers.¹⁸

- 1.13 At least 29 statutory instruments were implemented under the CPA 1961 between 1962 and 1987. These regulations applied to a diverse range of products, including for example oil heaters, children's nightdresses, toys, electrical and heating appliances, pencils, babies' dummies and cosmetic products.¹⁹ However, products falling outside the scope of the regulations, such as pharmaceutical drugs, medical devices, and motor vehicles, were excluded, leaving claimants who suffered harm from such products without recourse under this regime.

The thalidomide tragedy and the move towards strict liability

- 1.14 The move towards a strict liability model for defective products in England and Wales was driven to a significant extent by the thalidomide tragedy. Thalidomide, prescribed to pregnant women as a treatment for morning sickness, caused severe congenital abnormalities in their children.²⁰ Developed in Germany and marketed in the United Kingdom between 1958 and 1961, the drug was falsely promoted as safe for use during pregnancy.²¹ Subsequent litigation resulted in limited compensation, and prompted widespread public and parliamentary criticism, both of the inadequacy of the redress obtained and of the difficulty of proving negligence under existing personal injury law.²²
- 1.15 Against this background, in 1971 the Law Commission of England and Wales and the Scottish Law Commission (the "Law Commissions") were asked to consider the law governing liability for defective products.²³ The following year, the UK Government established a Royal Commission on Civil Liability and Compensation for Personal Injury (the "Pearson Commission"), tasked with examining these issues.²⁴
- 1.16 The Law Commissions' report,²⁵ published in 1977, identified fundamental shortcomings in the existing law on defective products, particularly the narrow reach of contractual remedies and the practical barriers facing claimants in negligence. As only contracting parties could recover without proof of fault, liability commonly fell on retailers rather than manufacturers, and the law encouraged multiple linked claims along the distribution chain. Claimants suing producers in tort also faced serious evidential hurdles, including proving the existence and origin of a defect and

¹⁸ See Liability for Defective Products (1975) Law Commission Working Paper No 64; Scottish Law Commission Memorandum No 20, para 24.

¹⁹ E Lomnicka and P Dobson, *Encyclopaedia of Consumer Credit Law* (2026) para 6-140.

²⁰ *Sunday Times v United Kingdom* (1979) 2 EHRR 245 (App No 6538/74).

²¹ *Sunday Times v United Kingdom* (1979) 2 EHRR 245 (App No 6538/74).

²² *Sunday Times v United Kingdom* (1979) 2 EHRR 245 (App No 6538/74); *Hansard* (HC), 29 November 1972, vol 847, col 478; *Hansard* (HC), 29 November 1972, vol 847, col 487.

²³ Liability for Defective Products (1977) Law Com No 82; Scot Law Com No 45, para 1.

²⁴ On the interaction between these two somewhat overlapping reviews, see Liability for Defective Products (1977) Law Com No 82; Scot Law Com No 45, paras 1 to 5.

²⁵ Liability for Defective Products (1977) Law Com No 82; Scot Law Com No 45, paras 24 to 33.

establishing fault, often without access to the necessary technical evidence or expert support.

- 1.17 The report rejected placing the burden of proof upon the defendant in negligence as insufficient to address these problems, noting that fault-based systems inevitably lead to evidential imbalance, expert battles, and uncertainty.²⁶ Instead, it recommended introducing strict liability, primarily on producers, for damage caused by defective products placed into circulation in the course of business.²⁷ This approach was justified by public expectations that producers stand behind product safety, the need to remove evidential and procedural obstacles to justice, and the aim of reducing unnecessary litigation. A product would be defective if it failed to meet the objective standard of reasonable safety expected, assessed in light of all relevant circumstances, including instructions, warnings, and foreseeable uses.
- 1.18 The Pearson Commission agreed that the existing product liability regime was inadequate, pointing to inconsistencies between contract and tort and concluding that a move towards strict liability was needed to reflect modern manufacturing, market realities and public expectations.²⁸ After rejecting alternatives such as a no-fault compensation scheme,²⁹ reform of privity of contract, and placing the burden of proof on the defendant in tort as impractical or ineffective, it endorsed strict liability for defective products, aligning with both European developments and the Law Commissions' conclusions. This approach was justified on the basis that claimants should not have to prove negligence or be purchasers; producers should be held to expected standards of safety and are best placed to insure against risks; and safety incentives should be strengthened. Parliament subsequently debated the proposals, and there was support for adopting a strict liability regime, ideally coordinated at a European level.³⁰

The 1985 Directive

- 1.19 These reviews coincided with a period of reform in product liability law across Europe. Various jurisdictions responded to the challenges posed by new forms of technological production,³¹ while broader initiatives sought to harmonise product liability law at European level. Together, these developments led to the adoption of the 1985 Directive. This was a measure of maximum harmonisation, requiring Member States to adopt a framework of strict liability for defective products.³²
- 1.20 At the core of the Directive was a “no fault” liability regime, premised on the view that only strict liability can fairly allocate the risks of modern technological production.

²⁶ Liability for Defective Products (1977) Law Com No 82; Scot Law Com No 45, paras 34 to 37.

²⁷ Liability for Defective Products (1977) Law Com No 82; Scot Law Com No 45, from para 38.

²⁸ Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054.

²⁹ This is the approach adopted in some other jurisdictions, such as the Accident Compensation Corporation in New Zealand, <https://www.acc.co.nz/about-us/who-we-are>.

³⁰ *Hansard* (HL), 28 November 1979, vol 403, col 453-54.

³¹ Simon Whittaker (ed), *The Development of Product Liability* (2014) pp 91 to 92, 121, 139, 158 to 159 and 213.

³² See eg Case C-183/00 *González Sánchez v Medicina Asturiana SA* [2002] ECR I-3901; *Wilson v Beko* [2019] EWHC 3362 (QB), [2021] 1 WLR 1711.

Liability was anchored in the concept of “defect”, defined by reference to the level of safety persons are entitled to expect, deliberately separated from fault-based reasoning. While this approach reflected a strong commitment to consumer protection and constituted a deliberate effort to alleviate claimants from the challenges of proving fault, it was not intended to impose unlimited liability on producers. The framework also sought to balance competing interest through the introduction of various defences to avert liability,³³ optional financial caps on liability, and a ten-year long-stop that extinguishes claims not brought within time.

The Consumer Protection Act 1987

- 1.21 The UK implemented the EU’s 1985 Directive through Part 1 of the Consumer Protection Act 1987 (the “CPA”), enacted within a broader package of consumer protection measures. In introducing the legislation, the Government emphasised that it implemented the Directive “no more and no less”, drawing from the recommendations of the Law Commissions and the Pearson Commission in favour of strict liability for defective products, subject to limited defences.³⁴ Although there was broad parliamentary support for the shift away from fault-based liability, debate centred on the inclusion of the development risks defence.³⁵ The Act received Royal Assent on 15 May 1987, and came into force on 1 March 1988, establishing the strict liability regime that is in place today.

The purpose of the CPA

- 1.22 Section 1(1) of the CPA acknowledges that Part 1 was enacted to comply with the 1985 Directive “and shall be construed accordingly”.³⁶ The Directive’s original aims therefore remain central to the interpretation and purpose of the regime. At their core is the objective of securing a fair apportionment of the risks associated with modern technological production. As stated in recital 2 of the 1985 Directive:

Liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production.³⁷

As we will see throughout this paper, the concern that modern technology presents new challenges to injured parties has only grown in recent years.

- 1.23 The European Commission identified two primary reasons for adopting a strict liability regime. First, strict liability facilitates the efficient allocation of losses arising from defective products. Manufacturers are generally better placed than individual consumers to absorb and distribute those losses, whether through insurance or by passing costs across their customer base. By contrast, under a negligence-based

³³ For example, the “development risks” defence provides defendants with a full defence where they could not have known about the existence of a defect. See para 6.24 below.

³⁴ *Hansard* (HL), 8 December 1986, vol 482, col 1003.

³⁵ On the development risks defence, see from para 6.24 below.

³⁶ CPA, s 1(1).

³⁷ 1985 Directive, recital 2.

regime, injured individuals bear the loss alone, unless they have independent insurance.³⁸

- 1.24 Second, strict liability addresses the evidential difficulties faced by injured individuals. The European Commission considered it unjust for individuals to bear their own losses where they are unable to prove negligence on the part of the manufacturer. In its 1976 Memorandum, it observed that establishing such negligence is often “extremely difficult or even impossible”,³⁹ particularly because individuals will rarely be in a position to prove fault, as they typically lack access to the manufacturer’s production processes and relevant information. A strict liability regime was therefore justified as a means of ensuring that injured individuals are not left without compensation. The Commission further considered that strict liability does not impose unfair burdens on manufacturers, who are able to distribute the costs and risks associated with liability across their customer base.⁴⁰
- 1.25 At the same time as seeking to alleviate individuals’ evidential challenges associated with proving fault, the Commission was aware of the risk that over-exposure to liability might inhibit innovation and productivity. For this reason, the regime includes a range of defences to claims, including that the state of scientific and technical knowledge at the relevant time was not such as to enable the existence of the defect to be discovered (the “development risks” defence).⁴¹ This reflects a concern to ensure that businesses are not deterred from pursuing frontier innovation.
- 1.26 More generally, both businesses and consumers benefit from a clear statutory framework for liability. Greater clarity enables businesses and their insurers to understand potential exposure, supporting more accurate risk assessment and insurance pricing. This, in turn, reduces uncertainty that might otherwise discourage investment in new products.

An overview of the CPA’s provisions

- 1.27 Part 1 of the CPA introduces a strict liability regime for damage caused by defective products. Under this regime, liability arises where damage is caused wholly or partly by a defect in a product, without the claimant needing to prove negligence.⁴² The CPA also sets out the core elements of a product liability claim, including what qualifies as a product; who may be held liable; what constitutes supply; how a defect is defined; what types of damage are compensable and who may claim; the available defences; and the applicable limitation periods.

³⁸ Lord Griffiths, P De Val and RJ Dormer, “Developments in English Product Liability Law: A Comparison with the American System” (1988) 62 *Tulane Law Review* 353, 370 to 372.

³⁹ European Commission, *Proposal for a Council Directive relating to the Approximation of the Laws, Regulations and Administrative Provisions of Member States concerning Liability for Defective Products* (1976) para 1.

⁴⁰ Lord Griffiths, P De Val and RJ Dormer, “Developments in English Product Liability Law: A Comparison with the American System” (1988) 62 *Tulane Law Review* 353, pp 370 to 372.

⁴¹ CPA, s 4(1)(e).

⁴² CPA, s 2(1).

- 1.28 Our Terms of Reference require us to review these core elements and the chapters that follow therefore examine each of them in depth. They are outlined briefly below for convenience.
- 1.29 **Product:** The CPA defines a product broadly to include all goods and electricity. This also extends to products that are comprised in another product, whether as a component, raw material, or otherwise.⁴³ “Goods” are further defined to include substances, growing crops, items attached to land, and vehicles, ships, and aircraft.⁴⁴ While it is uncontroversial that these definitions cover tangible items, it is open to question whether they extend to digital technologies such as standalone software and AI systems. Chapter 2 examines whether the definition of “product” should be expanded to cover such technologies, and how it can remain capable of accommodating future technological developments.
- 1.30 **Who can be liable:** Under the CPA, product liability claims may be brought against producers, own-branders, importers, and, in certain circumstances, suppliers of products who fail to identify the responsible producer, own-brander or importer.⁴⁵ The CPA gives “supply” a wide meaning. It includes selling, hiring, lending, hire-purchase arrangements, contracts for work and materials, exchanges involving non-monetary consideration, provision in the course of public functions, and gifts or prizes.⁴⁶ Chapter 3 considers whether the list of people that can be potentially liable should be expanded to take into account the new ways in which products are marketed and purchased.
- 1.31 **Defect:** A product is defective if its safety falls below the level that persons are generally entitled to expect.⁴⁷ This assessment covers risks to personal safety as well as risks of damage to property. In determining the level of safety that may reasonably be expected, all relevant circumstances must be considered, including how the product is marketed, its packaging and instructions, and what might reasonably be expected to be done with it.⁴⁸ A product is not deemed defective merely because safer versions are later developed.⁴⁹ As will be explained in Chapter 4, the broad nature of the definition of defect has led to uncertainty and different approaches in the courts, which our provisional proposals seek to address by providing clearer and more structured guidance on its application.
- 1.32 **Compensable damage:** The CPA allows claims for death, personal injury, and certain types of property damage. Claims cannot be brought for pure economic loss, including loss of or damage to the defective product itself, nor for the loss of or damage to the “overall” or “finished” product caused by a defective component

⁴³ CPA, s 1(2).

⁴⁴ CPA, s 45(1).

⁴⁵ CPA, ss 2(2) and 2(3), and 1(2).

⁴⁶ CPA, s 46.

⁴⁷ CPA, s 3(1).

⁴⁸ CPA, s 3(2).

⁴⁹ CPA, s 3(2).

product.⁵⁰ Property damage is only compensable where the property is ordinarily intended for private use, and the value of the loss exceeds £275.⁵¹ Our provisional proposals in Chapter 5 seek to clarify the types of damage covered by the CPA, including the extent to which psychiatric harm is compensable, and consider whether these limitations remain appropriate.

- 1.33 **Defences:** The CPA provides a range of defences, including where the defect resulted from compliance with legal or regulatory requirements; the defendant did not supply the product or did so outside the course of business and without a view to profit; the defect did not exist at the time of supply; the defect could not have been discovered given the state of scientific and technical knowledge at the time; or the product formed only a component part of a larger product, and the defect arose from the design of the final product or compliance with the instructions given by its producer.⁵² In Chapter 6 we consider whether these defences continue to operate fairly, and, where necessary, adapt them to the challenges posed by digital, connected and iteratively updated products.
- 1.34 **Limitation and long-stop:** Claims under the CPA must generally be brought within three years from the later of the date the cause of action accrued or the claimant's date of knowledge of the injury or damage.⁵³ In addition, a ten-year long-stop applies. This extinguishes any right of action ten years after the product was supplied, regardless of when damage occurs, bringing finality to liability for that product.⁵⁴ Chapter 6 considers whether changes to the long-stop are needed to reflect products that can be updated, and for latent harm.

THE CASE FOR REFORM

- 1.35 The need to reconsider the product liability regime was first identified during the Law Commissions' joint review of the law applicable to automated vehicles.⁵⁵ In that context, stakeholders expressed strong support for a stable and flexible legal framework capable of anticipating future developments, rather than one that allows regulatory gaps to emerge before responding. Against that background, the Law Commission recommended in 2022 that the Government undertake a broader review of product liability law, including the CPA, to address the challenges posed by emerging technologies.⁵⁶ Responses to our consultation on our 14th Programme of

⁵⁰ CPA, s 5(2).

⁵¹ CPA, s 5(3) and 5(4).

⁵² CPA, s 4(1)(a) to (f).

⁵³ Limitation Act 1980, s 11A(4).

⁵⁴ Limitation Act 1980, s 11A(3), read with CPA, s 4(2).

⁵⁵ Automated Vehicles (2018) Law Commission Consultation Paper No 240; Scottish Law Commission Discussion Paper No 166, paras 6.65 and 6.117.

⁵⁶ Automated Vehicles (2022), Law Com No 404; Scot Law Com No 258, recommendation 71.

Law Reform also advanced broader arguments for revisiting the framework to ensure that it achieves its original aims.⁵⁷

- 1.36 More generally, the case for reform is driven by concerns that the existing framework may no longer secure a fair apportionment of risks between consumers and potential defendants. While broadly effective, the current regime is not readily adapted to developments such as software and AI-enabled products, products that can “learn” or be iteratively updated, as well as new methods of selling and delivering products. In complex cases, the burden of proving defect and causation is said to pose particular difficulties for claimants.
- 1.37 At EU level, these issues have been explored through a range of initiatives, including work on AI liability,⁵⁸ leading to a consensus that the product liability regime required updating. The arguments for reform advanced at EU level largely mirror those that have been raised with us in the course of this project, reflecting the shared origins of the two regimes. There are, however, some differences in the way the 1985 Directive was implemented across Member States.
- 1.38 Below, we expand on the two key drivers for our review of the CPA: the need to accommodate digital technologies; and debates as to whether the regime continues to meet its initial aims.

The need to accommodate digital technologies

- 1.39 As explained at paragraph 1.14, the product liability regime was developed in response to harms arising from medical treatments, and much of the subsequent case law in England and Wales has similarly focused on pharmaceuticals and medical devices, such as blood products and hip implants. While these and other tangible products remain capable of causing harm, the product landscape has evolved significantly. Consumers are now exposed to a much wider range of products that similarly combine risk and benefit, including software embedded in medical devices, autonomous vehicles, AI, and social media platforms.
- 1.40 These developments have delivered considerable economic and societal benefits and have the potential to transform how we live and work. At the same time, they give rise to new forms of harm that were not within the contemplation of the original regime. They have also altered the structure of supply chains. In particular, AI-based products often involve multiple actors in their design, development and operation, creating complex chains of responsibility and raising questions as to who is or should be held

⁵⁷ Respondents who supported a review of the product liability regime included the Law Society, the Bar Council, the City of London Law Society, the Association of Personal Property Lawyers, law firms and academics.

⁵⁸ See European Commission, “White Paper on Artificial Intelligence: a European approach to excellence and trust” (COM(2020) 65), https://commission.europa.eu/system/files/2020-02/commission-white-paper-artificial-intelligence-feb2020_en.pdf; European Commission, “Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics” (COM(2020) 64), <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52020DC0064>; and European Commission, Expert Group on Liability and New Technologies, “Liability for Artificial Intelligence and other emerging digital technologies” (2019), <https://op.europa.eu/en/publication-detail/-/publication/1c5e30be-1197-11ea-8c1f-01aa75ed71a1/language-en>.

responsible for harmful outcomes.⁵⁹ In addition, consumers now often purchase through online marketplaces, which may play a limited role in the design, manufacture and selection of the products offered, an arrangement that was unknown in the 1980s. These developments were recognised as key drivers for reform in the explanatory memorandum to the proposal for a new EU product liability directive,⁶⁰ which acknowledged that the concepts underpinning the 1985 Directive lacked legal clarity when applied to products in the digital and circular economy.

- 1.41 Product liability law is also increasingly out of step with other consumer protection frameworks, including consumer sales law and product safety law, which have been updated to reflect technological changes. The Consumer Rights Act 2015, for example, extends sale of goods law to digital content through bespoke provisions.⁶¹ This protection, however, is limited to purchasers, and does not extend to those injured by products they did not themselves acquire. More recently, the Digital Markets, Competition and Consumers Act 2024 strengthened the regulation of digital markets, including “big tech” companies.⁶² In the parallel sphere of product safety, the Product Regulation and Metrology Act 2025 conferred powers on the Government to regulate online marketplaces,⁶³ including by imposing requirements on online platforms to prevent unsafe products from being made available to consumers and to ensure that sellers operating on their platform comply with product safety obligations.⁶⁴ Reforming the product liability regime would significantly strengthen consumer protection and promote greater consistency across the wider framework of consumer law.
- 1.42 Other jurisdictions beyond the EU, including the US and Australia,⁶⁵ have also updated their product liability frameworks to encompass software. Ensuring that the law of England and Wales keeps pace with these developments is important if it is to remain internationally competitive with comparable regimes.
- 1.43 Taken together, these considerations point to a compelling case for reform. A failure to keep pace risks leaving gaps in consumer protection. By contrast, a modernised regime can enhance public confidence in new technologies, support their development, and provide businesses with greater legal certainty. In particular, a

⁵⁹ See eg I Brown, “Allocating Accountability in AI Supply Chains” (Ada Lovelace Institute, 29 June 2023), <https://www.adalovelaceinstitute.org/resource/ai-supply-chains/>. See further Law Commission, AI and the Law: A Discussion Paper (2025), <https://lawcom.gov.uk/publication/artificial-intelligence-and-the-law-a-discussion-paper/>.

⁶⁰ European Commission, “Proposal for a Directive of the European Parliament and of the Council on liability for defective products Brussels” (COM/2022/495 final) pp 1 to 2, https://single-market-economy.ec.europa.eu/system/files/2022-09/COM_2022_495_1_EN_ACT_part1_v6.pdf.

⁶¹ Consumer Rights Act 2015, Pt 1, Ch 3.

⁶² Digital Markets, Competition and Consumers Act 2024, Ch 2.

⁶³ Product Regulation and Metrology Act 2025, s 1. Although this section does not refer explicitly to online marketplaces, it gives broad powers to make regulations “in relation to the marketing or use of products” and the Government has indicated that the power will be used to regulate online marketplaces.

⁶⁴ Department of Business and Trade, “Tough new laws to make online marketplaces safer” (July 2025), <https://www.gov.uk/government/news/tough-new-laws-to-make-online-marketplaces-safer>.

⁶⁵ Competition and Consumer Act 2010, Sch 2. See especially para 2, which includes “computer software” in the definition of “goods”.

clearer framework for liability enables businesses and their insurers to understand and manage risk, supports more accurate pricing, and gives businesses greater confidence to innovate and structure supply chains and contractual arrangements.

The efficacy of the CPA in meeting its initial aims

- 1.44 The case law on the CPA regime has been described as “sparse”⁶⁶ and there were no reported cases on the regime in its first decade of operation.⁶⁷ Caution is therefore required in assessing the effectiveness of the regime by reference to reported decisions. Such cases are likely to represent only a small proportion of the litigation arising under the CPA. They provide no insight into unreported cases or claims resolved or discontinued before judicial determination, nor do they reflect the strategic and case management decisions that may shape the conduct and outcome of proceedings.
- 1.45 Similar caution applies to stakeholders’ views on the case law, which have been markedly polarised. Some stakeholders regard case law as evidence that the regime operates effectively; others see it as indicative of systemic shortcomings.⁶⁸
- 1.46 Notwithstanding these limitations, the case law provides a useful basis for assessing whether the regime has achieved one of its central aims: alleviating the claimant’s burden of proving fault. This assessment can be informed by the context in which the regime emerged, in particular the evidential difficulties it was designed to address. These included limited access to technical and expert evidence, evidential asymmetries between claimants and defendants, and the prevalence of complex expert disputes.
- 1.47 Viewed in this light, the reported cases suggest that the CPA may not have fully achieved this objective. In some instances, claimants appear to have relied on arguments closely resembling fault-based reasoning in order to establish defect. In others, they have encountered significant evidential hurdles, akin to those arising in negligence, in establishing defect and causation. These issues are examined in greater detail in Chapter 4.
- 1.48 Stakeholder accounts provide further, albeit qualified, support for this assessment. Some stakeholders identify frequent difficulties in proving defect and causation, compounded by asymmetries in access to technical information and expertise, and by the costs associated with complex litigation.

⁶⁶ E Russell, “Determining ‘defectiveness’ in terms of the Consumer Protection Act 1987” (2023) 11 *Scots Law Times* 53.

⁶⁷ C Gibson and P Popat, “Product Liability update in the UK/emerging risks” (Henderson Chambers, 2007), <https://www.hendersonchambers.co.uk/wp-content/uploads/2017/11/product-liability-update-paper-for-bila-seminar-2007.pdf>.

⁶⁸ It is notable, for example, that there has not been any successful group litigation in the UK concerning the defectiveness of pelvic mesh, unlike in the US and Australia: Baroness Cumberledge, “First Do No Harm: The report of the independent Medicines and Medical Devices Safety Review” (Department of Health and Social Care, July 2020) pp 27 and 213.

- 1.49 These concerns are consistent with broader evaluations of the 1985 Directive. Reports dating back to 1998⁶⁹ and 2003⁷⁰ identify structural difficulties faced by claimants in proving that a product is defective, particularly in technically complex cases where they lack the resources, expertise and access to information available to producers. More recent assessments, including those relied upon in the explanatory memorandum to the New Directive, indicate that these challenges persist.⁷¹
- 1.50 Similar themes are reflected in the academic literature. Professor Jane Stapleton has famously indicated that “the core theoretical problem with the definition [of defect], however, is that it is circular. This is because what a person is entitled to expect is the very question a definition of defect should be answering”.⁷² Likewise it has been remarked that the definition “provides little guidance” for anything beyond “easy cases”.⁷³
- 1.51 Taken together, this material suggests that, while caution is required in relying on any single source of evidence, there are consistent indications that the regime has not fully achieved its aim of alleviating the burden on claimants. The persistence of difficulties in establishing defect and causation, particularly in technically complex cases, points to potential shortcomings in the operation of the framework. These issues provide an important backdrop to the analysis that follows.

Modernisation at EU level: the New Directive

- 1.52 Similar drivers for reform at EU level led to the adoption of the New Directive in October 2024. It replaces the 1985 Directive and must be implemented by Member States by 9 December 2026. It retains its strict liability model but updates the regime in a way intended to reflect technological advancement and globalised supply chains.
- 1.53 Structurally, the New Directive largely mirrors the existing framework under the 1985 Directive and the CPA, but it introduces several significant changes. These include an expanded definition of product and liable parties, enhanced rules on defect that expressly address digital functionality and cybersecurity, rebuttable presumptions to ease proof of defect and causation, broader categories of compensable damage (including psychological harm and data loss), and new disclosure obligations on defendants. The New Directive also removes the minimum threshold for property

⁶⁹ European Parliament, *Report of the European Parliament Committee on the Environment, Public Health and Consumer Protection, on the proposal for a European Parliament and Council Directive amending Council Dir 85/374/EEC on the approximation of the law, regulations and administrative provisions of the Member States concerning liability for defective products* (COM(97)478) para 4.1. This report is referenced in D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 7.40.

⁷⁰ J Meltzer, R Freeman and S Thompson, *Product Liability in the European Union: a report for the European Commission* (European Commission Study MARKT/2001/11/D, 2003) p 43. This report is referenced in D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 7.52.

⁷¹ European Commission, “Proposal for a Directive of the European Parliament and of the Council on liability for defective products” (COM(2022) 495 final) para 1.1 of the explanatory memorandum. The explanatory memorandum cites various reports including: European Commission, “White Paper on Artificial Intelligence – A European approach to excellence and trust” (COM(2020) 65 final); and European Commission, “Report on safety and liability implications of AI, the Internet of Things and Robotics” (COM(2020) 64 final).

⁷² J Stapleton, *Product Liability* (1994) p 234.

⁷³ J Stapleton, *Product Liability* (1994) p 234.

damage, limits exclusions to property used exclusively for professional purposes, and extends the long-stop period for latent personal injury claims from 10 to 25 years.

- 1.54 These changes reflect broader policy objectives identified at EU level. In adopting the New Directive, the European Parliament underlined the need for liability rules that are adapted to the digital environment, to ensure a high level of consumer protection, provide legal certainty and a level playing field for businesses, and avoid disproportionate costs and risks for small and medium-sized enterprises and start-ups. The New Directive updates liability rules to reflect the risks and characteristics of products in the digital age and circular economy. It also seeks to ensure that there is always an EU-based economic operator that can be held liable for defective products purchased from outside the EU. The New Directive further aims to reduce barriers faced by consumers seeking to establish that a product is defective and bringing claims in complex cases. At the same time, it seeks to maintain a fair balance between competing interests, and to enhance legal certainty by better aligning the liability regime with the EU's broader product safety framework and relevant case law.⁷⁴

SCOPE AND STRUCTURE OF THE PROJECT

- 1.55 The project forms part of the Law Commission's 14th Programme of Law Reform, published in 2025. The project was initially sponsored by the Department of Business and Trade ("DBT"), with protocol support from the Department for Science, Innovation and Technology ("DSIT"). In July 2026, the Government announced that elements of DSIT would be merged with DBT to form the Department of Business, Innovation, Science and Trade ("BIST"). Responsibility for the product liability regime within Government now sits with BIST.
- 1.56 We began work in September 2025.

Terms of Reference

- 1.57 The review focuses on the key issues identified in our Terms of Reference, together with those highlighted by stakeholders, rather than undertaking a line-by-line review of the CPA.
- 1.58 The Terms of Reference for this project, set out at Appendix 1, were published in December 2025. They provide that the Law Commission will review and analyse the existing product liability regime as contained in Part 1 of the CPA with a view to developing recommendations for reform that better achieve the purposes of the regime, particularly in relation to emerging technologies, including AI. The Law Commission was specifically asked to consider a range of issues, including the following.
- (1) Whether the CPA's definitions of "product", "damage" and "producer" should be reformed to accommodate new technologies and economic operators.

⁷⁴ New Directive, recitals 3 and 4.

- (2) Whether the definition of “defect” should be reformed to account for difficulties for claimants to establish that a product is defective and to account for the nature of emerging technologies, including AI.
 - (3) Whether the existing ten-year long-stop date should be extended for latent harm, and whether products that are iteratively updated (such as some forms of software) pose any difficulties with the long-stop date.
 - (4) Whether the statutory defences require updating, including to account for the fact that some technology-based products can be updated iteratively.
 - (5) Whether the burden for claimants to bring a successful claim is too onerous under the existing product liability regime.
- 1.59 While we focus on the issues set out in our Terms of Reference, we ask in our final chapter whether consultees have suggestions for reform that we have not considered in this paper.
- 1.60 We have not been asked to consider whether the New Directive should be adopted in this jurisdiction. Rather, our task is to review the CPA and make recommendations for its reform, taking the CPA and the law of England and Wales as our starting point. That said, we do not work in a vacuum, and our analysis is informed by developments beyond this jurisdiction. In developing our proposals, we have had regard to the New Directive and commentary on it, including from academics and practitioners. We are also mindful that many stakeholders are familiar with the changes introduced by the New Directive and will wish to understand how our proposals compare. Accordingly, we include brief comparative discussion of the New Directive’s approach after each topic, identifying points of alignment and divergence. We have also prepared a table comparing our proposals with the New Directive’s treatment of the same issues.⁷⁵

Our work to date

- 1.61 Our reform proposals have been underpinned by three general principles:
- (1) updating the law to accommodate modern and emerging technologies;
 - (2) ensuring that the regime meets its aim of delivering a fair apportionment of risk; and
 - (3) making the law as fair, modern, simple and cost-effective as possible.
- 1.62 In the first stage of our work, we have engaged with stakeholders with an interest in product liability, to identify the issues with the operation of the current law and gather their views on whether reform is needed. This engagement has taken several forms. We issued a short scoping questionnaire seeking views about the operation of the current law, the need for reform and any concerns or risks associated with reform, and received nearly 50 responses. In addition, we have held numerous meetings with stakeholders, including law firms and barristers’ chambers with product liability expertise. We have spoken to stakeholders from the world of business,

⁷⁵ See Appendix 2.

including companies and industry organisations from the automotive, insurance, pharmaceutical and tech sectors, amongst others, as well as organisations representing consumer rights and personal injury lawyers. We have spoken at several conferences and roundtables. We thank all those who have engaged with our work so far. We have incorporated our engagement work and stakeholders' views into this consultation paper.

Next steps: consultation and beyond

- 1.63 Following the publication of this paper, there will be a formal consultation period during which we will run consultation events aimed at eliciting views from the public and a broad range of stakeholders. The consultation period begins on 8 October 2026 and ends on 14 January 2027. Consultees can respond to the consultation online through the link on our website at <https://lawcom.gov.uk/project/product-liability/>.
- 1.64 After the consultation period ends, we will analyse the responses to the consultation carefully and develop our final recommendations. We will publish a final report containing an account of the consultation process and setting out our recommendations for reform. For further updates, please see our website⁷⁶ and email productliability@lawcommission.gov.uk to be added to the mailing list.
- 1.65 Our recommendations will be laid before Parliament. It will then be a matter for the Government to decide whether to put legislation before Parliament to implement our recommendations.

Other related Law Commission work

- 1.66 Consultees may also be interested in our forthcoming work on consumer class actions, to be commenced in the coming months. The Government has asked the Law Commission to consider whether the way consumer laws are enforced could be strengthened through the introduction of a consumer class actions regime. The project will examine the potential benefits and risks of introducing a consumer class actions regime, alongside existing mechanisms such as public enforcement action and alternative dispute resolution. It will also consider how any such regime should be designed, were one to be introduced.
- 1.67 We have prepared an Initial Scoping Questionnaire to collect early input from stakeholders and to help shape and inform our initial research on this project. Please see our website for details,⁷⁷ and email consumerclassactions@lawcommission.gov.uk to be added to the mailing list.

TERRITORIAL EXTENT

- 1.68 The CPA extends to England, Wales and Scotland (subject to some differences in Scotland, largely in relation to limitation periods and the long-stop date).⁷⁸ An identical

⁷⁶ <https://lawcom.gov.uk/project/product-liability/>.

⁷⁷ <https://lawcom.gov.uk/project/consumer-class-actions/>.

⁷⁸ Product liability is a reserved matter under both the Government of Wales Act 2006, Sch 7A, s C7, para 79, and the Scotland Act 1998, Sch 5, para C8.

regime applies in Northern Ireland, under the Consumer Protection (Northern Ireland) Order 1987.⁷⁹

- 1.69 Since we are the Law Commission for England and Wales, we can only make recommendations for legislative reform in respect of England and Wales. It will be up to the UK Government, in discussion with the devolved administrations, to decide whether our recommendations for reform should be considered beyond England and Wales.
- 1.70 While this review is being undertaken by us as the Law Commission of England and Wales, we will endeavour to consult with stakeholders in Scotland and Northern Ireland to record any relevant differences between the law of England and Wales and the law of Scotland and the law of Northern Ireland respectively. In the final chapter of this paper, we ask consultees whether there are any jurisdiction-specific issues in respect of Wales, Scotland or Northern Ireland that we should be aware of.
- 1.71 We note however that, as a result of the Windsor Framework,⁸⁰ the New Directive will need to be implemented in Northern Ireland by 9 December 2026, so far as it is within scope of the Framework.

ASSESSING THE IMPACT

- 1.72 Throughout this paper we explain our policy reasons for making provisional proposals on a range of issues, and ask consultees whether they agree. In their answers, we would welcome consultees' inclusion of information or evidence of economic impact, whether positive and negative, of these proposals. This will be used in our analysis to help determine our final recommendations. We are particularly interested in any evidence of monetisable costs and benefits, but where that is not possible, we are grateful for any qualitative insights that consultees can offer. We also ask some overarching questions about impact in the final chapter of this consultation paper, and would be grateful for any information that consultees can provide about the volume of disputes and cases and other costs and benefits of the current law in this area.
- 1.73 We further invite views on whether our provisional proposals could have equality impacts, meaning advantages or disadvantages arising from particular characteristics. These include the protected characteristics under the Equality Act 2010, that is, age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.⁸¹

STRUCTURE OF THIS CONSULTATION PAPER

- 1.74 The rest of this consultation paper consists of eight further chapters and three appendices.

⁷⁹ Product safety is a reserved matter under Northern Ireland Act 1998, Sch 3, para 37, but civil liability is transferred (devolved).

⁸⁰ HM Government, "The Windsor Framework: a new way forward" (February 2023), https://assets.publishing.service.gov.uk/media/63fccf07e90e0740d3cd6ed6/The_Windsor_Framework_a_new_way_forward.pdf.

⁸¹ Equality Act 2010, s 4.

- (1) Chapter 2 looks at a range of issues including the definition of “product” and “supply”, with particular focus on the need for the regime to accommodate new technologies. We make various provisional proposals, in particular that “product” should be expanded to include software and AI systems (whether delivered on or embedded in a physical medium or supplied digitally), as well as the design components and features of social media and other online platforms. We also provisionally propose ensuring that the definition of “product” remains adaptable to technological change and updating the definition of “supply” to capture digital supply and modern commercial models in which digital technologies are provided without charge but generate revenue through other means, such as advertising or the use of personal data of users.
- (2) Chapter 3 focuses on the potential defendants under the product liability regime, examining who might be liable. We consider whether the range of persons potentially liable under the CPA ought to be expanded to accommodate the complexities of modern supply chains and the prevalence of e-commerce. We provisionally propose to expand the list of persons who can potentially be liable under the CPA to accommodate technological advances and the complexity of modern supply chains, and consider the allocation of liability when such persons are located outside the UK.
- (3) Chapter 4 looks at the central questions of defect and causation. We consider whether the CPA’s definition of “defect” requires reform to address difficulties faced by claimants in establishing that a product is defective, and to respond to the challenges posed by emerging technologies, including AI. We provisionally propose guidance on the determination of defect to help reduce the uncertainty in its interpretation. We also consider whether the burden placed on claimants in establishing defect and causation has become unduly onerous, particularly in the context of complex products, provisionally concluding in favour of the use of presumptions of fact to reduce the burden upon claimants. Finally, we consider whether liability based upon defect is capable of providing a fair apportionment of risk in all cases. We provisionally propose a new mechanism that would allow parties to share the risks in cases where the claimant faces exceptional evidential difficulties, such as where the evidence necessary to prove that a product is defective does not exist or cannot be obtained.
- (4) Chapter 5 addresses the types of damage that give rise to liability. The analysis is divided into two main parts: personal injury (including psychiatric harm and claims by indirect victims) and property damage (covering mixed-use property, data loss, economic loss related to defective products, and the minimum claim value threshold). We provisionally propose a clearer threshold for the recovery of damages for personal injury, together with a more clearly defined framework for the compensation of psychiatric harm. We also provisionally propose changes to recovery for property damage to modernise the regime, including changes to reflect the growing prevalence of mixed-use property and the modern importance and value of data as personal property.
- (5) Chapter 6 focuses on the defences available to defendants, and the long-stop date beyond which no further actions are available. We provisionally propose various reforms to the existing defences, including to account for products that

can be iteratively updated, and changes to the long-stop including an extended long-stop date for latent harm.

- (6) Chapter 7 looks at practical issues that arise in identifying defendants, particularly in the context of group companies, and makes provisional proposals for allowing the substitution of defendants after the expiry of the long-stop period. We also consider other issues such as the situation where a defendant is insolvent or unable to satisfy claims, recognising that broader insolvency and corporate governance reforms are needed to address defendant insolvency issues more generally.
- (7) Chapter 8 poses questions about economic and equality impact. We also ask consultees to tell us about any specific issues that should be noted in respect of Wales, Scotland or Northern Ireland, and give consultees the opportunity to raise any other issues in the regime that they consider in need of reform but which we have not discussed.
- (8) Chapter 9 provides a list of all the consultation questions contained in this consultation paper.

1.75 The consultation paper also includes two appendices:

- (1) Appendix 1 – Terms of Reference.
- (2) Appendix 2 – Table comparing our proposals against the treatment of related issues in the New Directive.

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1.76 We are grateful to all of those individuals and organisations that have engaged with us during the preparation of this consultation paper. We are particularly grateful to Professor Duncan Fairgrieve for his general assistance, and to Dr Petros Terzis, Dr John Zerilli, and Lisa McClory, who provided comments on Chapter 2.

1.77 The Commissioners would like to record their thanks to the following members of staff who worked on this consultation paper: Laura Burgoyne (Law Reform Team Manager), David Roberts (Law Reform Lawyer), Rick Aiyer, Mariam Ibrahim and Raffaella Dattler (Law Reform Assistants). Additional support has been provided by Dr Nicholas Hoggard, Elizabeth Welch, (Law Reform Senior Lawyers), Tusmo Ismail (Law Reform Assistant Lawyer), and Lorenzo Estero (Law Reform Assistant).

Chapter 2: Definition of a “product” under the CPA

INTRODUCTION

- 2.1 This chapter considers whether definition of “product” under the Consumer Protection Act 1987 (the “CPA”) is fit for purpose and whether, and if so how, it should be reformed in light of the increasing prevalence of emerging technologies. Our Terms of Reference require us to consider whether the current definition needs to be reformed to accommodate the intangibility of digital technologies. This includes whether the definition should be widened to cover software supplied in an intangible format, such as by download over the internet.¹
- 2.2 The chapter begins by examining the present definition of “product” under the CPA and the difficulties associated with that definition. It then considers the position of software and AI systems, provisionally proposing that they should be treated as products under the Act and addressing the concerns raised by that proposal. The chapter next turns to social media platforms, setting out our proposal to bring them within the regime and explaining why the existing regulatory framework governing these platforms does not currently address product liability issues. The final section considers how the definition of “product” might be future-proofed, what should be excluded from its scope, and the consequential expansion of the definition of “supply” under the CPA.
- 2.3 The categorisations and distinctions between software, AI systems and online platforms, including social media, adopted in this chapter are intended to provide analytical clarity and to address the distinct policy considerations raised by each. We nevertheless recognise that these categories overlap and that AI systems and online platforms may, in practice, be subsets of what is understood to be software.² The use of separate categories is therefore a matter of exposition only and does not suggest that they are mutually exclusive types of technology.

Summary of our key provisional proposals

- 2.4 In summary, we provisionally propose that the definition of “product” under the CPA should include:
- (1) software and AI systems, regardless of whether they are delivered on or embedded into a physical product or digitally supplied, such as by download from a website or application;
 - (2) design components and features of social media platforms and other online platforms;³

¹ See para 4(1) of our Terms of Reference, included in full at Appendix 1.

² Indeed, the New Directive provides that AI systems are an example of software at recital 13. See also from para 2.86 below for our discussion on social media platforms.

³ See para 2.90 below on “design components and features” of platforms.

- (3) digital manufacturing files and other functional information necessary to produce a tangible product by enabling the automated control of machinery or tools;
 - (4) any other thing (digital or otherwise) that is designed or developed to perform a specific function for users, irrespective of how it is supplied or made available. This residual provision is intended to future-proof the definition of “product”, enabling it to accommodate new technologies as they emerge.
- 2.5 We ask consultees whether there are categories of information that should fall within the definition of “product” under the CPA, particularly where information is supplied in a form (such as a set of instructions or code) intended to be processed by a computer system or connected product, directly influencing the system’s operation, behaviour, or outputs.
- 2.6 We provisionally propose that the definition of “product” should exclude any service interconnected with a product or that is required for a product to function. We ask consultees whether there should be an additional exclusion for bespoke software that is provided as a service.⁴
- 2.7 We provisionally propose that the definition of “supply” in the CPA should be expanded so that a product is treated as supplied regardless of the means of delivery, including where it is provided otherwise than on a physical medium, such as by remotely-delivered downloads. It should also encompass situations in which products are made available without the user giving any monetary or other consideration for their use, provided they are made available in the course of business and/or with a view to profit.

CURRENT DEFINITION OF A “PRODUCT” UNDER THE CPA

- 2.9 Under section 1(2) of the CPA, a “product” is defined as “any goods or electricity and... includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise”. “Goods” includes “substances, growing crops and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle”.⁵
- 2.10 That definition does not extend to services, information or advice.⁶ This reflects the 1985 Directive, which the CPA was enacted to implement. The 1985 Directive defined a “product” as “all movables” and electricity.⁷ The Court of Justice of the European

⁴ Our reference to “bespoke software that is provided as a service” refers to bespoke software that is provided in a manner akin to a service, namely, software that is specifically customised and provided on an ongoing basis for a particular customer, rather than being generally supplied on the market. We are not referring to software provided through a software-as-a-service model, which should be included within the scope of the CPA. See paras 2.156 and 2.157 below for our consultation question on bespoke software.

⁵ CPA, s 45(1).

⁶ A Tettenborn and M Jones, *Clerk & Lindsell on Torts* (24th ed 2023) para 10-49.

⁷ Recitals to the 1985 Directive, which state that liability without fault should apply only to movables which have been industrially produced, used in the construction of immovables or installed in immovables. See also art 2 of the 1985 Directive defines “product” as “all movables ...”.

Union (“CJEU”) has confirmed that the 1985 Directive excludes services from its scope and that service-provider liability and product liability are distinct regimes.⁸

THE ISSUES WITH THE DEFINITION OF “PRODUCT” UNDER THE CPA

- 2.11 The CPA, like the 1985 Directive before it, was originally designed with tangible products in mind: physical objects placed on the market through a one-time act of production by the producer.⁹
- 2.12 Since the CPA has been enacted, however, digital technologies such as software and AI systems have become increasingly prevalent. These technologies may be supplied in a variety of ways. They may form part of a tangible product, whether embedded in autonomous vehicles, medical devices, industrial machinery, smart home devices or consumer appliances. Some may also be delivered on a tangible medium, such as a disc or memory card.¹⁰ Alternatively, they may be supplied independently of any physical medium, for example through remotely-delivered downloads or updates delivered via a website or application. Particularly in the latter cases, there is uncertainty as to whether these technologies can constitute a “product” under the CPA.¹¹ That question is compounded by the lack of case law on whether they can be so characterised for the purposes of the CPA.¹²
- 2.13 The uncertainty surrounding the status of such technologies under the CPA is particularly concerning given their capacity to cause harm and the resulting potential lacuna in the product liability regime. Those harmed by such technologies may be left to rely on actions in contract or negligence, which are unlikely to provide equally effective or accessible remedies.

SHOULD SOFTWARE AND AI BE CONSIDERED A PRODUCT UNDER THE CPA?

Our proposed approach

- 2.14 We provisionally propose that the definition of “product” under the CPA should be expanded to include software and AI systems, whether they are delivered on or embedded in a tangible and physical medium, supplied electronically, or otherwise.

Treatment of software and AI systems as products: the irrelevance of the mode of delivery

- 2.15 There is no direct authority on whether software and AI systems constitute “products” under the CPA. However, in relation to software, the courts have considered analogous questions in other contexts, albeit with inconsistent results. The authorities

⁸ Case C-65/20 *VI v KRONE – Verlag Gesellschaft mbH & Co KG* (2021) EU:C:2021:471 at [27] and [38].

⁹ Expert Group on Liability and New Technologies – New Technologies Formation, *Liability for Artificial Intelligence and Other Emerging Digital Technologies* (2019) p 28. See also D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020), from para 9.80.

¹⁰ Although downloads now dominate, software is still supplied on tangible media in a number of contexts, including on hard drives, solid-state drives and other physical storage devices.

¹¹ See A Tettenborn and M Jones, *Clerk & Lindsell on Torts* (24th ed 2023) at para 10-51: software supplied on a tangible medium counts as goods, whereas software supplied non-physically cannot be a product.

¹² M Hervey and M Lavy KC, *The Law of Artificial Intelligence* (2nd ed 2024) para 6-037. However, the courts have dealt with this issue in a non-CPA context, with conflicting views in different areas of the law: see from para 2.15 below.

have traditionally recognised that software supplied on a tangible medium may qualify as a product, while purely intangible software does not. That distinction has, however, come under increasing pressure in more recent case law, reflecting the growing difficulty of maintaining a rigid divide between tangible and intangible forms of software.

- 2.16 In *St Albans City and District Council v International Computers Ltd*,¹³ the Court of Appeal indicated that a disk on which software was downloaded constituted “goods” for the purposes of the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982, whereas software in itself could not.¹⁴ This approach was subsequently endorsed in *Your Response Ltd v Datateam Business Media Ltd*,¹⁵ where the court held that data stored in a database was not a physical object capable of possession independently of the medium in which it was held.
- 2.17 More recent case law has challenged the rigidity of this distinction. In *Software Incubator Ltd v Computer Associates UK Ltd*,¹⁶ Mr Justice Waksman held at first instance that software supplied electronically under a perpetual licence constituted “goods” for the purposes of the Commercial Agents (Council Directive) Regulations 1993, emphasising the functional equivalence between digital content and traditional goods.¹⁷ Although this decision was overturned by the Court of Appeal, which reaffirmed the traditional distinction between tangible and intangible items,¹⁸ the court made clear that its conclusion was driven by binding authority and that any reform should be left to Parliament,¹⁹ acknowledging that the distinction may be outdated.²⁰
- 2.18 The matter was referred by the Supreme Court to the Court of Justice of the European Union (the “CJEU”), which adopted a broader approach. The CJEU held that software constituted “goods” irrespective of whether it was supplied on a tangible medium or by electronic download.²¹ It concluded that, for the purposes of the EU Commercial Agents Directive, the concept of a sale of goods includes software supplied electronically under a perpetual licence.²² While CJEU authority is likely to carry persuasive weight, it is no longer binding on domestic courts following the UK’s withdrawal from the EU. It is therefore not possible to state with confidence how a court in England and Wales would resolve the question of whether software supplied

¹³ *St Albans City v International Computers Ltd* [1996] 4 All ER 481.

¹⁴ *St Albans City v International Computers Ltd* [1996] 4 All ER 481 by Sir Iain Glidewell.

¹⁵ *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281, [2015] QB 41 at [19].

¹⁶ *Software Incubator Ltd v Computer Associates UK Ltd* [2016] EWHC 1587 (QB), [2017] Bus LR 245.

¹⁷ *Software Incubator Ltd v Computer Associates UK Ltd* [2016] EWHC 1587 (QB), [2017] Bus LR 245 at [36].

¹⁸ *Computer Associates UK Ltd v Software Incubator Ltd* [2018] EWCA Civ 518, [2019] Bus LR 522.

¹⁹ *Computer Associates UK Ltd v Software Incubator Ltd* [2018] EWCA Civ 518, [2019] Bus LR 522 at [55] and [67].

²⁰ *Computer Associates UK Ltd v Software Incubator Ltd* [2018] EWCA Civ 518, [2019] Bus LR 522 at [19].

²¹ Case C-410/19 *The Software Incubator Ltd v Computer Associates (UK) Ltd* (2021) EU:C:2021:741 at [36]. The CJEU held that from an economic point of view, the sale of a computer program on a disk and through download from the internet are similar, since the online transmission method is the functional equivalent of the supply of a material medium: see [38].

²² Case C-410/19 *The Software Incubator Ltd v Computer Associates (UK) Ltd* (2021) EU:C:2021:741 at [43].

in intangible form constitutes a “product” for the purposes of the CPA, or other legislation employing a comparable concept.

- 2.19 In our view, software should be treated as a “product” under the CPA, whether delivered on or embedded in tangible goods or supplied digitally. The mode of supply should not determine classification. To hold otherwise would be to draw a distinction of form rather than substance, and to elevate a purely technical distinction over the substantive nature of what is supplied. That would be arbitrary and would create an unjustified gap in consumer²³ redress under the CPA’s strict liability regime.
- 2.20 The arbitrariness of the distinction can be illustrated by a simple example. Software pre-loaded on a motor vehicle would likely be treated as part of a “product” covered by the CPA, whereas functionally identical standalone software supplied later to that same vehicle by means of a digital download may fall outside the Act.²⁴ Yet nothing of substance has changed: the software is the same, it performs the same function, and its safety profile is unaffected by the means of delivery. The method of supply therefore provides no principled basis on which to determine liability, and with it access to redress.²⁵
- 2.21 In this respect, we find persuasive the reasoning of Mr Justice Waksman in *Software Incubator Ltd v Computer Associates UK Ltd*.²⁶ As he observed, the
- essential characteristics of a piece of software ... cannot depend on its mode of delivery any more than the nature of tangible goods depends on whether they are transported by rail, sea or air.²⁷
- He was also right to emphasise that software, although intangible and often electronically supplied, is capable of transfer and commercial exploitation.²⁸ Mr Justice Waksman further recognised that, although software itself is intangible and may be electronically supplied, it does not operate in the abstract but only through tangible hardware, such as a hard disk or server.²⁹ In our view, these considerations undermine any justification for retaining a purely technical distinction under the CPA based on how software reaches the user.
- 2.22 Our provisional proposal also responds to the changes in software distribution in recent years, with digital download and software-as-a-service models becoming increasingly prevalent, and with subscription-based licensing often replacing perpetual

²³ In this consultation paper, we use “consumer” to refer to persons who use, interact with, or may be affected by a product. It extends beyond consumers who have purchased a product, encompassing all natural persons who suffer harm as a result of a defective product.

²⁴ M Hervey and M Lavy KC, *The Law of Artificial Intelligence* (2nd ed 2024) paras 6-037 and 6-041. See also our discussion from para 2.12 above.

²⁵ Some products are also distributed in multiple forms. For example, in the video game industry, consumers often have the option of buying a product on a physical disk or via download.

²⁶ *Software Incubator Ltd v Computer Associates UK Ltd* [2016] EWHC 1587 (QB), [2017] Bus LR 245.

²⁷ *Software Incubator Ltd v Computer Associates UK Ltd* [2016] EWHC 1587 (QB), [2017] Bus LR 245 at [39].

²⁸ *Software Incubator Ltd v Computer Associates UK Ltd* [2016] EWHC 1587 (QB), [2017] Bus LR 245 at [36].

²⁹ *Software Incubator Ltd v Computer Associates UK Ltd* [2016] EWHC 1587 (QB), [2017] Bus LR 245 at [36].

licences,³⁰ compared to distribution through physical mediums such as disks. To hold that only software supplied on a tangible device would constitute a “product” under the CPA would not reflect the way in which software is commonly supplied in practice today.

- 2.23 The same reasoning applies to AI systems. The means by which these systems are supplied should not determine their classification. Whether an AI system is embedded in hardware, downloaded, or accessed through a subscription model, the mode of delivery does not alter its nature, functionality, or safety profile. For example, the Grok AI chatbot³¹ performs the same function and raises the same safety risks, regardless of whether it is accessed through an app, a browser, the X platform, or embedded in a device such as a vehicle.³²
- 2.24 More fundamentally, software and AI systems are deployed as operative tools designed to achieve various purposes, such as analysing data or, in the case of AI systems, generating content. In this respect, they share similarities with physical products: they are used as tools by individuals, often replacing or controlling processes that were previously mechanical, and can give rise to risks of personal injury or property damage. They are also commonly developed for widespread deployment rather than bespoke use, with the same system often supplied, licensed, or otherwise commercially exploited³³ across a large user base. These features reflect their functional reality as products and align closely with the mass-market distribution model with which the CPA is concerned, supporting an approach that focuses on the risks a technology creates rather than in its material form.
- 2.25 That approach is consistent with the position now adopted in the EU. Under the new EU Product Liability Directive 2024 (the “New Directive”),³⁴ the definition of “product” expressly includes “software”,³⁵ which the recitals make clear is intended to encompass AI systems.³⁶ The Directive further provides that software constitutes a product irrespective of how it is supplied or used, and whether it is stored on a device or accessed through the cloud.³⁷
- 2.26 Our approach is also aligned with the law in Australia. The Australian Consumer Law sets out the liability of manufacturers for “goods” with safety defects, and “goods”, in

³⁰ For software under a perpetual licence, the consumer will typically have infinite access, whereas for a subscription model, a consumer will only have access for the duration of their subscription. There may also be different levels of service and/or updates provided in perpetual versus subscription model software. However, these characteristics are more relevant to the determination of defect or the establishment of defences than whether the software should be a product.

³¹ xAI, *xAI Consumer FAQs*, <https://x.ai/legal/faq>.

³² For example, chatbots are now being provided in some vehicles as an in-vehicle AI assistant: https://www.tesla.com/en_gb/support/grok#grok-vehicles.

³³ See *Software Incubator Ltd v Computer Associates UK Ltd* [2016] EWHC 1587 (QB), [2017] Bus LR 245 on software. See para 2.21 below.

³⁴ The New Directive repealing the 1985 Directive.

³⁵ New Directive, art 4(1).

³⁶ New Directive, recital 13.

³⁷ New Directive, recital 13.

this context, includes computer software, such as software accessed through the internet.³⁸ We note that Australia offers a helpful comparison because a “safety defect” is defined in terms similar to those in the CPA, that is, goods have a safety defect if “their safety is not such as persons generally are entitled to expect”.³⁹

AI models as products

- 2.27 Having considered whether software and AI systems should fall within the definition of “product” under the CPA, we seek consultees’ views on whether AI models should be treated in the same way. The position of AI models is less straightforward. Although AI systems are the technologies with which consumers will generally interact directly,⁴⁰ and are therefore more likely to be the immediate source of harm, AI models may also possess characteristics associated with products.⁴¹
- 2.28 As recognised by the EU AI Act, AI models and AI systems are distinct concepts. An AI model is typically a core element of an AI system⁴² and generally requires additional elements, such as a user interface, before it interacts with users.⁴³ AI models and AI systems also occupy different positions in the AI value chain⁴⁴ and are subject to different regulatory obligations,⁴⁵ reflecting the fact that natural persons are more directly exposed to AI systems than the models on which they are based.⁴⁶
- 2.29 Nevertheless, many AI models are developed and made available as discrete technological artefacts. They may be made available by a developer and acquired for use for a particular purpose.⁴⁷ Some may also be made available directly to

³⁸ Competition and Consumer Act 2010 (Australia), s 2; see also *Goldiwood Pty Ltd v ADL (Aust) Pty Ltd* [2014] QCAT 238 (Queensland Civil and Administrative Tribunal).

³⁹ Competition and Consumer Act 2010 (Australia), s 9.

⁴⁰ D Fernández-Llorca, E Gómez, I Sánchez and G Mazzini, “An interdisciplinary account of the terminological choices by EU policymakers ahead of the final agreement on the AI Act: AI system, general purpose AI system, foundation model, and generative AI” (2024) 33 *Artificial Intelligence and Law* 881.

⁴¹ In the context of the New Directive, some academics suggest that AI models constitute products, see M Ebers and E Vargas Penagos, “Upstream, Downstream, and in Between: Navigating the GPAI Value Chain under EU Law” (2026) *Information & Communications Technology Law* 28. See also A Mayrhofer, “AI Act and New Product Liability Directive: The Interplay between AI Safety Regulation and Compensation” (2026) 2 *Cambridge Forum on AI: Law and Governance* 5.

⁴² AI Act (EU) 2024/1689, Official Journal L of 13.6.2024, recital 97.

⁴³ AI Act (EU) 2024/1689, Official Journal L of 13.6.2024, recital 97.

⁴⁴ See AI Act (EU) 2024/1689, Official Journal L of 13.6.2024, art 3(63), which defines a general-purpose AI model as “an AI model ... that can be integrated into a variety of downstream systems and applications”. See also M Ebers and E Vargas Penagos, “Upstream, Downstream, and in Between: Navigating the GPAI Value Chain under EU Law” (2026) *Information & Communications Technology Law*; and D van der Neut, “Article 2: Scope” (2026) *Cambridge Commentary on EU General-Purpose AI Law*, section 2.1.1.3.

⁴⁵ Compare eg AI Act (EU) 2024/1689, Official Journal L of 13.6.2024, arts 5 and 53.

⁴⁶ H Junklewitz, R Hamon, A Andre, T Evas, J Soler Garrido and I Sanchez Martin, “Cybersecurity of Artificial Intelligence in the AI Act” (2023) *Publications Office of the European Union* 9.

⁴⁷ AI models can be placed on the market without being integrated into an AI system, see European Commission, “Guidelines on the scope of the obligations for general-purpose AI models established by AI Act” (2025) C(2025) 7719, para 51.

consumers.⁴⁸ Although they often require further integration before functioning as part of a user-facing AI system, they are capable of being developed, supplied, licensed and commercially exploited as standalone items. In that respect, they share a number of characteristics commonly associated with products. For these reasons, we seek consultees' views on whether AI models should also be regarded as products for the purposes of the CPA.

Policy reasons behind the CPA supporting the inclusion of software and AI systems

- 2.30 Our provisional proposal to include software and AI systems within the definition of “product” is supported by the policy underlying the CPA. The recitals to the 1985 Directive made clear that its strict product liability regime was to achieve “a fair apportionment of the risks inherent in modern technological production”.⁴⁹ It also sought to provide “an increased degree of protection of consumers’ and other natural persons’ health or property”,⁵⁰ providing a more straightforward route to claim compensation, without needing to prove negligence.
- 2.31 Those considerations apply with particular force to AI systems. Their autonomy and opacity can make it inherently difficult to determine how a harmful outcome was produced, a difficulty compounded by the asymmetry of knowledge between claimant and developer, the latter typically having exclusive insight into the system’s design, training and operation. Establishing fault may therefore be exceptionally challenging. In this respect, AI systems exemplify the type of technical and evidential complexity for which a strict liability regime is intended, ensuring that access to redress does not depend on overcoming barriers that may, in practice, be insurmountable for a claimant.
- 2.32 In our view, extending the scope of the CPA to encompass these would therefore give effect to its underlying rationale. It would preserve strict liability as a meaningful route to redress in cases where the technical complexity of the AI system makes fault particularly difficult to establish, while ensuring a more appropriate allocation of risk between injured persons and those who develop and place such systems on the market.

Arguments against including software and AI systems as products under the CPA

- 2.33 Concerns have been expressed about bringing standalone software and AI systems within the scope of the CPA, including by some of the consultees responding to our Initial Scoping Questionnaire. There have been suggestions that such technologies do not pose the same risks of personal injury or property damage as tangible products; that liability is better addressed through service-based rather than product-based rules; and that their inclusion would unduly expand the reach of strict liability. For the reasons set out below, we do not consider these concerns to be persuasive.

⁴⁸ Consumers may download AI model weights from open platforms and run the model locally, see *Getty Images v Stability AI* [2025] EWHC 2863 (Ch), [2026] Bus LR 582 at [265]

⁴⁹ Recitals to the 1985 Directive.

⁵⁰ New Directive, recital 1, referring to the objectives of the 1985 Directive; see also *A v National Blood Authority* (No 1) [2001] EWHC QB 446, [2001] 3 All ER 289 at [31].

Intangible products posing a low risk

- 2.34 It has been suggested that standalone software is unlikely to cause the kind of damage to people's health or property with which the product liability regime is concerned.⁵¹ Some consultees told us that only software embedded in a tangible product poses that type of risk. Others considered that only software necessary to operate a tangible product should fall within the scope of the CPA.
- 2.35 We do not consider that those distinctions can be justified. Whether software is pre-installed in a product or supplied separately by download does not affect the risk of harm it poses. In both cases, it operates within the physical device in the same way; the only difference lies in how it came to be present on that device. Nor do we consider that the mere fact that software is not embedded in a tangible product necessarily means that it cannot give rise to the type of harm with which the CPA is concerned. Software may influence or control physical systems regardless of how it is supplied. The relevant question is therefore not whether software is embedded in a product, but whether a defect in the software is capable of causing the personal injury or property damage for which the CPA provides a remedy.
- 2.36 We also consider that there is no principled basis for limiting liability to software that is "necessary" to the operation of a tangible product. If "necessary" means software without which the product cannot function, the capacity to cause personal injury or property damage is not confined to such software. Defects in software performing other functions may equally give rise to actionable harm. If, instead, the distinction is between software performing a core function and software performing a more ancillary one, the importance of the software's role does not determine whether a defect is capable of causing such harm. In either case, the relevant question is whether a defect in the software caused the type of harm for which the CPA provides a remedy, rather than whether the software was indispensable to the operation of the product or how central its function was within it.
- 2.37 The current framework already reflects this to some extent. Where a defect in software or an AI system embedded in a tangible product causes that product to be defective, its producer may be liable under the CPA even if the defect originates in the embedded system (and the producer may then seek recourse against the developer). It would seem arbitrary if the availability of a remedy depended on whether the same defective system was embedded in a tangible product or supplied independently. The distinction would turn on the manner of supply rather than the nature of the defect or the harm caused.
- 2.38 Nor is there any basis for assuming that standalone software or AI systems are generally incapable of causing the kind of harm with which the CPA is concerned. Possible examples of software itself causing personal injury or property damage include a medical app defectively failing to alert a user to irregular heartbeats or to tell

⁵¹ This argument was made by some respondents to the European Commission's consultation on product liability: European Commission, *Commission Staff Working Document Impact Assessment Report accompanying the document Proposal for a Directive of the European Parliament and of the Council on liability for defective products* (September 2022) p 67. See also A Knight, *Encyclopaedia of Information Technology Law* (Release 105 2026) para 7.132.

a diabetic user that their blood sugar is dangerously low,⁵² or a defective app causing a computer battery to explode.⁵³ Digital technologies can also result in psychological harm, which is recoverable under the CPA, as will be discussed in Chapter 5.

- 2.39 In any event, the CPA already contains its own limiting principle on recoverable damage.⁵⁴ If a piece of standalone software or AI system does not cause the kind of damage for which the CPA provides a remedy, no claim will arise. There is therefore no need to exclude such systems in advance on the assumption that they are generally low risk. To do so may deny redress in cases where standalone software or AI systems do in fact cause actionable harm.

Differentiation with services

- 2.40 Concerns were also raised during pre-consultation that standalone software and AI systems are more akin to services than traditional products and should therefore fall outside the CPA. That concern reflects a genuine feature of the current law. As explained at paragraph 2.10 above, the CPA governs liability for products, not services. If software and AI systems were properly characterised as services, they would therefore fall outside the statutory scheme.
- 2.41 In our view, however, that conclusion does not follow. We have already explained why the method of supply does not alter the nature of what is supplied. In the case of software, the manner in which it is supplied, whether on or incorporated in a tangible product or digitally, does not alter its nature and therefore does not convert the software from a product into a service.
- 2.42 In the case of AI systems, they are generally more appropriately characterised as products than as services. A service is ordinarily assessed by reference to the skill and care exercised by the provider in the circumstances of the particular case, whereas a product is assessed by reference to the safety of what is supplied, as determined by its design and production.⁵⁵ AI systems align more closely with the latter model: when deployed for a particular purpose, users are entitled to expect them to operate to a reliable and consistent standard for that purpose, based on how they have been designed and trained. An AI system used to analyse medical scans, for example, would be expected to meet an appropriate level of performance as a tool in that clinical context, unlike a service such as surgery, where the standard depends on the expected skills and care of the professional in the circumstances of the particular

⁵² In the US, glucose monitors were recalled in 2025 due to a speaker malfunction which meant that alerts may not have made a sound when blood sugar levels were dangerously low or high. See US Food and Drug Administration, “Continuous Glucose Monitor Receiver Recall” (July 2025), <https://www.fda.gov/medical-devices/medical-device-recalls-and-early-alerts/continuous-glucose-monitor-receiver-recall-dexcom-inc-removes-certain-dexcom-g6-g7-one-and-one>.

⁵³ European Commission, *Commission Staff Working Document Impact Assessment Report accompanying the document Proposal for a Directive of the European Parliament and of the Council on liability for defective products* (September 2022) pp 15 and 16.

⁵⁴ See CPA, s5 for the types of damage actionable under the regime.

⁵⁵ International Association of Privacy Professionals, *AI as product vs AI as service: Unpacking the liability divide in EU safety legislation* (19 November 2025), <https://iapp.org/news/a/ai-as-product-vs-ai-as-service-unpacking-the-liability-divide-in-eu-safety-legislation>.

case.⁵⁶ The position is not materially altered by the fact that AI systems (or other technologies) may be subject to ongoing updates or refinements after deployment. Those updates may affect the characteristics of the product, but they do not change the fundamental nature of what is supplied: a system intended to perform a particular function to a consistent standard. However, as discussed from paragraph 2.150 below, we consider whether there should be an exception for bespoke software (including AI) provided as a service and ask consultees for their views.⁵⁷

- 2.43 Nor does the capacity of an AI system to generate different outputs depending on its user or environment convert it into a service.⁵⁸ The variability of an AI system's outputs is the product of its design and training. Even though a user may feed different inputs into the AI system and receive different outputs, this is not because the user is causing the AI system to behave in this way; rather it is just a consequence of how the AI system is designed to perform.⁵⁹ The capability of an AI system also does not change how it is used, namely as a tool deployed by an individual rather than a service performed by a provider.
- 2.44 More generally, a product's performance may be expected to vary depending on the purpose for which it is used, in a similar way to how AI systems produce different outputs depending on the context in which it is deployed. The CPA already accommodates this by requiring the court to consider all the circumstances when determining the level of expected safety of a product, including the purposes for which the product has been marketed and how the product may reasonably be used.⁶⁰
- 2.45 Equally, the possibility that outputs are influenced by factors outside the developer's control, such as user inputs, does not compel a service-based characterisation of an AI system. Safety under the CPA is inherently relative because no product can be absolutely safe.⁶¹ It therefore remains conceptually coherent to treat an AI system as a product, even if it causes harm due to a particular user input, as a court could still hold that the system is safe under the CPA. The risk of its outputs being affected by external factors is not a reason to exclude AI systems from the CPA.

Expansion of liability

- 2.46 Some responses to the Initial Scoping Questionnaire expressed concern that extending liability to developers of software and AI systems would significantly

⁵⁶ See *A Tettenborn and M Jones, Clerk & Lindsell on Torts* (24th ed 2023) para 7.161 on how this applies in a negligence context.

⁵⁷ See below from para 2.150.

⁵⁸ International Association of Privacy Professionals, *AI as product vs. AI as service: Unpacking the liability divide in EU safety legislation* (19 November 2025), <https://iapp.org/news/a/ai-as-product-vs-ai-as-service-unpacking-the-liability-divide-in-eu-safety-legislation>, suggests that these factors complicate the categorisation of AI as goods or services.

⁵⁹ In the case of dedicated attempts at 'jailbreaking', where the developer's attempts to constrain the functionality are thwarted by users, this could point to a failure to ensure successfully that the product can only be used safely.

⁶⁰ CPA, s 3(2).

⁶¹ *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [110].

increase their exposure. In particular, it was suggested that this could inhibit innovation and increase costs, which may ultimately be passed on to consumers.

- 2.47 While these concerns are understandable, they do not justify excluding software or AI systems from the product liability regime. Considerations of innovation and cost must be assessed in light of the central objective of the CPA: to secure a fair apportionment of the risks of modern technological production between producers and individuals. Where technologies placed on the market cause harm, a fair apportionment of risk would allocate responsibility to those who develop and supply them in the course of business, derive profit from their use, and are better able to understand and manage the associated risks, rather than the individuals who are harmed. This reflects the established principle that producers bear the risks associated with what they produce, as is already the case for producers of tangible goods. Given the characteristics of software and AI systems discussed above, and the risks they are capable of creating, the policy rationale underpinning the CPA applies to them with equal force. Software and AI systems therefore sit naturally within the category of products which should fall within the scope of the CPA.
- 2.48 Moreover, the current framework already exposes developers to indirect liability, revealing an underlying inconsistency. As explained at paragraph 2.37, where a defect arises in software or AI embedded within a tangible product, the producer may be liable under the CPA, even if the defect originates in the embedded system, and may then seek recourse against the developer. By contrast, where the same system is supplied independently, the injured person may have no direct claim because it falls outside the statutory definition of a “product”. The availability of remedies therefore turns on the manner of supply rather than the nature of the defect, exposing a clear and unjustified gap in the regime.

Consultation Question 1.

- 2.49 We provisionally propose that the definition of “product” under the CPA should be expanded to include software however supplied, including software downloaded from the cloud or internet, and software-as-a-service.

Do consultees agree?

Consultation Question 2.

- 2.50 We provisionally propose that the definition of “product” under the CPA should be expanded to include AI systems however supplied, including AI systems downloaded from the cloud or internet or otherwise supplied in an intangible form.

Do consultees agree?

- 2.51 Do consultees consider that AI models should constitute products in their own right and separately from AI systems?

Core features of “software” and “AI systems”

- 2.52 Since we propose that software and AI systems ought to be treated as products under the CPA, we consider below what they should encompass for these purposes. This is not straightforward. Software and AI do not fit neatly within concepts originally developed for physical products. They can take many forms, may be integrated into or connected with physical products, and often involve complex interactions between multiple technological and human elements. Harmful outcomes may result from a combination of factors, including the AI model, training data, system architecture, deployment environment and user inputs. Software and AI can also blur the distinction between functionality and information, making it difficult to determine whether harm results from a defective product or inaccurate content. Any attempt to define these technologies must therefore balance legal certainty with sufficient flexibility to accommodate technological developments and future innovation.
- 2.53 These difficulties may help to explain why the New Directive does not attempt to define software or AI; rather, “product” is said to include “software”, and the recitals refer to software “such as operating systems, firmware, computer programs, applications or AI systems”.⁶² We are aware of criticisms for the lack of definition and the uncertainty that it may create.⁶³
- 2.54 Nevertheless, we consider that there is value in exploring whether certain core features of software and AI systems could be identified for the purposes of the CPA. Doing so could help to provide a more principled and predictable basis for determining what falls within the regime. At the same time, we recognise the risks inherent in such an exercise. Any attempt to identify core characteristics of software and AI may create artificial distinctions between technologies, become outdated as technologies evolve, or inadvertently exclude future developments. For that reason, the features discussed below are not advanced as proposed statutory definitions. Rather, they are intended to elicit consultees’ views on whether an approach based on identifying core features of software and AI systems would be useful and workable and, if so, what such core features should be.

Core features of “software”

- 2.55 In very simple terms, software can be understood as the instructions that tell a computer what to do, in other words, a computer program or application.⁶⁴ Those instructions can exist in a variety of forms, including “source code” written in a human-readable programming language, and “object code” written in a machine-readable

⁶² New Directive, recital 13.

⁶³ G Howells and D Fairgrieve, “The New Product Liability Directive: Steadily Expanding Liability or Business as Usual” (2025) 33 *European Review of Private Liability* 549, paras 13 to 18. On the difference between software and pure information, especially where a defect arises from the source code, which is excluded from the definition of product, see G Wagner, “Next Generation EU Product Liability – For Digital and Other Products” (2024) 15 *Journal of European Tort Law* 172, 183; on the difference between software-as-service (a product) and a pure service (not a product), in the absence of clear boundaries set out in the New Directive, see European Law Institute, *1st Supplement to the European Law Institute’s work on the new EU framework on product liability, Liability for Defective Software Under the New EU Product Liability Regime* (2026) p 9.

⁶⁴ See the Cambridge Dictionary definition of “software”, <https://dictionary.cambridge.org/dictionary/english/software>.

format capable of execution by a computer. Source code is translated into object code that can be executed by a computer or other computing system.⁶⁵ Modern software architectures may involve a number of intermediate forms of code or instructions to a computer between human-readable source code and the machine code executed by a processor.

- 2.56 There is no general definition of a “computer program” in English legislation. The EU Software Directive 2009⁶⁶ defines a “computer program” as including programs in any form, extending to those incorporated into hardware and preparatory design work of a computer program.⁶⁷ However, such a definition offers limited assistance in identifying what software should mean for the purposes of the CPA. A more functional description appears in the 1978 World Intellectual Property Organisation Model Provisions on the Protection of Computer Software, which describe a computer program as a set of instructions capable, when incorporated in a machine-readable medium, of causing a machine to indicate, perform or achieve a particular function, task or result.⁶⁸
- 2.57 For CPA purposes, we think there are two possible elements that could, together, form part of a definition of “software”.
- (1) The first is the code or other instructions which are capable of causing a machine to perform or achieve a particular function, task or result.
 - (2) The second is the resulting functionality produced when those instructions are executed: the function, task or result (or a combination of such functions, tasks or results) that is performed or achieved.
- 2.58 Code, in itself, can be regarded as pure information, which is generally excluded from the CPA.⁶⁹ It becomes capable of operating as a product that may cause harm only when those instructions are executed by a computer. The second element therefore matters because it is the functionality that the instructions produce, rather than any of the underlying instructions viewed in isolation, that is capable of causing harm. It also captures other elements of a software package that are produced when such a system operates. Taking a computer game as an example, this approach would mean that “software” would require not only the code running on a computer but also the other functionality which is achieved when executing the program, such as the game graphics and sound effects. In other words, “software” would encompass the user

⁶⁵ D Lin, M Sag and R S Laurie, “Source code versus object code: Patent Implications for the Open Source Community” (2002) 18 *Computer & High Technology Law Journal* 235. See also the explanations in *IBM United Kingdom Ltd v LzLabs GmbH* [2025] EWHC 532 (TCC), [2025] FSR 25 at [23] and [24].

⁶⁶ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version). The previous version of the Software Directive (91/250/EEC) was implemented in the UK by the Copyright (Computer Programs) Regulations 1992, which amended the Copyright, Designs and Patents Act 1988. The 1988 Act does not have a definition of a “computer program” or “software”.

⁶⁷ Recital 7 of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version).

⁶⁸ Model Provisions on the Protection of Computer Software by the World Intellectual Property Organisation, s 1(i).

⁶⁹ See discussion from 2.133 below.

interface of a computer program and the aspects which an individual would experience and interact with when using software, not just the underlying instructions.

- 2.59 However, we recognise that a broader conception of software is also possible, under which it would be defined by reference to code or instructions alone, without the second element identified above. We note that this is the approach in the Cyber Resilience Act,⁷⁰ an EU regulation that sets out cybersecurity requirements for placing “products with digital elements” on the market. It defines a “product with digital elements” as:

a software or hardware product and its remote data processing solutions, including software or hardware components being placed on the market separately.⁷¹

- 2.60 “Software” is itself defined as “the part of an electronic information system which consists of computer code”.⁷² “Software”, being therefore defined as consisting of code, is a “product with a digital component” in its own right for the purposes of the Cyber Resilience Act.⁷³

- 2.61 It is important to recognise that the aims and scope of the Cyber Resilience Act differ significantly from those of the product liability regime. The former is concerned specifically with products with digital elements, and therefore addresses a narrower and more technologically-focused subject matter, aiming to be comprehensive within that context. By contrast, the product liability regime has a much wider scope and applies to “products” more generally (albeit as defined for the specific purposes of that regime). Its strict liability feature means that its boundaries have traditionally been relatively tightly controlled. We consider therefore that comparisons between the two regimes are not necessarily apt.

- 2.62 Importantly, we note that the EU’s approach to software differs between the New Directive and the Cyber Resilience Act. While the New Directive does not include a definition of software for the purposes of the product liability regime, it does not apply to the content of digital files such as “the mere source code of software”, which it classifies as information and therefore outside its scope.⁷⁴ It therefore broadly aligns

⁷⁰ Regulation (EU) 2024/2847 of the European Parliament and of the Council of 23 October 2024 on horizontal cybersecurity requirements for products with digital elements and amending Regulations (EU) No 168/2013 and (EU) 2019/1020 and Directive (EU) 2020/1828. Its main obligations apply from 11 December 2027, with reporting obligations already applying as of 11 September 2026. The UK has implemented similar cybersecurity requirements in regulations made under Part 1 of the Product Security and Telecommunications Infrastructure Act 2022.

⁷¹ Cyber Resilience Act, art 3.

⁷² Cyber Resilience Act, art 3.

⁷³ The Commission’s guidance to the CRA explains: “Computer code can take the form of (i) machine code, which is the set of instructions directly executed by a computer’s processor, written in binary format; or (ii) source code, i.e. the set of instructions and statements written in a programming language, which must be compiled or interpreted to be executed by a computer. The definition of software laid down in the CRA covers both”: C(2026) 5252 - Communication on the Cyber Resilience Act (CRA) guidance (July 2026), <https://digital-strategy.ec.europa.eu/en/library/commission-publishes-new-guidance-support-timely-cyber-resilience-act-implementation>.

⁷⁴ See New Directive, recital 13.

with the possible approach outlined above, in terms of being less inclusive as regards what constitutes a product.

- 2.63 We recognise that it may be difficult to draw a firm boundary around the concept of “software” for the purposes of the product liability regime, and also between “software” and “pure information”. We ask for consultees’ views on alternative approaches. We discuss pure information further below.⁷⁵

Consultation Question 3.

- 2.64 We seek consultees’ views as to whether the CPA should seek to identify the core features of “software”.
- 2.65 We seek consultees’ views on whether the core features of “software” for the purposes of the CPA should include the following two elements:
- (1) the code or other instructions capable of causing a machine to perform or achieve a particular function, task or result; and
 - (2) the resulting functionality produced when those instructions are executed: the function, task or result (or a combination of such functions, tasks or results) that is performed or achieved?
- 2.66 Alternatively, do consultees consider that software should be understood solely by reference to code or other instructions alone?
- 2.67 More generally, we invite consultees’ views on the feasibility of this approach and on whether any alternative approaches or formulations would be preferable. In particular, we welcome views on whether identifying core features of software provides a useful means of delineating its scope for the purposes of the CPA, or whether such an approach risks creating distinctions that may become difficult to sustain as technology evolves.

Core features of “AI system”

- 2.68 Following the same approach, we seek below to identify the core features of AI systems.
- 2.69 There is no universally agreed definition of AI.⁷⁶ There is at least one definition in UK statute, in the Data (Use and Access) Act 2025, which defines an “AI system” as:
- a machine-based system that, from the input it receives, can infer how to—
- (a) generate predictions, digital content, recommendations, decisions or other similar outputs, or

⁷⁵ From para 2.133.

⁷⁶ Department for Science, Innovation and Technology, *A pro-innovation approach to AI regulation* (August 2023) para 39.

(b) influence a physical or virtual environment,

with a view to achieving an explicit or implicit objective.⁷⁷

2.70 This definition is relatively brief, and is used in a very different context: that of a reporting obligation on the Secretary of State. Another recent definition, which has been influential and is more relevant to our current context, appears in the EU AI Act.⁷⁸ It describes an AI system as a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations or decisions that can influence physical or virtual environments.⁷⁹

2.71 That definition is a useful starting point, but it has attracted criticism. In particular, concerns have been raised that concepts such as autonomy, inference and adaptiveness are not clear, and that the definition may be broad enough to capture traditional software systems that do not display the same features as AI.⁸⁰ The European Commission's later non-binding guidelines on the definition of an AI system under the EU AI Act published in July 2025 sought to clarify that autonomy and inference are the key features of AI systems, and that adaptiveness (namely, self-learning capabilities) after deployment is an optional characteristic.⁸¹

2.72 The challenges of defining AI systems raise the question of whether a separate definition is needed for CPA purposes at all. In any case, there is likely to be significant overlap with software more generally. However, for the purposes of discussion, we set out some of the salient features of AI systems that could be relevant for CPA purposes:

(1) it operates on a machine; and

(2) it:

(a) generates outputs from the inputs it receives, in circumstances where:

(i) such inputs may be provided or designed by a natural person or may be generated autonomously;

⁷⁷ Data (Use and Access) Act 2025, s 135(4). This definition was based on OECD definition of AI system; see OECD, "Explanatory memorandum on the updated OECD definition of an AI system" (2024), https://www.oecd.org/en/publications/explanatory-memorandum-on-the-updated-oecd-definition-of-an-ai-system_623da898-en.html.

⁷⁸ For reference, the New Directive adopts the definition of an "AI system provider" from the EU Artificial Intelligence Act (Regulation (EU) 2024/1689). See recital 13 of the New Directive, which notes that a developer of software "including AI system providers within the meaning of Regulation (EU) 2024/1689 of the European Parliament and of the Council, should be treated as a manufacturer".

⁷⁹ EU Artificial Intelligence Act (Regulation (EU) 2024/1689), art 3(1).

⁸⁰ European Commission, *Analysis of EU AI Office stakeholder consultations: defining AI systems and prohibited applications* (May 2025) p 21.

⁸¹ European Commission, *Commission Guidelines on the definition of an artificial intelligence system established by Regulation (EU) 2024/1689 (AI Act)* (July 2025).

- (ii) such outputs are not pre-determined, controlled or specified by a natural person, in each case, at all or to a significant extent; and
 - (iii) such outputs may include predictions, content, recommendations or decisions that can influence physical or virtual environments; or
- (b) otherwise displays significant generality and is capable of performing a wide range of distinct tasks or fulfilling a variety of purposes (“general-purpose AI” or “GPAI”); and
- (3) it has been developed using techniques, including machine learning techniques and logic- and knowledge-based techniques (and in the case of GPAI, including through large-scale training methods and self-supervised or unsupervised learning), that enable the system’s capability to generate such outputs referenced in paragraph 2.72(2)(a) or otherwise enable the system’s capability referenced in paragraph 2.72(2)(b); and
- (4) it may (or may not) continue to learn after deployment automatically, which may result in the system generating different outputs from the same inputs it receives.

2.73 We intend that these elements of an AI system include both task-specific AI systems and general-purpose AI systems (including generative AI systems), drawing inspiration from the EU AI Act’s definition of a general-purpose AI model and general-purpose AI system.⁸²

⁸² See EU Artificial Intelligence Act (Regulation (EU) 2024/1689), arts 3(63) and 3(66).

Consultation Question 4.

- 2.74 We seek consultees' views as to whether the CPA should seek to identify the core features of "AI system".
- 2.75 If consultees consider that identifying these core features would be helpful, do consultees consider that, for the purposes of the CPA, they should be as follows:
- (1) it operates on a machine; and
 - (2) it:
 - (a) generates outputs from the inputs it receives, in circumstances where:
 - (i) such inputs may be provided or designed by a natural person or may be generated autonomously;
 - (ii) such outputs are not pre-determined, controlled or specified by a natural person, in each case, at all or to a significant extent; and
 - (iii) such outputs may include predictions, content, recommendations or decisions that can influence physical or virtual environments; or
 - (b) otherwise displays significant generality and is capable of performing a wide range of distinct tasks or fulfilling a variety of purposes ("general-purpose AI" or "GPAI"); and
 - (3) it has been developed using techniques, including machine learning techniques, and logic- and knowledge-based techniques (and in the case of GPAI, including through large-scale training methods and self-supervised or unsupervised learning), that enable the system's capability to generate such outputs referenced in limb (2)(a) above or otherwise enable the system's capability referenced in limb (2)(b) above; and
 - (4) it may (or may not) continue to learn after deployment automatically, which may result in the system generating different outputs from the same inputs it receives.
- 2.76 More generally, we invite consultees' views on the feasibility of this approach and on whether any alternative approaches or formulations would be preferable. In particular, we welcome views on whether identifying core features of an "AI system" provides a useful means of delineating its scope for the purposes of the CPA, or whether such an approach risk creating distinctions that may become difficult to sustain as technology evolves.

Open-source software

- 2.77 In light of our proposal to include standalone software within the scope of the CPA, it may be asked whether this would also bring open-source software within the product liability regime.
- 2.78 Software can broadly be divided into two categories:
- (1) open-source software: where the source code is made available and may generally be used, modified and redistributed by others, typically at no cost;⁸³ and
 - (2) closed-source software or proprietary software: where use, modification and redistribution of the software are only permitted on the terms of its owner.⁸⁴
- 2.79 Open-source software is now widely used and forms a large part of the code base of many popular applications.⁸⁵ It has been suggested that almost every highly profitable company incorporates open-source code into its commercial products or services.⁸⁶
- 2.80 The concern regarding the inclusion of open-source software within the product liability regime is that imposing strict liability on developers of open-source software, typically provided at no cost, may undermine collaborative development⁸⁷ and discourage innovation and research.⁸⁸
- 2.81 In our view, however, it is not necessary to include a separate exemption for non-commercial open-source software. This is because the critical question under the CPA is not whether software is open-source, but whether it is supplied in the course of a business and/or with a view to profit. Under the existing provisions of the Act, a producer who supplies a product outside the course of business and without a view to profit is not liable under the CPA. Accordingly, developers who make open-source software available on a genuinely non-commercial basis would generally fall outside the regime.
- 2.82 By contrast, software may fall within the scope of the CPA, even where users do not pay for it directly, provided that it is supplied in the course of business and/or with a

⁸³ IBM, *What is open source software?*, <https://www.ibm.com/think/topics/open-source>. What a user is allowed to do with a particular piece of open-source software will depend on the terms of the specific open-source software licence.

⁸⁴ IBM, *What is open source software?*.

⁸⁵ 70-90% of any given software code base consists of open-source elements, according to a study from the Linux Foundation. Many popular software-as-a-service applications incorporate a degree of open-source software within their infrastructure. See IBM, *What is open source software?*.

⁸⁶ Liane Colonna, "The end of open source? Regulating open source under the cyber resilience act and the new product liability directive" (2025) 56 *Computer Law & Security Review* 106105.

⁸⁷ Liane Colonna, "The end of open source? Regulating open source under the cyber resilience act and the new product liability directive" (2025) 56 *Computer Law & Security Review* 106105.

⁸⁸ See the New Directive, recital 14. The New Directive provides that free and open-source software developed or supplied outside the course of a commercial activity should not fall within its scope, as otherwise this would hamper innovation and research.

view to profit. For example, software may be made available free of charge while generating revenue through associated support, maintenance or other services.

- 2.83 For these reasons, open-source software should not be excluded simply because of its open nature. Only non-commercial open-source software should fall outside the scope of the CPA. Where such software is made available commercially, or incorporated into a product or service supplied commercially, there is no principled basis for treating it differently from any other software.
- 2.84 For reference, although our approach is substantively similar to that adopted in the EU, it differs in that we do not propose an express exclusion for non-commercial open-source software. The New Directive provides that free and open-source software developed or supplied outside the course of a commercial activity should not fall within its scope, as otherwise this would hamper innovation and research. But where software is supplied in exchange for a price, or for personal data used other than exclusively for improving the software, this is considered a commercial activity, to which the New Directive applies.⁸⁹ As explained at paragraph 2.81, this distinction is already reflected in the defence in section 4(1)(c) of the CPA.

Consultation Question 5.

- 2.85 We provisionally propose that the CPA should not include an express exemption for non-commercial open-source software, on the basis that this is unnecessary because such software would already be exempt under section 4(1)(c) of the CPA, which provides a defence where supply of the product was outside the course of business and without a view to profit.

Do consultees agree?

SOCIAL MEDIA AND OTHER ONLINE PLATFORMS

- 2.86 Social media platforms now play a central role in daily life. They are capable of causing harm and the risks that they pose have been recognised by Government,⁹⁰ widely discussed in the media,⁹¹ and the subject of litigation in other jurisdictions.⁹² The principal piece of legislation governing online safety in relation to online platforms is the Online Safety Act 2023 (“OSA 2023”). The Act is concerned primarily with illegal content, risk assessment and mitigation, and governance obligations applicable to online platforms. It does not address whether individual users should have a right to compensation for harm suffered as a result of those platforms.⁹³ Against this

⁸⁹ New Directive, art 2(2) and recital 14.

⁹⁰ See, eg, the Government’s consultation *Growing up in the online world: a national consultation* (March 2026) <https://www.gov.uk/government/consultations/growing-up-in-the-online-world-a-national-consultation>, in relation to measures to protect children using technology, including social media sites.

⁹¹ See, eg, S Wingate, “Social media as dangerous as smoking for children, doctors warn” (26 May 2026) *The Independent*, <https://www.independent.co.uk/tech/social-media-children-ban-smoking-b2983432.html>.

⁹² See our discussion of the proceedings in the US from para 2.113 below.

⁹³ See para 2.88 below.

background, we consider below whether some features of these platforms should be treated as products and fall within the scope of the CPA. Although this section focuses on social media platforms, given the attention they have attracted, similar reasoning applies to other online platforms, for example gaming platforms. The analysis that follows should therefore be understood as extending more broadly to online platforms as a category.

The limitations of social media regulation in addressing product liability issues

- 2.87 The OSA 2023 establishes a regulatory framework for specific types of services, such as “user-to-user services”,⁹⁴ which include social media services.⁹⁵ It requires social media platforms, among other duties, to assess and mitigate risks arising from illegal content by carrying out risk assessments and implementing proportionate measures relating to the design of functionalities, algorithms and other features.⁹⁶ At EU level, similar obligations are imposed, which likewise regulate their design features and algorithms in the EU’s Digital Services Act 2022.⁹⁷
- 2.88 The focus of the OSA 2023 is on preventing and mitigating online harms through duties relating to risk assessment, risk management and governance, enforced by Ofcom rather than on individual redress. Importantly, it does not confer private rights of action or enable individuals to obtain compensation for harm resulting from a breach by a social media platform of the Act.⁹⁸
- 2.89 Since the OSA 2023 has been designed to address systemic or widespread issues rather than individual claims, users harmed by an online platform lack an effective route to redress. In the absence of coverage under the CPA, this creates a gap in the law, leaving affected individuals to rely on other causes of action that may be less accessible or effective. This contrasts with the EU’s Digital Services Act 2022, which expressly provides users with a right to seek compensation from providers for damage suffered as a result of breaches of their obligations under that regime.⁹⁹

⁹⁴ A user-to-user service is defined in Online Safety Act 2023, s 3(1) as “an internet service by means of which content that is generated directly on the service by a user of the service, or uploaded to or shared on the service by a user of the service, may be encountered by another user, or other users, of the service.”

⁹⁵ Social media services are listed as an example of a user-to-user service by Ofcom. See Ofcom, *Protecting people from illegal harms online* (November 2023) para 3.37.

⁹⁶ Online Safety Act 2023, ss 9 and 10.

⁹⁷ See eg Digital Services Act 2022 (EU), arts 34 and 35.

⁹⁸ U Kohl, “Toxic Recommender Algorithms: Immunities, Liabilities and the Regulated Self-regulation of the Digital Services Act and the Online Safety Act” (2024) 16 *Journal of Media Law* 301.

⁹⁹ Digital Services Act 2022 (EU), art 54.

Should social media platforms be treated as products under the CPA?

Design components and features of social media platforms as products

- 2.90 We provisionally propose that the design components and features of social media platforms, which underpin, form part of, and give effect to their architecture, functionality and operation, should fall within the scope of the CPA.¹⁰⁰
- 2.91 As discussed above from paragraph 2.14, we provisionally propose that software should constitute a product under the CPA. Since social media platforms are built on software, the software underpinning these platforms would therefore also fall within the scope of the product liability regime. However, social media platforms are complex offerings that encompass elements beyond their core software. Rather than limiting our analysis to the question of whether a platform, viewed as a whole, constitutes a “single product”, we focus on the constituent design components and features that make up the platform by giving effect to its developers’ design choices. We provisionally propose that those components and features should themselves be treated as products for the purposes of the CPA (whether as a distinct category or as a subset of software). Whether they are already captured within the concept of software is ultimately a matter of classification and does not affect the underlying conclusion that they should fall within the scope of the CPA.
- 2.92 The design components and features of social media platforms, such as recommender algorithms that curate content shown to users, the “infinite scroll” and content filters, form part of the platform’s architecture and are deliberately designed and incorporated by its developers, much as a traditional product is designed and produced. These design choices, and the platform behaviour they produce, have the potential to cause harm and should therefore attract liability under the CPA in the same manner as any other product. This would render providers potentially liable under the CPA for harm caused by the design of their platforms and the unique features they have built into them.
- 2.93 The design components and features of social media platforms that would fall within the definition of a product for the purposes of the CPA include, but are not limited to, the following.
- (1) Algorithms, such as social media recommender algorithms. Algorithms are software procedures that transform data inputs into outputs by sorting and ordering the data. These outputs underpin functions such as content ranking and recommendation.¹⁰¹ Platforms deploy algorithms to recommend content most likely to maximise engagement of users based on their behaviour and interests, as well as to moderate content and deliver targeted advertising.¹⁰²

¹⁰⁰ We explain from para 2.96 that our proposal does not engage with, or seek to regulate, a platform’s role as a host of user-generated content, nor does it attribute liability to platforms for the substance of third-party material. Similarly, from para 2.107, we explain that any operational services provided by platforms would fall outside of scope.

¹⁰¹ F Saurwein and C Spencer-Smith, “Automated Trouble: The Role of Algorithmic Selection in Harms on Social Media Platforms” (2021) 9 *Media and Communication* 222 at 223.

¹⁰² F Saurwein and C Spencer-Smith, “Automated Trouble: The Role of Algorithmic Selection in Harms on Social Media Platforms” (2021) 9 *Media and Communication* 222 at 224.

- (2) Features relating to the presentation of content on a platform, such as the “infinite scroll” and video autoplay features.¹⁰³
- (3) Features governing user interaction on platforms, such as intermittent social reinforcement mechanisms of “likes”, new followers and friendship streaks (such as the “Snapstreaks” deployed by SnapChat),¹⁰⁴ and other features that create a variable reward system, such as the ability to like, share or comment on posts.¹⁰⁵
- (4) Any ephemeral features of a platform (that is, where content can be accessed only a limited number of times, such as Snaps on Snapchat, or during a limited time period, like Stories on Instagram).¹⁰⁶
- (5) Personalised notifications sent by a platform to users.¹⁰⁷
- (6) The tools made available on online platforms for users to edit or label content, such as content filters (including filters that alter the appearance of users and that allow users to overlay content on top of existing content). Whether a platform would label content edited using such filters as “edited content” could also be a design feature.
- (7) The mechanisms allowing or restricting access of users to online platforms, such as age verification processes, parental controls and notifications, screen-time limits and account deactivation processes.
- (8) Any reporting mechanisms that allow users to report illegal or harmful content.

Impact of user interaction on user experience

- 2.94 The fact that each individual’s experience when using a social media platform will vary depending on various factors does not, in our view, undermine the characterisation of its constituent design components and features as products. This is because social media platforms are pre-designed to operate in a certain way and contain specified features, with all users engaging with the same underlying architecture.
- 2.95 Taking algorithms as an example, although algorithmic outputs vary between users (such as different users encountering different types of content on a platform), this variation reflects the way in which the algorithm works by processing different inputs into different outputs.¹⁰⁸ It does not result from the platform provider tailoring the algorithm to each individual user. Rather, all users interact with the same underlying

¹⁰³ L Clark and M Zack, “Engineered highs: Reward variability and frequency as potential prerequisites of behavioural addiction” (2023) 140 *Addictive Behaviours* 107626.

¹⁰⁴ L Clark and M Zack, “Engineered highs: Reward variability and frequency as potential prerequisites of behavioural addiction” (2023) 140 *Addictive Behaviours* 107626.

¹⁰⁵ J Amirthalingam and A Khera, “Understanding Social Media Addiction: A Deep Dive” (2024) 16 *Cureus* 10.

¹⁰⁶ M Forrai, K Koban and J Matthes, “Not so ephemeral after all: Longitudinal associations between emerging adults’ engagement with ephemeral social media features, production stress, and social capital” (2025) 19 *Cyberpsychology: Journal of Psychosocial Research on Cyberspace* 1.

¹⁰⁷ J Amirthalingam and A Khera, “Understanding Social Media Addiction: A Deep Dive” (2024) 16 *Cureus* 10.

¹⁰⁸ See para 2.93(1) above.

system, which produces different outcomes based on behaviour and preferences, in much the same way as AI systems more generally. Similarly to software and AI systems, the fact that developers may update or refine a platform over time does not alter the classification of its design components and features as products, particularly as any such changes are implemented uniformly across the user base, rather than provided on a bespoke basis to each individual.

User-generated content and third-party content

- 2.96 Our proposal does not engage with, or seek to regulate, a platform's role as a host of user-generated content, nor does it attribute liability to platforms for the substance of third-party material. It is instead confined to defects in design. The critical distinction is between content and the platform architecture through which that content is organised, prioritised and delivered. Some design components and features, including recommender systems, necessarily take account of the characteristics of the content they process, as well as user behaviour, predicted engagement and inferred preferences. The relevant question is therefore not whether a feature or component interacts with content, but whether the alleged defect lies in the platform's design or operation, rather than in the meaning, lawfulness or viewpoint of any particular item of content. In other words, the regime would apply to how the platform functions, not to the content it carries.
- 2.97 On this basis, liability would arise where harm is caused by design components and features such as algorithms which select, organise and amplify content. Harm attributable to individual items of content, taken in isolation, would fall outside the regime, as the harm would derive from what is being posted, rather than how that content is being pushed or presented to users. In practice, harm rarely stems from a single piece of content, but from how a large volume of similar kinds of content is encountered by users, as a result of recommender algorithms that target content at particular individuals.¹⁰⁹ It is the cause of this amplification of content, in this case the algorithm, rather than the underlying content itself, that could attract liability under the CPA. Similarly, liability could attach where a platform's design means that it fails to screen adequately for particular forms of content. In such circumstances, any liability would arise from the design of the mechanism itself, rather than from the content it was supposed (but failed) to screen for.
- 2.98 This distinction is also important when considering Article 10 of the European Convention on Human Rights. Article 10 protects freedom of expression, including the freedom to receive and impart information and ideas. It is not, however, an absolute right. Interferences with freedom of expression may be justified where they are prescribed by law, pursue a legitimate aim, such as the protection of health or the rights of others, and are necessary and proportionate in a democratic society.
- 2.99 In our view, the approach we propose should not generally engage Article 10. It does not make platforms liable for the meaning, lawfulness, offensiveness or viewpoint of third-party content, nor does it require them to remove or suppress particular

¹⁰⁹ U Kohl, "Toxic Recommender Algorithms: Immunities, Liabilities and the Regulated Self-regulation of the Digital Services Act and the Online Safety Act" (2024) 16 *Journal of Media Law* 301.

expression. The question is instead whether the platform's own design or functionality falls below the level of safety that persons are generally entitled to expect.

- 2.100 Even if Article 10 were engaged in a particular case, on the basis that the product liability regime affected the manner in which information and ideas were received and imparted, we consider that the proposed approach would be compatible with it. Any interference would be grounded in product liability law and would pursue the legitimate aims of protecting health and the rights of others. There would also be a proper relationship of proportionality between those aims and the means adopted: liability would be limited to cases where the platform's own design or functioning gives rise to a relevant safety risk. The regime would not impose liability simply because unlawful expression appears on a platform, nor would it create a general obligation to monitor, remove or suppress third-party content.
- 2.101 That approach is consistent with the European Court of Human Rights' case law, which does not treat liability connected with online platforms as inherently incompatible with Article 10, but requires careful attention to the basis for liability and to proportionality.¹¹⁰ The case law marks an important distinction between carefully confined liability, supported by adequate balancing, and broad or automatic liability for third-party expression. A regime concerned with the safety of platform design, rather than the substance of third-party expression, falls on the former side of that distinction.
- 2.102 We therefore do not consider that Article 10 provides a reason to exclude online platforms from product liability where the claim is directed not at the substance of expression, but at the safety of the platform's own design features and functionalities. We come back to these issues in Chapter 5 when we discuss "damage".¹¹¹
- 2.103 Nor would the liability exemptions for third-party content under the Electronic Commerce (EC Directive) Regulations 2002 be engaged by our proposal. Under those Regulations, which implement the EU Electronic Commerce Directive,¹¹² social media platforms currently benefit from certain exemptions from liability in respect of third-party content uploaded on their sites. The most relevant exemption is the "hosting exemption", which shields platform providers from liability where they store information provided by a user and the provider does not know, nor is aware of, the unlawful information (or if they do become aware, acts expeditiously to remove the information).¹¹³ In the context of this Directive, the CJEU has held that the exemptions from liability only apply where the service provider is passive and has no knowledge of, nor control over, the information which is transmitted or stored.¹¹⁴
- 2.104 However, for the reasons set out above, the liability exemptions for third-party content under the Electronic Commerce (EC Directive) Regulations 2002 would not be

¹¹⁰ See, eg, *Delfi AS v Estonia* (2016) 62 EHRR 6 (App No 64569/09); *Magyar Tartalomszolgáltatók Egyesülete and Index.hu v Hungary* App No 22947/13; *Tamiz v United Kingdom* App No 3877/14; *Toth and Crişan v Romania* App No 45430/19; *Sanchez v France* App No 45581/15 (Grand Chamber decision).

¹¹¹ See our discussion from paras 5.41 to 5.49.

¹¹² Directive on electronic commerce 2000/31/EC Official Journal L 178 of 8 June 2000.

¹¹³ Electronic Commerce (EC Directive) Regulations 2002, reg 19.

¹¹⁴ Joined cases C-682/18 and C-683/18 *Frank Peterson v Google LLC (among others) and Elsevier Inc v Cyando AG* [2021] at [105].

engaged by our proposal. This is because a claim under the CPA focuses on the provider's own design of their platform to include the components and features which may render the platform defective, rather than third-party content. We are not proposing that social media companies should be liable for third-party content or for the storage of information, but for the underlying design of their platforms, over which they have full control.¹¹⁵

Differentiation with services

2.105 It was suggested to us during pre-consultation discussions with stakeholders that social media platforms are better characterised as services than products, because the OSA 2023 classifies such platforms (including video-sharing services, online marketplaces, and online gaming services)¹¹⁶ as “user-to-user services”.¹¹⁷ The structure of the OSA 2023 frames its obligations on providers of user-to-user services as “duties of care”, such as the duties mentioned in paragraph 2.87 above, which is based on a model of imposing ongoing obligations on providers.

2.106 However, the treatment of platforms in the OSA 2023 is not determinative of their broader classification, as the Act's definitions are specific to that statutory context. The OSA 2023 and the CPA serve different purposes; the former is concerned with regulating systemic risks posed by platforms, while the latter is designed to provide compensation where harm is caused by defective products. The OSA 2023 does not seek to establish a uniform standard of safety for platforms. Its designation of social media platforms as “services” should therefore not dictate their classification under the CPA, which approaches the issue from a different, product liability perspective.

2.107 Nor does the provision of services by platform operators undermine the classification of platform design and its components as products. Operational services, such as user support and complaint handling, are distinct from the design of the underlying platform. The platform itself comprises identifiable design components and features that enable and determine its operation. It is those components and features which should in our view fall within the definition of “product” under the CPA.¹¹⁸

2.108 If anything, the industry's own terminology undermines a purely service-based characterisation. Social media companies do not generally describe their platforms as “services”, but instead adopt language consistent with a product-based conception. For example, TikTok refers to its “Product Team” and “product launches”, while Meta distinguishes between “apps” and “services”, categorising Facebook and Instagram as “apps” rather than “services”. This internal framing is instructive, indicating that these

¹¹⁵ Our approach is supported by US case law showing that liability exemptions for third-party content do not preclude claims where harm arises from a platform's design: see *Lemmon v Snap* (2021) No 20-55295 (US Court of Appeals) and *Anderson v TikTok* (2024) No 22-3061 (US Court of Appeals) in relation to algorithms in particular (although the position on algorithms is more contested in the US).

¹¹⁶ See Ofcom, *Protecting people from illegal harms online* (November 2023) paras 3.38, 3.40 and 3.44.

¹¹⁷ A user-to-user service is defined in s 3(1) of the Online Safety Act 2023 as “an internet service by means of which content that is generated directly on the service by a user of the service, or uploaded to or shared on the service by a user of the service, may be encountered by another user, or other users, of the service.”

¹¹⁸ The same reasoning currently applies with tangible products supplied in the course of providing a service.

platforms are not merely conduits for services but are understood, even by their creators, as products in their own right.¹¹⁹

Proportionality

- 2.109 We also do not consider it disproportionate to subject social media platforms to the CPA's strict liability regime for several reasons. The first is that the relevant design features and components of social media platforms are entirely within the provider's control, making it appropriate to hold them accountable for their own design choices that give rise to risks of harm. This aligns with the CPA's rationale of assigning liability to those best placed to control product quality,¹²⁰ and does not extend beyond holding providers responsible for matters within their control, as with any product manufacturer.
- 2.110 As already explained in Chapter 1, the CPA, and the 1985 Directive before it, were intended to achieve a fair apportionment of the risks inherent in modern technological production between producers and individuals. Extending the CPA to encompass social media platforms is consistent with that objective. In particular, the complexity of their design, especially the use of algorithms that shape user experience and behaviour, aligns with the rationale for imposing liability on those who are best placed to control the risks associated with such technologies.
- 2.111 Secondly, the CPA imposes strict, but not absolute, liability, underpinned by a fair risk apportionment between the injured person and the producer, and producers are only required to bear quantifiable risks.¹²¹ Consistent with this approach, the CPA does not impose liability merely because a product has harmful characteristics.¹²² Strict liability removes the need for a claimant to prove fault, but it does not require producers to guarantee absolute safety, nor can it be construed in that way. Rather, liability depends on whether the product meets the level of safety persons generally are entitled to expect. That standard would define the scope of a platform operator's obligations under the CPA, meaning a platform would not be required to eradicate all harmful content from their site.
- 2.112 Thirdly, obligations under the OSA 2023 may mitigate the practical burden on platform operators. The Act requires platforms to take proportionate measures in designing and operating their services to reduce exposure to illegal content while protecting the freedom of expression of users.¹²³ Although regulatory compliance is not a complete defence, it may be relevant evidence that a product is not defective in relation to the

¹¹⁹ See <https://lifeattiktok.com/teams/product> and https://www.meta.com/en-gb/technologies/?utm_source=chatgpt.com&tab=Apps. The claimants in the US case *In Re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation* (2023) No 4:22-md-03047-YGR (California District Court) also argued that Facebook, Instagram, YouTube, TikTok and Snapchat describe their platforms as "products".

¹²⁰ One of the policy rationales underpinning the 1985 Directive (which was implemented by the CPA) was to concentrate liability for defective products on the producer, as the person capable of affecting the quality of the products. See Ch 3 for more information on liable persons under the CPA.

¹²¹ *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [65], citing Advocate General Tesauro in his Opinion in *Case C-300/95 Commission v UK* (Case C- 300/95) [1997] at [15] to [18].

¹²² *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [96].

¹²³ Online Safety Act 2023, ss 10 and 22.

aspects addressed by those standards, and may therefore impact the level of safety users are entitled to expect.¹²⁴ Given that the CPA requires courts to consider all the circumstances in assessing defectiveness,¹²⁵ such compliance may be relevant. In particular, the focus on proportionality in the OSA 2023 supports the CPA in not imposing absolute liability on product manufacturers.

Support for our approach in recent US litigation

2.113 Recent US litigation provides some support for our proposed approach. In the 2023 multi-district litigation in the Northern District of California,¹²⁶ claimants alleged that the designs of Facebook, Instagram, YouTube, TikTok and Snapchat caused physical and mental harm. The court considered whether specific functionalities of the platforms could constitute products or product components. It held that a range of design features, such as the absence of age verification and parental controls,¹²⁷ lack of default protections limiting usage,¹²⁸ barriers to account deletion,¹²⁹ the availability of content filters and lack of transparency around edited content,¹³⁰ and reporting mechanisms,¹³¹ could qualify as products or product components on the basis that they were content-agnostic and analogous to tangible property. Our proposal aligns closely with this design-focused analysis.¹³²

¹²⁴ *Wilkes v Depuy International* [2016] EWHC 3096 (QB); [2018] QB 627 at [97]. Although note in *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [175], where the court held that the weight that the court places on such compliance depends on the facts of the case and may not be relevant at all.

¹²⁵ Online Safety Act 2023, s 3(2).

¹²⁶ *In Re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation* [2023] No 4:22-md-03047-YGR (California District Court). See however *In Re Coordinated Proceeding Special Title (Rule 3.550) Social Media Cases* (2023) Case No JCCP 5255, Lead Case: 22STCV21355, where it was found at the interlocutory stage that certain social media platforms were not products; and *P F (KGM) v Meta Platforms, Inc*, Case No 22STCV33140 (Cal Super Ct 25 Mar 2026), which grounded the claims in negligence and not in product liability.

¹²⁷ *In Re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation* [2023] No 4:22-md-03047-YGR (California District Court) "Order Granting in Part and Denying in Part Defendants' Motions to Dismiss" (14 November 2023) at p 36.

¹²⁸ *In Re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation* [2023] No 4:22-md-03047-YGR (California District Court) "Order Granting in Part and Denying in Part Defendants' Motions to Dismiss" (14 November 2023) at p 37.

¹²⁹ *In Re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation* [2023] No 4:22-md-03047-YGR (California District Court) "Order Granting in Part and Denying in Part Defendants' Motions to Dismiss" (14 November 2023) at p 38.

¹³⁰ *In Re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation* [2023] No 4:22-md-03047-YGR (California District Court) "Order Granting in Part and Denying in Part Defendants' Motions to Dismiss" (14 November 2023) at pp 39 and 40.

¹³¹ *In Re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation* [2023] No 4:22-md-03047-YGR (California District Court) "Order Granting in Part and Denying in Part Defendants' Motions to Dismiss" (14 November 2023) at p 41.

¹³² See also *Garcia v Character Technologies* [2025] No 6:24-cv-1903 (Florida District Court) "Order Granting in Part and Denying in Part Defendants' Motions to Dismiss" (21 May 2025) from pp 33 to 36, where the court stated that "courts [are] split on whether virtual platforms, such as social media sites, are products". The virtual platform in this case was an app which allowed users to communicate with various AI-generated

Support for our approach at European level

- 2.114 Support for our approach can also be found in the European Law Institute's report on the interpretation of the New Directive.¹³³ The report identifies three potential routes by which social media platforms could be brought within the scope of the New Directive, two of which broadly align with our proposal. First, the report suggests that social media platforms themselves could constitute "software" and therefore fall within the New Directive. This accords with our view that the design components and features of social media platforms should constitute "products" under the CPA. In some cases, those components and features may themselves be regarded as software. However, even leaving that classification aside, we consider that they should nevertheless fall within the definition of "product", given their distinct role in determining how the platform operates and the harms it may cause.¹³⁴
- 2.115 The European Law Institute also suggests an alternative route where social media is considered to be a service rather than a product. In that case, software developed by the platform operator to provide its social media service may itself fall within the New Directive, even if the social media service as such lies outside its scope. Although we have not justified our proposal on the same grounds,¹³⁵ this supports our view that it is irrelevant whether a platform operator also provides services alongside the provision of its platform. The provision of services does not affect the analysis and does not undermine the classification of the design components and features of a platform themselves as "products" under the CPA.

Online platforms

- 2.116 As noted above, we believe that our proposal in relation to design components and features of social media platforms can equally apply to other online platforms with comparable architecture. A similar approach to our proposal was in fact taken in the context of gaming platforms in the US.¹³⁶
- 2.117 We suggest that the CPA should include a concept of "online platform" (not specific to social media sites) in order to bring these aspects of a platform within the scope of the CPA, with the caveat that we only propose including the design components and features of online platforms within the regime. Any part of an online platform which is not such a component or feature, or is an aspect of a service, is not covered by our

fictional characters; the court concluded that the app could be a product insofar as the claims related to defects arising from features of the app rather than ideas or expressions communicated through it. Such features might include the inability "to exclude indecent content", programming chatbots to "employ human mannerisms", or failing "to confirm users' ages and omit[ting] reporting mechanisms".

¹³³ European Law Institute, *1st Supplement to the European Law Institute's work on the new EU framework on product liability, Liability for Defective Software Under the New EU Product Liability Regime* (22 June 2026).

¹³⁴ See para 2.92.

¹³⁵ The European Law Institute have justified their approach by applying the CJEU ruling in *C-203/99 Veedfald v Arhus Amtskommune* [2001] ECR-I-3569.

¹³⁶ See *Turner v Epic Games Inc* Case No 3:26-cv-02975 (California District Court). The claim alleged that the addictive design of two online gaming platforms caused harm (including the use of reward tactics to increase usage and lack of parental controls). One of the claims is a product liability claim. See Crowell, *Gaming Addiction Litigation: Turner v Epic Games & Roblox and What It Means for the Industry*, <https://www.crowell.com/en/insights/client-alerts/gaming-addiction-litigation-turner-v-epic-games-and-roblox-and-what-it-means-for-the-industry>.

proposal and would not fall within the scope of the CPA. For example, services provided as part of an online platform offering, including user support and complaint handling, would be excluded from the definition of “product”. Any content uploaded to an online platform would also be excluded from the regime.

- 2.118 Our focus on “design components and features” of online platforms will require the identification and analysis of individual elements, such as specific functionalities or tools, in order to determine whether they should fall within the scope of the CPA. Although this delineates the boundaries of the CPA’s regime more clearly, we recognise that this approach may give rise to difficulty at the stage of assessing defectiveness.
- 2.119 This is because under the CPA, defectiveness is assessed by reference to the safety that the public is entitled to expect, and it may be artificial to determine the entitled level of safety in respect of individual design components and features in isolation, as users experience them as an integrated whole, rather than as a collection of discrete elements. For example, a platform may combine robust age verification with weaker parental controls. If considered alongside any other mechanisms designed to limit or supervise underage use, such as age verification, the parental controls may be considered sufficiently safe under the CPA’s test for defect; yet if those weaker parental controls were to be viewed in isolation, they may fail to meet the required standard of safety.
- 2.120 We do not consider this problematic. The assessment of defectiveness will remain holistic: as is currently the case, all relevant circumstances will be taken into account when determining the level of safety persons generally are entitled to expect of a product.¹³⁷ Accordingly, where a safeguarding feature is alleged to be defective, and the platform combines stronger and weaker safeguards, all relevant safeguards would be considered during the assessment of defect.

Core element of an “online platform”

- 2.121 We consider that the core element of an “online platform” for the purposes of the CPA should be: an internet-based system, which at the request of a user, stores and disseminates information to the public; or through which content generated by a user may be encountered by another user.¹³⁸
- 2.122 However, even though the CPA could clarify what an “online platform” is, only design components and features of an online platform should constitute “products” under the CPA.

¹³⁷ CPA, s 3(2).

¹³⁸ This takes inspiration from the definition of “online platform” under Digital Services Act 2022 (EU), art 3(i) and the definition of “user-to-user service” under the Online Safety Act 2023, s 3(1).

Consultation Question 6.

2.123 We provisionally propose that the design components and features of social media platforms and other online platforms should constitute “products” under the CPA.

Do consultees agree?

Consultation Question 7.

2.124 We provisionally propose that the core element of an “online platform” for the purposes of the CPA should be an internet-based system, which at the request of a user, stores and disseminates information to the public; or through which content generated by a user may be encountered by another user, or other users.

Do consultees agree?

FUTURE-PROOFING THE DEFINITION OF “PRODUCT”

2.125 The current definition of “product” has proved insufficiently adaptable, requiring courts in other contexts to draw formal and often arbitrary distinctions based on how goods are supplied rather than on their substantive characteristics.¹³⁹ Much of the resulting uncertainty stems from this misplaced focus on form. As technological innovation continues to blur established distinctions and challenge traditional product classifications, a definition tied to existing categories risks becoming progressively less workable.

2.126 To address this, the concept of “product” should be anchored in function rather than form. We therefore consider that the definition of product in the CPA should be future-proofed by including a residual provision, which captures any other thing (digital or otherwise) that performs a specific function for users and creates a risk of harm, irrespective of its mode of delivery. This approach reflects the reasoning adopted above in relation to software, AI systems, and design components and features of social media platforms, where the decisive factor is the function performed and the risks created, rather than the technology’s material form.

2.127 On that basis, we provisionally propose that the definition of a “product” should extend to any other thing (digital or otherwise) that is designed or developed to perform a specific function for users, irrespective of how it is supplied or made available. This formulation focuses on the defining characteristic of a product, namely how it is designed to function, while avoiding the rigidity of closed categories. This is because products have specific functional characteristics which dictate their operation or the way they perform (even if, in cases like AI, the exact manner in which they perform is not known).

¹³⁹ See from para 2.15 above in relation to the case law on tangibly vs intangibly supplied software.

2.128 This provision should be read alongside our proposal on the categories expressly excluded from the CPA.¹⁴⁰ Taken together, these elements ensure that the definition is sufficiently flexible to accommodate technological developments, while remaining principled and coherent in scope.

2.129 For reference, there is no equivalent provision in the New Directive, which defines “product” as “all movables, even if integrated into, or inter-connected with, another movable or an immovable; it includes electricity, digital manufacturing files, raw materials and software”.¹⁴¹

Consultation Question 8.

2.130 We provisionally propose that the CPA should include a residual provision within the definition of “product” to incorporate any other thing (digital or otherwise) that is designed or developed to perform a specific function for users, irrespective of how it is supplied or made available.

Do consultees agree?

2.131 We invite consultees’ views as to whether this approach would be workable in practice and to provide examples supporting these views.

WHAT SHOULD BE EXCLUDED FROM THE DEFINITION OF “PRODUCT” UNDER THE CPA?

2.132 Below, we consider what might be excluded from the definition of “product” under the CPA. In particular, we discuss:

- (1) pure information and data, except digital manufacturing files; and
- (2) services, including bespoke software that is provided as a service and any other service interconnected with a product or that is required for a product to function.

Pure information and data

2.133 Pure information and data are not considered products under the CPA in its current form, which is generally taken to exclude intangible items (other than electricity) from its scope.¹⁴² By pure information, we mean facts, data, instructions, knowledge, or ideas that are intangible and abstract in nature and do not perform any operational or functional role. The adjective “pure” emphasises the distinction between the information and the means by which, or tangible medium on which, that information is

¹⁴⁰ See from para 2.132 below.

¹⁴¹ New Directive, art 4(1).

¹⁴² CPA, s 1(2); and see D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 9.80.

recorded,¹⁴³ whether a human brain, a piece of paper,¹⁴⁴ a USB drive¹⁴⁵ or something else.

- 2.134 There has been debate about whether these and the “intellectual contents” of a product¹⁴⁶ should fall within the scope of the product liability regime.¹⁴⁷ One reason is that inaccurate or dangerous instructions, datasets or other informational content may, if relied upon, result in the creation of a defective product.¹⁴⁸ An example is a chemical textbook containing dangerously defective instructions for an experiment, which a pupil uses to set up an experiment which causes the chemicals to explode and cause harm.¹⁴⁹ In such circumstances, should potential liability attach to the producer of the inaccurate information, or a publisher who disseminates it?
- 2.135 While this question is not new,¹⁵⁰ recent technological developments have increased both its practical significance and the range of circumstances in which it may arise. Producers, particularly software developers, increasingly supply information in the form of code that they intend users to compile, build, deploy or otherwise use. Similarly, training datasets may be supplied for use in developing large language models. In both cases, the information supplied may play a direct role in creating or operating products capable of causing harm. Given the relative ease with which such information can be used for those purposes, it is worth considering whether, and if so in what circumstances, forms of pure information should fall within the CPA’s scope.
- 2.136 We recognise that pure information and its incorporation in a product may be difficult to distinguish functionally, particularly where information is supplied in a form intended to be processed by a computer system or connected product, directly influencing the system’s operation, behaviour, or outputs. This could include, for example, datasets, digital instructions, or machine-readable content.
- 2.137 However, this does not necessarily mean that pure information, or some types of pure information, should be brought within the product liability regime. Incorrect or incomplete information that causes harm might be actionable under other areas of law, such as contract, tort (for example, negligence including professional negligence), or sector-specific regulatory rules. Excluding it from the product liability regime does not necessarily mean that harm would go uncompensated, or that the party responsible for the software or AI system would escape liability.
- 2.138 On balance, our current view is that pure information, on its own and without any additional function, should not generally be regarded as a product. It is not designed to perform a task or to exhibit defined features that have specific functionality; any

¹⁴³ A distinction drawn by Floyd LJ in *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281, [2015] QB 41 at [42].

¹⁴⁴ *Oxford v Moss* (1979) 68 Cr App R 183.

¹⁴⁵ See *R v Dixon* [2015] NZSC 147, by Arnold J at [39] to [53].

¹⁴⁶ D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 9.80.

¹⁴⁷ D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) paras 9.80 and 9.81.

¹⁴⁸ For a longer discussion, see D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) from para 9.78.

¹⁴⁹ Example given in D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 9.78.

¹⁵⁰ D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 9.78.

harm arises only once it has been incorporated into, and acted upon through, another product.¹⁵¹ We are also conscious that extending the concept of product to include instructions or data would significantly expand the scope of the strict liability regime.

2.139 In addition, the way in which harm may arise from pure information is different to a traditional product. Incorrect information will often lead a recipient to undertake a dangerous course of action, rather than causing harm directly. By contrast, a defective product will generally cause harm through its use or operation.¹⁵²

2.140 For reference, this is consistent with the position in the EU. The New Directive provides that information and the content of digital files (such as media files, e-books or source code of software) are not considered products.¹⁵³

2.141 However, below we consider a specific exception for digital manufacturing files. We also ask consultees whether there is an argument for bringing certain other types of information within the product liability regime.

Exception for digital manufacturing files and other “functional information”

2.142 As an exception to the general exclusion of information and data from the CPA, we provisionally consider that digital manufacturing files should be treated as products. By this, we mean digital files containing the functional information necessary to produce a tangible product by enabling the automated control of machinery or tools.¹⁵⁴ They are typically associated with technologies such as 3D printing and computer-controlled manufacturing processes. For example, a digital manufacturing file may provide the instructions that direct a 3D printer to reproduce a physical object or control machinery used to cut or shape materials. In each case, the file enables the automated production of a tangible product.

2.143 In such cases, the person producing the tangible product does no more than execute the file on a machine, while the characteristics of the resulting product are pre-determined by the design contained in the file. If a defect arises in the resulting product due to its flawed design, responsibility should lie with the developer of the file, rather than with the person who merely operates the machine.

2.144 We consider that “digital manufacturing files” are best distinguished from software. They do not themselves perform functions or operate a system, but instead contain the design specifications for a physical product. It is the software within the machine that produces the item by executing the files containing such specifications.

¹⁵¹ Pure information includes source code, for example, which could be written on a piece of paper; see discussion at para 2.58 above. Data such as AI training data would also, in itself, constitute pure information.

¹⁵² Professor Whittaker distinguishes between two scenarios: (i) a situation where information accompanies the product and renders it dangerous in the claimant’s hands would be within the CPA; but (ii) another situation where defective information obtained from the product causes the doing of something dangerous but physically unconnected with the product would be outside the CPA: see discussion in D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 9.81.

¹⁵³ New Directive, recital 13.

¹⁵⁴ This is similar to the approach in the New Directive. See para 2.146 below.

2.145 On that basis, we provisionally propose that the definition of “product” in the CPA should include digital manufacturing files and any other functional information necessary to produce a tangible item by enabling the automated control of machinery or tools. This is because, in contrast to the information considered in the previous section, this information has an operative function: it is designed to perform a task or to exhibit defined features with specific functionality.

2.146 For reference, our proposal is consistent with the position in the EU. The New Directive provides that a “product” includes a digital manufacturing file, which is defined as a digital version of a movable containing the functional information necessary to produce a tangible item by enabling the automated control of machinery or tools.¹⁵⁵

Consultation Question 9.

2.147 We provisionally propose that the definition of “product” in the CPA should include digital manufacturing files and other functional information necessary to produce a tangible product by enabling the automated control of machinery or tools.

Do consultees agree?

Consultation Question 10.

2.148 We invite consultees’ views as to whether there are other categories of information or code that should fall within the definition of “product” under the CPA, particularly where it is supplied in a form intended to be processed by a computer system or connected product, directly influencing the system’s operation, behaviour, or outputs. For example, is there a case for treating code and other machine-readable instructions differently from other forms of information?

Services

2.149 Services in general should continue to be excluded from the CPA as is currently the case. The CPA is a strict liability regime for products, not services, which are more appropriately addressed through other areas of the law.

Bespoke software that is provided as a service

2.150 We have considered whether software developed and supplied as part of a bespoke service should likewise fall outside the product liability regime. By this, we mean software that is specifically customised and provided on an ongoing basis for a particular customer, rather than software that is placed on the market or distributed more widely.

2.151 This category does not include software supplied through a software-as-a-service model. As noted at paragraph 2.22 above, we provisionally propose that software-as-

¹⁵⁵ New Directive, art 4(1) and 4(2).

a-service offerings should fall within the CPA, since software should be covered regardless of its mode of supply. The question considered here is therefore a narrower one: whether an exclusion should apply to software provided as part of a genuinely bespoke and ongoing service to a particular customer. This is distinct from software that is distributed in substantially the same way as any other product (such as software that is adapted for a large subset of customers but is otherwise provided in a similar manner to off-the-shelf software). In our view, such software should fall within the CPA's scope like any other form of software.

- 2.152 Some commentators have noted¹⁵⁶ that the policy justifications for strict liability do not readily apply in the context of bespoke software provided as a service. Such software is not placed in the stream of commerce since it is distributed only to one customer or user, who is typically in a comparable position to the supplier in anticipating and managing risks, as well as in bearing the associated costs.¹⁵⁷ This contrasts with off-the-shelf software, which is standardised and distributed at scale in the same way as the mass distribution of a conventional product.¹⁵⁸
- 2.153 Where bespoke software that is provided as a service is defective, the customer or user is likely to have an appropriate remedy in contract. The contractual framework is likely to include service levels and other obligations governing performance by the supplier, providing a more suitable basis for redress. In any case, we imagine that bespoke software that is provided as a service is more likely to be provided in a commercial context, which generally would fall outside the CPA,¹⁵⁹ so this exclusion would not have a material impact on the claims being brought. Excluding such software from the CPA would therefore reflect its distinct characteristics without materially affecting the availability of remedies.
- 2.154 On the other hand, recent technological developments and especially the widespread access to AI systems might be seen to break down the distinction between bespoke and off-the-shelf software. AI enables significant customisation of software in all cases, and we do not consider that producers should be able to rely on an exception such as this to avoid liability in respect of AI systems. We make no proposal here but ask consultees for their views.
- 2.155 For reference, there is no exception for bespoke software in the New Directive. It provides that software is a product,¹⁶⁰ irrespective of the mode of its supply or usage, and irrespective of whether the software is stored on a device, accessed through a

¹⁵⁶ D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 9.103, also citing PS Atiyah, *The Sale of Goods* (13th ed 2016) p 54 and J Prince, "Negligence: Liability for Defective Software" 33 *Oklahoma Law Review* 848.

¹⁵⁷ D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 9.103.

¹⁵⁸ D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 9.103.

¹⁵⁹ A claim under the CPA can currently only be brought for death, personal injury or loss of or damage to property that is ordinarily intended for private use and is intended mainly for private use: CPA, s 5(1) and 5(3).

¹⁶⁰ New Directive, art 4(1).

communication network or the cloud, or supplied through a software-as-a-service model.¹⁶¹

Consultation Question 11.

2.156 We invite consultees' views as to whether bespoke software that is provided as a service should be excluded from the CPA.

2.157 If the law were to distinguish bespoke software provided as a service from other software, what factors or practical hallmarks should be taken into account when determining whether software is bespoke? Please give reasons for your views and, where possible, examples.

Any other service related to a product

2.158 In light of our view that services should continue to be excluded from the CPA, this should extend to services that are interconnected with, or are required for the functioning of, a product. A claimant will ordinarily be able to bring a claim in respect of the defective product itself, without the need to pursue the provider of any ancillary service supporting the product. There is therefore no need for a separate provision under the CPA for services that merely support or enable product functionality.

2.159 This can be illustrated by the example of a smart fridge that relies on a temperature-control service.¹⁶² If the fridge fails to regulate temperature, causing an individual to consume spoiled food and suffer injury, the claim would lie against the producer of the fridge and, where relevant, the developer of the embedded temperature-control technology. This, in our view, provides adequate protection without extending liability to a third party that is supplying a service to monitor the temperature through the embedded technology in the fridge.

2.160 Introducing separate provision for such ancillary services would risk blurring the boundary between products and services. Avoiding this type of blurring is part of the rationale for having a product liability regime in the first place. We therefore do not consider that such services should be treated as product components within the meaning of the CPA but would welcome the views of consultees on this point.

2.161 For reference, this contrasts with the approach adopted in the EU. The New Directive clarifies that, although it does not apply to services as such, it does apply to integrated or interconnected digital services.¹⁶³ To this end, it introduces the concept of a "related service", which is defined as "a digital service that is integrated into, or inter-

¹⁶¹ New Directive, recital 13.

¹⁶² This is an example given in recital 17 of the New Directive. Other examples given include the continuous supply of traffic data in a navigation system, and a health monitoring service reliant on a physical product's sensors to track the user's health.

¹⁶³ New Directive, recital 17.

connected with, a product in such a way that its absence would prevent the product from performing one or more of its functions”.¹⁶⁴

2.162 The New Directive defines a “component” as including a related service that is integrated into or interconnected with a product,¹⁶⁵ meaning providers of related services may be liable as component manufacturers.

2.163 Using the earlier smart fridge example, under the approach of the New Directive, the injured individual could claim against the manufacturer of the fridge and any developer behind the technology regulating the fridge’s temperature as the manufacturer of the component product. It is not clear to us that relying on the concept of a related service is necessary. Further, as explained above, creating additional provisions for related services risks blurring the distinction between products (regulated by the CPA) and services (outside the scope of the CPA and governed by other regimes such as contract and negligence). However, we would welcome the views of consultees on this point.

Consultation Question 12.

2.164 We provisionally propose that services that are interconnected with a product, or that are required for a product to function, should be excluded from the scope of the CPA.

Do consultees agree?

Consultation Question 13.

2.165 We provisionally propose that the CPA should not include a concept similar to the “related service” concept in the New Directive.

Do consultees agree?

DEFINITION OF “SUPPLY” UNDER THE CPA

2.166 In light of our proposal to expand the definition of “product” under the CPA to include intangible goods (such as software, AI systems, and the design components and features of online platforms), we consider that the definition of “supply” under the CPA should be updated to reflect this change.

Current definition of “supply” under the CPA

2.167 Section 46(1) of the CPA defines “supply” broadly, covering a range of actions through which goods are made available, including sale, hire, lending, hire-purchase, contracts for work and materials, provision in exchange for non-monetary consideration, provision in the exercise of statutory functions, and gifts or prizes. The concept is

¹⁶⁴ New Directive, art 4(3).

¹⁶⁵ New Directive, art 4(4).

therefore not limited to traditional commercial sales but encompasses multiple modes by which goods are made available to others.

2.168 The notion of “supply” is central to the operation of the CPA and underpins key aspects of liability and available defences. It is used, for example, to determine who qualifies as a supplier,¹⁶⁶ and it is one of the circumstances taken into account when assessing whether a product is defective.¹⁶⁷ It is relevant to the scope of important defences, including that a defendant did not “supply” the product,¹⁶⁸ or supplied it outside the course of business and without a view to profit.¹⁶⁹ It also impacts the definition of “relevant time”,¹⁷⁰ which is used in various contexts including for limitation purposes¹⁷¹ and defences such as the development risks defence.¹⁷² In this way, “supply” operates as a foundational concept structuring both liability and the limits of the regime.

The issue with the current definition of “supply” under the CPA

2.169 It is unclear whether the current definition of “supply” under the CPA extends to software or AI systems not supplied on a tangible medium, or the provision of online platforms, such as social media platforms. As explained at paragraph 2.11, this stems from the fact that the CPA was designed with traditional products in mind and as a result the elements of “supply” similarly focus on the provision of tangible goods.

2.170 Given our proposal to include software and AI systems in the definition of “product”, it is necessary to consider whether the CPA’s existing definition of “supply” also needs to be changed to accommodate this. For example, if an individual were to access software through the cloud via a software-as-a-service model, it is unclear whether the developer of the software would be deemed to have “supplied” the software. The developer would not strictly “sell” the software in the traditional sense, since some software-as-a-service models operate on a subscription basis and customers generally do not acquire any rights in the software. In a similar way, a social media company does not sell its platform to users, nor does it provide goods to users in the traditional sense of transferring ownership; instead, it makes the platform available for individuals to use.

2.171 This is particularly an issue due to the availability of the defence under section 4(1)(b) of the CPA that the defendant did not at any time “supply the product to another”.¹⁷³ Therefore, if the definition of “supply” is not amended to accommodate our proposed changes to the definition of “product”, there is a risk that providers of software, AI

¹⁶⁶ CPA, s 2(3).

¹⁶⁷ CPA, s 3(2)(c).

¹⁶⁸ CPA, s 4(1)(b).

¹⁶⁹ CPA, s 4(1)(c).

¹⁷⁰ As defined in CPA, s 4(2).

¹⁷¹ See Limitation Act 1980, s 11A in relation to the long-stop period.

¹⁷² CPA, s 4(1)(e).

¹⁷³ CPA, s 4(1)(b).

systems and online platforms could rely on the defence of lack of supply to escape liability.¹⁷⁴ Amending the definition of supply would therefore bring clarity.

Our proposed approach to amending the definition of “supply” under the CPA

2.172 We provisionally propose that the definition of “supply” under section 46(1) of the CPA should be amended in two ways. Firstly, the definition should be expanded to ensure that products are treated as supplied irrespective of their mode of delivery. In particular, a product should be considered as “supplied” even where it is not provided on a tangible medium but is supplied digitally, such as by internet download.

2.173 Our suggested amendment would also include online platforms which are made available to users solely through the internet, rather than being sold or transferred.

2.174 Secondly, we provisionally propose expanding the meaning of “supply” to cover situations in which products are made available without the user giving any monetary or other consideration for their use, provided they are made available in the course of business and/or with a view to profit. This would ensure that the regime captures modern commercial models which may fall outside the existing meaning of supply. Examples include software, AI systems or online platforms that are made available free of charge to users but generate revenue through other means, such as advertising or the use of personal data of users. While some cases where user data constitutes consideration may already fall within section 46(1)(d) of the CPA and therefore fit within the definition of “supply”,¹⁷⁵ our proposed amendment would make clear that supply is established even where no such exchange is present.¹⁷⁶

2.175 Our proposals differ from the approach taken in the New Directive, which introduces a new concept of “making available on the market”.¹⁷⁷ However, because that concept encompasses the supply of products for use on the EU market in the course of a commercial activity, whether for payment or free of charge, the practical effect is consistent with our proposal.

Consultation Question 14.

2.176 We provisionally propose that a product should be considered to be “supplied” under the CPA irrespective of its mode of delivery, even where it is supplied through intangible means.

Do consultees agree?

¹⁷⁴ D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 9.100.

¹⁷⁵ CPA, s 46(1)(d) provides that “supply” includes providing the goods in exchange for any consideration other than money.

¹⁷⁶ For the meaning of “consideration”, see H Beale, *Chitty on Contracts* (36th ed 2025) paras 6.001 to 6.003. In this case, the user is giving something of value to the software, AI or platform provider by sharing their data and allowing the provider to use it.

¹⁷⁷ New Directive, art 4(7).

Consultation Question 15.

2.177 We provisionally propose that products made available by a person in the course of their business and/or with a view to profit should be considered to be “supplied” under the CPA even where the user has not given money or other consideration for their use of the product.

Do consultees agree?

Chapter 3: Persons liable under the CPA

INTRODUCTION

- 3.1 This chapter addresses whether the categories of persons potentially liable under the CPA should be expanded to accommodate the complexities of modern supply chains and the growth of e-commerce. In accordance with our Terms of Reference, we consider whether the objectives of the product liability regime would be better served by reforming the definition of “producer” and extending liability to a wider range of economic operators, including in circumstances where a product has been modified by the producer or a third party.¹
- 3.2 We consider in particular whether the current definitions and liability positions of producers (including component producers), own-branders, importers and suppliers remain appropriate, and whether the CPA should make express provision for products that are substantially modified. We also focus on whether to expand the list of liable persons to include fulfilment service providers, online marketplaces and UK authorised representatives.

CURRENT PERSONS LIABLE UNDER THE CPA

- 3.3 The Consumer Protection Act 1987 (the “CPA”) provides that the following persons are liable for damage caused by a defective product:²
- (1) the “producer” of the product,³ who is the person who manufactured, won, abstracted or carried out an industrial or other process in relation to a product;⁴
 - (2) any person who, by putting their name or trade mark on the product, has held themselves out to be the producer of the product⁵ (“own-brander”);⁶
 - (3) any person who has imported the product into the UK in order, in the course of their business, to supply it to another.⁷

¹ See para 1.4(3) of our Terms of Reference, set out in Appendix 1.

² These persons are said to be primarily liable, meaning that their liability is not provisional nor displaced by the liability of another person. See D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 8.01.

³ CPA, s 2(2)(a).

⁴ CPA, s 1(2).

⁵ CPA, s 2(2)(b).

⁶ “Own-brander” is the term commonly used in the literature to describe this party. See D Fairgrieve and R Goldberg, *Product Liability* (3rd 2020) paras 8.16 and 8.17,

⁷ CPA, s 2(2)(c).

- 3.4 Suppliers of products can also be liable under the CPA,⁸ but only where: (i) the injured person requests the supplier to identify one or more of the producer, own-brander or importer; (ii) the request is made within a reasonable period and it is not reasonably practicable for the injured person to identify those persons; and (iii) the supplier fails, within a reasonable period, to comply with the request or to identify their own supplier.⁹
- 3.5 The circumstances in which a person is deemed to have supplied goods are set out in section 46(1) of the CPA. This defines “supply” broadly, including sale, hire, exchange for non-monetary consideration, and gifts or prizes. Under section 2(3) of the CPA, a supplier liable for a defective product is any person who supplied the product, whether to the person who suffered the damage, the producer of any product in which the product in question is comprised or any other person. This means that the CPA imposes liability not only on the product’s immediate supplier but also on all those who supply a product along the distribution chain. However, this does not include every person who may affect the safety of a product, such as a designer of a product who is not also its manufacturer.¹⁰
- 3.6 Where more than one person set out above is liable for the same damage, their liability is joint and several.¹¹ This means that a claimant may bring a claim against any one or more of those persons for the full amount of their loss, choosing which potential defendant to pursue. A defendant who pays more than their share may then seek a contribution from the others.¹²

Policy considerations behind the CPA

- 3.7 The main policy considerations governing who is liable under the CPA are as follows.
- (1) **Liability should be channelled to the person with control over the product, the producer**, reflecting the approach of the 1985 Directive (implemented by the CPA), which concentrated liability on the producer as the only person capable of affecting the quality of products.¹³
 - (2) **The regime seeks to strike a balance between ensuring that claimants can bring claims effectively and minimising insurance and transaction costs.** The CPA reflects this balance by imposing liability primarily on producers, own-branders and importers. Suppliers can avoid liability by identifying the producer, own-brander or importer to the claimant on request, or by identifying the person

⁸ Suppliers are said to have secondary liability, which means their liability is only provisional and can be displaced if they meet the conditions in the CPA. See D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 8.02.

⁹ CPA, s 2(3).

¹⁰ D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 8.34.

¹¹ CPA, s 2(5).

¹² Civil Liability (Contribution) Act 1987. See also D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 8.73.

¹³ Explanatory Memorandum for the European Commission’s draft EU Product Liability Directive in 1976, para 6, annexed to Liability for Defective Products (1977) Law Com No 82; Scot Law Com No 45, Appendix B.

who supplied the product to them.¹⁴ This helps contain costs, although it narrows the range of potential defendants available to claimants where other defendants are insolvent, cannot readily be identified or are located outside the UK.¹⁵

- (3) **Readily identifiable defendant:** imposing liability on own-branders serves to ensure that claimants have a readily identifiable defendant, enabling them to rely on product packaging information to identify an entity against whom a claim may be brought. This also reflects the reliance consumers place on brand reputation, which justifies holding such entities responsible for product safety.¹⁶
- (4) **Ability to sue a defendant within the jurisdiction:** imposing liability on importers allows claimants to identify a potential defendant within the UK, thereby avoiding the complexities associated with bringing claims against entities located abroad.¹⁷
- (5) **Protection against anonymous products:** imposing liability on suppliers protects the consumer¹⁸ against anonymous products (where the producer cannot be identified from the product information), as suppliers are obliged to reveal the identity of another potential defendant to avoid liability under the CPA. Allowing suppliers to avoid liability if they identify an alternative defendant also reflects how they typically have little control over product safety.¹⁹

SHOULD THE LIST OF LIABLE PERSONS BE AMENDED UNDER THE CPA?

3.8 In light of the evolution and complexity of modern supply chains, the emergence of new technologies and the rise of e-commerce, there is a question as to whether the list of potentially liable persons under the CPA is outdated. In this section, we consider whether the existing categories of liable persons under the CPA should be amended or expanded.

The producer of the product

The issue with the definition of “producer” under the CPA

3.9 As explained above, the CPA defines a “producer” as a person who manufactured, won, abstracted or carried out an industrial or other process in relation to the product.²⁰ This definition was framed with tangible products in mind. Its continued suitability must therefore be reviewed against our provisional proposals in Chapter 2

¹⁴ CPA, s 2(3). See para 3.4 above for full details.

¹⁵ D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) paras 8.01 to 8.04.

¹⁶ D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 8.17.

¹⁷ D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 8.26.

¹⁸ In this consultation paper, we use “consumer” to refer to persons who use, interact with, or may be affected by a product. It extends beyond consumers who have purchased a product, encompassing all natural persons who suffer harm as a result of a defective product.

¹⁹ Explanatory Memorandum for the European Commission’s draft EU Product Liability Directive in 1976, paras 6 and 9, annexed to the Liability for Defective Products (1977) Law Com No 82; Scot Law Com No 45, Appendix B.

²⁰ CPA, s 1(2).

to extend the concept of “product” to include intangible items such as digitally supplied software, AI systems and online platforms. There is a question as to whether the current definition of “producer” can readily accommodate those who create such intangible products. Software, AI systems and online platforms are not naturally described as being manufactured, won, abstracted or subjected to an industrial process. Rather, they are typically brought into existence through a process of development. As a result, there is a risk that, unless the definition of “producer” is explicitly extended to encompass the developers (who are, in effect, the producers) of intangible products, those responsible for creating such products may fall outside the scope of the current definition.

Our proposal to amend the definition of “producer”

- 3.10 We provisionally propose that the definition of a “producer” under the CPA should be expanded to include the person who developed the product. The CPA would then capture developers of software, AI systems, online platforms and other intangible products (which would fall within the CPA under our provisional proposals in Chapter 2). This would reflect the terminology commonly used in relation to intangible products. Just as a person who brings a tangible product into existence through a manufacturing, industrial or other process is a producer, so too should a person who brings an intangible product into existence through a process of development be regarded as a producer. For reference, this is consistent with the position in the EU Directive 2024/2853 (the “New Directive”) under which the definition of “manufacturer” includes anyone who develops, manufactures or produces a product.²¹

Consultation Question 16.

- 3.11 We provisionally propose that the definition of “producer” under the CPA should be expanded to include the person who developed the product.

Do consultees agree?

Own-brander

No amendment proposed

- 3.12 We consider that own-branders should remain liable for products under the CPA and we do not propose any changes to the definition of “own-brander”.²² This is because the policy reasons set out above at paragraph 3.7(3) are still relevant today.
- 3.13 There is also a question as to whether the definition of “own-brander” should include persons who request third parties to manufacture products on their behalf. Notably, the New Directive expands its definition of “manufacturer” to a person who has a product designed or manufactured.²³ However, we do not consider that a person should fall within the scope of an “own-brander” merely because they request a third party to manufacture a product, where the product is not marketed under their own

²¹ New Directive, art 4(10)(a).

²² See para 3.3(2) above and s 2(2)(b) of the CPA for the definition of “own-brander”.

²³ New Directive, art 4(10)(b).

name or trade mark. Liability as an “own-brander” should arise only where a person has put their own brand on a product and has thereby held themselves out to be the producer. Where a product is not sold under a company’s branding, consumers are unlikely to rely on that company’s reputation when deciding whether to purchase or use it. In some cases, the company’s identity may not even be apparent to the consumer. Imposing liability in such circumstances would therefore neither assist claimants in identifying a defendant nor reflect the limited control such a company has over the safety of the product.

Consultation Question 17.

3.14 We provisionally propose that:

- (1) the definition of “own-brander” in section 2(2)(b) of the CPA should remain unchanged, such that an own-brander is any person who by putting their name or trade mark on the product has held themselves out to be the producer of the product; and
- (2) own-branders should remain liable for damage caused by a defective product under the CPA.

Do consultees agree?

Importers

No amendment proposed

- 3.15 We consider that the existing position, where the CPA imposes liability on importers, should be retained. We also do not propose amending the definition of an “importer”.²⁴
- 3.16 Watering down the scope of liability of importers would be detrimental to claimants and undermine the original aims of the CPA. For example, allowing importers to avoid liability in the manner available to suppliers (by identifying the producer, own-brander or their own supplier) would defeat the rationale for holding them liable under the CPA in the first place, namely, to enable individuals to bring proceedings against a defendant within the UK. In practice, importers would likely be able to identify the relevant producer, own-brander or person that supplied the product to them. This would enable them to avoid liability in most cases and could leave claimants without a UK-based defendant. Even if a claimant were permitted to sue an importer directly on the condition that the producer or own-brander is outside the UK, this would still be unsatisfactory, as the claimant would first need to identify those entities. This is especially problematic in complex supply chains where claimants often have very limited information about the product and may struggle to identify overseas defendants.

²⁴ See para 3.3(3) above and s 2(2)(c) of the CPA for the definition of “importer”.

- 3.17 Nor would the current approach impose an undue burden on importers, who are able to allocate liability contractually with their suppliers.²⁵ The existing position should therefore be retained, as it is both simpler to enforce and consistent with the objectives of the CPA. As such, importers should not be allowed to avoid liability by identifying other participants in the supply chain.
- 3.18 For reference, the New Directive takes a slightly different approach, as it holds an importer of a product liable only where the manufacturer of a product or component is established outside the EU.²⁶

Consultation Question 18.

3.19 We provisionally propose that:

- (1) the definition of importer in section 2(2)(c) of the CPA should remain unchanged, such that an importer is any person who has imported the product into the UK in order, in the course of their business, to supply it to another; and
- (2) importers should remain liable for damage caused by a defective product under the CPA.

Do consultees agree?

Producer liability for defective components

The issue with the current law

- 3.20 Under the CPA as it stands, where the defect lies in a component product (the “component”)²⁷ of a product, both the producer of the component and the producer of the finished product may be liable.²⁸ This is because the CPA defines a “product” as including a “product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise”.²⁹ Both producers would be jointly and severally liable for damage caused by the defective component.³⁰
- 3.21 Allowing a claimant to bring a claim against either or both producers reflects one of the principles of the 1985 Directive, namely to facilitate redress by enabling the injured party to pursue an accessible defendant without needing to bring multiple claims

²⁵ See Explanatory Memorandum for the European Commission’s draft EU Product Liability Directive in 1976, para 10, annexed to Liability for Defective Products (1977) Law Com No 82; Scot Law Com No 45, Appendix B.

²⁶ New Directive, art 8(1)(c)(i).

²⁷ Hereafter references to components are references to component products. That is components which meet our proposed CPA definition of a product.

²⁸ M Hervey and M Lavy KC, *The Law of Artificial Intelligence* (2nd ed 2024) para 6-047.

²⁹ CPA, s 1(2).

³⁰ CPA, s 2(5).

where there is more than one potential defendant.³¹ To maintain a balance of interests between claimants and defendants, the regime provides a defence that allows the producer of a finished product to escape liability where the defective component was introduced into their product after they supplied it.³² Similarly, the producer of a component product can escape liability where the defect is attributable to the design of the product in which the component has been incorporated or the instructions given by the producer of that product.³³

- 3.22 However, components may be integrated into finished products in circumstances that differ materially. For example, defective standalone software, itself a product,³⁴ may be installed by the producer of the finished product or a third party acting under the producer's instructions. Equally, the same software may be installed independently and without the producer's knowledge or control. In either case, the finished product may become defective. Nevertheless, the current regime does not distinguish between these scenarios despite the producer's differing degree of involvement. Furthermore, modern products are also frequently capable of not only having components integrated into them but also being interconnected with external components. The CPA does not provide for this circumstance. Consequently, it does not provide a sufficiently clear framework for determining when the producer of the finished product should, or should not, be liable for defects arising from integrated or interconnected components.

Our proposal on producer liability for defective components

- 3.23 We provisionally propose that where a producer of a finished product integrates or connects a component to its product, or such integration or interconnection is otherwise within their control, the producers of both the finished product and the component may be liable if the component is defective. By contrast, where a component is integrated into or interconnected with a producer's finished product outside of their control, the producer of the finished product is not liable for the defective component. In such a case, the producer of the component may be liable if they cannot establish a defence.
- 3.24 We discuss the concept of "producer's control" further from paragraph 3.44 below.
- 3.25 This approach is particularly relevant in the context of the Internet of Things ("IoT"). These are circumstances where multiple products are connected and interact with each other (such as by exchanging data).³⁵ Under our proposal, a producer would be liable only for defects in their own products or for defects in products and components which they have intended to integrate or connect with their own products. If a producer does not authorise such integration or interconnection, such as where a user

³¹ The European Law Institute, *Guiding Principles for Updating the Product Liability Directive for the Digital Age* (January 2021) p 3.

³² CPA, s 4(1)(d).

³³ CPA, s 4(1)(f).

³⁴ Standalone software would fall within the definition of a product as explained in Ch 2.

³⁵ The European Law Institute, *Guiding Principles for Updating the Product Liability Directive for the Digital Age* (January 2021) p 6.

independently connects other products with the producer's product, the producer would not be liable for defects in those other products.³⁶

- 3.26 This is broadly consistent with the position in the EU. The New Directive provides that the manufacturer of an overall product is liable for a defective component where it was integrated into, or interconnected with, its product within that manufacturer's control.³⁷ However, where a component is integrated into, or interconnected with, a product outside the control of the manufacturer of that product, a claimant can seek compensation from the component manufacturer where the component itself is a product under the New Directive.³⁸

Consultation Question 19.

- 3.27 We provisionally propose the following.

- (1) Where a defective component product is integrated into or interconnected with a finished product within the control of the producer of the finished product, then both the producer of the finished product and the producer of the component should potentially be liable under the CPA.
- (2) Where a defective component product is integrated into or interconnected with a producer's finished product outside of their control, only the producer of the component should potentially be liable under the CPA.

Do consultees agree?

Substantial modifications of a product

The issue with the current law

- 3.28 The CPA is currently unclear as to who is liable where a product has been substantially modified and what amounts to a substantial modification. In particular, it does not distinguish between a product that has simply been repaired and one that has been altered to such an extent that it effectively becomes a new product. This distinction matters because a person who repairs a product may incur liability as a supplier (as they may have supplied the repaired product to another), but would not be considered a producer, as they did not manufacture the original product themselves.³⁹ It should be noted, as explained above, that suppliers are able to avoid liability if they identify an alternative defendant on request,⁴⁰ whereas producers may not. The issue is particularly significant for emerging technologies, which can more easily interact

³⁶ This position is supported by the European Law Institute. See The European Law Institute, *Guiding Principles for Updating the Product Liability Directive for the Digital Age* (January 2021) p 9.

³⁷ New Directive, art 8(1).

³⁸ New Directive, recital 36. See also New Directive, art 8(1).

³⁹ D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 8.09. See also the example of the garage in Liability for Defective Products (1975) Law Commission Working Paper No 64; Scottish Law Commission Memorandum No 20, para 48.

⁴⁰ See para 3.4 above for details.

with other products or be modified by persons other than the original developer, as compared to tangible products. For example, software is often integrated with other systems for various reasons, including to share information and streamline data between platforms.⁴¹

- 3.29 The product liability regime was established for tangible goods on the basis that producers control the design of their products whose characteristics and functionality remain substantially unchanged over time, profit from their sale, and are therefore best placed to bear responsibility for the risks they create. Software-enabled and AI-connected products, however, are not static. Their capabilities may evolve through updates, and responsibility for their operation may be shared among multiple actors who can modify features and/or performance over time. In some cases, a product may be substantially modified by a third party, yet the original producer may still appropriately bear responsibility, for example where they authorise the modification. The CPA does not address who should be treated as the “producer” in such circumstances. This creates uncertainty because liability may attach to risks arising from aspects of a product that a particular actor does not control, potentially leading to outcomes that are both unfair and commercially impracticable.

Our proposal on liability for substantial modifications

- 3.30 We provisionally propose that the CPA should clarify what amounts to a substantial modification, and who should be liable where a product is substantially modified.
- 3.31 Firstly, we provisionally propose that a “substantial modification” should cover any modification of a product made by a person after the “relevant time”⁴² where the modification:⁴³
- (1) changes such product’s original performance, purpose or type; and
 - (2) as a result, either (i) changes what persons are generally entitled to expect in relation to such product for the purposes of section 3(1) on “defect”;⁴⁴ or (ii) changes the nature of the risk, creates a new risk or increases the level of risk, of the product causing damage giving rise to liability under section 5 on “damages”.⁴⁵
- 3.32 This approach focuses on the impact of the modification on the level of entitled safety or the risk of damage. Given that the CPA is concerned with product safety, we consider that this metric should be used to assess how substantial a modification to a product is.

⁴¹ Coursera, “Software Integration: Examples and Why It’s Important” (updated Dec 2025) <https://www.coursera.org/articles/software-integration>.

⁴² As defined in section 4(2) of the CPA on “defences”, that is, the time when the product was supplied by the producer, own-branders or importer.

⁴³ This is modelled after the equivalent definition in art 4(18) of the New Directive.

⁴⁴ CPA, s 3(1) sets out the test for defect.

⁴⁵ CPA, s 5 sets out the types of damage which are actionable under the CPA.

- 3.33 In the context of AI systems, we do not consider that the continuous learning of an AI system should amount to a “substantial modification” unless a developer has specifically fine-tuned or re-trained the system to a significant degree. This is because such self-learning is within the expected operation of the AI system as designed by the original developer. Even if the AI system evolves in unforeseen ways, this itself is a feature of AI systems that is anticipated, if not positively intended. To ensure this scenario would not be classified as a “substantial modification”, we have therefore clarified that the product has to be modified by a person.

Consultation Question 20.

- 3.34 We provisionally propose that the CPA should make provision for liability where a product is substantially modified after the time it was supplied by the producer, own-brander or importer.
- 3.35 By substantial modification, we mean a modification which:
- (1) changes such product’s original performance, purpose or type; and
 - (2) as a result, either: (i) changes what persons generally are entitled to expect in relation to such product for the purposes of section 3(1) on “defect”; or (ii) changes the nature of the risk, creates a new risk or increases the level of risk, of the product causing damage giving rise to liability under section 5 on “damages”.

Do consultees agree?

- 3.36 Secondly, we provisionally propose that where a product is substantially modified, the following principles should apply to govern the allocation of liability.

A substantial modification outside the original producer’s control

- 3.37 Where a person substantially modifies a product outside the original producer’s control and supplies such modified product in the course of their business and/or with a view to profit, they should be liable for such modified product as the producer. This is on the basis that a person who modifies a product to such an extent that it becomes an entirely new product would have the same degree of control over such modified product as a producer. We discuss the concept of “producer’s control” further from paragraph 3.44 below.
- 3.38 The modifier should be liable for the modified product as a whole, even where the defect is unrelated to the part modified. This reflects the position for producers of finished products, who are liable for defective components even where their only action was integrating the components without being responsible for their defectiveness. By choosing to modify an existing product and market the modified product for profit, the modifier should bear the risk for it in its entirety. This approach is also consistent with the existing case law, which recognises that a claimant need not

prove the precise mechanism which caused the defect.⁴⁶ If modifiers were liable only for the parts that they altered, this would lead to complex disputes about which part of the product caused the defect. In cases of highly technical products such as AI systems, it may be difficult to prove which part of the product is defective.

- 3.39 In these circumstances, where the defect in the modified product arose outside of the original producer's control, the original producer would have a defence and escape liability.⁴⁷

A substantial modification outside the original producer's control but no supply

- 3.40 Where a person substantially modifies a product outside the original producer's control but does not supply it in the course of their business, for example where the modification is made for personal use, they should not be liable for the modified product if it causes harm as they did not commercially supply it. This is consistent with the defences in the CPA, under which liability does not arise where a person has not supplied the product or has done so outside the course of business and without a view to profit.⁴⁸ In such cases, the original producer could rely upon a defence to escape liability if the defect in the product arose outside of their control.⁴⁹

A substantial modification within the original producer's control

- 3.41 Where a product is substantially modified within the original producer's control, the original producer should remain liable for the modified product, rather than the person who carried out the modification.
- 3.42 For reference, our proposal is consistent with the position in the EU. The New Directive provides that any person who substantially modifies a product outside the manufacturer's control and makes it available on the market is held liable as a manufacturer of that product.⁵⁰ Conversely, where a substantial modification of a product is carried out within the original manufacturer's control, the New Directive provides that such manufacturer cannot avoid liability by arguing that the defectiveness of the product occurred after they placed it on the market.⁵¹

⁴⁶ *Ide v ATB Sales Ltd* [2007] EWHC 1667 (QB) at [81] and [86]; [2008] EWCA Civ 424, [2008] PIQR P13 at [19].

⁴⁷ See paras 6.15 to 6.22.

⁴⁸ CPA, s 4(1)(b) and (1)(c). On defences, see Chapter 6.

⁴⁹ See paras 6.15 to 6.22.

⁵⁰ New Directive, art 8(2).

⁵¹ New Directive, art 11(2) and recital 39.

Consultation Question 21.

- 3.43 We provisionally propose that a person who substantially modifies a product outside the original producer's control and supplies it in the course of their business and/or with a view to profit should be liable for such modified product as the producer under the CPA.

Do consultees agree?

Defective components and substantial modifications: “producer’s control”

- 3.44 In respect of our provisional proposals regarding the liability for defective components⁵² and substantial modifications of products,⁵³ the apportionment of liability between different actors depends on whether the component was integrated into, interconnected with or the modification was made, within the original producer's control.
- 3.45 We provisionally propose that “producer’s control” in this context should cover circumstances:
- (1) where the producer of a product itself integrates or connects a component with their product, or itself modifies their product (including carrying out a substantial modification), regardless of how this modification is made; or
 - (2) where the producer of a product authorises or consents to a third party integrating or connecting a component with the producer's product, or modifying the producer's product (including carrying out a substantial modification), regardless of how this modification is made, but in each case, only where the producer has presented the particular component or modification as part of their product or product offering.⁵⁴
- 3.46 For the purposes of determining who is liable under the CPA,⁵⁵ we suggest that a producer is liable for the actions of third parties only where a component or modification is presented as part of the original producer's product or product offering.⁵⁶ This apportions the risk more appropriately than making a producer liable for any component or modification to which it may be deemed to have consented. This is to address the risk of a producer not contemplating the possibility of their product being integrated or interconnected with another, but who may be deemed to have consented to such integration or interconnection merely by not preventing it.⁵⁷ If a

⁵² See from para 3.23 above.

⁵³ See from para 3.30 above.

⁵⁴ This is modelled after the equivalent definition in art 4(5) of the New Directive.

⁵⁵ We discuss the meaning of “producer’s control” in the context of assessing whether a person is liable under the CPA (as opposed to *who* is liable) in Ch 6 on defences.

⁵⁶ This takes inspiration from one of the examples of liability given in recital 18 of the New Directive.

⁵⁷ This takes inspiration from recital 18 of the New Directive, which notes that a manufacturer should not be considered to have consented to integration merely by providing for the technical possibility of it or by not prohibiting potential related services or components.

producer is only held to have consented to a component being integrated or interconnected or a modification being made where it was part of its original product offering, this is a clearer delineation of liability for producers and avoids uncertainty. This also aligns with one of the factors taken into account when assessing defectiveness under the CPA, which considers how the product has been marketed to the public.⁵⁸

- 3.47 We have suggested that the original producer needs to consent to the particular component or modification as part of its product offering. For example, if a smart television is presented as including a video application which the user must download from a third party's website after buying the television, the television producer should remain liable, alongside the developer of the video application, for damage caused by the video application.⁵⁹ However, we consider that for the television producer to be liable for the video application, they must have intended for that particular video application to be downloaded onto its television. The requisite level of control is not present if the television producer allows a user to download any video application and the application which the user chooses turns out to be defective. That particular application may not even have been available at the time the producer manufactured the television. The lack of liability is justified because a producer would not have sufficient oversight over all video applications to prevent the defectiveness of each one. It cannot be said that the producer had presented all video applications to be part of its initial offering of the television simply by instructing users to download a particular video application only.

Consultation Question 22.

- 3.48 We provisionally propose that "producer's control" in this context should cover the following circumstances.

- (1) Where the producer of a product themselves integrates or connects a component with their product, or themselves modifies their product (including carrying out a substantial modification), regardless of how this modification is made.
- (2) Where the producer of a product authorises or consents to a third party integrating or connecting a component with the producer's product, or modifying the producer's product (including carrying out a substantial modification), regardless of how this modification is made, but in each case, only where the producer has presented the particular component or modification as part of their product or product offering.

Do consultees agree?

⁵⁸ CPA, s 3(2). See also our proposal at para 4.39 which maintains and expands upon this approach.

⁵⁹ This is the example given in recital 50 of the New Directive.

Fulfilment service providers

The issue with the current law

- 3.49 Modern supply chains have become increasingly complex, particularly due to the rise of e-commerce. The 1985 Directive (and so the CPA) has not kept pace with these developments and is less well suited to addressing modern supply chain developments.⁶⁰
- 3.50 This is a particular issue in light of the aims of the CPA. As noted at paragraph 3.7(4) above, the rationale for imposing liability on importers was mainly to facilitate claims within the jurisdiction. However, modern supply chains often involve novel operators who do not fit easily into traditional supply chains, such as fulfilment service providers, who play a significant role in providing access to the UK market for third country products. These are entities which offer services such as warehousing, packaging and dispatching of products. They perform many of the same functions as importers but may not always fit into the traditional definition of an importer.⁶¹ Fulfilment service providers are especially important when a product is sold online, as online sellers often rely on fulfilment service providers to package and dispatch products.⁶²
- 3.51 Under the CPA, a fulfilment service provider that merely stores, packages and ships a product without importing it into the UK is not liable as an importer and is only liable as a supplier. As a result, it can avoid liability if it identifies an alternative defendant. Given the increasingly prominent role of fulfilment service providers in modern supply chains, we consider it appropriate to place greater responsibility on these actors and correspondingly limit the circumstances in which they may avoid liability. The current position also risks leaving injured persons without an effective remedy where the producer, own-brand and importer are all located outside the UK and are difficult to identify or pursue. This would be inconsistent with one of the key policy objectives underpinning the CPA.

Our proposal on the liability position for fulfilment service providers

- 3.52 We therefore provisionally propose that the CPA should adopt a new category of liable persons to capture fulfilment service providers. However, they should be liable only where a UK producer, own-brand, importer or UK authorised representative of any of those persons, cannot be identified.⁶³ In these circumstances, fulfilment service providers would serve as a “fall-back” defendant, since a claimant could sue them before first proving that they cannot identify a UK producer, own-brand or UK authorised representative. At the same time, fulfilment service providers would be less insulated from liability than suppliers, as they would not be able to displace their liability by identifying another relevant liable person.

⁶⁰ D Fairgrieve, C Busch, E Büyüksagis, Z G Garrett, G Straetmans, A Karaikos, R D Linley, C Markou, J M Paterson and C M Sharkey, “Product Liability and Online Marketplaces: Comparison and Reform” (2024) 73 *International and Comparative Law Quarterly* 477.

⁶¹ New Directive, recital 37.

⁶² J-S Borghetti, “Taking EU Product Liability Law Seriously: How Can the Product Liability Directive Effectively Contribute to Consumer Protection?” (2023) 1 *French Journal of Legal Policy* 136.

⁶³ See from para 3.85 below for our discussion on authorised representatives.

- 3.53 Our proposed approach is informed by the view that the importer should be liable instead of the fulfilment service provider where possible, given the greater significance of the importer's activities in bringing the product into the UK. The producer and own-brander also should remain the principal focus of the liability regime as they have the most control over the safety of a product (or hold themselves out to have such control).
- 3.54 We provisionally propose that a fulfilment service provider should be any person offering, in the course of their business, at least two of the following services: warehousing, packaging, addressing and dispatching of a product, in each case without having ownership of that product, and excluding postal services, parcel delivery services and freight transport services.⁶⁴
- 3.55 This aims to capture the core elements of a fulfilment service provider's role in facilitating access to the UK market. Any entities that only provide minor services should be excluded, since only providers which play a significant role in placing a product onto the market should be liable for its defectiveness. This is because an entity that performs an ancillary role in the distribution chain would not be sufficiently capable of influencing the safety of the product being supplied. This aligns with the reasons for holding importers liable, who can control product quality by consolidating compliance with parties up the chain and contractually passing on legal duties.⁶⁵
- 3.56 For reference, the New Directive provides that a fulfilment service provider is liable where the manufacturer of the product or the component is established outside the EU and where there is no importer established within the EU or authorised representative of the manufacturer.⁶⁶ This contrasts with our proposal that a fulfilment service provider is liable where a UK producer, own-brander, importer or UK authorised representative of any of those persons, cannot be identified. We consider that this approach better reflects the rationale underpinning our wider proposals. The purpose of extending liability to fulfilment service providers is to ensure that claimants are not left without an identifiable defendant in the UK against whom they can bring a claim. By focusing on whether an appropriate defendant can be identified, rather than on the location of particular economic operators, our proposal provides a simpler route to redress. It also avoids requiring claimants to establish the location and status of multiple parties within the supply chain before a fulfilment service provider can be held responsible.

⁶⁴ This definition is modelled after the equivalent definition in a 4(13) of the New Directive.

⁶⁵ G Veldt, "The Fulfilment Service Provider in Product Safety and Liability: A Silver Bullet for the Enhancement of Safety and Compensation in E-Commerce, or a Leap of Faith?" (2024) 16 *European Journal of Risk Regulation* 721.

⁶⁶ New Directive, art 8(1)(c)(iii).

Consultation Question 23.

- 3.57 We provisionally propose that a fulfilment service provider should be liable under the CPA, but only where a UK producer, own-brander, importer, or UK authorised representative of any of those persons, cannot be identified.

Do consultees agree?

Consultation Question 24.

- 3.58 We provisionally propose that a fulfilment service provider under the CPA should be any person offering, in the course of their business, at least two of the following services: warehousing, packaging, addressing and dispatching of a product, in each case without having ownership of that product, excluding postal services, parcel delivery services and freight transport services.

Do consultees agree?

Online marketplaces

The problem with the current law

- 3.59 Due to the growth of e-commerce, UK consumers are increasingly buying products from online sellers and marketplaces. Products sold on online marketplaces generally fall into two categories: (i) products bought and priced by the online marketplace itself and sold to consumers; and (ii) products sold and priced by third party sellers through the online marketplace.⁶⁷ In the former case, depending on their exact activities, the marketplace could be acting as an importer, fulfilment service provider or supplier. In the latter case, they could be seen as an intermediary between sellers and buyers, as they do not set the price nor assume ownership of products.
- 3.60 As mentioned above, the 1985 Directive (and so the CPA) was not designed to accommodate modern supply chains and e-commerce, as it was based on the pre-internet era.⁶⁸ As a result, online marketplaces are not liable under the CPA if they are acting purely as intermediaries between sellers and buyers and are not producers, own-branders or importers. At most, an online marketplace could incur liability as a supplier if it fails to identify one or more of the persons who may be liable under section 2(2) of the CPA or fails to identify the person who supplied the product to them.⁶⁹ However, in these circumstances, marketplaces can avoid liability by keeping good records of those persons and identifying them on request.

⁶⁷ *Bolger v Amazon.com LLC* (2020) No D075738 (California Court of Appeal) at p 5.

⁶⁸ D Fairgrieve, C Busch, E Büyüksagis, Z G Garrett, G Straetmans, A Karaikos, R D Linley, C Markou, J M Paterson and C M Sharkey, "Product Liability and Online Marketplaces: Comparison and Reform" (2024) 73 *International and Comparative Law Quarterly* 477.

⁶⁹ CPA, s 2(3).

3.61 This is problematic because products sold through online marketplaces are often manufactured by producers based outside the UK, against whom it may be difficult in practice to bring a claim. As a result, injured persons may be left without an effective remedy. This concern has become increasingly significant as online marketplaces have grown in prominence and account for an increasing share of consumer purchases. It is also problematic because product safety is a notable concern in buying products online.⁷⁰

Our proposal on liability for online marketplaces

3.62 We therefore provisionally propose that online marketplaces should be liable for defective products sold on their platforms on the basis that it would be a fair apportionment of risk for them to bear this burden as opposed to individuals. Four main reasons justify our proposal.

3.63 Firstly, online marketplaces hold a contractual relationship with the third party seller and generally have greater bargaining power.⁷¹ Marketplaces therefore have an indirect form of control over products by imposing requirements on sellers to enhance product safety. Amazon, for example, requires sellers to obtain insurance⁷² and requires safety certification and indemnification.⁷³ It also requires sellers to comply with regulations and can block sellers from offering defective products.⁷⁴ Holding marketplaces liable would not be overly onerous as they may already have measures in place to minimise and mitigate their risk.

3.64 Secondly, online marketplaces enable manufacturers to sell products in a domestic market in circumstances where they might otherwise have little opportunity to do so and may even be a manufacturer's sole route to market, rendering them in a similar position to an importer. It has been stated in US case law that the features of Amazon and its role as a fulfilment service provider allow manufacturers and sellers with little presence in the United States to sell products there, and that the Amazon-designed features facilitate such a presence.⁷⁵ If online marketplaces are intentionally facilitating the presence of manufacturers and sellers and profit from doing so, they ought to bear responsibility for the safety of products sold on their platforms.

3.65 Thirdly, online marketplaces can select their sellers and conduct due diligence on the quality of products, whereas individuals cannot conduct such checks easily.⁷⁶ Many

⁷⁰ D Fairgrieve, C Busch, E Büyüksagis, Z G Garrett, G Straetmans, A Karaikos, R D Linley, C Markou, J M Paterson and C M Sharkey, "Product Liability and Online Marketplaces: Comparison and Reform" (2024) 73 *International and Comparative Law Quarterly* 477.

⁷¹ A similar point is noted in D Fairgrieve, C Busch, E Büyüksagis, Z G Garrett, G Straetmans, A Karaikos, R D Linley, C Markou, J M Paterson and C M Sharkey, "Product Liability and Online Marketplaces: Comparison and Reform" (2024) 73 *International and Comparative Law Quarterly* 477.

⁷² *Bolger v Amazon.com LLC* (2020) No D075738 (California Court of Appeal) at p 24.

⁷³ *Loomis v Amazon.com LLC* (2021) No B297995 (California Court of Appeal) at pp 19 and 20.

⁷⁴ *Bolger v Amazon.com LLC* (2020) No D075738 (California Court of Appeal) at p 27.

⁷⁵ For example, there is the "Fulfillment by Amazon" program which allows companies to outsource order fulfilment and provide customers with free shipping that is organised by Amazon. This example is expressly mentioned in *Bolger v Amazon.com LLC* (2020) No D075738 (California Court of Appeal) at p 26.

⁷⁶ See also *Loomis v Amazon.com LLC* (2021) No B297995 (California Court of Appeal) at p 17.

platforms and their insurers have expertise and resources to reduce consumers' exposure to unsafe products whereas remedies for consumers are very limited, as suing a foreign manufacturer is generally neither feasible nor cost-effective.⁷⁷

- 3.66 Lastly, reputable online marketplaces attract consumers through a perceived trust in the safety of products sold on their platforms, which marketplaces aim to foster.⁷⁸ Consumers expect platforms to exercise some control over third party sellers, particularly given the challenge of pursuing foreign traders.⁷⁹ Online marketplaces benefit from this trust by increasing sales and enticing more sellers to use their platforms, generating further revenue and entrenching themselves as a core component of the supply chain. If products sold on their platforms are defective, it is therefore justified to hold marketplaces liable for failing to meet the expectation that they instil in consumers and benefit from.
- 3.67 We acknowledge the concerns that holding online marketplaces liable for defective products may result in increased prices for consumers if platforms pass on their costs, or that platforms will no longer find it worthwhile to spend resources to innovate and enhance the value of the user experience. However, we consider that these concerns are overstated. Online marketplaces are often able to manage their exposure through indemnification arrangements with upstream suppliers. We also note that there is little concrete empirical evidence to suggest that increased liability would in practice result in higher consumer prices, reduced innovation, or a deterioration in the user experience. We do not therefore consider this concern, without more, to be a sufficient reason not to impose liability.

US case law in support of online marketplace liability

- 3.68 Our approach is consistent with that of the California Court of Appeal, Fourth Appellate District. In *Bolger v Amazon.com LLC*, it held that Amazon was strictly liable for defective products of third party sellers on its website as it placed itself between the seller and the claimant in the chain of distribution.⁸⁰ It did so through storing and shipping the product, providing the product listing, receiving payment and limiting the seller's involvement in the transaction.⁸¹ The court also held that Amazon could be the only entity reasonably available to claimants and may be best placed to ensure product safety, such as by exerting pressure on distributors.⁸² Strict liability was also not unjust, as marketplaces can adjust the costs of compensating claimants between themselves and third party sellers, such as by obtaining indemnification from sellers.⁸³

⁷⁷ D Fairgrieve, C Busch, E Büyüksagis, Z G Garrett, G Straetmans, A Karaikos, R D Linley, C Markou, J M Paterson and C M Sharkey, "Product Liability and Online Marketplaces: Comparison and Reform" (2024) 73 *International and Comparative Law Quarterly* 477.

⁷⁸ As noted in *Bolger v Amazon.com LLC* (2020) No D075738 (California Court of Appeal) at p 28.

⁷⁹ D Fairgrieve, C Busch, E Büyüksagis, Z G Garrett, G Straetmans, A Karaikos, R D Linley, C Markou, J M Paterson and C M Sharkey, "Product Liability and Online Marketplaces: Comparison and Reform" (2024) 73 *International and Comparative Law Quarterly* 477.

⁸⁰ *Bolger v Amazon.com LLC* (2020) No D075738 (California Court of Appeal) at pp 2 and 3.

⁸¹ *Bolger v Amazon.com LLC* (2020) No D075738 (California Court of Appeal) at pp 3 and 25.

⁸² *Bolger v Amazon.com LLC* (2020) No D075738 (California Court of Appeal) at pp 4 and 26.

⁸³ *Bolger v Amazon.com LLC* (2020) No D075738 (California Court of Appeal) at pp 4 and 28.

- 3.69 *Bolger* was held to be correctly decided by the California Court of Appeal, Second Appellate District in *Loomis v Amazon.com LLC*, which held that strict liability may attach to Amazon.⁸⁴ Amazon did not store and ship products in this case (unlike in *Bolger*), meaning that the court held that Amazon may be strictly liable for third party products sold on its platform even though it acted as an intermediary between the buyer and seller. The reasoning of the court in *Loomis* was similar to *Bolger*, but in particular it justified its decision using the stream of commerce approach, a basis for strict liability in the US. This holds a defendant liable where: the defendant received a direct financial benefit from the sale of the product; the defendant's role was integral to the business enterprise such that their conduct was a necessary factor in bringing the product to the initial consumer market; and the defendant had control over, or a substantial ability to influence, the manufacturing or distribution process.
- 3.70 In making our provisional proposals, we have drawn inspiration from the US stream of commerce approach. This is because this approach aligns with the aims of the CPA to channel liability towards those who can influence product safety.⁸⁵ On this basis, we consider the stream of commerce approach to be a persuasive source of comparative law that allows us to respond to modern supply chain realities and extend the range of liable persons in a principled manner.

Future-proofing our approach to online marketplace liability

- 3.71 We therefore consider that online marketplaces should be liable in certain circumstances for the products sold on their platforms. However, adopting a fixed definition of what constitutes an “online marketplace” may not adequately future-proof the regime. Online marketplaces may evolve in the future, and novel operators acting in a similar way to marketplaces could become prevalent, creating a risk that such entities fall outside a rigid definition. Instead, we propose to identify the core attributes of online marketplaces that justify the imposition of liability. The CPA should then impose liability on entities that exhibit these attributes.
- 3.72 We provisionally propose that a natural or legal person (a “Core Participant”) may be liable under the CPA where: (i) a UK producer, own-brander, importer, fulfilment service provider or UK authorised representative⁸⁶ of any of those persons, cannot be identified;⁸⁷ and (ii) all the following conditions are satisfied:⁸⁸
- (1) the conduct of such person (or of another person whose conduct they control, or could have controlled, either directly or indirectly) was a significant factor in

⁸⁴ *Loomis v Amazon.com LLC* (2021) No B297995 (California Court of Appeal).

⁸⁵ As explained, the CPA is derived from the 1985 Directive. The rationale for the types of persons made liable for defective products is set out in the recitals to the 1985 Directive, in particular the following: “Whereas protection of the consumer requires that all producers involved in the production process should be made liable, in so far as their finished product, component part or any raw material supplied by them was defective; whereas, for the same reason, liability should extend to importers of products into the Community and to persons who present themselves as producers by affixing their name, trade mark or other distinguishing feature or who supply a product the producer of which cannot be identified”.

⁸⁶ See from para 3.85 below for our discussion on authorised representatives.

⁸⁷ See from para 3.85 below for our discussion on authorised representatives.

⁸⁸ These conditions draw inspiration from the stream of commerce approach used in the US, discussed at para 3.69 above.

making the product available for sale, or distributing the product, to individuals in the UK. This includes storing, packaging or delivering the product, or providing a platform facilitating the sale or marketing of the product in the UK;⁸⁹

- (2) such person (or another person in whom such person has a controlling interest) has received a direct or indirect financial benefit from its acts relating to the sale of the product, or otherwise conducted such acts in the course of its business and/or with a view to profit;
- (3) such person (or another person whose conduct they control, or could have controlled either directly or indirectly) has direct or indirect control over, or a decisive ability to influence, the manufacturing or distribution process of the product; and
- (4) such person is not a producer, own-brander, importer, fulfilment service provider or a UK authorised representative of any of these persons.

3.73 These criteria would only capture platforms which significantly facilitate the access of sellers to the UK market, not every single entity along the supply chain. Those in the supply chain not caught by our criteria could remain liable as suppliers regardless of their impact on bringing the product to the market. Since the CPA aims to channel liability towards those who can influence product safety, we have suggested that Core Participants must have a certain level of control before being held liable (see paragraph 3.72(3) above). This control requirement has been adopted in other contexts, such as the CJEU decision that Uber Systems Spain SL was more than an intermediation service due to its decisive influence over the service provided to passengers.⁹⁰ A claimant could prove that a marketplace exhibits the requisite control by showing that it procures contractual assurances from sellers, blocks certain products or vendors or controls the transaction between the seller and customer.

3.74 In formulating the four conditions above, we have sought to recognise the commercial reality that, within a corporate group made up of several related but legally distinct entities, responsibility for different aspects of the group's operations may be divided between those entities. Consequently, if our proposed conditions focussed narrowly on the direct conduct of a single entity, no single entity within the group might satisfy all four conditions, even though the group, assessed as a whole, did so. That outcome would be unsatisfactory, as it could enable corporate defendants to avoid liability by restructuring their operations so that no single entity met all four criteria. Given that online marketplaces will often be corporate defendants, this possibility could undermine the proposal. The conditions are therefore framed in a way that respects the separate legal personality of individual companies, while reducing the risk that a corporate group could circumvent the regime by structuring its affairs such that no single entity within the group satisfies all four conditions.

3.75 Further, for the avoidance of doubt, the purpose of the fourth condition in paragraph 3.72 above is to clarify that a Core Participant must be a person other than a

⁸⁹ This example draws on the definition of an “online marketplace” in s 12(1) of the Product Regulation and Metrology Act 2025, which is the UK’s recent product safety legislation.

⁹⁰ See Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain, SL* [2017] at [37] to [40].

producer, own-brander, importer or fulfilment service provider (or a UK authorised representative of any such person). If, for example, a platform satisfies the criteria for treatment as a fulfilment service provider, it would incur liability in that capacity rather than as a Core Participant. This reflects the broader approach to the categories of persons liable under the CPA, namely that actors should be classified, and their liability determined, according to the role they perform within the supply chain. The Core Participant category aims to provide for the liability of actors which are crucial in the distribution chain, but which would nevertheless fall outside the scope of established categories, including fulfilment service providers. These actors facilitate the access of foreign manufacturers to the UK market in a similar way to importers or fulfilment service providers.

- 3.76 There is a concern that expanding strict liability to online marketplaces could have anti-competitive effects by unfairly disadvantaging smaller platforms or new entrants, leading them to exit the market. Large platforms, on the other hand, are well-placed to absorb the costs of increased liability exposure.⁹¹ We do not consider it appropriate to carve out an exemption for smaller marketplaces, since defective products could be sold on any platform regardless of its size. Introducing an exemption for smaller operators could also undermine their credibility and risk creating a dumping ground for defective products.
- 3.77 Our approach is slightly different to the position in the EU. Online marketplaces are only liable under the New Directive if: (i) the manufacturer, the importer, the authorised representative and the fulfilment service provider within the EU cannot be identified; (ii) the marketplace holds itself out as providing the product; and (iii) the marketplace fails to identify a relevant economic operator within the EU or its own distributor within one month of receiving such request from the claimant.⁹² However, we have taken a different approach to the EU as there is a risk that online marketplaces could avoid liability under the New Directive in circumstances where liability might otherwise be expected. Online marketplaces seemingly can avoid liability by simply adding a disclaimer that the product is not being provided by the marketplace itself, or by identifying a relevant economic operator within the EU or its own distributor. This means marketplaces are in the same position as suppliers under the CPA, and can escape liability by keeping good records of their distributors.

⁹¹ D Fairgrieve, C Busch, E Büyüksagis, Z G Garrett, G Straetmans, A Karaiskos, R D Linley, C Markou, J M Paterson and C M Sharkey, "Product Liability and Online Marketplaces: Comparison and Reform" (2024) 73 *International and Comparative Law Quarterly* 477.

⁹² New Directive, art 8(4).

Consultation Question 25.

3.78 We provisionally propose that Core Participants who meet the following criteria should be liable under the CPA where a UK producer, own-brander, importer, fulfilment service provider or UK authorised representative of any of those persons, cannot be identified:

- (1) the conduct of such person (or of another person whose conduct they control, or could have controlled, either directly or indirectly) was a significant factor in making the product available for sale, or distributing the product, to individuals in the UK, including storing, packaging or delivering the product, or providing a platform facilitating the sale or marketing of the product in the UK;
- (2) such person (or another person in whom such person has a controlling interest) has received a direct or indirect financial benefit from its acts relating to the sale of the product or otherwise conducted such acts in the course of its business and/or with a view to profit;
- (3) such person (or another person whose conduct they control, or could have controlled, either directly or indirectly) has direct or indirect control over, or a decisive ability to influence, the manufacturing or distribution process of the product; and
- (4) such person is not a producer, own-brander, importer, fulfilment service provider or a UK authorised representative of any of these persons.

Do consultees agree?

The applicability of the liability exemptions under the ECR 2002 to online marketplaces

3.79 In proposing to hold online marketplaces liable under the CPA where they meet the conditions of a Core Participant, it is necessary to consider the applicability of the liability exemptions in the Electronic Commerce (EC Directive) Regulations 2002. These protect online marketplace operators from liability in relation to third party content on their platforms. The most relevant exemption is the “hosting exemption”, which shields platform providers from liability where they store information given by a user and the provider neither knows, nor is aware of, the unlawful information (or if they do become aware, acts expeditiously to remove the information).⁹³ It has been held that the exemptions from liability only apply where the service provider is passive and has no knowledge of, nor control over, the information which is transmitted or stored.⁹⁴ The exemptions are discussed in more detail in Chapter 2.⁹⁵

⁹³ Electronic Commerce (EC Directive) Regulations 2002 (SI 2002 No 2013), reg 19.

⁹⁴ Joined cases C-682/18 and C-683/18 *Frank Peterson v Google LLC (among others) and Elsevier Inc v Cyando AG* [2021] at [105].

⁹⁵ See paras 2.103 to 2.104.

- 3.80 The case law of the CJEU illustrates the operation of the exemptions in the context of online marketplaces. In particular, the court held that if the online marketplace has optimised the presentation of, or promoted, offers for sale, it has played an active role and has knowledge of, or control over, such offers. Therefore, it cannot rely on the hosting exemption in the EU Electronic Commerce Directive (which was implemented by the Electronic Commerce (EC Directive) Regulations 2002).⁹⁶ By contrast, activities such as storing offers for sale, setting the terms of its service and providing general information to customers do not prevent an online marketplace from relying on the liability exemptions.⁹⁷
- 3.81 We consider that imposing liability on online marketplaces would not engage the liability exemptions in the Electronic Commerce (EC Directive) Regulations 2002. Our proposed criteria of a Core Participant at paragraph 3.72 above focus on the acts of the platform operator itself. This includes assessing what the platform operator did to make the product available for sale and whether it exercised control over the distribution process. This means the liability exemptions in the Electronic Commerce (EC Directive) Regulations 2002 would not be engaged at all, as such exemptions protect platforms from being liable for third party content, not the activities of the platform itself. Our position is supported by commentary and is consistent with the approach of the California Court of Appeal.⁹⁸ We also make a similar argument in Chapter 2 at paragraphs 2.103 to 2.104 in relation to social media platforms. Our proposed amendments to the CPA therefore exist alongside the liability exemptions and do not seek to remove or amend them.

Interaction with the Product Regulation and Metrology Act 2025

- 3.82 The Product Regulation and Metrology Act 2025 (“PRAM”) empowers the Secretary of State to pass regulations setting out product requirements that must be met in relation to products marketed or used in the UK.⁹⁹ This means PRAM does not list the product requirements themselves, and no relevant regulations have been passed under PRAM at the date of publication of this Consultation Paper. The Government announced in 2025 that it intends to create a proportionate regulatory framework under PRAM where online marketplaces must prevent unsafe products from being sold and ensure that sellers operating on their platform comply with product safety obligations.¹⁰⁰
- 3.83 However, PRAM does not contain any private rights of redress if product regulations passed under PRAM are breached; this is because it only allows enforcement by a

⁹⁶ As held in Case C-324/09 *L’Oreal SA v eBay* [2011] at [116].

⁹⁷ Case C-324/09 *L’Oreal SA v eBay* [2011] at [115].

⁹⁸ See D Fairgrieve, C Busch, E Büyüksagis, Z G Garrett, G Straetmans, A Karaikos, R D Linley, C Markou, J M Paterson and C M Sharkey, “Product Liability and Online Marketplaces: Comparison and Reform” (2024) 73 *International and Comparative Law Quarterly* 477 in relation to the hosting exemption in the DSA. See also *Bolger v Amazon.com LLC* (2020) No D075738 (California Court of Appeal) at p 4 in relation to the non-applicability of the immunity under s 230 of the Communications Decency Act 1996.

⁹⁹ PRAM, ss 1(1) and 2(1).

¹⁰⁰ Department of Business and Trade, “Tough new laws to make online marketplaces safer” (2025), <https://www.gov.uk/government/news/tough-new-laws-to-make-online-marketplaces-safer>.

public authority.¹⁰¹ This aligns with the distinct purposes of PRAM and the CPA. PRAM is product safety legislation with a preventive function of ensuring products are safe before they are made available; the CPA is consumer protection legislation that provides redress for individuals harmed by defective products, including products that are defective because they breach product requirements.

- 3.84 Therefore, holding online marketplaces liable under the CPA dovetails with the regime under PRAM and even complements it, since it prevents individuals from being left without a remedy where a marketplace is in breach of PRAM. Our proposal would supplement PRAM by influencing market behaviour through deterrence, incentivising operators to monitor the safety of products on their sites.¹⁰² This is particularly helpful as public enforcement of regulations requires deployment of significant public funds and depends on the adaptability of regulators to keep up with technological developments, which can be challenging, as evidenced by the regulatory gap in respect of online marketplaces.¹⁰³ The availability of redress under the CPA therefore provides an additional way in which PRAM could be indirectly enforced.

UK authorised representatives

The issue with the current law

- 3.85 As noted above,¹⁰⁴ one of the original policy aims of the CPA was to impose liability on importers to allow claimants to identify a potential defendant within the UK and avoid difficulties with pursuing a claim outside the jurisdiction.
- 3.86 Our proposals would advance this objective by extending liability to fulfilment service providers and Core Participants. However, the CPA could go further by imposing liability on a UK authorised representative of a non-UK producer (including a producer of a component product), own-brand, importer, fulfilment service provider or Core Participant. At present, the CPA does not provide for liability to attach to authorised representatives.
- 3.87 In the context of the manufacture and sale of products, any entity may appoint an authorised representative, either voluntarily or in compliance with a legal obligation, for a range of purposes. Commonly these purposes relate to assisting with regulatory and compliance matters that must be met to permit the sale of the product in the UK and/or serving as a UK contact point for non-UK based persons on such matters. For example, manufacturers of medical devices based outside the UK are required to appoint a UK responsible person pursuant to the Medical Devices Regulations

¹⁰¹ See s 3(6) and 3(9)(c) of PRAM for examples of sanctions under PRAM.

¹⁰² D Fairgrieve, C Busch, E Büyüksagis, Z G Garrett, G Straetmans, A Karaikos, R D Linley, C Markou, J M Paterson and C M Sharkey, "Product Liability and Online Marketplaces: Comparison and Reform" (2024) 73 *International and Comparative Law Quarterly* 477.

¹⁰³ D Fairgrieve, C Busch, E Büyüksagis, Z G Garrett, G Straetmans, A Karaikos, R D Linley, C Markou, J M Paterson and C M Sharkey, "Product Liability and Online Marketplaces: Comparison and Reform" (2024) 73 *International and Comparative Law Quarterly* 477.

¹⁰⁴ See para 3.7(4) above.

2002.¹⁰⁵ Furthermore, PRAM envisages that regulations may be imposed in relation to the appointment of authorised representatives.¹⁰⁶ PRAM also provides that authorised representatives of manufacturers, persons marketing products, importers, installers of products or online marketplace providers may be obliged to abide by any obligations set out in product requirements.¹⁰⁷ As noted above, no such regulations have yet been passed.

- 3.88 Where a UK-based authorised representative has been appointed by a non-UK producer, own-brander, importer, fulfilment service provider or Core Participant, it would be easier for a consumer to pursue a claim against the authorised representative rather than an entity outside the jurisdiction. A UK authorised representative acts on behalf of the appointer, and it is therefore reasonable for them to assume liability in place of a non-UK appointer. They can, in turn, allocate that risk contractually with the appointer. The CPA therefore contains a gap, in that it does not currently extend liability to UK authorised representatives.

Our proposal on the liability position of authorised representatives

- 3.89 We provisionally propose imposing liability on the UK authorised representative of a producer, own-brander, importer, fulfilment service provider or Core Participant if they are based outside the UK. A UK authorised representative, for these purposes, would mean any UK established person authorised to act in relation to the product, including dealing with regulators, compliance obligations, enforcement matters, product-related requirements or market-access functions. In the absence of regulations made under PRAM or otherwise, this approach seeks to capture authorised representatives through their function and the services they provide. This ensures that the meaning is not so broad that it covers any and all authorised representatives beyond that which are intended to be within scope.
- 3.90 The breadth of our proposal, in extending liability to the UK authorised representatives of a producer, own-brander, importer, fulfilment service provider, or Core Participant, mirrors the approach under PRAM, where product requirements may be imposed on a wide range of authorised representatives (such as marketers, importers and online marketplaces). Our approach would mitigate the risk that persons liable under the CPA are not based in the UK, thereby undermining the rationale for holding them liable in the first place. For example, it has been recognised that an importer may not be established within the jurisdiction if they work in several markets.¹⁰⁸
- 3.91 For reference, our approach is broadly consistent with the position in the EU, although the New Directive only holds the authorised representative of the manufacturer liable

¹⁰⁵ See the Medical Devices Regulations 2002 (SI 2002 No 618), reg 7A(2)(a)(ii) in relation to a UK responsible person. See also for example the European Commission, "Medical Devices: Guidance document, Guideline for authorised representatives" (2012), <https://webgate.ec.europa.eu/circabc-ewpp/rest/download/f41ad64b-4bce-4f5c-af6e-64c4d3babd12>. See further: The European Association of Authorised Representatives, <https://www.eaarmed.org>.

¹⁰⁶ PRAM, s 2(2)(l).

¹⁰⁷ PRAM, s 2(3)(f).

¹⁰⁸ G Howells, *Product Liability: The Law of Product Liability (Common Law Series)* (2nd ed 2007) para 4.96.

where the manufacturer is outside the EU.¹⁰⁹ This would include the authorised representative of an own-brand where they fall under the definition of a manufacturer.¹¹⁰ The New Directive does not extend liability to the authorised representative of an importer, fulfilment service provider or Core Participant.

Consultation Question 26.

- 3.92 We provisionally propose that, where a producer, own-brand, importer, fulfilment service provider or Core Participant is established outside the UK, its UK authorised representative should be liable. This would be limited to representatives authorised to act on that person's behalf in relation to the product, including for regulatory, compliance, enforcement, product-related and market-access functions.

Do consultees agree?

Suppliers

The issue with the current liability position for suppliers in the CPA

- 3.93 We consider that the existing position in the CPA relating to suppliers, which enables them to avoid liability where they can identify the producer, any own-brand, importer or their own supplier, should be retained due to the policy reasons set out in paragraphs 3.7(2) and 3.7(5) above. The CPA currently strikes the right balance between facilitating product liability claims and minimising transaction costs by calibrating the liability borne by each actor according to the role it performs within the supply chain. We believe that suppliers have comparatively little control over the safety of products in any case, which makes it appropriate to subject them to liability only in limited circumstances.
- 3.94 However, in light of our provisional proposals above expanding the list of persons liable, the current provisions in the CPA setting out which persons the supplier is required to identify to avoid liability should be amended to accommodate our suggested changes. Since we are proposing that the persons potentially liable for defective products ought to extend beyond the producer, own-brand and importer, the existing supplier liability provisions in the CPA should be amended to take this into account.

Our proposal to amend the liability of suppliers under the CPA

- 3.95 To accommodate our proposed expansion of the categories of persons liable under the CPA, we provisionally propose retaining the existing supplier liability provisions, while expanding the categories of persons whom a supplier must identify to avoid liability. We also propose two additional conditions. First, where the identified person is not the supplier's own supplier, that person must be established in the UK. Secondly, the supplier must identify another liable person in accordance with a prescribed order of priority.

¹⁰⁹ New Directive, art 8(1)(c)(ii).

¹¹⁰ New Directive, art 4(10)(b).

- 3.96 This means that the supplier should first have to identify a UK producer, own-brander or importer. If the supplier cannot identify a UK producer, own-brander or importer, the supplier then should have to identify the first person in the following list who is within the UK: any authorised representative of the producer, own-brander or importer; the fulfilment service provider (or if they are outside the UK, their authorised representative); or a Core Participant (or if they are outside the UK, their authorised representative). Alternatively, the supplier could identify their own supplier to escape liability as is the existing position under the CPA. This is to enable claimants to sue a defendant within the jurisdiction and mitigate the risk that the claimant is left without a viable recourse to redress since the supplier has only identified a foreign entity (and by doing so, itself has escaped liability).
- 3.97 Our suggested amendments are not unduly onerous on the supplier, as it is likely that any supplier would know the identity of at least one of the expanded list of persons potentially liable. In any case, the supplier can always avoid liability by identifying their own supplier, as per the existing position in the CPA.
- 3.98 For reference, the New Directive takes a broadly similar approach, although there are still some differences from our proposal.¹¹¹ Suppliers, termed distributors in the New Directive, are liable where the injured person requests that supplier identify a person potentially liable under Article 8(1)¹¹² and established in the EU, or its own supplier; and that supplier fails to identify such a person or its own distributor within one month of receiving the request.¹¹³ This largely aligns with our proposal, save that our proposal sets out the order in which the supplier must identify another liable person to avoid liability. The persons which are required to be identified also differ. This is only, however, a reflection of the differences in our approaches to who should incur liability for defective products under the separate regimes.

¹¹¹ See Appendix 2 for more detail.

¹¹² That is, the manufacturer of the defective product or component (whether the original manufacturer or the person who carried out a substantial modification), the importer, the authorised representative of the manufacturer or the fulfilment service provider.

¹¹³ New Directive, art 8(3).

Consultation Question 27.

3.99 We provisionally propose that suppliers should be liable in the following circumstances:

- (1) the person who suffered the damage requests the supplier to identify one or more of the following persons: the producer of the product or of any defective component, any own-brander, the importer, the fulfilment service provider, a Core Participant or the UK authorised representative of any such persons; and
- (2) such a request is made within a reasonable period after the damage occurs and at a time when it is not reasonably practicable for the person making the request to identify all those persons; and
- (3) the supplier fails, within a reasonable period after receiving the request, either to identify its own supplier or comply with the request by identifying:
 - (a) the UK producer of the product or of any defective component product, any UK own-brander or the UK importer; or
 - (b) the first person in the following list who is established within the UK, where the supplier cannot identify a UK established producer, own-brander or importer:
 - (i) any UK authorised representative of one of the following: the producer of the product or defective component product, any own-brander or the importer;
 - (ii) the fulfilment service provider (or where the fulfilment service provider is outside the UK, its UK authorised representative);
 - (iii) a Core Participant (or where such Core Participant is outside the UK, its UK authorised representative).

Do consultees agree?

Summary of our proposed approach to persons liable under the CPA

3.100 In summary, we provisionally propose that the persons set out below should be liable for damage caused by defective products under the CPA, subject to the specified conditions for liability where applicable. Where more than one person is liable, they should be jointly and severally liable and the claimant may, at their election, bring proceedings against any one or more of them. Those persons are:

- (1) the producer of the product, which means the following persons:
 - (a) the person who manufactures, develops, wins, abstracts or carries out an industrial or other process, in each case in relation to a product; or

- (b) any person who substantially modifies a product outside the original producer's control and supplies it in the course of their business;
- (2) both the producer of the overall product and the producer of the component product where a component is defective and such component was integrated into or interconnected with the finished product within the control of the producer of the finished product;
- (3) any own-brander;
- (4) an importer of the product into the UK in order, in the course of their business, to supply it to another;
- (5) where a producer, own-brander or importer is established outside the UK, its UK authorised representative;
- (6) where a UK producer, own-brander, importer, or UK authorised representative of any of those persons, cannot be identified, the fulfilment service provider (or where they are outside the UK, any UK authorised representative of such fulfilment service provider);
- (7) where a UK producer, own-brander, importer, fulfilment service provider or UK authorised representative of any of those persons cannot be identified, a Core Participant where:
 - (a) the conduct of such person (or of another person whose conduct they control, or could have controlled, either directly or indirectly) was a significant factor in making the product available for sale, or distributing the product, to individuals in the UK, including storing, packaging or delivering the product, or providing a platform facilitating the sale or marketing of the product in the UK;
 - (b) such person (or another person in whom such person has a controlling interest) has received a direct or indirect financial benefit from its acts relating to the sale of the product or otherwise conducted such acts in the course of its business and/or with a view to profit;
 - (c) such person (or another person whose conduct they control, or could have controlled, either directly or indirectly) has direct or indirect control over, or a decisive ability to influence, the manufacturing or distribution process of the product; and
 - (d) such person is not a producer, own-brander, importer, fulfilment service provider or a UK authorised representative of any of these persons.

Or where the Core Participant is outside the UK, any UK authorised representative of such Core Participant.

- (8) any supplier of the product where:
 - (a) the person who suffered the damage requests the supplier to identify one or more of the following persons: the producer of the product or of any

defective component, any own-brander, the importer, the fulfilment service provider, a Core Participant or the UK authorised representative of any such persons; and

- (b) such a request is made within a reasonable period after the damage occurs and at a time when it is not reasonably practicable for the person making the request to identify all those persons; and
- (c) the supplier fails, within a reasonable period after receiving the request, either to identify its own supplier or comply with the request by identifying:
 - (i) the UK producer of the product or of any defective component product, any UK own-brander or the UK importer; or
 - (ii) the first person in the following list who is established within the UK, where the supplier cannot identify a UK established producer, own-brander or importer:
 - (A) any UK authorised representative of one of the following: the producer of the product or defective component product, any own-brander or the importer;
 - (B) the fulfilment service provider (or where the fulfilment service provider is outside the UK, its UK authorised representative);
 - (C) a Core Participant (or where such Core Participant is outside the UK, its UK authorised representative).

Chapter 4: Defect and causation under the CPA

INTRODUCTION

- 4.1 This chapter considers the law governing defect and causation in claims brought under the Consumer Protection Act 1987 (the “CPA”). It does so by reference to our Terms of Reference, which require us to assess whether the regime strikes a balance between business confidence and innovation, on the one hand, and ensuring consumer¹ protection, on the other. In particular, we are asked to consider whether the CPA’s definition of “defect” requires reform to address difficulties faced by claimants in establishing that a product is defective, and to respond to the challenges posed by emerging technologies, including AI.² We are also asked to assess whether the burden placed on claimants to bring a successful claim, which includes establishing defect and causation, has become unduly onerous, particularly in that context.
- 4.2 The chapter analyses four interrelated issues that have given rise to difficulties: the interpretation and application of the definition of defect; the court’s approach to causation under the CPA; proving defect and causation; and whether a liability regime based on establishing defect achieves a fair apportionment of risk.
- 4.3 Strongly held and often divergent views were expressed on these issues by stakeholders in their responses to our Initial Scoping Questionnaire and during meetings held in the pre-consultation period. Some considered that the regime is flexible and generally produces fair outcomes, whereas others expressed the view that proving defect and causation is too difficult, making it unduly hard for meritorious claims to succeed. We refer to these views throughout this chapter.

THE DEFINITION OF DEFECT IN THE CPA

- 4.4 Under the CPA, a producer or another potentially liable party is strictly liable for any damage caused wholly or partly by a defect in a product.³ A product is defective “if the safety of the product is not such as persons generally are entitled to expect”.⁴ That is an objective test to be determined by the court,⁵ by reference to what the general public is entitled to expect, rather than what the public or a specific claimant in fact expects. The test does not impose an absolute level of safety, nor does it render the

¹ In this consultation paper, we use “consumer” to refer to persons who use, interact with, or may be affected by a product. It extends beyond consumers who have purchased a product, encompassing all natural persons who suffer harm as a result of a defective product.

² See Appendix 1, paras 1.1, 1.4(2), 1.4(5) and 1.4(6), reproducing our Terms of Reference.

³ CPA, s 2. See Ch 3 for our provisional proposals in this regard.

⁴ CPA, s 3(1).

⁵ See *A v National Blood Authority* (No 1) [2001] 3 All ER 289 at [26] to [27]; *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [69] to [70]; *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [159].

defendant liable for every injury caused by a harmful characteristic in a product.⁶ “Safety” is defined broadly and extends to the risk that a product may cause personal injury, death, or damage to property, as well as risks arising from any products comprised within that product.⁷

- 4.5 In determining the level of safety which persons and society are entitled to expect, the court must take into account all relevant circumstances.⁸ The CPA provides a list of such circumstances including the manner in which the product was marketed, its appearance, any instructions or warnings, how it might reasonably be used, and the time of its supply.⁹ The list concludes by making clear that a product is not automatically defective solely because a product which becomes available later is safer. These circumstances must be considered, but they are not exhaustive. Which circumstances are relevant will vary according to the facts of the particular case.¹⁰
- 4.6 In an appropriate case, compliance or non-compliance with regulations or standards relevant to product safety, for example the General Product Safety Regulations 2005, may provide compelling evidence for the assessment of whether the entitled level of safety has been met. The weight to be ascribed to those considerations will depend on the facts and circumstances of the individual case. Importantly, compliance is not an automatic defence under the CPA.¹¹
- 4.7 The burden of proving defect rests with the claimant,¹² although they need not identify the specific cause of the lack of safety that constitutes the defect nor establish why the product failed.¹³
- 4.8 The definition of defect is inherently broad and allows the court a high degree of flexibility when interpreting and applying the statutory test. This is both a strength and a potential source of difficulty. The flexibility of the definition enables the regime to operate across a wide and evolving range of products. It also allows it to adapt to

⁶ See *A v National Blood Authority (No 1)* [2001] 3 All ER 289 at [24]; *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [69]; *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [96].

⁷ CPA, s 3(1).

⁸ See *A v National Blood Authority (No 1)* [2001] 3 All ER 289 at [57]; *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [76]; and *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [139].

⁹ CPA, s 3(2).

¹⁰ See *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [77]; and *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [143].

¹¹ See *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [97] to [101]; and *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [170] to [178]. See also D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 10.92 to 10.99.

¹² See *A v National Blood Authority (No 1)* [2001] 3 All ER 289 at [46]; *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [76]; *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [98]; *Hastings v Finsbury Orthopaedics Ltd and another* [2022] UKSC 19, [2023] 1 All ER 885 at [15(v)]. See also the 1985 Directive, art 4.

¹³ See *Ide v ATB Sales Ltd* [2008] EWCA Civ 424, [2008] PIQR P13 at [11] to [22]; and *Baker v KTM Sportmotorcycle UK Ltd* [2017] EWCA Civ 378, [2018] ECC 35 at [35], as discussed in D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 10.12.

novel products and emerging technologies as they enter the market. Such adaptability would be difficult to achieve under a more prescriptive and rigid framework, as recognised by the courts and commentators.¹⁴

- 4.9 However, that same breadth and flexibility can, in some circumstances, generate confusion, a degree of inconsistency in its application, and uncertainty. A central issue, identified both here and in the literature, arises from the structure of the definition itself, which answers the question of defectiveness by reference to a further question, that is whether the product meets the entitled level of safety.¹⁵ How that second question is to be answered is not always clear and that can cause difficulties.
- 4.10 We highlight below four issues, drawn from our analysis of the case law and also raised by some stakeholders during pre-consultation, which illustrate the uncertainty created by the breadth of the definition of defect, particularly in technically complex claims: the difficulties in determining defect in complex cases; the uncertainty and inconsistency in the application of the defect test; the divergent interpretation of the regime's purpose; and the uncertainty as to how the definition applies to modern and future products.

The difficulties in determining defect in complex cases

- 4.11 Cases in which the defect is readily apparent, such as an inadequately earthed electrical appliance or a hazardous children's toy with lethal spikes,¹⁶ do not give rise to difficulty. As stakeholders have told us, these claims are often resolved without the need for judicial determination. It is in cases where reasonable views may differ as to the level of safety to which the public is entitled, that the application of the definition becomes correspondingly more complex.¹⁷
- 4.12 These specific cases arise where, for example, defendants have relied on warnings addressing the risk, compliance with applicable regulations or standards, or the contention that the harm reflects an ordinary and inherent risk of the product. These factors often operate in combination, and in such cases, the parties and the court may be required to expend significant time and resources determining which considerations are relevant to the determination of the entitled level of safety, and how

¹⁴ See *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [78] to [79]; *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [93] and [154]; and M Powers and A Barton, *Clinical Negligence* (5th ed 2015) para 13.87, as cited in [2016] EWHC 3096 (QB) at [78].

¹⁵ See eg J-S Borghetti, "Taking EU product liability law seriously: how can the product liability directive effectively contribute to consumer protection?" [2023] 1 *French Journal of Public Policy* 136, 172 referencing J Stapleton, *Product Liability* (1994) p 234: "The core theoretical problem with the definition, however, is that it is circular. This is because what a person is entitled to expect is the very question a definition of defect should be answering".

¹⁶ Lord Griffiths, P De Val and RJ Dormer, "Developments in English Product Liability Law: A Comparison with the American System" (1987-1988) 62 *Tulane Law Review* 353, 379 to 380.

¹⁷ Lord Griffiths, P De Val and RJ Dormer, "Developments in English Product Liability Law: A Comparison with the American System" (1987-1988) 62 *Tulane Law Review* 353, 379 to 380.

they should be weighed. This increases the complexity, cost and uncertainty of the claim.¹⁸

- 4.13 These difficulties are illustrated in the case law, which shows that claimants have sometimes struggled to articulate why a product has failed to meet the entitled level of safety (and is therefore defective), without resorting to arguments that closely resemble alleging fault, such as deficiencies in warnings,¹⁹ or flaws in design.²⁰ Some claimants have sought to prove defect through comparisons with alternative products, such as by seeking to show that the product carried a risk that was materially higher than that of a comparator product.²¹ Consequently, the analysis of “defect” has at times come to mirror fault-based reasoning,²² albeit expressed in the language of the entitled level of safety.
- 4.14 Some stakeholders indicated during pre-consultation that this is very much a reality and a problem.²³ They reported that the uncertainty about how defect is determined in complex cases has led claimants to plead negligence routinely alongside CPA claims, pointing to a strict product liability regime that is, in these circumstances, failing to achieve its intended function. As set out in Chapter 1, the strict liability regime introduced by the CPA was designed to relieve claimants of the burden of proving fault, particularly in light of the evidential difficulties inherent in product liability claims.

Uncertainty and inconsistency of application

- 4.15 A further difficulty with the current definition of defect lies in its inconsistent interpretation in the case law, particularly where different approaches have been taken to assessing whether a product has met the entitled level of safety. Although the High Court has interpreted defect on several occasions,²⁴ and there is substantial

¹⁸ See *A v National Blood Authority* (No 1) [2001] 3 All ER 289 at [31] to [46] and [55] to [73]; *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [53] to [108]; and *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [64] to [178].

¹⁹ See *Worsley v Tambrands Ltd* [2000] PIQR P95.

²⁰ See *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [114]; *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [471].

²¹ See *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [137], [180], [186], [247] to [248], [251], [272], [289], [499] to [500]. See also *XYZ v Schering Health Care Ltd* [2002] EWHC 1420 (QB), (2003) 70 BMLR 88 at [20], in which a test of “more than doubling the risk” was considered.

²² See eg the UK Jurisdiction Taskforce, *Legal Statement on Liability for AI Harms under the Private Law of England and Wales* (July 2026), https://27221500.fs1.hubspotusercontent-eu1.net/hubfs/27221500/UKJT%20work/UK%20Jurisdiction%20Taskforce_Legal%20Statement_FINAL.pdf at para 78: “where the product is a highly technical one, the enquiry process to assess ‘negligence’ and to assess ‘defect’ is likely to overlap substantially in practice”.

²³ See *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 and *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347. The Supreme Court’s decision in *Hastings v Finsbury Orthopaedics Ltd* [2022] UKSC 19, [2023] 1 All ER 885 is also often raised, though our view is this decision goes to the difficulties proving defect, as opposed to the interpretation of defect.

²⁴ See eg *Worsley v Tambrands Ltd* [2000] PIQR P95; *Richardson v LRC Products Ltd* [2000] PIQR P164; *A v National Blood Authority* (No 1) [2001] 3 All ER 289; *Sam B v McDonald’s Restaurants Limited* [2002] EWHC 490 (QB); *XYZ v Schering Health Care Ltd* [2002] EWHC 1420 (QB), (2003) 70 BMLR 88; *Palmer v Palmer* [2006] EWHC 1284 (Admin); *Ide v ATB Sales Ltd* [2007] EWHC 1667 (QB); *Love v Halfords Limited* [2014] EWHC 1057 (QB), [2014] RTR 32; *Hufford v Samsung Electronics (UK) Limited* [2014] EWHC 2956

agreement on some aspects of the test,²⁵ the leading authorities nevertheless reveal two distinct approaches: that adopted by *A v National Blood Authority* (No 1),²⁶ and that taken by *Wilkes v DePuy International Limited* (“*Wilkes*”)²⁷ and *Gee v DePuy International Ltd* (“*Gee*”).²⁸

- 4.16 In *A v National Blood Authority* (No 1), the court proposed a structured approach to determining whether a product is defective.²⁹ The first step was to identify the harmful characteristic of the product alleged to have caused the injury. The product was then classified as either “standard” or “non-standard”, depending on whether that characteristic was shared by other products of the same type.³⁰ This classification was used to determine which circumstances were relevant to the assessment of defect.³¹
- 4.17 The approach was subsequently considered in *Wilkes*, where the court criticised it as circular. In the court’s view in that case, it was not possible to prove a causal connection between a defect and the damage suffered without first determining whether a defect existed and, if so, what it was. The court also considered that focusing at an early stage on the characteristic said to have caused the injury risked treating causation as the starting point of the analysis, thereby diverting attention from the central question under the CPA: whether the product provided the level of safety that persons generally are entitled to expect.³²
- 4.18 The same approach was considered again in *Gee*, where the court agreed with the criticisms expressed in *Wilkes*. It regarded the approach in *A v National Blood Authority* (No.1) as circular because it required the identification of a “harmful characteristic”, a concept that already implied the existence of a defect, before asking whether that characteristic amounted to a defect in light of all the circumstances. The court further considered that requiring the harmful characteristic that caused the injury to be identified at the outset gave primacy to causation before any assessment of defect, which it regarded as inconsistent with the structure of the CPA. Accordingly, the court rejected the approach, emphasising that the central question remained whether the product met the level of safety persons generally are entitled to expect.³³

(TCC), [2014] BLR 633; *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627; *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347; *Busby v Berkshire Bed Company Limited* [2018] EWHC 2976 (QB); and *Al-Iqra v DSG Retail Ltd* [2019] EWHC 429 (QB), [2019] ECC 23.

²⁵ See paras 4.4 to 4.6 above.

²⁶ *A v National Blood Authority* (No 1) [2001] 3 All ER 289. The High Court subsequently adopted elements of this analysis in *Sam B v McDonald’s Restaurants Limited* [2002] EWHC 490 (QB) at [73].

²⁷ *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627.

²⁸ *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347.

²⁹ Note this was for defect under art 6 of the 1985 Directive, but that was on the basis that it would be the same under the CPA.

³⁰ If other products of the same type or series share the same harmful characteristic, then it is a “standard” product. If they do not, it is a “non-standard” product.

³¹ See *A v National Blood Authority* (No 1) [2001] 3 All ER 289 at [66] to [71].

³² See *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [58].

³³ See *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [106] to [108].

- 4.19 This divergence in approach to the assessment of defect illustrates how the open-textured nature of the definition permits divergent methods of analysis. As these approaches have emerged from decisions of the High Court and have not been resolved at appellate level, a degree of uncertainty remains as to the correct approach to be followed. That uncertainty may encourage parties to pursue litigation, including appeals, in the hope of obtaining authoritative guidance. In the meantime, parties may face uncertainty not only as to the outcome of a claim, but also as to the factors that a court will regard as relevant and the manner in which the assessment will be conducted.

Interpretation of the purpose of the regime

- 4.20 In applying the definition of defect, the courts have sought, so far as possible, to construe the provision in line with the CPA's objectives.³⁴ On one view, those objectives are relatively clear: the CPA implements the 1985 Directive,³⁵ which seeks to achieve a fair apportionment of risk between producers and consumers through the imposition of strict liability.³⁶ However, the case law reveals a divergence in views as to whether the purpose of creating a strict liability regime should be construed narrowly or widely. Those differing views have also contributed to uncertainty in the interpretation and consequent application of the definition of defect.
- 4.21 In *A v National Blood Authority* (No 1), the court placed significant weight on the 1985 Directive's objective of removing the need to prove fault. It considered that objective not merely to remove fault as a formal requirement of liability, but also to reduce the practical difficulties claimants face in establishing their claims. The court therefore rejected the relevance of the avoidability of the risk³⁷ as a circumstance in determining defect,³⁸ on the footing that it would introduce elements of negligence, and the difficulties traditionally associated with proving fault, into the analysis.³⁹ A caution against importing negligence principles into the CPA was also expressed by the Court of Appeal in *Abouzaid*, where the court observed that foreseeability should not be required for defect.⁴⁰

³⁴ See *Uber BV v Aslam* [2021] UKSC 5, [2021] 4 All ER 209 at [70].

³⁵ CPA, s 1(1).

³⁶ 1985 Directive, recitals 2, 7, 9, 10, 11 and 16. The 1985 Directive's key objectives also include the approximation of the laws of the Member States concerning the liability for damage caused by defective products and effective protection of consumers: see recitals 1, 4, 5, 6, 8, 9, 12 and 13.

³⁷ That is for example what could or should have been done differently, whether there were any steps or precautions reasonably available, whether it was impossible to take any steps by way of prevention or avoidance, or impracticable or economically unreasonable: see *A v National Blood Authority* (No 1) [2001] 3 All ER 289 at [31].

³⁸ Note this was in regard to what the Court termed non-standard products and that the Court appeared to leave the door open for the use of avoidability in what it termed standard products. *A v National Blood Authority* (No 1) [2001] 3 All ER 289 at [68] and [73] and *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [87].

³⁹ See *A v National Blood Authority* (No 1) [2001] 3 All ER 289 at [57] to [63].

⁴⁰ See *Abouzaid v Mothercare (UK) Ltd* [2001] CLY 920, [2000] 12 WLUK 627, [2000] EWCA Civ 348 at [44].

4.22 By contrast, in *Wilkes*⁴¹ and *Gee*,⁴² the courts accepted that considerations such as the avoidability of the risk and “risk-benefit”, which involves an assessment of whether the risks in the use of a product are balanced against its potential benefits, including its utility,⁴³ could be taken into account as circumstances relevant to the assessment of defect. The court in both those cases considered that taking such matters into account did not transform the inquiry into one of fault, and emphasised the need to preserve the flexibility of the statutory test and avoid excluding relevant factors from the assessment of defect. These different approaches reflect broader uncertainty as to the role of negligence-based reasoning within the CPA, and contribute to inconsistency in the application of the defect test.

Uncertain application to modern and future products

4.23 The difficulties that the CPA’s definition of defect have generated, as described in the previous sections, are likely to become more pronounced in the context of products with digital elements. Digital products can be modified remotely, for example through updates, so that their performance is programmable and capable of change over time. In addition, many such technologies operate in opaque and technically complex ways that are not readily understood by the public. This may make it more difficult for litigants and the courts to identify the factors relevant to the level of safety to which persons are entitled, and to assess the evidential weight to be given to them.

4.24 The following scenarios, drawn from stakeholders’ feedback, the academic literature and practitioner commentary on the CPA and the 1985 Directive, illustrate some of the challenges that may arise when applying the test to products with digital elements which operate in opaque and technically complex ways.⁴⁴

- (1) A product that depends on a continuous internet connection may become dangerous where that connection is lost, whether due to service failure, a software update, or an interaction with another connected product. Identifying the cause of the loss of connection may be technically complex, particularly where multiple factors are involved. For example, a software update may create a compatibility issue with another connected product, causing the connection to fail.
- (2) A product incorporating AI may cause harm either because of a fault in its software or because of changes in user behaviour, without any clear means of identifying the underlying cause. For example, a product that monitors blood glucose levels, predicts future levels and automatically adjusts insulin delivery

⁴¹ See *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [81] to [89].

⁴² See *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [139] to [167].

⁴³ See *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [82].

⁴⁴ These examples are drawn from recitals 17, 18, 19, 35, 48, 50, 51 and 55 of the New Directive, stakeholder engagement and wider reading. See eg C Twigg-Flesner, in consultation with ELI Members and adopted by the ELI Council; see ELI Council, *Guiding Principles for Updating the Product Liability Directive for the Digital Age* (ELI Innovation Paper Series 2021) https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Guiding_Principles_for_Updating_the_PLD_for_the_Digital_Age.pdf.

in real time, may begin to make errors that cause harm for a number of reasons.

- (3) A medical product using nanotechnology to detect disease biomarkers may produce a false positive, leading to errors in diagnosis and treatment. Although the product may have a stated confidence level (whether high or more modest), it may be impossible to determine why the false positive occurred, particularly where the product cannot be extracted or its underlying software, algorithms or AI systems cannot be examined.
- (4) A product in respect of which the producer (or a third party acting on the producer's behalf) retains an ongoing ability to provide software updates and/or upgrades is supplied with a known risk, or it later becomes susceptible to a risk (for example, a cybersecurity attack). The risk persists and causes harm. It may be technically difficult to demonstrate whether and when, the producer or third party could have eliminated the risk through an update within their control but did not do so.⁴⁵

4.25 These challenges may be compounded by the limited guidance provided by regulatory frameworks and standards, whether because they have not kept pace with technological developments or because the products fall outside established regimes. In some cases, there may also be significant knowledge gaps between those responsible for developing such products and those tasked with regulating them.⁴⁶

Summing up the case for reform

- 4.26 While the current definition of defect offers flexibility, its breadth also creates significant uncertainty in its interpretation and application, particularly in technically sophisticated claims. This can require substantial time and resources to determine how the definition applies in a given case, contributing to inconsistency in outcomes and further uncertainty.
- 4.27 Some stakeholders told us during pre-consultation that the impact of this uncertainty is especially acute at the early stages of investigation of technically complex claims. Such cases are often regarded as high risk, given the need for expert evidence and analysis of defendant disclosure, which may be difficult and costly for claimants to obtain. This is compounded by a perception, whether justified or not, that challenging a defendant within its own area of expertise carries significant risk. This may in turn discourage some claims from being pursued.
- 4.28 That is not to say that technically complex claims are not being brought under the CPA. Stakeholders told us that such claims continue to be pursued, often with the support of litigation funding.⁴⁷ However, this does not undermine the concerns we

⁴⁵ Note these examples also serve to illustrate the difficult evidential challenges that may arise with such claims. This issue is dealt with further from para 4.98 onwards.

⁴⁶ See HM Treasury, *Pro-innovation Regulation of Technologies Review: Digital Technologies* (March 2023) https://assets.publishing.service.gov.uk/media/64118f0f8fa8f555779ab001/Pro-innovation_Regulation_of_Technologies_Review_-_Digital_Technologies_report.pdf.

⁴⁷ Stakeholders have told us that such funded cases often proceed after a positive outcome for claimants in relation to the same product in another jurisdiction, most commonly the US.

have identified. The fact that claims are still being brought does not mean that the definition of defect is operating with sufficient clarity, nor does it alter the reality that uncertainty surrounding defect may increase the risks and costs associated with pursuing such claims.

- 4.29 The role that uncertainty surrounding the definition of defect may play in increasing those risks and costs falls squarely within our Terms of Reference. As we explained in Chapter 1, the 1985 Directive and the CPA were enacted to establish a product liability regime capable of dealing effectively with technically complex claims.⁴⁸ It is therefore significant that uncertainty surrounding the definition of defect is a particular difficulty in such cases. The frequent practice of pleading negligence alongside CPA claims to mitigate that uncertainty further suggests that the current definition of defect is not fully achieving its intended purpose.
- 4.30 Although flexibility remains one of the definition's principal strengths, we do not consider that reducing the uncertainty associated with its application requires abandoning that flexibility. In our view, it is possible to retain an adaptable and future-proof definition while providing greater clarity as to its operation. As modern and emerging technologies generate a growing number of technically complex product liability claims, the need for that greater clarity is likely to become increasingly important. We therefore consider that reform is warranted. In the following section, we set out our provisional proposals for achieving that objective.

OUR PROVISIONAL PROPOSALS RELATING TO THE DEFINITION OF DEFECT

- 4.31 Our provisional proposals seek to retain the flexibility of the definition of defect while providing clearer and more structured guidance on its application, without undermining its ability to adapt to a wide and evolving range of products.
- 4.32 We provisionally propose that this is achieved in three ways.
- (1) By providing a non-exhaustive list of principles for assessing whether the safety of a product is not such as persons generally are entitled to expect.
 - (2) By supplementing and updating the list of circumstances that shall be considered by the courts when determining whether the safety of a product is not such as persons generally are entitled to expect.
 - (3) By clarifying and elaborating the stated purpose of the CPA.

Non-exhaustive list of principles for assessing the entitled level of safety

- 4.33 The CPA provides a single test for defect: whether the safety of the product is, or is not, such as persons generally are entitled to expect. While the test is clear, the process by which a court is to apply it is often far less so. As we have seen, differing approaches to its application can create uncertainty and difficulty.⁴⁹

⁴⁸ See para 1.14 onwards.

⁴⁹ See paras 4.8 to 4.30.

- 4.34 We provisionally propose the introduction of a non-exhaustive list of principles that may be relied upon when determining whether a product has met the entitled level of safety. These are drawn from principles and practices recognised in domestic case law, in other jurisdictions including Australia, France and Germany, and in the jurisprudence of the Court of Justice of the European Union (“CJEU”), where comparable product liability tests have been applied. They also draw from developments in the United States, where product liability has attracted an unprecedented amount of litigation and academic attention.⁵⁰ We propose to codify aspects of those principles and practices in order to provide parties with a structured framework, enhance legal certainty, and assist the courts in assessing the entitled level of safety.
- 4.35 In introducing these principles, we aim to establish a more predictable approach to determining defectiveness. This should give claimants a firmer analytical starting point when investigating a potential claim, enabling them to assess defect against the available evidence without needing to speculate how a court might apply the statutory test. More broadly, the proposed principles focus attention on the relevant considerations bearing on defectiveness, rather than on the prior question of how the statutory test should be applied. In turn, this should narrow the issues in dispute at an earlier stage, facilitate more targeted disclosure, and support the efficient resolution of claims, reducing litigation costs and delays.
- 4.36 We explain each of our proposed principles below, but first we discuss briefly how we think they should operate, and how they would interact with the existing basis for assessing defect.
- 4.37 We do not propose that these principles replace the overarching question of whether the safety of a product is not such as persons generally are entitled to expect. Retaining the statutory test preserves one of its principal strengths: adaptability. It provides an overarching test within which different approaches to assessing defect can develop over time, allowing the law to respond to the facts of any particular case, and to new products and risks, without the need for further legislative intervention. This flexibility is particularly important given the rapid emergence of technologies such as AI, whose capabilities and potential to cause harm are still developing and are not yet fully understood.
- 4.38 Rather, the proposed principles articulate and give more concrete expression to the test, guiding the court as to its application and providing claimants with a clearer route to establishing that a product's safety was not such as persons generally are entitled to expect. A claimant would be able to rely on one or more of the principles in support of that contention. Should a claimant successfully establish that a principle has been met, and should the court then be satisfied that the facts engage that principle, then the product will be defective.

Our proposed principles for establishing defect

- 4.39 We provisionally propose that the safety of a product is not such as persons are entitled to expect where:

⁵⁰ See D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) paras 1.32 to 1.48.

- (1) **Normal and reasonably expected use:** the product, when used in a manner that could be reasonably expected, caused damage beyond that which was ordinarily and inherently associated with such use.
- (2) **Provision of information and acceptance of risk:** the product carried a risk of damage, and insufficient information was provided to enable persons to make a decision as to whether to accept that risk.
- (3) **Instructions and warnings to avoid harm:** the product carried a risk of damage that could be avoided and adequate instructions or warnings as to how that risk might be avoided were not provided.
- (4) **Presentation of risk:** any warning or information provided in respect of a risk of damage posed by the product did not accurately and clearly convey the nature and seriousness of that risk, and/or downplayed or obscured it.
- (5) **Avoidability of risk at the time of supply:**⁵¹ the risk of damage posed by the product at the time of supply could reasonably (taking into account the cost and feasibility of doing so) have been eliminated or materially reduced, without compromising the product's benefits, and it was not.
- (6) **Relationship between risks and benefits:** the risk of damage posed by the product is not proportionate to, and justified by, the benefits which the product provides, unless that risk of damage is so well known by the public at large as to be considered socially acceptable.
- (7) **Comparison with available alternatives:** the product, at the time of supply, posed a materially greater risk of damage than other products then available which would have provided comparable or greater benefits.

4.40 We explain each principle in further detail below.

Principle 1: Normal and reasonably expected use

4.41 The first principle we propose is that the safety of a product is not such as persons are entitled to expect where the product, when used in a manner that can reasonably be expected, caused damage beyond that which was ordinarily and inherently associated with such use. In other words, the court would ask whether, having regard to the way the product is presented and the use that could reasonably be expected of it, the product posed an abnormal risk of harm. If it did, the product would not have provided the level of safety persons generally are entitled to expect and would therefore be defective.

4.42 This first principle draws on the opinion of the Advocate General, as endorsed by the CJEU in *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt - Die*

⁵¹ Eg, this may include an “unforgiveable vulnerability” where the challenges of implementing mitigations are deemed negligible. See NCSC, “A method to assess ‘forgivable’ vs ‘unforgivable’ vulnerabilities” (2025) <https://www.ncsc.gov.uk/report/a-method-to-assess-forgivable-vs-unforgivable-vulnerabilities>.

Gesundheitskasse (“*Boston Scientific*”),⁵² that a defect arises where a product poses an abnormal safety risk beyond the level of risk ordinarily associated with its use.⁵³ This principle is especially effective when it comes to assessing a product with an anomalous risk that makes it more dangerous than other products of the same type. It is less useful when the risk of harm is inherent in all products of the same type, and/or the heightened risk is subtle and/or difficult to assess.⁵⁴ We address this limitation through the further principles that we propose.

Principles 2, 3 and 4: Provision of information, warnings and the presentation of risk

- 4.43 Our second, third and fourth principles focus on the extent and adequacy of the information provided about a product.⁵⁵ Information plays an important role both in shaping the level of safety that persons generally are entitled to expect and in enabling them to understand, accept, avoid or mitigate risks associated with the product (by warning of risks, explaining their nature, or providing instructions on how they may be avoided). These principles complement our first principle by addressing situations in which a risk is not, in itself, abnormal, but the information provided in respect of that risk is inadequate.
- 4.44 **Provision of information and acceptance of risk:** Under our second principle, the safety of a product is not such as persons are entitled to expect where it carried a risk of damage, and insufficient information was provided to enable persons to make a decision as to whether to accept that risk. The principle draws from the recognition in *A v National Blood Authority* (No 1) that individuals are free to expose themselves to and accept risks, provided that they have been given sufficient information to allow them to make an informed choice.⁵⁶ This principle also draws on cases such as *Wilkes*⁵⁷ and *Gee*,⁵⁸ and views expressed in commentary,⁵⁹ all of which recognise that the information provided about a risk can qualify expectations about a product’s safety.
- 4.45 **Instructions and warnings to avoid harm:** Our third proposed principle is that the safety of a product is not such as persons are entitled to expect where the product carried an avoidable risk of damage, and adequate instructions or warnings as to how that risk might be avoided were not provided. This is derived from the Court of

⁵² Joined Cases C-503/13 and C-504/13 *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt – Die Gesundheitskasse* [2015] EU:C:2015:148. This is also an articulation and extension of CPA, s 3(2)(a) to (b). See D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 10.77-10.78.

⁵³ Joined Cases C-503/13 and C-504/13 *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt – Die Gesundheitskasse* [2015] EU:C:2015:148 at [AG30] and [40].

⁵⁴ See Rajneri Karageorgevich Eleonora, “The notion of product defectiveness in the case law of European countries” (2015) 67 *International Journal of Comparative Law* 185, 195.

⁵⁵ They are drawn from CPA, s 3(2)(a) and the caselaw mentioned in the main text.

⁵⁶ See *A v National Blood Authority* (No 1) [2001] 3 All ER 289 at [31(28)].

⁵⁷ See *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [34], [102] to [108] and [127] to [130].

⁵⁸ See *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [169], [213] to [216], [219] and [244].

⁵⁹ See eg D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) paras [10.70] to [10.76], [12.01] to [12.06], and [12.16] to [12.18].

Appeal's decision in *Abouzaid*, where the court held that a product was defective because it created a risk of injury and failed to provide an adequate warning about that risk, including how it could be avoided. In reaching its decision, the court recognised that the consequences of the risk were relevant to the assessment of the adequacy of the information provided about it.⁶⁰ It also draws on the High Court's decision in *Palmer v Palmer* which reached a similar conclusion,⁶¹ as well as *Worsley v Tambrands Ltd*, where having assessed the product's instructions leaflet, the court held that the information provided was adequate and consequently the product not defective.⁶² The significance of instructions and warnings to avoid harm in the assessment of defect is also recognised in the literature.⁶³

4.46 What amounts to insufficient information or inadequate instructions or warnings will depend on the circumstances of each case and should be assessed by the court.

4.47 **Presentation of risk:** under the fourth principle, the safety of a product would not be such as persons are entitled to expect where any warning or information provided in respect of a risk of damage posed by the product did not accurately and clearly convey the nature and seriousness of that risk, and/or downplayed or obscured it.⁶⁴ This principle is drawn from the consideration of defect in *A v National Blood Authority* (No 1)⁶⁵ and *Wilkes*.⁶⁶ It also draws from the Australian decision in *Gill v Ethicon Sàrl* (No 5), where the court recognised that society is entitled to frank information which is not misleading about the risk of harm posed by a product.⁶⁷ It could be said that this principle is inherent within principles two and three, but we consider that there is value in a distinct principle which focuses on the need for accuracy and transparency in any information provided.

Principles 5, 6 and 7: "Risk-utility analysis"

4.48 Elements reflected in our proposed principles 5, 6 and 7 have collectively been described in the case law and literature as forming the "risk-utility analysis"⁶⁸,

⁶⁰ See *Abouzaid v Mothercare (UK) Ltd* [2001] CLY 920 at [27].

⁶¹ See *Palmer v Palmer* [2006] EWHC 1284 (QB), [2006] All ER (D) 86 (Jun) at [51] to [54].

⁶² See *Worsley v Tambrands Ltd* [2000] PIQR P95.

⁶³ See for example Jean-Sébastien Borghetti, "Taking EU Product Liability Law Seriously: How Can the Product Liability Directive Effectively Contribute to Consumer Protection?" (2023) 1 French Journal of Legal Policy 141. See also Lord Griffiths, P De Val and RJ Dormer, "Developments in English Product Liability Law: A Comparison with the American System" (1987-1988) 62 *Tulane Law Review* 353, 375 to 378.

⁶⁴ This is drawn from CPA, s 3(2)(a) and cases such as *A v National Blood Authority* (No 1) [2001] 3 All ER 289 at [31] and [56]; see also *Gill v Ethicon Sàrl* (No 5) [2019] FCA 1905 (Federal Court of Australia). See also D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) paras 12.74 and 12.75.

⁶⁵ See *A v National Blood Authority* (No 1) [2001] 3 All ER 289 at [31(28)].

⁶⁶ See *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [34], [102] to [108] and [127] to [130].

⁶⁷ See *Gill v Ethicon Sàrl* (No 5) [2019] FCA 1905 (Federal Court of Australia) at [3273] to [3346], [3368] and [3376].

⁶⁸ See Lord Griffiths, P De Val and RJ Dormer, "Developments in English Product Liability Law: A Comparison with the American System" (1987-1988) 62 *Tulane Law Review* 353, 381. See also *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [13] to [14], [67] and [82] to [89]. See also *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [144] to [167].

sometimes also called the “cost-benefits” analysis. In this context, risk-utility is an umbrella term for a number of different approaches to assessing defect. Broadly speaking, these approaches examine: whether a product’s risks exceed its social or economic utility, whether a safer design could reasonably have been adopted (taking account of the cost and feasibility of doing so), and whether alternative products fulfilling the same function without posing comparable risks were available.⁶⁹

- 4.49 Views on the value and appropriateness of risk-utility analysis in assessing defect have been divided. Critics argue that it introduces a negligence-based inquiry that favours defendants and is inconsistent with the approach adopted by the 1985 Directive, and therefore the CPA, under which liability does not depend on fault. Supporters, by contrast, contend that the broad definition of defect under the 1985 Directive permits such an analysis, and that such a balancing exercise is inherent within the assessment of the safety of a product.⁷⁰
- 4.50 **Avoidability of risk at the time of supply:** This proposed principle would establish that the safety of a product would not be such as persons are entitled to expect where, at the time of supply, the risk of damage posed by the product could reasonably (taking into account the cost and feasibility of doing so) have been eliminated or materially reduced, without compromising the product’s benefits, and it was not. This principle is drawn from observations in *A v National Blood Authority* (No 1), *Wilkes* and *Gee* on the relevance of avoidability to the assessment of defect;⁷¹ that is, the ease with and extent to which a risk can be avoided. It also draws on approaches developed in the United States in design defect cases, where generally, a design defect exists where a product is not reasonably safe because a reasonable alternative design was available.⁷² Similar reasoning can also be found in Germany⁷³ and in

⁶⁹ See Lord Griffiths, P De Val and RJ Dormer, “Developments in English Product Liability Law: A Comparison with the American System” (1987-1988) 62 *Tulane Law Review* 353, 381.

⁷⁰ See for example Lord Griffiths, P De Val and RJ Dormer, “Developments in English Product Liability Law: A Comparison with the American System” (1987-1988) 62 *Tulane Law Review* 353, 375 to 382; see also D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) at [10.28] to [10.56]; and see also J-S Borghetti, M Santos Esteves da Silva, D Fairgrieve, P García, A Keirse, P Machnikowski, E Rajneri, C Schmon, V Ulbeck, V Vallone, H Zech, “Relevance of Risk-benefit for Assessing Defectiveness of a Product: A Comparative Study of Thirteen European Legal Systems” (2021) 29 *European Review of Private Law* 91 at [2] to [3] and [86] to [100].

⁷¹ See *A v National Blood Authority* (No 1) [2001] 3 All ER 289 at [32] and [56]; See *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [81] to [89]; and *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [144] to [167].

⁷² See the Restatement of the Law, Third, Torts: Product Liability (1998) at section 2(b) which defines a design defect as: “A product ... is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design ... and the omission of the alternative design renders the product not reasonably safe”. For a more detailed description of the approaches developed in the US, see D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) at [11.10] to [11.47].

⁷³ See J-S Borghetti, M Santos Esteves da Silva, D Fairgrieve, P García, A Keirse, P Machnikowski, E Rajneri, C Schmon, V Ulbeck, V Vallone, H Zech, “Relevance of Risk-benefit for Assessing Defectiveness of a Product: A Comparative Study of Thirteen European Legal Systems” (2021) 29 *European Review of Private Law* 91 at [39].

France, where the courts have at times effectively applied a reasonable alternative design standard when assessing defectiveness.⁷⁴

- 4.51 We recognise that views on the relevance of avoidability to the assessment of defect are sharply divided. It has been accepted that it risks focusing attention on the conduct of the designer or producer rather than the characteristics of the product itself,⁷⁵ and thereby importing a negligence-style inquiry with similar evidential challenges for claimants.⁷⁶ However, we consider that avoidability serves an important function in the assessment of defect. In particular, it provides a principled basis for assessing defect where other principles are of no assistance because, for example, the risk is not inherently abnormal (Principle 1) and adequate information about the risk has been provided (Principles 2, 3 and 4).⁷⁷
- 4.52 **Relationship between risks and benefits:** The sixth principle is that the safety of a product would not be such that persons are entitled to expect where the risk of damage posed by the product is not proportionate to, and justified by, the benefits which the product provides, unless that risk of damage is so well known by the public at large as to be considered socially acceptable. This is informed by the decisions in *Wilkes* and *Gee*, in which the courts recognised that both the risks and benefits of a product may be relevant to the assessment of defect.⁷⁸ It also draws from developments in other jurisdictions. French courts have recognised the relevance of risk-benefit analysis in assessing the defectiveness of pharmaceutical products,⁷⁹ while, in the United States, risk-benefit analysis is used to determine defect in design

⁷⁴ See J-S Borghetti, M Santos Esteves da Silva, D Fairgrieve, P García, A Keirse, P Machnikowski, E Rajneri, C Schmon, V Ulbeck, V Vallone, H Zech, “Relevance of Risk-benefit for Assessing Defectiveness of a Product: A Comparative Study of Thirteen European Legal Systems” (2021) 29 *European Review of Private Law* 91 at [31].

⁷⁵ See *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [85].

⁷⁶ See for example D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) at [10.42].

⁷⁷ This point applies equally to our proposed principles 6 and 7.

⁷⁸ See *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [13] to [15], [65] to [67], [82], [111(ii)]; and *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [144] to [167].

⁷⁹ See J-S Borghetti, “Comment caractériser le défaut de sécurité d’un médicament?” (Cass. 1re civ., 26 septembre 2018, n° 17-21271), JCP G 2018, 1337 (“How can the lack of safety of a medication be characterized?” (Cass. 1st civ., 26 September 2018, no. 17-21.271)); see also J-S Borghetti, M Santos Esteves da Silva, D Fairgrieve, P García, A Keirse, P Machnikowski, E Rajneri, C Schmon, V Ulbeck, V Vallone, H Zech, “Relevance of Risk-benefit for Assessing Defectiveness of a Product: A Comparative Study of Thirteen European Legal Systems” (2021) 29 *European Review of Private Law* 91 at [31] to [37].

defect cases involving prescription drugs and medical devices.⁸⁰ Support for such an approach can also be found in the academic literature.⁸¹

- 4.53 One limitation of this test is that it may be difficult for a claimant to rely on it to establish defect where the product has already been subject to, and passed, a formal risk-benefit assessment, particularly where such an assessment is a precondition of the product being placed on the market. For example, in *Wilkes*, the allegedly defective product was subject to the Medical Devices Regulations 2002⁸² and could not be marketed unless it satisfied certain regulatory requirements. Those requirements included that any risks which may be associated with the product's intended use be acceptable when weighed against the benefits to the patient and compatible with a high level of protection of health and safety.⁸³ Such a requirement does not, however, necessarily mean that a claim on this basis would fail. The prior assessment and approval may have been based on incomplete or inaccurate information and therefore open to challenge. In any event, the court would not be bound to reach the same conclusion as the prior assessment and could come to a different view on the facts before it.
- 4.54 We recognise that this test could give rise to unintended consequences. In particular, some products that are widely consumed for their recreational or hedonistic benefits, for example tobacco and alcohol, might be regarded as posing risks that outweigh their benefits, even where those benefits are taken into account. To address that concern, our proposed test includes a qualification excluding risks that are sufficiently well known and widely accepted by the public to be regarded as socially acceptable. In our view, that qualification mitigates the risk of such outcomes.
- 4.55 **Comparison with available alternatives:** The final principle is that the safety of a product would not be such as persons are entitled to expect where, at the time of supply, it posed a materially greater risk of damage than other products then available which would have provided comparable or greater benefits.⁸⁴ This principle draws from the decision in *Gee*, where the court accepted that a product could be established as having a defect in it where it had a materially higher risk than a comparator product.⁸⁵ Similarly, in *XYZ v Schering Health Care Ltd* ("*XYZ*"),⁸⁶ it was

⁸⁰ See James A Henderson Jr and Aaron D Twerski, "Drug Designs are Different" (2001) 111 *Yale Law Journal* 151; see also J-S Borghetti, "Comment caractériser le défaut de sécurité d'un médicament?" (Cass. 1re civ., 26 septembre 2018, n° 17-21271), JCP G 2018, 1337 ("How can the lack of safety of a medication be characterized?") (Cass. 1st civ., 26 September 2018, no. 17-21.271); see also J-S Borghetti, M Santos Esteves da Silva, D Fairgrieve, P García, A Keirse, P Machnikowski, E Rajneri, C Schmon, V Ulbeck, V Vallone, H Zech, "Relevance of Risk-benefit for Assessing Defectiveness of a Product: A Comparative Study of Thirteen European Legal Systems" (2021) 29 *European Review of Private Law* 91 at [3].

⁸¹ See for example J Stapleton, "Products Liability Reform—Real or Illusory?" (1986) 6 *Oxford Journal of Legal Studies* 392, 405, as referenced in D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 10.42.

⁸² SI 2002 No 618.

⁸³ See for example *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [10] to [13].

⁸⁴ This is drawn from cases such as *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [494] to [500].

⁸⁵ See *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [136] to [138] and [494] to [500].

⁸⁶ [2002] EWHC 1420 (QB).

accepted that a product would be defective if it carried a risk that was more than twice that carried by the comparator product.⁸⁷

- 4.56 We recognise that this principle would not be helpful for claimants when insufficient data exists to compare confidently a product's performance to a comparator, or where no suitable comparator exists. Nevertheless, there will be circumstances in which this is not an issue. The proposal we set out below, concerning a new mechanism to aid claimants who face exceptional evidential difficulties proving defect,⁸⁸ would also mitigate the difficulties claimants face.

Final observations on the proposed principles

- 4.57 Our proposed principles are intended to provide the parties and the court with greater clarity as to how to approach the assessment of defect. However, there may be concerns that rigid application of the principles could lead to unwanted outcomes. For example, there could be a concern that Principle 2 ("provision of information and acceptance of risk") requires producers to provide information about every possible risk. Nevertheless, we consider it extremely unlikely that a court would find that inadequate information was provided about the existence of a risk when that risk is well known amongst the public at large and the consequences of it arising are small.
- 4.58 In addition, we have taken care in ensuring that where such risks might arise, we have proposed qualifiers within the proposed new principles that will allow the courts to avoid such outcomes. For example, Principle 3 ("instructions and warnings to avoid harm") provides that instructions and warnings must be "adequate" and Principle 5 ("avoidability of risk at the time of supply") provides that it is whether the risk of damage posed by the product could "reasonably" have been eliminated or materially reduced, without compromising the product's benefits. These qualifiers recognise that the assessment of defect cannot be reduced to a mechanical exercise and must remain sensitive to the facts of the individual case. They also ensure that the principles retain sufficient flexibility for courts to assess defects in a practical and proportionate way.
- 4.59 We have also considered whether more is required to maintain the overall balance of interests which the regime seeks to achieve, and we are interested in consultees views and ask an exploratory consultation question on this issue. In particular, we ask whether, where one of our proposed principles is satisfied, it should nevertheless be open to a defendant to show that the product was not defective. If so, what should a defendant be required to establish?

Comparison with the New Directive

- 4.60 The New Directive does not include any provisions equivalent to the principles we propose. The most comparable change to the EU product liability regime is the New Directive's expansion of its definition of defect, under which a product is defective if it fails to provide the safety that is "required under [European] Union or national law".⁸⁹ Some stakeholders have raised concerns about how the EU's expanded definition will

⁸⁷ See also *XYZ v Schering Health Care Ltd* [2002] EWHC 1420 (QB), (2003) 70 BMLR 88 at [20].

⁸⁸ See para 4.135 onwards (including consultation question 34 at para 4.139).

⁸⁹ New Directive, art 7(1).

operate in practice. There are concerns that a technical breach of legal requirements could lead to a finding of defect, even where the breach is unrelated to the harm the product is alleged to have caused. In our view such a provision in the CPA is unnecessary because, where a breach of law relates to the risk of harm complained of, it will already no doubt be considered by the court as a circumstance relevant to the determination of defect.⁹⁰

⁹⁰ See *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [97] and *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [176].

Consultation questions

Consultation Question 28.

- 4.61 We provisionally propose that the CPA should include a non-exhaustive list of principles for assessing whether a product has met the entitled level of safety. The principles would operate as alternative bases for establishing the entitled level of safety, meaning that a product would be defective if any one of the principles is satisfied.
- 4.62 The principles are that the safety of a product is not such as persons are entitled to expect where:
- (1) the product, when used in a manner that could be reasonably expected, caused damage beyond that which was ordinarily and inherently associated with such use;
 - (2) the product carried a risk of damage, and insufficient information was provided to enable persons to make a decision as to whether to accept that risk;
 - (3) the product carried a risk of damage that could be avoided and adequate instructions or warnings as to how that risk might be avoided were not provided;
 - (4) any warning or information provided in respect of a risk of damage posed by the product did not accurately and clearly convey the nature and seriousness of that risk, and/or downplayed or obscured it;
 - (5) the risk of damage posed by the product at the time of supply could reasonably (taking into account the cost and feasibility of doing so) have been eliminated or materially reduced, without compromising the product's benefits and, it was not;
 - (6) the risk of damage posed by the product is not proportionate to, and justified by, the benefits which the product provides, unless that risk of damage is so well known by the public at large as to be considered socially acceptable; or
 - (7) the product, at the time of supply, posed a materially greater risk of damage than other products then available which would have provided comparable or greater benefits.

Do consultees agree?

Consultation Question 29.

- 4.63 Where one of our proposed principles is satisfied, should it nevertheless be open to a defendant to show that the product met the entitled level of safety? If so, what should a defendant be required to establish?

Additional “relevant circumstances”

4.64 To maintain the flexibility of the definition of defect, we propose preserving the court’s ability to assess defect by reference to all relevant circumstances. In our view, this remains essential to ensure the regime can adapt to emerging technologies and novel risks, and continue to operate effectively over time despite the complexity of such claims. At the same time, we consider that this evaluative exercise would benefit from greater focus and direction. We therefore provisionally propose supplementing the framework by updating existing circumstances and specifying additional circumstances to be taken into account when determining whether a product is defective. The updated and additional circumstances we propose consist of the following.

- (1) The manner in which, and the purposes for which, the product has been marketed and presented; its get-up,⁹¹ labelling, packaging and the use of any mark in relation to the product; the characteristics of the product, including its design, technical features and composition; and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product, including in relation to its assembly, installation, use and maintenance.⁹²
- (2) The specific needs of the group of users for whose use the product is intended.⁹³
- (3) In the case of a product whose very purpose, or a primary purpose, is to prevent damage, any failure of the product to fulfil that purpose.⁹⁴
- (4) The product’s ability to acquire new features or continue learning after it has been supplied by the producer to another.⁹⁵
- (5) The reasonably foreseeable effect on the product of other products that can be expected to be used together with the product, including by means of interconnection.⁹⁶
- (6) The relevant product cybersecurity guidance, standards, codes of practice and legal requirements.⁹⁷

⁹¹ Get-up is a term frequently used to refer to a product’s appearance, particularly in the context of passing off claims. See for example *Reckitt & Colman Products Ltd v Borden Inc* [1990] 1 WLR 491 (HL); and Sir J Mellor, D Llewelyn, T Moody-Stuart, D Keeling, I Berkeley and A Chantrielle, *Kerly’s Law of Trade Marks and Trade Names* (17th ed 2023) paras 20-162 to 20-165.

⁹² Drawn from the existing text of CPA, s 3(2)(a) and the New Directive, art 7(2)(a).

⁹³ Drawn from the New Directive, art 7(2)(h).

⁹⁴ Drawn from the New Directive, art 7(2)(i).

⁹⁵ Drawn from the New Directive, art 7(2)(c).

⁹⁶ Drawn from the New Directive, art 7(2)(d).

⁹⁷ Drawn from the New Directive, art 7(2)(f).

- (7) The time when the product was supplied by its producer to another or, where the producer retains control after supply, the time when that control ceased.⁹⁸
- (8) Where the producer retains control after supply, the extent to which that control could have been, and was, exercised by the producer, including the degree to which the product could be modified by update, upgrade or otherwise to address a risk of harm posed by the product.⁹⁹

4.65 These circumstances are drawn from stakeholder input, the broader literature on product liability, and comparative analysis, including of developments in the New Directive. They are intended to reduce uncertainty by clarifying how courts should approach the level of safety to which persons are entitled. In particular, they will provide more certainty in claims based on a failure to prevent harm, and in claims involving modern and emerging technologies, which present new and distinctive challenges that were not envisaged when the CPA was enacted. Digital technologies may depend on inputs received remotely from other products through the internet and as part of a broader cloud infrastructure. Increased interconnectivity has heightened exposure to cybersecurity risks, and the growing use of AI expands the capacity for products to learn and change over time. In addition, producers often retain ongoing control, enabling them to update or modify products remotely, and thereby both introduce and address risks post supply.

Where a defect is due to a lack of software update or upgrade

- 4.66 Because of its novelty, we look in detail here at the circumstance listed at (8) above. As we have emphasised previously,¹⁰⁰ modern technology means that some products remain subject to ongoing control by their producers after supply, whereby the producer (or a third party authorised by them) can provide software updates or upgrades to these products. Such updates and upgrades can have a direct bearing on the safety of a product. They might, for example, be necessary to maintain the operational health of the product, such as to address and resolve software bugs or errors which can accumulate over time and impact a product's performance. Updates or upgrades may also be needed to address or prevent software conflicts, or to maintain the effectiveness of a product's cybersecurity. These examples could lead to a situation where a lack of software updates or upgrades causes the product to be, or become, unsafe, and potentially defective for the purposes of the CPA.
- 4.67 A flaw or vulnerability that is capable of being fixed by software upgrade could be present in the product when it is supplied, or the risk or vulnerability may arise at a later point (for example, because a bad actor develops malware which can penetrate the product's cybersecurity, or even because the producer's own software update introduces a flaw). The mere presence of a flaw or vulnerability does not necessarily render the product "defective"; rather, whether and when a product is or becomes defective is a question of fact and law for the court. However, in relevant cases, a court may consider, as part of its assessment of defect, whether or when the public

⁹⁸ This proposal is drawn from CPA, s 3(2)(c), updated to reflect that producers may retain control over a product after it has been supplied.

⁹⁹ This proposal is drawn from the New Directive, recitals 17 to 19, 32, 50 and art. 4(5).

¹⁰⁰ See para 4.23 above.

were entitled to expect that the producer would have issued an update to address the vulnerability, such that a lack of update renders the product defective. These matters will be part of the court's consideration of "all the circumstances" when it assesses whether the product met the entitled level of safety.¹⁰¹

- 4.68 Our proposals do not create any freestanding obligation to provide software updates to prevent such a risk materialising. We consider that this would risk imposing an onerous obligation on suppliers and could discourage companies from developing software updates. Rather, we propose that whether updates or upgrades have been provided should, in certain cases, be relevant to the assessment of whether the product is defective. For example, the claimant might rely on the fact that a producer had made representations about the quality of the cybersecurity of its product and that there were standards that required the product to be provided with adequate cybersecurity updates or upgrades for a certain period post-supply.¹⁰² The claimant may then argue that these inform the level of safety that the public were entitled to and then seek to evidence that in the particular instance the product fell below the entitled level of safety. Although compliance with regulations would not be determinative either way, we would expect the court to take these into account in determining the standard of safety that persons can expect and, in particular for our purposes, whether a software update should have been provided.
- 4.69 Relatedly, under the current law, defectiveness is assessed by reference to the safety expectations that existed at the time of supply.¹⁰³ Under our proposals, however, a relevant circumstance in assessing defectiveness, where the producer retains control of the product after supply, is the point at which that control ceased (see paragraph 4.64(7)). This means that, in an appropriate case, a court may take into account changes in safety expectations during the period of control when determining whether the product was defective.
- 4.70 In considering such issues, the court could also refer to other factors such as those listed at paragraph 4.64 above:
- (1) the information/marketing provided with and about the product (which in such a case may include information about how long it will be supported), its technical features etc, and any public statements about withdrawal of support;
 - (2) relevant product cybersecurity guidance, standards, codes of practice and legal requirements; and
 - (3) the time when the product was supplied by its producer or, where the producer retains control after supply, the time at which the product left that control.

¹⁰¹ CPA, s 3(2).

¹⁰² For software-backed or connected products, there are specific regulations which might be relevant, for example, the Product Security and Telecommunications Infrastructure (Security Requirements for Relevant Connectable Products) Regulations 2023, SI 2023 No 1007. Although not about product safety standards directly, they require suppliers regulated under them to communicate a specific support period for certain products. These regulations might therefore be relevant to a court considering whether the producer could reasonably have been expected to provide an update to address an issue.

¹⁰³ CPA, s 3(2)(c).

4.71 Importantly, this proposal does not impose any requirements on a claimant in a case concerning a connected product to consider the availability of software updates. As in any other case, the claimant need only establish that the product was defective. They are not required to prove how the defect arose or what caused the product to become defective. Nor do they need to show that a particular software update or other “fix” was available and could have been implemented. A claimant may simply argue that the product contained a fault, weakness or vulnerability that rendered it defective, without seeking to demonstrate when or how that fault emerged, or whether it could have been addressed through a software update. The court would then determine whether the product was defective by considering all the relevant circumstances, in accordance with both the current law and our proposed approach.¹⁰⁴

4.72 If the product is found to be defective according to the court’s assessment, the analysis turns to the defences. Two defences are particularly relevant to the current issue:

- (1) that the defect was not present in the product at the time of supply;¹⁰⁵ and
- (2) the development risks defence (that is, that the state of scientific and technical knowledge at the time of supply was not such as to allow the defect to be discovered).¹⁰⁶

4.73 We discuss these defences, and our proposals to take account of connected products, in Chapter 6.

A product should not be regarded as defective solely because another product which was supplied or modified later is safer

4.74 The CPA sets out the circumstances that shall be considered when determining defect at section 3(2), the last limb of which provides that there is no requirement to infer that a product is defective only because a product which is supplied later is safer. To preserve the operation of this part in a world of digital products, where a product’s safety can be modified and improved after it has been supplied, we propose clarifying that a product should not be regarded as defective solely because another product which was supplied or modified later is safer. This provisional proposal addresses paragraph 1.4(5) of the Terms of Reference in Appendix 1.¹⁰⁷

¹⁰⁴ In doing so, the court could take into account initiatives such as the National Cyber Security Centre’s work on “forgivable” and “unforgivable” vulnerabilities as evidence of what the public might be entitled to expect; see National Cyber Security Centre, “A method to assess ‘forgivable’ vs ‘unforgivable’ vulnerabilities” (2025) <https://www.ncsc.gov.uk/report/a-method-to-assess-forgivable-vs-unforgivable-vulnerabilities>.

¹⁰⁵ CPA, s 4(1)(d).

¹⁰⁶ CPA, s 4(1)(e).

¹⁰⁷ Para 1.4(5) of our Terms of Reference refers to the term “State of the Art” defence. It is used in this context to refer to the last sentence of s 3(2) of the CPA, which provides that nothing in this section “shall require a defect to be inferred from the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question”.

Comparison with the New Directive

- 4.75 Our provisional proposals broadly reflect the updates made in the New Directive to the list of relevant circumstances at article 7(2).¹⁰⁸ One notable difference, however, concerns “any recall of the product or any other relevant intervention relating to product safety”.¹⁰⁹ We consider that including such a provision in the CPA is unnecessary. Where a recall or similar intervention relates to the risk of harm complained of, it would in any event be considered a relevant circumstance by the court. Adding a specific provision would therefore offer little practical benefit.
- 4.76 In a departure from the previous regime, and in a manner broadly consistent with our proposals, the New Directive permits claims to be brought where a lack of software update or upgrades causes a product to become defective. There are two key elements of the New Directive which permit such claims to be brought under it. Firstly, where a manufacturer retains control over a product after it has been supplied, the period during which defect is assessed is extended beyond the point of supply, so that defect may be assessed during the period the producer retained control of the product.¹¹⁰ Secondly, the New Directive amends the operation of two defences (that the defect arises post supply¹¹¹ and the development risks defence¹¹²) so that they will no longer act as barriers to such claims where they arise post supply. On this second issue, our proposals for reform of the defences in Chapter 6 are broadly aligned with the New Directive.

¹⁰⁸ See the New Directive, art 7(2)(c) to (f) and (h) to (i).

¹⁰⁹ See the New Directive, art 7(2)(g).

¹¹⁰ New Directive, art 7(2)(e).

¹¹¹ New Directive, art 11(1)(c) as it operates with art 11(2).

¹¹² New Directive, art 11(1)(e).

Consultation questions

Consultation Question 30.

4.77 We provisionally propose that the following updated and additional circumstances should be added to the circumstances that are relevant to the determination of what persons generally are entitled to expect in relation to a product under the CPA.

- (1) The manner in which, and the purposes for which, the product has been marketed and presented; its get-up, labelling, packaging and the use of any mark in relation to the product; the characteristics of the product, including its design, technical features and composition; and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product, including in relation to its assembly, installation, use and maintenance.
- (2) The specific needs of the group of users for whose use the product is intended.
- (3) In the case of a product whose very purpose, or a primary purpose, is to prevent damage, any failure of the product to fulfil that purpose.
- (4) The product's ability to acquire new features or continue learning after it has been supplied by the producer to another.
- (5) The reasonably foreseeable effect on the product of other products that can be expected to be used together with the product, including by means of inter-connection.
- (6) The relevant product cybersecurity guidance, standards, codes of practice and legal requirements.
- (7) The time when the product was supplied by its producer to another or, where the producer retains control after supply, the time when that control ceased.
- (8) Where the producer retains control after supply, the extent to which that control could have been, and was, exercised by the producer, including the degree to which the product could be modified by update, upgrade or otherwise to address a risk of harm posed by the product.

Do consultees agree?

Consultation Question 31.

4.78 We provisionally propose that a product should not be regarded as defective under the CPA solely because another product which was supplied or modified later is safer.

Do consultees agree?

Expanding and clarifying the stated purpose of the CPA

- 4.79 The CPA does not contain an express statement of purpose. Instead, its purpose is currently framed simply as implementing the 1985 Directive and requiring the Act to be interpreted accordingly.¹¹³ Divergent views as to the meaning and implications of that purpose have contributed to uncertainty and inconsistency in the interpretation of defect. Clarifying the purpose of the regime would assist courts and parties in interpreting and applying its provisions more consistently. In particular, an express statement of purpose would provide a clear anchor for judicial reasoning, supporting the development of the law while ensuring that interpretations of the CPA remain aligned with its overarching objectives.
- 4.80 In our view, that purpose should be articulated through three core propositions: first, that the CPA establishes a regime of liability for defective products designed to secure a fair apportionment of the risks inherent in products; second, that it achieves this by allocating those risks, so far as appropriate, to those who create, control, or benefit from them, and by ensuring that persons who suffer damage can obtain effective compensation without needing to prove fault; and third, that the regime seeks, where consistent with that fair allocation of risk, to mitigate evidential difficulties that might otherwise undermine its operation.
- 4.81 These three propositions derive from the recitals to the 1985 Directive and the European Commission's explanations about its purpose during its development. Together, they provide the clearest account of the 1985 Directive's purpose and, by extension, that of the CPA.
- 4.82 In particular, the second recital identifies liability without fault as the mechanism to achieve a fair apportionment of the risks inherent in modern technological production:
- Liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production.¹¹⁴
- 4.83 The fair allocation of risk was achieved by combining strict liability with safeguards for businesses, including specific defences not to inhibit innovation and productivity. From this we derive our first proposition: that the CPA establishes a regime of liability for defective products designed to secure a fair apportionment of the risks inherent in products.
- 4.84 The materials accompanying the 1985 Directive also explain how that objective is to be achieved. As noted in Chapter 1, the European Commission justified strict liability on two principal grounds. The first reason related to loss allocation: under such a regime, the cost of harm caused by a defective product is initially borne by the manufacturer and then distributed across consumers through pricing, so that the loss is shared among consumers rather than falling on a single individual.¹¹⁵ The second

¹¹³ CPA, s 1(1) provides: "This Part was enacted for the purpose of making such provision as was necessary in order to comply with the product liability Directive and shall be construed accordingly".

¹¹⁴ 1985 Directive, recital 2.

¹¹⁵ Lord Griffiths, P De Val and RJ Dormer, "Developments in English Product Liability Law: A Comparison with the American System" (1988) 62 *Tulane Law Review* 353, 370 to 372.

reason was grounded in fairness to consumers. It is unjust for consumers to bear their own losses where they are unable to prove negligence, since establishing negligence is often “extremely difficult or even impossible”,¹¹⁶ particularly because consumers are rarely in a position to prove fault.¹¹⁷

- 4.85 These rationales underpin our second proposition: that the regime allocates risks, so far as appropriate, to those who create, control or benefit from them, while ensuring that persons who suffer damage can obtain compensation without proving fault.
- 4.86 They also support our third proposition. Strict liability was introduced to address the evidential difficulties faced by claimants in establishing fault. As discussed earlier in this chapter,¹¹⁸ similar difficulties continue to arise under the CPA, particularly in technically complex claims. In our view, the regime should therefore seek, where consistent with a fair allocation of risk, to mitigate evidential difficulties that might otherwise undermine its operation.
- 4.87 Taken together, these propositions aim to provide a coherent statement of the CPA's original purpose, which remains valid. They are firmly rooted in the rationale of the 1985 Directive, while providing a principled framework for the interpretation and development of the regime.
- 4.88 The New Directive does not include an express statement of purpose, but achieves a similar effect through its recitals, including those recognising that liability without fault supports a fair apportionment of risk in modern technological production.¹¹⁹ In contrast with the 1985 Directive, the New Directive also makes express reference to evidential difficulties that can undermine the performance of the regime and the need to address them.¹²⁰ In this respect, our provisional proposal is broadly aligned with the New Directive.

¹¹⁶ Lord Griffiths, P De Val and RJ Dormer, “Developments in English Product Liability Law: A Comparison with the American System” (1988) 62 *Tulane Law Review* 353, 370 to 372.

¹¹⁷ Lord Griffiths, P De Val and RJ Dormer, “Developments in English Product Liability Law: A Comparison with the American System” (1988) 62 *Tulane Law Review* 353, 370 to 372.

¹¹⁸ See paras 4.11 onwards.

¹¹⁹ See recital 2 of both the 1985 Directive and New Directive.

¹²⁰ See the New Directive, recitals 3, 42, 46, 47 and 48.

Consultation question

Consultation Question 32.

4.89 We provisionally propose that the purpose of the product liability regime under the CPA should be updated and its purpose articulated through the following three core propositions.

- (1) That the CPA establishes a regime of liability for defective products designed to secure a fair apportionment of the risks inherent in products.
- (2) That it achieves this by allocating those risks, so far as appropriate, to those who create, control, or benefit from them, and by ensuring that persons who suffer damage can obtain effective compensation without needing to prove fault.
- (3) That the regime seeks, where consistent with that fair allocation of risk, to mitigate evidential difficulties that might otherwise undermine its operation.

Do consultees agree?

THE CAUSAL LINK BETWEEN DEFECT AND DAMAGE

- 4.90 Section 2(1) of the CPA provides that liability arises where damage is caused, wholly or partly, by a defect in a product. It is therefore not sufficient for a claimant to establish that a product is defective; they must also prove, on the balance of probabilities,¹²¹ that the defect caused the damage complained of.
- 4.91 Neither the CPA nor the 1985 Directive prescribe how causation is to be determined. This is left to the courts, subject to the requirement that the approach adopted does not undermine the strict liability nature of the regime and does not disturb the balance of interests established by the 1985 Directive.¹²²
- 4.92 The courts have indicated that, depending on the circumstances, classic rules of causation may apply, and have also suggested that causation may be established where the defect materially contributed to the damage,¹²³ or where it more than doubled the risk of harm.¹²⁴ They have also addressed cases involving competing explanations for the cause of the damage.¹²⁵ In *Ide v ATB Sales Ltd*, the Court of

¹²¹ 1985 Directive, art 4. See *Ayannuga v One Shot Products Ltd* [2022] EWHC 590 (QB) at [17] and [23].

¹²² *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [179]. See also Case-621/15 *W v Sanofi Pasteur* EU:C:2017:484 at [25].

¹²³ D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 17.25; *Bonnington Castings v Wardlaw* [1956] AC 613; *Holmes v Poeton Holdings Ltd* [2023] EWCA Civ 1377, [2024] KB 521 at [60]. There is also the issue of material contribution to the risk of damage: see A Tettenborn and M Jones, *Clerk & Lindsell on Torts* (24th ed 2023) para 2-49.

¹²⁴ See *XYZ v Schering Health Care Ltd* [2002] EWHC 1420 (QB), (2003) 70 BMLR 88 at [21].

¹²⁵ D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 17.33; *AB v John Wyeth & Brother Ltd* [1997] PIQR P385, 395.

Appeal held that where two competing theories are both probable causes, rejecting one may justify, as a matter of logic, accepting the other as the cause.¹²⁶ More generally, the court emphasised that, in the context of a claim under the CPA, the inquiry is directed to whether the damage was caused by the defect,¹²⁷ rather than identifying the precise mechanism by which the defect arose.¹²⁸

- 4.93 In our view, a central feature of a strict liability regime is that the claimant bears the burden of proving that the defect caused the damage. This is necessary to secure a fair apportionment of risk and to ensure that liability does not extend beyond its proper scope, for example to cases where a product causes damage for reasons unconnected with its defectiveness.
- 4.94 Against that background, two principal issues arise in the law governing causation under the CPA: the balance between flexibility and the resulting uncertainty in the court's approach, and the practical difficulty of establishing that the defect caused the damage. We address the first issue immediately below and address the second in the following section ("proving defect and causation").

The balance between flexibility and uncertainty of approach to causation

- 4.95 Mirroring our analysis of defect, the flexibility afforded to courts in determining causation under the CPA is both a strength and a potential weakness. It enables the regime to operate across a wide and varied range of products, allowing courts to tailor their approach to the facts of each case.¹²⁹ The issues arising in a straightforward malfunction, for example, differ markedly from those in claims involving elevated background risks, multiple contributing causes, or allegedly deficient warnings. This flexibility is also essential to ensure that the regime responds effectively to new and emerging technologies without the constraints of an overly prescriptive framework.
- 4.96 At the same time, that flexibility creates uncertainty, particularly in technically complex claims. The relative scarcity of case law in such contexts limits the development of clear principles, leaving parties uncertain as to how the courts will approach the issue. As with defect, this uncertainty increases litigation risk and may deter the pursuit of complex claims, precisely those for which the regime is intended to facilitate a fair apportionment of risk.
- 4.97 Recognising both the strengths and limitations of the current approach to causation, our provisional proposals seek to provide greater focus and direction to the parties and the courts, while preserving necessary flexibility. In our view, this is best achieved through the introduction of an express statement of the CPA's purpose as set out in paragraphs 4.79 to 4.87. That statement would guide courts in determining causation, anchor their reasoning in the regime's underlying objectives and promote a consistent

¹²⁶ *Ide v ATB Sales Ltd* [2008] EWCA Civ 424, [2008] PIQR P13 at [6].

¹²⁷ *Ide v ATB Sales Ltd* [2008] EWCA Civ 424, [2008] PIQR P13 at [7].

¹²⁸ *Ide v ATB Sales Ltd* [2008] EWCA Civ 424, [2008] PIQR P13 at [19] to [21]; *Baker v KTM Sportmotorcycle UK Ltd* [2017] EWCA Civ 378 at [35]; *Nash v Volkswagen Financial Services (UK) Ltd* [2023] EWHC 2326 (KB) at [53].

¹²⁹ There is evidence of the courts exercising the flexibility offered to them in challenging cases already, for example *Ide v ATB Sales Ltd* [2008] EWCA Civ 424, [2008] PIQR P13 and *Baker v KTM Sportmotorcycle UK Ltd* [2017] EWCA Civ 378.

and principled approach. It would articulate our third core proposition (see paragraph 4.80), namely that the regime should seek to mitigate evidential difficulties that might otherwise undermine its operation, where doing so is consistent with a fair allocation of risk. It would therefore provide a legal basis for, and encourage, the court to adopt a flexible approach to causation where it is necessary to prevent the regime's aims from being undermined.

PROVING DEFECT AND CAUSATION

Proving defect

- 4.98 The claimant bears the burden of proving defect under the CPA.¹³⁰ As the CPA does not specify how that burden is to be discharged, this is left to the courts, which have held that to prove defect, a claimant is not required to establish why the product failed or the cause of the lack of safety that constitutes the defect.¹³¹
- 4.99 In practice, however, and as noted from paragraph 4.11 above, proving defect can be challenging in technically complex claims. The application of the defect test has at times led claimants to rely on arguments resembling negligence, particularly where there is genuine scope for disagreement as to the level of safety persons are entitled to expect. As noted in Chapter 1, negligence was historically regarded as an unsatisfactory basis for product liability claims, because claimants are often poorly placed to challenge a defendant's evidence. Such claims can require extensive technical investigation and competing expert evidence, increasing the length, cost and unpredictability of proceedings.¹³²
- 4.100 The case law indicates that these difficulties persist under the CPA in technically complex claims, particularly where reasonable views may differ as to the level of safety which persons are generally entitled to expect. In such claims, parties frequently rely on extensive expert evidence, sometimes across multiple disciplines, to address matters such as product design, performance, and statistical data.¹³³ Some stakeholders during pre-consultation expressed concerns about the limited availability and high cost of suitable experts, the difficulties associated with analysing technical disclosure, and the practical challenges of scrutinising evidence produced by manufacturers with greater technical knowledge and resources.

¹³⁰ See *A v National Blood Authority* (No 1) [2001] 3 All ER 289 at [46]; *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [54]; *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [98]; *Hastings v Finsbury Orthopaedics Ltd* [2022] UKSC 19, [2023] 1 All ER 885 at [15]. See also the 1985 Directive, art 4.

¹³¹ See *Ide v ATB Sales Ltd* [2008] EWCA Civ 424, [2008] PIQR P13 from [11] to [22]; *Baker v KTM Sportmotorcycle UK Ltd* [2017] EWCA Civ 378 at [35]; and D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) paras 10.12 to 10.13.

¹³² Liability for Defective Products (1977) Law Com No 82; Scot Law Com No 45, para 36.

¹³³ *Sam B v McDonald's Restaurants Ltd* [2002] EWHC 490 (QB); *XYZ v Schering Health Care Ltd* [2002] EWHC 1420 (QB), (2003) 70 BMLR 88; *Palmer v Palmer* [2006] EWHC 1284 (QB); *Love v Halfords Ltd* [2014] EWHC 1057 (QB); *Hufford v Samsung Electronics (UK) Ltd* [2014] EWHC 2956 (TCC); *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627; *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347; *Busby v Berkshire Bed Co Ltd* [2018] EWHC 2976 (QB); and *Al-Iqra v DSG Retail Ltd* [2019] EWHC 429 (QB), [2019] PIQR P11.

- 4.101 Similar concerns have been identified for many years in the literature. Reports dating back to 1998¹³⁴ and 2003¹³⁵ noted the obstacles claimants face in obtaining the evidence, specialist knowledge and financial resources required to establish defect, particularly in technically sophisticated cases. More recent assessments, including the explanatory memorandum to the New Directive, suggest that these challenges persist, particularly in relation to products such as pharmaceuticals, smart technologies and AI-enabled systems.¹³⁶
- 4.102 In our view, these issues support the case for reform. Where the ability to investigate and prove a claim in technically complex cases is heavily influenced by disparities in access to evidence, technical knowledge and resources, the regime risks falling short of its objective of securing a fair apportionment of risk. That concern is likely to become more acute as products increasingly incorporate digital and AI-driven technologies. At the same time, reform must be carefully calibrated so as not to impose disproportionate burdens on defendants or disturb the balance of interests underpinning the regime.¹³⁷ This is particularly important given that a degree of complexity is inevitable in technically sophisticated claims.

Proving causation

- 4.103 Many of the same practical difficulties arise in relation to causation. Establishing that an alleged defect caused the damage complained of often requires extensive expert evidence, particularly where both the nature of the defect and its causal relationship to the damage may be uncertain and open to competing expert views.¹³⁸ In practice, claimants may also face obstacles in identifying, instructing and funding suitable experts, and in obtaining the technical material needed to advance their case.
- 4.104 Some stakeholders told us that these problems are often aggravated by disparities in access to information and specialist knowledge between the parties, with defendants typically having greater access to both. Particular concerns were raised in relation to increased-risk claims, where evidential requirements such as showing a more than doubling of risk may be difficult to satisfy in the absence of reliable data or specialist expertise. Similar concerns have been identified in evaluations of the 1985

¹³⁴ European Parliament Committee on the Environment, Public Health and Consumer Protection, *Report on the proposal for a European Parliament and Council Directive amending 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* (COM(97)0478 - C4-0503/97 - 97/0244(COD)) (doc A4–0326/98, September 1998), para 4.1; as referenced in D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 7.40.

¹³⁵ J Meltzer, R Freeman and S Thomson, *Product Liability in the European Union: A report for the European Commission* (MARKT/2001/11/D, 2003) p 47; as referenced in D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 7.52.

¹³⁶ See European Commission, “Proposal for a Directive of the European Parliament and of the Council on liability for defective products” (COM(2022) 495 final) pp 1 to 2, https://eur-lex.europa.eu/resource.html?uri=cellar:b9a6a6fe-3ff4-11ed-92ed-01aa75ed71a1.0001.02/DOC_1&format=PDF.

¹³⁷ *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [179]. See also *Case-621/15 W v Sanofi Pasteur* EU:C:2017:484 at [25].

¹³⁸ See *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627 at [109] to [113]; see also *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [21] to [63], [259] to [268] and [471] to [483].

Directive,¹³⁹ and the explanatory materials to the New Directive, particularly in technically complex cases involving pharmaceuticals, smart technologies or AI systems.¹⁴⁰

4.105 As with defect, we consider that these difficulties support the case for reform, provided that the balance of interests underpinning the regime is maintained.¹⁴¹

Potential reform: rebuttable presumptions of fact

4.106 In our view, the starting point in a strict liability regime should be that the claimant bears the burden of proving defect and causation, thereby maintaining a fair balance of interests. However, the difficulties claimants may face in discharging that burden, particularly in technically complex claims, require a targeted response.

Our potential approach

4.107 One potential approach to addressing the difficulties claimants can face proving defect and causation, on which we are seeking consultees' views, is the introduction of rebuttable presumptions in relation to specific and discrete factual issues relevant to proving defect and/or causation. Such presumptions would arise when the claimant can show that an asymmetry of information exists in the defendant's favour and that it would be fair for the defendant to bear the burden of rebutting the presumption.

4.108 One illustration of how this approach might operate is a case in which an alleged weakness in a metal component is said to have originated in the manufacturing process. Where the claimant can show that the product was used reasonably and maintained in accordance with the manufacturer's instructions, yet nevertheless fractured prematurely, it may be fair to presume that the weakness originated during manufacture. The defendant is likely to be better placed to explain how the weakness arose and whether it was attributable to the manufacturing process. Another example of such a presumption may arise in relation to whether a medical device was properly fitted. In such a case, the manufacturer is likely to possess significantly greater knowledge of the product, its operation and the instructions governing its insertion.

4.109 Taken together with our proposed statement of purpose, which would encourage a flexible approach to the evidential difficulties discussed above (see paragraph 4.80), this approach would provide a proportionate means of addressing obstacles that might otherwise undermine the effective operation of the regime.

4.110 We recognise that courts may already draw inferences, that is to say common sense conclusions, when determining the facts of a case,¹⁴² and a number of stakeholders have emphasised that point to us during pre-consultation. Our approach would go

¹³⁹ D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 17.118; European Commission, "Fifth Report on the Application of Directive 85/374/EEC" (COM(2018) 246 final) p 5 to 6, eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0246. See also J Meltzer, R Freeman and S Thomson, *Product Liability in the European Union: A report for the European Commission* (MARKT/2001/11/D, 2003) p 47; as referenced in D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 7.52.

¹⁴⁰ See the Explanatory Note of the New Directive, p 1.

¹⁴¹ See *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB), [2018] Med LR 347 at [179]. See also *Case-621/15 W v Sanofi Pasteur* EU:C:2017:484 at [25].

¹⁴² See *Ide v ATB Sales Ltd* [2008] EWCA Civ 424, [2008] PIQR P13 at [21] and [42] to [43].

further by introducing rebuttable presumptions in relation to particular factual issues where there is a significant imbalance in access to relevant information and expertise.

The approach of the New Directive

4.111 Our potential approach would be more balanced and proportionate than that adopted by the New Directive. The New Directive is similarly motivated by concerns about the difficulties claimants may face in proving defect and causation in technically complex claims, but it goes further by permitting claimants to rely upon rebuttable presumptions of both defect and causation themselves, rather than rebuttable presumptions relating to specific facts.

- (1) A claimant may rely upon a rebuttable presumption of defectiveness where the claimant faces excessive difficulties, particularly due to technical or scientific complexity, in proving defect and can show that defect is likely.¹⁴³
- (2) A claimant may rely upon a rebuttable presumption of causation where the claimant faces excessive difficulties, particularly because of technical or scientific complexity, in proving causation and can show that a causal link is likely.¹⁴⁴

4.112 Stakeholders' views on these provisions are divided. Some support their adoption as a means of overcoming the evidential difficulties faced by claimants, particularly in technically complex cases involving emerging technologies, where they can reduce the impact caused by asymmetries in access to information and expert evidence. Others, however, regard them as among the most controversial aspects of the New Directive, on the basis that they place the burden of proving that a product is not defective upon the defendant, thereby, in their view, undermining the fair apportionment of risk and increasing liability in a way that may reduce funds available for innovation. Others consider the provisions unnecessary, on the basis that the courts are already able to deal with such difficulties in a way that preserves a fair balance of interests.

4.113 Criticism also focuses on the breadth and uncertainty of the qualifying conditions for triggering a presumption. In particular, stakeholders question the requirement to show "excessive difficulties", arguing that it sets too low a threshold and may, in practice, apply in most complex cases.

4.114 In our view, it is unnecessary to adopt so extensive an approach. We prefer a more balanced approach, that is limited to introducing presumptions relating to discrete factual issues relevant to defect and/or causation, rather than the complete determination of defect and/or causation as an issue. This approach would ensure that it remains a fundamental feature of the regime that the claimant must prove defect and the causal link between defect and damage. Importantly, a presumption

¹⁴³ New Directive, art 10(4). A claimant may also rely upon a rebuttable presumption of defect where the product does not comply with mandatory safety requirements intended to prevent the type of damage suffered, or where the damage results from an obvious malfunction during normal or reasonably foreseeable use: New Directive, art 10(2).

¹⁴⁴ New Directive, art 10(4). A claimant may also rely upon a rebuttable presumption of causation where the product is shown to be defective and the damage is of a kind typically consistent with that defect: New Directive, art 10(3).

would arise only where it is fair for the defendant to bear the burden in relation to the issue concerned. That should reduce concerns that the provision would unduly favour claimants or distort the overall balance of the regime.

4.115 As explained at paragraph 4.112 above, we acknowledge that stakeholders may hold strong views on the use of presumptions, and that particular care is required in their use so as not to disturb the balance of interests under the regime. We have kept this in mind in the development of the potential approach we have described, which in our view strikes the correct balance between the parties. Nevertheless, we acknowledge that our potential approach may in practice introduce additional complexity to proceedings. For example, it may require a court to decide whether presumptions arise in favour of multiple different facts and then keep track of and manage which party bears the burden of proving each fact. Given the potential for added complexity, it is necessary to proceed with caution. Rather than making a provisional proposal, we ask an exploratory question to determine whether consultees consider that this approach would assist claimants in overcoming the difficulties they face in proving defect and causation, without unfairly disturbing the balance of interests in favour of claimants. Consultees' responses will allow us to reflect and, if necessary, improve our potential approach before making a recommendation on the issue when we publish our final report.

Consultation question

Consultation Question 33.

4.116 We invite consultees' views on introducing a rebuttable presumption of a fact relevant to defect and/or causation when a claimant can show that there is an asymmetry of information in the defendant's favour and that it would be fair for the defendant to bear the burden of rebutting the presumption. We are particularly interested in consultees' views on:

- (1) its impact on the balance of interests between claimants and defendants;
- (2) any complexity it might create during litigation;
- (3) its impact on the evidential difficulties faced by claimants; and
- (4) any evidential difficulties it may cause for defendants.

WHETHER LIABILITY BASED UPON DEFECT PROVIDES A FAIR APPORTIONMENT OF RISK

4.117 A central theme of our analysis is that the uncertainty and evidential difficulties associated with establishing defect and causation can, in some cases, undermine the effectiveness of the regime and impede a fair apportionment of risk. In developing our provisional proposals, we have sought to address those shortcomings while maintaining an appropriate balance between promoting business confidence and innovation, and ensuring effective protection for consumers.

- 4.118 Even so, some difficulties will remain in a narrow and limited category of cases. These are cases where the available evidence is insufficient to determine whether a product is defective, not merely because the claimant has failed to discharge the burden of proof, but because the relevant evidence does not exist or cannot be obtained.
- 4.119 One such case may arise where a product carries a known risk of harm that has been adequately warned against, yet there may be grounds to suspect that the true level of risk is greater than that presented. Establishing this may require statistical evidence that is unavailable where the product has been used for only a short period, or withdrawn from the market following the introduction of a superior alternative, leaving insufficient data from which reliable conclusions can be drawn. In such circumstances, the court may lack a sufficient evidential basis on which to determine whether the product is defective.
- 4.120 Similar difficulties may arise with emerging technologies, where relevant performance data is unavailable or inaccessible. For instance, incidents of psychiatric injury associated with AI systems may go unreported, or it may be impossible to determine whether a risk could have been eliminated through alternative design where the operation of the system is not transparent.
- 4.121 The result of this evidential gap is that the claim fails, with the loss falling entirely on the claimant. We do not consider this outcome fair where the defendant has created and profited from the risk, particularly where the absence of evidence is attributable, at least in part, to the defendant's conduct, for example where a product is withdrawn before sufficient data could emerge.
- 4.122 In our view, this position is unsatisfactory and warrants reform. Moreover, such cases are likely to become more frequent as increasingly complex and opaque technologies, including AI systems, become more widespread and their operation more difficult to understand and explain.¹⁴⁵
- 4.123 Given that these evidential difficulties are exceptional, we consider that they require a correspondingly exceptional response. We have identified three possible responses, each with their own respective strengths and weaknesses.

- (1) A rebuttable presumption of defect.
- (2) A mechanism for sharing the burden of risk between the parties.
- (3) A hybrid model under which the defendant may elect either to rebut a presumption of defect or to accept a share of the risk.

4.124 We explore each of these approaches in turn below.

A rebuttable presumption of defect

4.125 The first possible response is to introduce a presumption of defect. This would apply where the claimant can satisfy the court that it is arguable that the product is defective; the alleged facts upon which the case is based are not fanciful; they face

¹⁴⁵ Law Commission, "AI and the Law – a Discussion Paper" (2025) <https://lawcom.gov.uk/publication/artificial-intelligence-and-the-law-a-discussion-paper/>.

exceptional evidential difficulties due to the limited availability of evidence; there is an asymmetry of access to relevant information and expertise in favour of the defendant; and the risk of harm in question is not so widely known as to be socially accepted. Where these criteria are met, a presumption of defect would arise which the defendant may choose to seek to rebut. If they fail to do so, defect is established.

- 4.126 This approach would alleviate evidential difficulties in exceptional circumstances while maintaining a fair apportionment of risk. This is because it requires a credible basis for suspecting defect, recognises the claimant faces an exceptional evidential disadvantage, and places the burden on the party better able to address it. The threshold for triggering the presumption is deliberately high, reducing the risk that it would be used as a matter of course. Even where a defendant fails to rebut the presumption, they may still avoid liability by establishing one of the available defences.
- 4.127 This approach would share some features with the presumption of defect under the New Directive, and views on it may be similarly divided. However, it would only apply in the exceptional and limited circumstances where the relevant evidence does not exist or cannot be obtained, and not in all cases of evidential difficulties.
- 4.128 A potential concern is that, in some cases, defendants may face similar evidential constraints as claimants and therefore be unable to rebut the presumption as a result. It may be argued that imposing the consequences of the evidential gap on the defendant only is unfair. We consider that concern in the following section.

Sharing the burden of risk

- 4.129 We recognise that a potential weakness of the first approach is that, in some cases, a defendant may wish to challenge a presumption of defect, but faces similar evidential difficulties to the claimant, being unable to discharge the burden because the necessary evidence does not exist or is not accessible. It may be argued, not unreasonably, that such an outcome is unfair for the defendant. In these exceptional circumstances, a possible solution is to share responsibility for the consequences of the harm.
- 4.130 As with the first potential approach, the mechanism should be subject to strict thresholds. The claimant must satisfy the court that it is arguable that the product is defective, that the case rests on non-fanciful facts, that they face exceptional evidential difficulties due to limited evidence, and that the risk of harm is not so widely known as to be socially accepted. Where these criteria are met the alleged defect would be treated as established, and the defendant would be able to rely on any available defences to escape liability.
- 4.131 If no defence is established, and subject to proof of damage and causation, the court would proceed to apportion the risk between the parties. The starting point would be equal sharing, equivalent to an award of 50% of the damages that would have been recoverable had defect been established.
- 4.132 In determining the appropriate award, the court would take into account (1) the extent to which an ordinary consumer in the claimant's position could reasonably have understood and accepted the risk, recognising that even adequate warnings may not

secure genuine understanding, and (2) the extent to which the claimant's own conduct contributed to the harm. The award may be adjusted upwards or downwards accordingly.

- 4.133 In our view, this second approach addresses the principal concern raised by the first, that the consequences of the evidential gap could unfairly be imposed solely on the defendant, while maintaining a fair apportionment of risk. It reflects that there is a credible basis for attributing the risk to the defendant, that the claimant faces exceptional evidential barriers, and that, in the absence of a determination on defect, the consequences of the risk should be shared. The structured criteria for apportionment also reduce uncertainty and limit the likelihood that the mechanism would be used routinely.
- 4.134 A further advantage of this approach is that it would avoid the time and cost associated with litigating defect, enabling the parties and the court to focus on the assessment of damages. We recognise, however, that some may regard this as a significant drawback. In particular, there may be cases in which a defendant would wish to establish that the product is not defective and thereby avoid liability altogether. Under this approach, the defendant would not have that opportunity. While that concern is not without force, it is one that our third and final approach seeks to address.

A presumption of defect and sharing of the burden of risk

- 4.135 An alternative approach involves combining the previous two approaches, retaining their benefits while addressing their respective limitations.
- 4.136 As before, the mechanism would be subject to strict thresholds. The claimant would have to satisfy the court that it is arguable that the product is defective, that the facts relied on are not fanciful, that they face exceptional evidential difficulties due to the limited availability of evidence, and that the risk of harm is not so widely known as to be socially accepted.
- 4.137 If these criteria are met, the defendant would then elect either to assume the burden of rebutting the presumption of defect or accept the alleged defect. If the defendant elects to accept the alleged defect, and provided that the claimant establishes damage and causation and no defence applies, the court would apportion the risk between the parties in line with our second approach above. If the defendant instead elects to rebut the presumption of defect and fails to discharge that burden, defect is treated as established and, subject to any available defence, damages are assessed as they would be if defect had been proved. This remains subject to the claimant establishing damage and causation, with defect treated as that alleged. No sharing mechanism applies where the defendant elects to rebut the presumption, reflecting that the defendant has chosen to pursue a more complex route requiring additional cost and court resources.
- 4.138 In our view, this proposal strikes a fair balance. It alleviates the exceptional evidential difficulties faced by claimants while preserving a meaningful degree of choice for defendants as to how they respond. Reflecting upon the strengths and weaknesses of the three approaches, our provisional view is that this last approach is the most advantageous. By encapsulating the strengths of the two alternative proposals, and

addressing their identified weaknesses, it offers the most effective means of providing a mechanism that fairly addresses liability where a claimant faces exceptional evidential difficulties proving defect. We therefore provisionally propose that the product liability regime should include such a mechanism.

Consultation question

Consultation Question 34.

4.139 We provisionally propose that the defendant(s) must either elect to accept the alleged defect or assume the burden of rebutting a presumption of defect where the claimant can show that:

- (1) it is arguable that the product is defective;
- (2) the facts relied on are not fanciful;
- (3) they face exceptional evidential difficulties due to the limited availability of evidence; and
- (4) the risk of harm is not so widely known as to be socially accepted.

4.140 Where the defendant elects to accept the alleged defect (and provided that the claimant establishes damage and causation and that no defence is established), we provisionally propose that the court should apportion the risk between the parties on the basis of the following.

- (1) The starting point would be equal sharing, equivalent to an award of 50% of the damages that would have been recoverable had defect been established.
- (2) In determining the appropriate award, the court would take into account:
 - (a) the extent to which an ordinary consumer in the claimant's position could reasonably have understood and accepted the risk, recognising that even adequate warnings may not secure genuine understanding; and
 - (b) the extent to which the claimant's own conduct contributed to the harm.

The award may be adjusted upwards or downwards accordingly.

4.141 Where the defendant elects to assume the burden of rebutting a presumption of defect and fails to discharge that burden (and provided that the claimant establishes damage and causation and that no defence is established), we provisionally propose that damages should be assessed as they would be if defect had been proven.

Do consultees agree?

Chapter 5: Damage giving rise to liability

INTRODUCTION

- 5.1 This chapter addresses the types of damage that give rise to liability under the Consumer Protection Act 1987 (“CPA”). Our Terms of Reference require us to consider whether the product liability regime’s definition of “damage” needs to be reformed to account for the types of harm caused by emerging technologies and in particular, whether it should extend to data destruction or corruption.¹
- 5.2 Against this background, the chapter proceeds in two parts. It focuses, first, on personal injury, including what constitutes an actionable injury, whether (and if so, what) control mechanisms should apply to claims for psychiatric harm, and whether and in what circumstances “indirect victims” may recover for such harm. It then addresses property damage, including recovery for damage to mixed-use (private and professional) property, data loss and destruction, economic loss relating to the defective product itself, and the continued appropriateness of the £275 minimum value threshold for property damage claims.
- 5.3 These issues reflect developments in case law, advances in technology, and stakeholders’ feedback, which together expose gaps and uncertainties in the current law. In particular, existing categories of harm such as psychiatric injury, as applied in new technological contexts, alongside emerging harms such as data-related loss, prompt reconsideration of whether the current framework remains appropriate.

OVERVIEW OF DAMAGE GIVING RISE TO LIABILITY UNDER THE CPA

- 5.4 Under the CPA, a producer or other liable party is strictly liable for any damage caused wholly or partly by a defect in a product.² “Damage” for these purposes means death, personal injury, and loss of or damage to property (including land),³ although it excludes damage to the defective product itself or to any item supplied with or forming part of it.⁴
- 5.5 Section 45(1) of the CPA defines “personal injury” broadly to include any disease and any impairment of a person’s physical or mental condition. By contrast, liability for property damage arises only where the property is of a type ordinarily intended for private use and was intended by the claimant mainly for such private purposes at the time of the loss.⁵ No award is made where the value of the property damage does not exceed £275.⁶

¹ See para 1.4(7) of our Terms of Reference at Appendix 1.

² CPA, s 2(1).

³ CPA, s 5(1).

⁴ CPA, s 5(2).

⁵ CPA, s 5(3).

⁶ CPA, s 5(4).

PERSONAL INJURY

5.6 As noted above, the CPA defines “personal injury” as “any disease and any other impairment of a person’s physical or mental condition”.⁷ The breadth of this definition gives rise to a number of unresolved questions, which have yet to be considered by the courts. In particular:

- (1) whether the definition of personal injury under the CPA extends to *any* change to the claimant’s condition, without any requirement of materiality, or whether it imposes a minimum threshold of material harm before liability arises. In other words, what constitutes an actionable personal injury under the CPA?;
- (2) whether losses incurred in taking necessary steps to avert a risk of personal injury posed by a defective product constitute compensable damage under the CPA;
- (3) whether any control mechanisms should apply to claims for “psychiatric” personal injury and, if so, what those mechanisms should be; and
- (4) whether indirect victims should be able to claim for psychiatric harm and, if so, subject to what conditions.

5.7 We address each of these issues in further detail below.

What constitutes an actionable personal injury under the CPA?

5.8 The breadth of the definition of “personal injury” in section 45(1), coupled with the absence of judicial consideration of the provision, raises an important question: does liability arise in respect of any impairment of a person’s physical or mental condition, or alternatively, should a minimum threshold of material harm be satisfied? This issue is particularly relevant in cases where a defect causes a physiological change in the claimant, but that change produces no symptoms, and causes no immediate harm, even though it indicates an increased risk of harm in the future, which may or may not materialise.

5.9 Such issues have been considered in negligence, where the case law has established that not every physical change constitutes actionable damage. In *Grieves v FT Everard & Sons Ltd*,⁸ the House of Lords made clear that the claimant must have suffered material damage,⁹ meaning that they are appreciably worse off physically or economically,¹⁰ and there is no right of action for mere nominal harm.¹¹ Accordingly, a condition that is entirely symptomless, cannot be perceived, and has no material impact¹² or adverse consequences, does not constitute actionable damage.¹³ On that

⁷ CPA, s 45(1).

⁸ *Grieves v FT Everard & Sons Ltd* [2007] UKHL 39, [2008] 1 AC 281.

⁹ *Grieves v FT Everard & Sons Ltd* [2007] UKHL 39, [2008] 1 AC 281 at [87].

¹⁰ *Grieves v FT Everard & Sons Ltd* [2007] UKHL 39, [2008] 1 AC 281 at [7].

¹¹ M Armitage, *Charlesworth & Percy on Negligence* (16th ed 2025) para 1-29.

¹² *Grieves v FT Everard & Sons Ltd* [2007] UKHL 39, [2008] 1 AC 281 at [1] and [2].

¹³ *Grieves v FT Everard & Sons Ltd* [2007] UKHL 39, [2008] 1 AC 281 at [47].

basis, pleural plaques, being no more than a marker of exposure to asbestos fibres and causing no impairment, were held not to be actionable.¹⁴

- 5.10 By contrast, in *Dryden v Johnson Matthey plc*,¹⁵ a physiological change which required claimants to alter their lifestyle to avoid risk of an allergic reaction was held to be actionable. The claimants' sensitisation to platinum limited their ability to work and affected their bodily functioning.¹⁶ In those circumstances, they were materially worse off, and the injury fell within the scope of actionable damage.
- 5.11 These authorities indicate that a minimum threshold of material harm is required: the claimant must be appreciably worse off as a result of the injury. In our view, it would be both appropriate and uncontroversial for this threshold to apply under the CPA. It is well-established, familiar to the courts, and provides a coherent limit on the scope of compensable damage. Alignment with negligence is also desirable as a matter of policy: the claimant suffers the same loss regardless of how it arises, and divergence in thresholds would distort claims behaviour. A significantly higher threshold under the CPA would encourage claimants to rely on negligence in parallel, complicating proceedings. Conversely, a lower threshold may incite inappropriate reliance on the CPA. In short, equivalent harm should attract equivalent treatment, irrespective of the legal basis on which the claim is brought.
- 5.12 We therefore provisionally propose that the CPA adopt the same position as that developed in the context of negligence claims, such that a minimum threshold of material harm must be met before a claim for personal injury may be brought.
- 5.13 We note that no such threshold is provided for by the New Directive. Our understanding is that to the extent that any such threshold exists, it is a matter for the national courts, subject to the requirement that in the application of their national rules, they do not undermine the regime established by the New Directive.¹⁷

Consultation Question 35.

- 5.14 We provisionally propose that the CPA should require that a minimum threshold of material harm be met before a claim for personal injury may be brought.

Do consultees agree?

Necessary measures taken to avert a risk of future personal injury

- 5.15 A further issue is whether pecuniary and non-pecuniary losses incurred in taking necessary steps to avert a risk of personal injury posed by a defective product can constitute compensable damage under the CPA, or whether liability is confined to injury that results from the materialisation of the risk of harm posed by the defective product. This issue arises where, in response to such a risk, a claimant takes

¹⁴ *Grieves v FT Everard & Sons Ltd* [2007] UKHL 39, [2008] 1 AC 281 at [1] and [2].

¹⁵ [2018] UKSC 18, [2019] AC 403.

¹⁶ *Dryden v Johnson Matthey plc* [2018] UKSC 18, [2019] AC 403 at [47].

¹⁷ New Directive, art 6; Case C-203/99 *Veedfald v Århus Amtskommune* [2001] ECR I-03569 at [27].

necessary preventative measures before any injury occurs. The question is therefore whether those losses may properly be characterised as “personal injury” within section 45(1), or whether they fall outside the statutory concept on the basis that no injury has yet been sustained.

- 5.16 The issue can be illustrated by the facts of *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt - Die Gesundheitskasse* (“*Boston Scientific*”).¹⁸ In that German case, a defect in certain implantable medical devices, namely pacemakers and implantable cardioverter defibrillators, created a risk of serious harm. To avert that risk, replacement devices were provided free of charge by the manufacturers, and the claim concerned the costs of the medical procedures required to remove and replace them. The question was whether such costs fell within the 1985 Directive’s concept of “damage caused by death or by personal injuries”.¹⁹ The CJEU adopted a broad interpretation, holding that the concept of damage includes “all that is necessary to eliminate harmful consequences and to restore the level of safety which a person is entitled to expect”.²⁰ On that basis, the costs of the preventive medical procedure to replace the defective devices could be compensable.
- 5.17 On a plain reading of section 45(1), these losses appear to fall outside the statutory definition. The provision is framed in terms that presuppose the occurrence of injury, referring to “any disease and any other impairment of a person’s physical or mental condition”. It therefore contemplates harm that has materialised in a concrete and present form, rather than losses incurred to prevent such harm from arising.
- 5.18 There is currently no domestic authority dealing with this question. In our view, however, the underlying principle set out by the CJEU should be followed and expressly set in the legislation. The public should not be expected to run a risk of personal injury where necessary measures are available to avert that risk, nor denied compensation for the losses incurred in taking such measures. On the contrary, the law should incentivise proactive behaviour that prevents harm from occurring.
- 5.19 Requiring claimants to wait until injury materialises before recovering damages would be inconsistent with the consumer²¹ protection aims of the product liability regime.²² Such an approach would effectively require individuals to expose themselves to avoidable harm in order to fall within the scope of the regime.²³
- 5.20 Recognising that compensation can be obtained for such losses would also promote product safety. It would incentivise manufacturers to address risks at an earlier stage,

¹⁸ Joined Cases C-503/13 and C-504/13 [2015] EU:C:2015:148.

¹⁹ Joined Cases C-503/13 and C-504/13 *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt – Die Gesundheitskasse* [2015] EU:C:2015:148 at [14] to [24].

²⁰ Joined Cases C-503/13 and C-504/13 *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt – Die Gesundheitskasse* [2015] EU:C:2015:148 at [49].

²¹ In this consultation paper, we use “consumer” to refer to persons who use, interact with, or may be affected by a product. It extends beyond consumers who have purchased a product, encompassing all natural persons who suffer harm as a result of a defective product.

²² 1985 Directive, recitals 4, 5, 8, 9 and 11. See also para 1.23 above.

²³ Opinion of Advocate General Bot, Joined Cases C-503/13 and C-504/13 *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt – Die Gesundheitskasse* [2014] EU:C:2014:2306 at [68].

rather than relying on the fact that liability arises only once injury occurs. Moreover, allowing recovery for the costs of necessary preventative measures may, in practice, reduce overall liability exposure. Where risks are not mitigated and injury does materialise, the resulting harm may give rise to claims of significantly greater value. Compensating necessary preventative measures therefore supports a fair apportionment of risk between claimants and defendants.

- 5.21 On that basis, we provisionally propose that, where measures are necessary to avert a risk of personal injury posed by a defective product, the resulting pecuniary and non-pecuniary losses constitute compensable damage.
- 5.22 We note that no such provision arises in the New Directive, however in our view that is because such a provision is unnecessary in this context as, absent any conflicting authority, the principle of recovery for such losses provided for by *Boston Scientific* would be followed.

Consultation Question 36.

- 5.23 We provisionally propose that, where measures are necessary to avert a risk of personal injury posed by a defective product, the resulting pecuniary and non-pecuniary losses should constitute compensable damage under the CPA.

Do consultees agree?

Compensation for psychiatric harm

- 5.24 The definition of “personal injury” in section 45(1) of the CPA encompasses psychiatric harm, referring to “any disease and any other impairment of a person’s ... mental condition”. Given its breadth and the absence of case law on its scope, the limits of this definition remain uncertain. In particular, it is unclear whether control mechanisms on recovery for psychiatric harm, comparable to those in negligence, should apply and how the law should distinguish between psychiatric harm that warrants compensation and that which does not. These questions assume added importance in light of harms that can potentially arise from modern and emerging technologies.²⁴
- 5.25 We consider below the position of two categories of claimants: “direct victims”, whose physical and/or psychiatric harm is directly caused by a defective product, and “indirect victims”, whose psychiatric harm arises from the physical and/or psychiatric harm, or the physical imperilment, or the death of a direct victim as a result of a defective product.

²⁴ World Health Organization, “Addressing the digital determinants of youth mental health and well-being: policy brief” (23 May 2025) <https://www.who.int/europe/publications/item/WHO-EURO-2025-12187-51959-79685>; World Health Organization, “A focus on adolescent social media use and gaming in Europe, central Asia and Canada” (2024) <https://iris.who.int/server/api/core/bitstreams/f787fae6-e564-477c-a0e6-d54f24b38f0b/content>.

Direct victims under the CPA

5.26 We begin with the position of direct victims. Our starting point is that of full compensation: a successful claimant should be put in the position they would have been in had the defective product not caused harm. However, maintaining a fair apportionment of risk requires limits on the psychiatric harm for which compensation may be recovered. For this purpose, we distinguish between two categories: psychiatric harm that is consequential upon the claimant's physical injury or physically imperilment, and psychiatric harm that arises otherwise.

Psychiatric harm consequential upon physical injury or physical imperilment

5.27 The first category concerns psychiatric harm which is consequential upon physical injury caused by a defective product, or psychiatric harm which arises from an event caused by the defective product in which the claimant, although not physically injured, was nonetheless physically imperilled. In such cases, we provisionally propose that the psychiatric harm should be actionable where it amounts to a medically "recognised" or "recognisable" psychiatric illness.

5.28 A medically "recognised" or "recognisable" psychiatric illness denotes harm going beyond "mere mental distress"²⁵ and reflects the principle that a threshold level of psychological injury must be met before damages are recoverable.²⁶ The requirement distinguishes compensable psychiatric injury from the ordinary vicissitudes of life, such as transient distress, anxiety or upset, for which a degree of resilience is expected and which do not warrant compensation.²⁷ It serves to confine liability within appropriate boundaries and to prevent an excessive and potentially unmanageable volume of claims.²⁸

5.29 In negligence, where a similar restriction applies,²⁹ the requirement does not depend on a fixed list of qualifying conditions. Rather, whether the threshold is met is normally determined by the court with the assistance of expert psychiatric evidence,³⁰ alongside factual evidence concerning the claimant's presentation and behaviour.³¹ In determining what constitutes a medically "recognised" or "recognisable" psychiatric illness, the case law in negligence cautions against placing undue reliance on

²⁵ The expression "mere mental distress" is used in the cases dealing with damages recoverable for psychiatric shock, to denote the mental distress that is an understandable but normal reaction in the wider populace to witnessing shocking events: *Liability for Psychiatric Illness* (1998) Law Com No 249, para 5.6.

²⁶ *Paul v Royal Wolverhampton NHS Trust* [2024] UKSC 1, [2025] AC 459 at [31].

²⁷ J Murphy, "Negligently inflicted psychiatric harm: a re-appraisal" (1995) 15 *Legal Studies* 415.

²⁸ J Murphy, "Negligently inflicted psychiatric harm: a re-appraisal" (1995) 15 *Legal Studies* 415.

²⁹ *Paul v Royal Wolverhampton NHS Trust* [2024] UKSC 1, [2025] AC 459 at [31], by Lord Leggatt and Lady Rose, saying, in the context of negligence, that "proof of a medically 'recognisable' or 'recognised' psychiatric illness has been treated as a requirement for a successful claim".

³⁰ *Frost v Chief Constable of South Yorkshire* [1999] 2 AC 455 at p 491. Our proposed approach is consistent with the law of negligence, which adopts a relatively generous stance where psychiatric harm is closely connected to physical injury or danger: *Page v Smith* [1996] AC 155; *Grievs v FT Everard & Sons Ltd* [2007] UKHL 39, [2008] 1 AC 281 at [32].

³¹ *Vernon v Bosley* [1997] 1 All ER 577, referred to in *D v The Bishop's Conference of Scotland* [2022] CSOH 46, 2022 SLT 816 at [70].

diagnostic manuals,³² such as the *Diagnostic and Statistical Manual* (the “DSM”) of the American Psychiatric Association and the *International Statistical Classification of Diseases* (the “ISCD”) of the World Health Organization, which were not developed for legal purposes.³³ We consider that the same approach should apply in the product liability context, where the limitations of such manuals are equally relevant.

- 5.30 We propose that no additional limitation should apply where psychiatric harm is consequential upon physical injury or imperilment suffered by direct victims. This approach is based on the principle of full compensation and recognises that psychiatric injury is no less real than physical injury. Indeed, it may have equally serious, and even more enduring, consequences, including financial loss such as loss of earnings.³⁴ The control mechanisms governing psychiatric harm should therefore not be unduly restrictive.

Psychiatric harm non-consequential upon physical injury or physical imperilment

- 5.31 The second category concerns cases falling outside the first. It includes circumstances in which psychiatric harm is the only injury suffered, such that it does not result from the claimant’s physical injury or physical imperilment. We consider that additional limits are required in such cases to ensure that liability remains appropriately confined. This is because the range of circumstances in which a defective product may give rise to psychiatric harm only is extremely broad, and individuals vary significantly in their susceptibility to such harm.³⁵ As a result, although a psychiatric condition may be causally linked to a defective product, it may nevertheless represent an abnormal reaction. Additional limits are therefore necessary to ensure a fair apportionment of risk within the regime and to prevent the imposition of excessive liability on defendants.
- 5.32 We therefore provisionally propose that, in such cases, psychiatric harm should be actionable only where two requirements are met.
- 5.33 First, the harm must amount to a medically “recognised” or “recognisable” psychiatric illness. In conducting this assessment, the caution against excessive reliance on diagnostic manuals, discussed above in relation to psychiatric harm consequential upon physical injury or physical imperilment, assumes heightened importance. This is because claims for psychiatric harm that is non-consequential upon physical injury or imperilment may increasingly arise in connection with digital and other modern technologies, where novel forms of harm may develop before they are widely recognised or formally defined.³⁶ Emerging conditions may be recognised in one

³² *Vernon v Bosley* [1997] 1 All ER 577 at p 610; *D v The Bishop’s Conference of Scotland* [2022] CSOH 46, 2022 SLT 816at [69]; W Norris and others, *Kemp & Kemp: Quantum of Damages* (179th release 2026) para 32-027.

³³ Liability for Psychiatric Illness (1998) Law Com No 249, para 5.2. Comparative experience further supports this position: *Saadati v Moorhead*, 2017 SCC 28, [2017] 1 SCR 543 at [33].

³⁴ See Tettenborn and M Jones, *Clerk and Lindseel on Torts* (24th ed 2023) para 2.102.

³⁵ Report on Damages for Psychiatric Injury (2004) Scot Law Com No 196, para 2.20.

³⁶ Eg, T Moretta and E Wegmann, “Toward the classification of social media use disorder: Clinical characterization and proposed diagnostic criteria” [2025] 21 *Addictive Behaviour Reports* 100603, advancing the classification of Social Media Use Disorder as a pathological condition sharing main mechanisms and maladaptive patterns with addictive behaviours.

manual but not another, or accepted in clinical practice before formal classification. For example, “Gaming Disorder” is recognised in the ICD but has no direct equivalent in the DSM,³⁷ while other conditions lack formal recognition altogether. In these circumstances, the absence of an established diagnostic label should not, in itself, preclude compensation, and the courts should adopt a sufficiently flexible approach to accommodate genuinely recognised or recognisable conditions that have not yet been formally classified.

- 5.34 Second, having regard to all relevant circumstances surrounding the event caused by the defective product which injured the claimant, the development of a psychiatric illness must fall within the natural range of reactions of a person of ordinary fortitude.
- 5.35 This additional requirement serves to exclude claims that fall outside the ordinary spectrum of human response and thereby operates to prevent excessive liability. It reflects a concept that is used in negligence to limit liability in some cases.³⁸ It is familiar to courts and practitioners, and offers a coherent and workable method of confining liability.
- 5.36 “Relevant circumstances” are assessed as a matter of fact, by reference to how the defective product operated, the context in which it operated, and the consequences of that operation. This may include, for example, the manner in which a product malfunctioned, the setting in which this occurred, and the sensory experience of those exposed to it. Consistently with the strict liability character of the regime, the assessment focuses on what happened in fact, not on what the defendant could or should have anticipated.
- 5.37 The standard of a “person of ordinary fortitude” refers to a hypothetical individual who is not unusually susceptible to psychiatric harm. While the standard is objective, it must be applied in a context-sensitive manner. Where a product is designed for, or marketed to, a group with particular vulnerabilities, such as children, those characteristics must be taken into account to the extent necessary to ensure that liability is imposed fairly.³⁹
- 5.38 The “natural range of reactions” of a person of ordinary fortitude recognises the inherent variability of ordinary human response: individuals of ordinary susceptibility exposed to the same circumstances may react differently, and only where the incidence of psychiatric illness falls outside that range is it excluded. In this way, the requirement ensures that liability is not imposed where the incidence of a psychiatric illness constitutes an abnormal reaction.
- 5.39 The ordinary “eggshell skull” principle applies, so that a defendant takes their victim as they find them. Consequently, once a psychiatric injury falls within the natural range of reactions of a person of ordinary fortitude, the claimant may recover for the full extent

³⁷ G Borges and others, “(Internet) Gaming Disorder in DSM-5 and ICD-11: A Case of the Glass Half Empty or Half Full” [2021] 66 *The Canadian Journal of Psychiatry* 477.

³⁸ In the context of psychiatric harm arising from anxiety concerning a risk of damage in the future, see *Group B Plaintiffs v Medical Research Council* [2000] Lloyd's Rep Med 161; and *Grieves v FT Everard & Sons Ltd* [2007] UKHL 39, [2008] 1 AC 281 at [24], [25] and [30]. In the context of secondary victims, see A Tettenborn and M Jones, *Clerk & Lindsell on Torts* (24th ed 2023) para 7-75.

³⁹ *Grieves v FT Everard & Sons Ltd* [2007] UKHL 39, [2008] 1 AC 281 at [25].

of the harm suffered, notwithstanding that the severity of their condition is unusually great because of pre-existing susceptibility or vulnerability.⁴⁰

- 5.40 Our provisional proposals bear some similarity to the New Directive. In particular, the New Directive recognises as compensable personal injury medically recognised and medically certified damage to psychological health affecting the victim's general state of health and potentially requiring treatment, taking into account, among other things, the International Classification of Diseases of the World Health Organization.⁴¹ Our proposed requirement that psychiatric harm be "recognised" or "recognisable" reflects this approach.

Psychiatric harm, digital products and freedom of expression

- 5.41 Particular care is required where psychiatric harm is alleged to have resulted from the operation of a digital product in circumstances involving the receipt of information or ideas. Examples may include harm said to have been caused by the repeated recommendation of material by a social media platform, the presentation of content through an engagement-optimising design feature, or outputs generated by an AI system or chatbot. In such cases, the claim may engage Article 10 of the European Convention on Human Rights, because the product is operating in a context in which information is imparted and received.
- 5.42 Article 10 does not make such claims impossible. The right to freedom of expression is qualified. Interference with it may be justified where the interference is prescribed by law, pursues a legitimate aim, and is necessary in a democratic society. The protection of health and the protection of the rights of others are legitimate aims capable of justifying interference. The central question is one of proportionality.
- 5.43 The case law of the European Court of Human Rights ("ECtHR") on online intermediary liability is relevant by analogy. In *Delfi AS v Estonia*,⁴² civil liability for user comments was held compatible with Article 10, but only in a particular context involving a commercially run news portal, extreme and clearly unlawful comments, the portal's control over the comments environment, and a modest sanction. Conversely, in *MTE and Index.hu v Hungary*,⁴³ the imposition of liability for user comments violated Article 10 where the domestic courts failed properly to balance the competing rights, and where the impugned speech was not treated in the same way as the extreme comments in *Delfi*. Those cases suggest that liability in an online expressive context is not impermissible, but it must be carefully confined and accompanied by a proper proportionality assessment.
- 5.44 We consider that the proposed limits on recovery for psychiatric harm are important safeguards in this context. Mere distress, offence, anxiety or upset would not be sufficient. The claimant must suffer a medically recognised or recognisable psychiatric illness. In cases of pure psychiatric harm, the development of a psychiatric illness must also fall within the natural range of reactions of a person of ordinary fortitude,

⁴⁰ A Tettenborn and M Jones, *Clerk & Lindsell on Torts* (24th ed 2023) para 7-75.

⁴¹ New Directive, recital 21 and art 6(1)(a).

⁴² *Delfi AS v Estonia* (2016) 62 EHRR 6 (App No 64569/09).

⁴³ *Magyar Tartalomszolgáltatók Egyesülete and Index.hu v Hungary* App No 22947/13..

having regard to the circumstances as a whole.⁴⁴ These requirements help to ensure that liability is confined to serious harm and does not arise merely because a person encounters lawful expression which is unwelcome, controversial, disturbing, upsetting, or offensive.

- 5.45 This approach is consistent with the caution reflected in *Tamiz v United Kingdom*.⁴⁵ In that case, the ECtHR held that the domestic courts had adequately balanced the Article 10 rights of the platform provider and users against the applicant's Article 8 reputation interest.⁴⁶ For present purposes, the point is that liability affecting online expression should not be imposed without attention to the seriousness of the harm, the role of the intermediary or product provider, and the proportionality of restricting expression.
- 5.46 The same contextual approach is reflected, more generally, in *Toth and Crişan v Romania*, where the Court considered whether domestic courts had struck a fair balance between the claimants' Article 8 interests in reputation and the competing Article 10 right to freedom of expression in the context of a Facebook post and associated comments. The Court found no violation of Article 8, concluding that the domestic courts had undertaken an adequate balancing exercise between the competing Convention rights. Although that case concerned individual liability and Article 8 rather than platform product liability, it reinforces the Court's broader insistence that online expression cases are highly fact-sensitive and that the assessment of Article 10 concerns depends upon the particular basis on which liability is imposed.⁴⁷
- 5.47 This means that the mere encounter with lawful but upsetting, controversial or challenging material should not, without more, turn the product through which it was encountered into a defective one. Nor should the CPA require a platform or AI provider to suppress lawful expression simply to avoid liability. The relevant questions are whether the alleged harm is properly attributable to the design or functioning of the product, rather than to the viewpoint, meaning or legal character of the material itself, and whether that design or function met the entitled level of safety.
- 5.48 In answering that question, it may be relevant to consider whether the product merely facilitated access to lawful expression, or whether its design materially shaped the user's exposure in a way that led to the risk of psychiatric injury. Relevant matters may include the intensity and persistence of recommendation, the targeting of material to known or reasonably foreseeable vulnerabilities, the reduction of meaningful user control, the absence of effective safeguards, and whether the design tends to exploit or impair ordinary processes of reasoning or autonomy. We do not consider that

⁴⁴ As noted at para 5.39 above, the ordinary "eggshell skull" principle applies, such that a defendant takes their victim as they find them.

⁴⁵ *Tamiz v United Kingdom* App No 3877/14.

⁴⁶ Article 8 of the ECHR protects the right to respect for private and family life, home and correspondence. A person's reputation may fall within the protection of "private life": *Axel Springer AG v Germany* (2012) 55 EHRR 6 (App No 39954/08). Article 8 is a qualified right and may require the individual's interests to be balanced against competing rights, including freedom of expression under Article 10.

⁴⁷ *Toth and Crişan v Romania* App No 45430/19. See also *Sanchez v France* App No 45581/15 (Grand Chamber decision).

manipulation should be a separate gateway requirement in every case, but it may be an important factor in deciding whether the product provided the level of safety persons were generally entitled to expect.

- 5.49 On that basis, we consider that liability is compatible with Article 10 where, as we provisionally propose, it is confined to serious, foreseeable and properly attributable psychiatric injury caused by defective product design or functioning. That approach keeps product liability on its proper ground, holding the line between two important concerns: ensuring that serious psychiatric injury does not go without redress, while avoiding an overbroad regime in which lawful expression is treated as the defect. It recognises that digital products may cause serious psychiatric harm, while avoiding a rule that would impose liability merely because lawful expression has caused distress or because a platform or AI provider has enabled access to controversial material.

Consultation questions

Consultation Question 37.

- 5.50 We provisionally propose that psychiatric harm suffered by a direct victim, which:

- (1) is consequential upon physical injury, or
- (2) arises from an event caused by the defective product in which the claimant was physically imperilled but not physically injured,

should constitute compensable damage under the CPA when it amounts to a medically “recognised” or “recognisable” psychiatric illness.

Do consultees agree?

Consultation Question 38.

- 5.51 We provisionally propose that psychiatric harm otherwise suffered by a direct victim should constitute compensable damage under the CPA when the following two criteria are satisfied.

- (1) The psychiatric harm amounts to a medically “recognised” or “recognisable” psychiatric illness.
- (2) Having regard to all the relevant circumstances surrounding the event caused by the defective product which injured the claimant, the development of a psychiatric illness falls within the natural range of reactions of a person of ordinary fortitude.

Do consultees agree?

Indirect victims within the CPA regime

- 5.52 We now turn to indirect victims, whose psychiatric harm arises as a result of the physical and/or psychiatric injury, the physical imperilment, or the death of the direct victim. The CPA is silent on whether, and if so in what circumstances, indirect victims can obtain compensation for their harm and there is no domestic case law on the point.
- 5.53 As noted at the outset of this chapter, some stakeholders have raised the status of indirect victims under the CPA with us, suggesting that the control mechanisms applicable to “secondary victims” in negligence should apply in this context. Some commentators have also expressed this opinion.⁴⁸ In our view, this uncertainty requires resolution, particularly in light of the need for a coherent and future-proof framework capable of addressing harms arising from modern and emerging technologies.
- 5.54 We consider that indirect victims should, in principle, be permitted to claim for psychiatric harm, subject to appropriate limitations. Two principal considerations support this position. First, medical evidence demonstrates that individuals may suffer psychiatric harm as a result of injury to another.⁴⁹ This is of particular relevance in the product liability context, where the types of harm within the regime, including those associated with emerging technologies, may readily give rise to such effects. For example, a parent may suffer psychiatric harm if a defective toy physically injures their child, or if a defective digital product, such as a chatbot or a social media platform, causes a psychiatric condition in their child.
- 5.55 Second, psychiatric harm suffered by indirect victims remains attributable to the defective product. Although an additional step arises in the causal chain, namely injury to the direct victim, this does not of itself break the chain of causation and/or warrant such claims exclusion from the regime.
- 5.56 More generally, recognising such claims is consistent with the consumer protection purpose of the CPA regime, and also reflects the practical reality that such claims are likely to face significant evidential and doctrinal barriers in negligence. Indeed, the strict liability regime was designed precisely to address those difficulties.
- 5.57 We have been mindful of the concerns that may attach to making express provision for claims by indirect victims. In particular, we have carefully considered the view that recognising such claims may impose on defendants the risk of disproportionate liability exposure. However, we are not convinced that such concerns are well-founded or that there otherwise exists a principled basis for excluding indirect victims from the scope of the product liability regime. This conclusion is informed by two considerations in particular.
- 5.58 First, liability arises only where the product that caused the harm was defective. This requirement to prove defect, the burden of which rests on the claimant, constitutes the central control mechanism of the product liability regime, serving to confine liability for

⁴⁸ D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) paras 16.16 to 16.17.

⁴⁹ Liability for Psychiatric Illness (1998) Law Com No 249, para 6.3.

all forms of damage, whether psychiatric harm or otherwise.⁵⁰ As discussed in Chapter 4, the mere fact that a product has caused harm does not mean that it is defective. Some products may acceptably cause some harm without being defective. Thus, by the time the question of damage arises, the product has not merely caused harm; it has caused harm which, according to the test for defect, it should not have caused.

- 5.59 Second, as discussed in Chapter 6, liability only arises in respect of knowable or discoverable defect. A defendant may avoid liability where, at the relevant time (typically the date of supply), the state of scientific and technical knowledge was such that the defect could not have been discovered.⁵¹ This feature of the regime strengthens the case for recognising indirect victim claims: the producer could have prevented the occurrence of psychiatric harm by refraining from placing on the market a product that it knew, or could have discovered, was defective, but it did not.
- 5.60 For these reasons, we are persuaded that psychiatric harm suffered by indirect victims should fall within the scope of the regime. At the same time, we consider that a fair apportionment of risk requires appropriate limits to prevent liability from becoming disproportionate or indeterminate.⁵² We therefore provisionally propose that recovery should be confined to cases where the indirect victim has a “close tie of love and affection” with the direct victim, and has suffered a medically “recognised” or “recognisable” psychiatric illness which, having regard to the all the relevant circumstances, falls within the natural range of reactions of a person of ordinary fortitude.
- 5.61 The requirement of a close tie of love and affection serves to keep the liability exposure of defendants within manageable and proportionate bounds by limiting the class of persons who may claim in respect of a defective product in this context. More specifically, we propose to adopt an updated version of the approach recommended in the Law Commission’s 1998 report on *Liability for Psychiatric Illness*.⁵³ Under this approach, a defined list would specify the relationships in which such a tie is deemed to exist, while allowing claimants outside the list to prove the existence of such a relationship. This fixed list would include spouse, parent, child, sibling, and cohabitant. “Spouse” would encompass those who are married to, or in a civil partnership with, the direct victim, while “cohabitant” would include a person who has lived with the direct victim for at least two years in a relationship akin to marriage or civil partnership.⁵⁴

⁵⁰ A qualification to this statement is that our provisional proposal for a new mechanism would allow a defendant to elect either to share a proportion of the risk with the claimant, or accept the burden of discharging a rebuttable presumption of defect: paras 4.135 to 4.138 above (and consultation question 43 at para 4.139).

⁵¹ CPA, s 4(1)(e).

⁵² *Armstead v Royal & Sun Alliance Insurance Co Ltd* [2024] UKSC 6, [2025] AC 406 at para [47], by Lord Leggatt and Lord Burrows: “the underlying policy reason for the remoteness rule is to ensure that an excessive burden of liability does not fall on the defendant. A line must be drawn to ensure that the defendant is not held liable for all loss factually caused by the tort, however far removed in time and space”.

⁵³ *Liability for Psychiatric Illness* (1998) Law Com No 249.

⁵⁴ *Liability for Psychiatric Illness* (1998) Law Com No 249, paras 6.26 to 6.27.

- 5.62 This approach reflects the practical reality that those most likely to suffer psychiatric harm as a result of injury to a direct victim are typically close family members, while promoting certainty and reducing the need for intrusive factual inquiry.⁵⁵ We recognise that views on whether particular relationships should be included in, or excluded from, the proposed list are likely to be strongly held. We therefore invite consultees' views on whether, and if so how, the list should be expanded.
- 5.63 The requirement of a close tie of love and affection also arises in negligence.⁵⁶ In that context, however, the law does not prescribe a fixed list of qualifying relationships,⁵⁷ but instead applies a rebuttable presumption in certain cases, such as between spouses, parents, and possibly engaged couples,⁵⁸ with claimants in other relationships required to prove the existence of the relevant tie.⁵⁹ In our view, a defined list provides a clearer and more predictable framework, while retaining flexibility for cases falling outside it.
- 5.64 The remaining requirements (namely, that the indirect victim has suffered a medically "recognised" or "recognisable" psychiatric illness which, having regard to all the relevant circumstances, falls within the natural range of reactions of a person of ordinary fortitude) operate as additional safeguards on liability. The requirement that the claimant suffer a medically "recognised" or "recognisable" psychiatric illness ensures that compensation is confined to cases involving a sufficient degree of harm, excluding ordinary emotional responses. The further requirement that the psychiatric harm falls within the natural range of reactions of a person of ordinary fortitude operates as a control on the scope of liability, excluding cases which, although causally linked to the defective product, represent an abnormal reaction. Taken together, these conditions mitigate the risk of unwarranted recovery.
- 5.65 Finally, our proposals depart from adopting all the control mechanisms applicable to "secondary victims" in negligence. In particular, we do not consider that the requirements of a sudden "accident"⁶⁰ or proximity in time and space⁶¹ should apply. In the product liability context, especially in cases involving digital products, harm may develop gradually and without a single identifiable event. For example, a child may develop a psychiatric condition over time as a result of using a defective digital product, and a parent may suffer psychiatric harm in the course of supporting and caring for them. As previously noted in the Law Commission's report on *Liability for Psychiatric Illness*, a requirement of temporal or spatial proximity is inconsistent with

⁵⁵ Liability for Psychiatric Illness (1998) Law Com No 249, para 6.24.

⁵⁶ *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310; *Paul v Royal Wolverhampton NHS Trust* [2024] UKSC 1, [2025] AC 459 at [44] and [45]; J Goudkamp and D Nolan, *Winfield & Jolowicz on Tort* (21st ed 2025) paras 5-024 and 5-026.

⁵⁷ J Goudkamp and D Nolan, *Winfield & Jolowicz on Tort* (21st ed 2025) para 5-022.

⁵⁸ J Goudkamp and D Nolan, *Winfield & Jolowicz on Tort* (21st ed 2025) para 5-022.

⁵⁹ J Goudkamp and D Nolan, *Winfield & Jolowicz on Tort* (21st ed 2025) para 5-022.

⁶⁰ *Paul v Royal Wolverhampton NHS Trust* [2024] UKSC 1, [2025] AC 459 at [52]; A Tettenborn and M Jones, *Clerk & Lindsell on Torts* (24th ed 2023) para 7-82.

⁶¹ *McLoughlin v O'Brian* [1983] 1 AC 410; *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310; *Paul v Royal Wolverhampton NHS Trust* [2024] UKSC 1, [2025] AC 459 at [44] and [45]; J Goudkamp and D Nolan, *Winfield & Jolowicz on Tort* (21st ed 2025) para 5-021.

medical evidence indicating that, where a close tie of love and affection exists, the onset of psychiatric harm does not depend on proximity to a particular incident.⁶² More broadly, such requirements would fail to reflect the reality that psychiatric harm may arise from injury to another even in the absence of a single proximate or identifiable occurrence.

- 5.66 Two further considerations support our decision not to adopt wholesale the control mechanisms applicable to “secondary victims” in negligence. First, product liability is a specialised regime directed at a limited class of defendants: those who profit from placing products on the market and who have produced or supplied a defective product in circumstances where the defect was knowable or discoverable. Negligence, by contrast, applies across a far wider range of situations and may impose liability on individuals of modest means for a momentary lapse of care or judgement. These contextual differences are relevant when assessing whether negligence-based control mechanisms are compatible with the distinctive policy aims of product liability law. In particular, product liability is underpinned by the principle that costs associated with defective products are better distributed across the market as a whole than borne only by those individuals who suffer harm.
- 5.67 Second, we do not consider that a more generous approach to compensation for psychiatric illness than that adopted in the current law of negligence would be problematic. Comparative experience demonstrates that liability can remain appropriately confined without adopting the relatively restrictive approach taken in England and Wales. Some common law and civil law jurisdictions maintain appropriate limits on liability while permitting recovery on a broader basis.⁶³ We note that the New Directive makes no specific provisions for indirect victims, save that recital 27 provides that the right to compensation for damage arising as a result of damage caused directly to another by a defective product is a matter for national laws.

Indirect victims, digital products and freedom of expression

- 5.68 As with direct victims, we must consider the relationship between our recommendations and freedom of expression, particularly where the direct victim’s injury is alleged to have arisen from a digital product operating in a context involving expression, such as an online platform or AI system. A parent or other close family member may suffer psychiatric harm after a child develops a psychiatric illness following prolonged interaction with a defective chatbot, recommender system or other digital product. In such cases, the claim by the indirect victim may be one step further removed from the design feature alleged to be defective, but the underlying Article 10 considerations (discussed earlier at paragraphs 5.41 to 5.49) remain relevant. That additional step in the causal chain is not a reason for automatic exclusion, but it is a reason for particular care in defining the limits of liability.

⁶² Liability for Psychiatric Illness (1998) Law Com No 249, para 6.10.

⁶³ The Supreme Court of Canada, for example, has “adopted [neither] the primary/secondary victim distinction, [nor] *McLoughlin v. O’Brian*’s disaggregated proximity analysis”: *Saadati v Moorhead*, 2017 SCC 28 [2017] 1 SCR 543, at [19]. In this case, the Court held that a “finding of legally compensable mental injury need not rest, in whole or in part, on the claimant proving a recognized psychiatric injury” and rejected the “view that a recognizable psychiatric illness requirement is necessary to prevent indeterminate liability”. Note also that many civil law jurisdictions, for example France, take a more generous approach to psychiatric harm claims.

- 5.69 Similarly to direct victims, Article 10 does not require such claims to be excluded. To the extent that there is any interference with the Article 10 right to freedom of expression, the protection of health and the protection of the rights of others may justify proportionate interference. However, the fact that the alleged harm arises through the communication of information and ideas reinforces the need for clear limits. The proposed requirements, namely a medically recognised or recognisable psychiatric illness, a close tie of love and affection with the direct victim, and psychiatric illness falling within the natural range of reactions of a person of ordinary fortitude, ensure that liability is confined to serious and closely connected cases.
- 5.70 That approach is supported by the ECtHR's case law on online intermediary liability, discussed in paragraphs 5.43 to 5.46. Those authorities do not determine the product liability question, still less the position of indirect victims. They do, however, indicate that liability connected with online expression is not impermissible in principle, provided that it is carefully confined and accompanied by a proper proportionality assessment. In this context, that directs attention to the nature of the alleged defect.
- 5.71 Where the direct victim's injury is linked to expressive material encountered through a digital product, the court should therefore be satisfied that the alleged defect lies in the design or functioning of the product, rather than in the mere fact that the direct victim encountered lawful expression. The assessment should focus on the product's own design and functioning, including matters such as recommendation, targeting, amplification, personalisation, persistence of exposure, generation of outputs, lack of safeguards, or failure to provide effective controls. The fact that the alleged harm arises through the communication of information and ideas should form part of the overall balancing exercise, including the assessment of defectiveness and the proportionality of any interference with Article 10 rights.
- 5.72 This approach is consistent with the broader distinction between product liability and content regulation. A claim by an indirect victim should not succeed simply because expressive material caused distress to the direct victim, or because a family member was deeply affected by the consequences of that distress. But where a defective design feature causes recognised or recognisable psychiatric injury to the direct victim, and that injury in turn causes recognised or recognisable psychiatric illness to a closely connected indirect victim, Article 10 does not necessarily preclude recovery (to the extent that it is even engaged), provided that liability remains appropriately confined. The question is whether the imposition of liability is proportionate in light of the seriousness of the harm, the closeness of the connection, the producer's degree of control over the relevant design feature, and the safeguards built into the regime.
- 5.73 The proposed limits on indirect victim claims are therefore intended to serve a dual function. They prevent the CPA from imposing indeterminate liability for the consequences of expression, while preserving the possibility of redress in serious cases where psychiatric harm is properly attributable to a defective product. They also help to ensure that the regime does not create a general incentive for the providers of online platforms or AI systems to suppress lawful speech, rather than to design safer products.

Consultation question

Consultation Question 39.

5.74 We provisionally propose that psychiatric harm suffered by indirect victims should constitute compensable damage under the CPA when the following three criteria are satisfied.

- (1) The indirect victim suffers a medically “recognised” or “recognisable” psychiatric illness consequent on actionable injury (either physical or psychiatric) or the physical imperilment or death of the direct victim.
- (2) The indirect victim has a “close tie of love and affection” with the direct victim.
- (3) Having regard to all the relevant circumstances surrounding the incident, the development of a medically “recognised” or “recognisable” psychiatric illness by the indirect victim falls within the natural range of reactions of a person of ordinary fortitude.

Do consultees agree?

Consultation Question 40.

5.75 We provisionally propose to adopt a defined list that would specify the relationships in which a “close tie of love and affection” is deemed to exist. That list would include the spouse, parents, children, siblings and cohabitant of the direct victim.

Do consultees agree?

Consultation Question 41.

5.76 We invite consultees' views on whether the list of relationships which we provisionally propose deems a close tie of love and affection to exist should be expanded and, if so, how.

PROPERTY DAMAGE

An overview of the scope of property damage claims under the CPA

5.77 The CPA's product liability regime provides compensation for loss of or damage to property, including land,⁶⁴ but only where the property was used mainly for private purposes.⁶⁵ It does not extend to loss of or damage to the defective product itself, nor to the loss of or damage to the “overall” or “finished” product caused by a defective

⁶⁴ CPA, s 5(1).

⁶⁵ CPA, s 5(3).

component product.⁶⁶ In addition, property damage can only give rise to compensation where the value of the claim exceeds £275.⁶⁷

- 5.78 We have identified four principal issues for reform in relation to claims for property damage under the CPA, informed by stakeholders' responses, the 2018 evaluation of the 1985 Directive, and the approach adopted by the New Directive. These issues are: the treatment of mixed-use property; whether, and on what basis, liability should extend to the destruction or corruption of data; whether the continued exclusion of damage to the defective product itself and to finished products caused by defective components remains appropriate; and whether the £275 minimum threshold should be retained. Each of these issues is considered in further detail below.

Mixed-use property claims

- 5.79 The current approach to mixed-use property claims is set out in section 5(3) of the CPA. Under that provision, the property must, at the time of the loss or damage, be of a type ordinarily intended for private use, occupation or consumption and be intended to be used by the person suffering the loss or damage mainly for their own private use, occupation or consumption.
- 5.80 The CPA's current approach requires reassessment in light of the increasing prevalence of mixed-use property. This shift is particularly evident following the COVID-19 pandemic, which has led to a marked expansion in flexible and home-working arrangements.⁶⁸ It is also reflected in the European Commission's 2022 Impact Assessment accompanying the proposed New Directive, which highlights that modern working practices frequently involve goods, such as home office equipment or computers, being used for both private and professional purposes.⁶⁹ There is evidence that individuals may, in practice, find it difficult to distinguish between these uses.⁷⁰
- 5.81 In these circumstances, reform is warranted and we consider that the issue could be addressed by permitting recovery for any loss of or damage to property, including land, subject to an exclusion for property used exclusively for professional purposes.

⁶⁶ CPA, s 5(2).

⁶⁷ CPA, s 5(4). See also 1985 Directive, art 9 and recital 9.

⁶⁸ Office for National Statistics, "Homeworking in the UK – regional patterns: 2019 to 2022" (July 2022) <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/homeworkingintheukregionalpatterns/2019to2022>; Office for National Statistics, "Who has access to hybrid work in Great Britain?" (June 2025) <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/whohasaccesstohybridworkinggreatbritain/2025-06-11>.

⁶⁹ European Commission, "Impact assessment report accompanying the document proposal for a Directive of the European Parliament and of the Council on liability for defective products" (SWD(2022) 316 final) p 94, https://single-market-economy.ec.europa.eu/system/files/2022-09/SWD_2022_316_1_EN_impact_assessment_part1_v2.pdf.

⁷⁰ European Commission, "Final Report - Evaluation of Council Directive 85/374/EEC on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products" (2018) p 33, https://publications.europa.eu/resource/cellar/d4e3e1f5-526c-11e8-be1d-01aa75ed71a1.0001.01/DOC_1; European Commission, "Impact assessment report accompanying the document proposal for a directive of the European Parliament and of the Council on liability for defective products" (SWD(2022) 316 final) p 94.

This would provide a clearer and more predictable test, more closely aligned with contemporary patterns of use.⁷¹ However, such an approach risks extending liability beyond appropriate limits, particularly where property is predominantly used for professional purposes but retains some private use.

- 5.82 Accordingly, to maintain a fair balance, we consider it necessary, in cases of mixed-use, to reduce any award to reflect the extent of the property's professional use. Recovery should be confined to the proportion of private use, with the apportionment determined as a question of fact.
- 5.83 Our proposal deviates in part from the approach taken under the New Directive. The New Directive compensates damage to mixed-use property and excludes only property used exclusively for professional purposes.⁷² Like the New Directive, we also propose an exclusion for property used exclusively for professional purposes. However, where mixed-use property is concerned, we consider that, in the interest of maintaining a fair balance, it is appropriate to limit recovery in mixed-use cases to the extent of the property's private use.

Consultation question

Consultation Question 42.

5.84 We provisionally propose that the CPA should be amended to:

- (1) recognise, as compensable damage, any loss of or damage to property, including land, subject to an exclusion for property that was used exclusively for professional purposes at the time that it was lost or damaged; and
- (2) provide that if the property was used for mixed private and professional purposes at the time that it was lost or damaged, the award of damages should be reduced to reflect the extent of the property's professional use.

Do consultees agree?

Claims for destruction and corruption of data

- 5.85 The CPA does not expressly address compensation for the destruction or corruption of data. In the nearly four decades since its enactment, however, data has assumed increasing economic and practical significance. The absence of express provision for such losses therefore constitutes a notable gap in the scheme of the CPA, and the resulting uncertainty as to the scope of recovery may result in complexity and expense in litigation.

⁷¹ European Law Institute, "Guiding Principles for Updating the Product Liability Directive for the Digital Age" (2021) pp 8 to 9, https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Guiding_Principles_for_Updating_the_Product_Liability_Directive_for_the_Digital_Age.pdf.

⁷² New Directive, recital 25.

- 5.86 From the perspective of claimants, damage to data may produce consequences that are equivalent to, or even more serious than, those associated with damage to tangible property. It is therefore difficult to justify a principled distinction between the two. In these circumstances, we consider that expressly recognising compensation for damage to data⁷³ is consistent with the principle of fair apportionment of risk underpinning the CPA, a conclusion also supported by comparative law developments.⁷⁴ That principle, however, requires clearly defined limits on liability.
- 5.87 One such limit is to confine recovery to cases involving the destruction or corruption of data, as distinct from data leaks or breaches of data protection obligations. The latter do not involve damage to the data itself and are therefore more appropriately addressed outside the product liability regime.
- 5.88 A further limit, consistent with our wider approach to property damage, is to exclude claims where the data is used exclusively for professional purposes. In cases of mixed use, we consider that any award should be reduced so as to reflect the extent of the data's professional use, thereby maintaining a fair balance between claimants and defendants.
- 5.89 Finally, we consider that when assessed in a functional rather than purely technical sense, the loss of access to data can have equivalence to the destruction or corruption of data. Where a cyberattack prevents a person from accessing data stored on a product, for example, unless a ransom payment is made and accessed is restored, the impact on the claimant may be no different than if the data had been destroyed or corrupted. Rather than making a proposal on this point at this stage, we ask an exploratory question to seek the views of consultees on whether, and in what circumstances, loss of access to data held on, or accessed via, a product should be treated as equivalent to the destruction or corruption of that data.
- 5.90 Our proposal shares similarities with the approach taken under the New Directive, where destruction or corruption of data is, in principle, compensable damage,⁷⁵ and we adopt the same position. The New Directive also excludes the destruction or corruption of data used exclusively for professional purposes,⁷⁶ and our proposed exclusion aligns with this.
- 5.91 However, the New Directive does not compensate data used for mixed private and professional purposes, in part to limit litigation.⁷⁷ We take a different approach, which is that where data is used for mixed purposes, we propose that compensation should be available, but reduced to reflect the extent of professional use. In our view, this approach better aligns with our wider treatment of property damage and provides a

⁷³ In the context of the 1985 Directive, and the need to update the notion of damage to reflect the features of the digital era, see: European Law Institute, "Guiding Principles for Updating the Product Liability Directive for the Digital Age" (2021) pp 8 to 9 ("Guiding Principle 7") https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Guiding_Principles_for_Updating_the_Product_Liability_Directive_for_the_Digital_Age.pdf.

⁷⁴ New Directive, art 6(1)(c) and recital 20.

⁷⁵ New Directive, art 6(1)(c).

⁷⁶ New Directive, art 6(1)(c) and recital 22.

⁷⁷ New Directive, recital 22.

more proportionate means of maintaining an appropriate balance between claimants and defendants.

Consultation question

Consultation Question 43.

5.92 We provisionally propose that the CPA should be amended to:

- (1) recognise, as compensable damage, destruction and corruption of data (as distinct from data leaks or breaches of data protection rules), subject to an exclusion for data used exclusively for professional purposes; and
- (2) provide that if the data was used for mixed private and professional purposes at the time that it was destroyed or corrupted, the award of damages should be reduced to reflect the extent of the data's professional use.

Do consultees agree?

Consultation Question 44.

5.93 We invite consultees' views on whether, and in what circumstances, loss of access to data held on, or accessed via, a product should be treated as equivalent to the destruction or corruption of that data.

Claims for damage to the defective product itself

5.94 Under section 5(2) of the CPA, liability shall not arise and compensation is not available for loss or damage to the defective product itself. Neither the CPA nor any of the recitals to the 1985 Directive provide an express justification for this exclusion. It is, however, best understood as reflecting the underlying distinction between tort and contract. Tort law is primarily concerned with safety risks affecting persons and other property, whereas contract law addresses the quality and fitness of the product itself. Consistently with this distinction, the regime focuses on protecting consumers from harm caused by defective products and limits compensable damage to damage caused by the product. Loss arising from the defect in the product itself is therefore treated as pure economic loss, which is more appropriately compensable in contract. In this way, the regime allocates the risks associated with dangerous products without extending to a general system of quality assurance.

5.95 As the CPA recognises that components may themselves constitute products,⁷⁸ it treats a product and its components as a single product where they are supplied together, in order to preserve this exclusion. Accordingly, where a defective component supplied as part of a finished product causes damage to that product, recovery is excluded on the basis that they are treated as a single product. By contrast, where a component is supplied separately and later incorporated into

⁷⁸ CPA, s 1(2)(c).

another product, damage to that product (excluding the component itself) may be compensable.

- 5.96 This approach does not, however, operate coherently in relation to products that are modified remotely by the producer after supply, including where a component is integrated into or interconnected with a product. Where an update is provided post-supply, it may form a component of the product in functional terms, but falls outside the exclusion because it was not supplied with the product. If such an update is defective and causes damage to the product into which it is installed, that damage is therefore compensable. In our view, this inconsistency undermines the coherence of the regime's exclusion of pure economic loss and calls for reform.
- 5.97 To address this issue, we provisionally propose that the exclusion of liability and compensation for loss or damage to the defective product itself should cover defective components that are integrated into or interconnected with the product by the producer or under the control of the producer. The concept of "producer's control" is discussed in Chapter 3.
- 5.98 Absent reform, the law would permit recovery for damage to technologically adaptable products while continuing to exclude equivalent damage in respect of traditional products. This would create an unjustified disparity.
- 5.99 Our proposal is consistent with the approach taken by the New Directive, which maintains the exclusion of recovery for the defective product itself, and also excludes recovery for a product damaged by a defective component that is integrated into, or interconnected with, that product by the manufacturer of that product or within that manufacturer's control.⁷⁹

Consultation question

Consultation Question 45.

5.100 We provisionally propose that the exclusion of liability and compensation for loss or damage to the product itself under the CPA should cover damage to a product caused by a defective component integrated into or interconnected with that product by the producer of that product or within the producer's control.

Do consultees agree?

The property damage lower threshold

- 5.101 Section 5(4) of the CPA imposes a lower threshold for property damage of £275. A claimant may therefore recover damages only where the value of their loss exceeds this amount. The stated objective of this threshold, as explained in the recitals to the 1985 Directive, is to avoid litigation arising in an "excessive" number of cases.
- 5.102 In our view, the exclusion of property claims falling below the threshold serves little meaningful purpose. While it protects producers and other liable parties from claims

⁷⁹ New Directive, art 6(1).

that may be regarded as trivial, it is unlikely in practice to reduce litigation and may, in some cases, increase its complexity. As observed in the 2018 evaluation of the 1985 Directive,⁸⁰ claimants with a low-value loss may still pursue recovery through alternative causes of action, such as contract or negligence. Likewise, a claimant bringing a personal injury claim may pursue low-value property damage through separate claims against multiple defendants, thereby complicating proceedings. Alternatively, claimants may forgo otherwise meritorious claims to limit legal cost and risk.⁸¹

- 5.103 In our view, this minimum value threshold should be removed for four reasons. First, it is better understood not as an expression of the principle of fair apportionment of risk, but as a derogation from it. The threshold excludes compensation even where a defect, causation, and damage are established by the claimant and no defence is available, thereby reallocating to the injured party a risk which properly lies with the defendant.
- 5.104 Second, its removal would simplify proceedings. Claimants with mixed claims, combining low-value property damage with other recognised heads of damage, such as personal injury, would be able to pursue those claims under a single cause of action against a single defendant, reducing complexity and likely lowering costs. Nor do we consider that removal would generate an increase in unmeritorious claims. The decision to pursue a product liability claim depends not on the amount at stake alone, but on a realistic assessment of whether defect and causation can be established and whether any defence is likely to succeed.
- 5.105 Lastly, the threshold is objectionable in principle. It effectively requires the public to self-insure against low-value damage caused by defective products, notwithstanding that defendants are typically better placed to absorb and distribute those risks. Its regressive character compounds this concern, as a fixed threshold imposes a proportionately greater burden on lower-income claimants, for whom such losses may nevertheless be significant.⁸²
- 5.106 Finally, we note that our proposal is consistent with the New Directive, which, unlike the 1985 Directive, no longer includes a minimum threshold for property damage.

⁸⁰ European Commission, “Impact assessment report accompanying the document proposal for a directive of the European Parliament and of the Council on liability for defective products” (SWD(2022) 316 final) pp 22 to 23, https://single-market-economy.ec.europa.eu/system/files/2022-09/SWD_2022_316_1_EN_impact_assessment_part1_v2.pdf.

⁸¹ As pursuing multiple defendants and relying upon multiple causes of action would likely increase legal costs and risks.

⁸² European Law Institute, “ELI Draft of a Revised Product Liability Directive” (2022) p 17, https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Draft_of_a_Revised_Product_Liability_Directive.pdf.

Consultation question

Consultation Question 46.

5.107 We provisionally propose that the CPA should be amended to remove the lower threshold for property damage of £275.

Do consultees agree?

Chapter 6: Defences, limitation and long-stop

INTRODUCTION

- 6.1 This chapter addresses the law governing the provision of defences, limitation periods and the “long-stop” under the Consumer Protection Act 1987 (“CPA”). Our Terms of Reference specifically require us to consider whether the development risks defence and/or the long-stop date should be amended to account for the fact that some products can be updated iteratively, and whether the “long-stop” should be extended for latent harm (injuries that emerge over time).¹
- 6.2 This chapter focuses, first, on the defences available under the CPA. As we set out in Chapter 1, the purpose of the CPA is to establish a liability regime that secures a fair apportionment of the risks associated with modern technological production. One of the primary ways in which the Act balances interests for that purpose is by providing defendants with defences to avert liability where it is fair to do so.² It is therefore important that these defences operate in a manner that maintains that balance.
- 6.3 Drawing on our engagement with stakeholders, our review of the case law and our assessment of the implications of our wider proposals, we have identified several key questions for consideration in reforming the defences so that they better achieve their purpose. First, we consider whether a producer should be able to rely on the defence of “non-supply” where a defective product has not technically been supplied to another but has caused harm during the provision of a service.³ Second, we examine whether a producer who retains control over a product after supply should be able to rely on the defence that the defect did not exist at the relevant time, and in what circumstances. Third, we address the “development risks defence” including whether it should be retained, whether it should be clarified in its interpretation and application, and whether and when it should be available to producers who retain control after supply. Lastly, we set out the law governing limitation periods and the “long-stop” that applies to CPA claims, before considering whether the long-stop period requires reform in the context of latent harm and products that are iteratively updated.

OVERVIEW OF THE DEFENCES PROVIDED BY THE CPA

- 6.4 Section 4 of the CPA provides six defences to defendants facing claims brought under the Act. Two of these defences (below at (2) and (3)) are impacted by proposals made

¹ See paras 1, 4(4) and 4(5) of our Terms of Reference at Appendix 1. Note that whilst para 4(5) of the Terms of Reference refers to the “State of the Art” defence, the reference is best understood as referring to the section 4(1)(e) “development risks defence”. While the development risks defence is sometimes referred to as the “State of the Art” defence, we think that term is better seen as referring to the section 3(2) statement that a product is not defective merely because “the safety of a product which is supplied after that time is greater than the safety of the product in question”.

² The 1985 Directive, recital 7.

³ This considers an issue raised by Case C-203/99 *Veefald v Århus Amtskommune* [2001] ECR-I-3569.

elsewhere in this consultation paper; we note them here for completeness and do not return to them again in this chapter. The six defences are as follows.

- (1) The defect arose from compliance with requirements or obligations under other legislation.⁴
- (2) The defendant did not at any time supply the product to another.⁵ Given our proposed changes to the concept of “supply”, discussed in Chapter 2, it would no longer be open to a defendant to argue, as they can under the current law, that they did not “supply” a product because it was supplied in intangible form (for example, via an internet download).⁶
- (3) The product was supplied outside the course of business⁷ and without a view to profit.⁸ Again, our proposed changes to the concept of “supply”, discussed in Chapter 2, mean that this defence would not be available merely on the basis that no money or other consideration was paid in return for the product.⁹
- (4) The defect did not exist at the relevant time (generally, when it was supplied).¹⁰
- (5) The state of knowledge at the time the product was supplied meant that the defect could not be discovered.¹¹ This is commonly referred to as the “development risks defence”.
- (6) The product was a component in another product, and the defect is wholly attributable to (a) the design of the subsequent product or (b) compliance with instructions from the producer of the finished product.¹²

6.5 In each case, it is for the defendant to establish the availability of the defence. In Chapter 3, we have proposed increasing the range of parties that can be liable for claims under the CPA. As the defences are available to all defendants to claims brought under the CPA, they would be available to any parties brought into the scope of the CPA under our proposals.

⁴ CPA, s 4(1)(a).

⁵ CPA, s 4(1)(b).

⁶ See para 2.166.

⁷ “Business” is defined in the CPA, s 45(1): “includes a trade or profession and the activities of a professional or trade association or of a local authority or other public authority”.

⁸ CPA, s 4(1)(c).

⁹ See para 2.174 and consultation question 15 at para 2.177.

¹⁰ CPA, s 4(1)(d). Relevant time is defined in s 4(2), and we explain the definition below at para 6.15.

¹¹ CPA, s 4(1)(e).

¹² CPA, s 4(1)(f).

WHERE THE DEFECTIVE PRODUCT WAS NOT SUPPLIED “TO ANOTHER”

- 6.6 Section 4(1)(b) of the CPA provides a defence where the defendant did not at any time supply the product to another.¹³ For the section 4(1)(b) defence to be available, the defendant must effectively show that the product was never provided, or made available, to another person. The defence might be available where a product causes damage during its production process, or where someone steals a defective product which then causes harm.¹⁴ The intention is that liability only arises once the defendant has chosen to expose others to the product.
- 6.7 Case law under the 1985 Directive tested whether this defence applied where a product was used in the course of providing a service, but at no point actually “supplied” to another. *Veedfald v Århus Amtskommune*¹⁵ concerned an unsuccessful kidney transplant operation in a Danish hospital. The kidney, after being removed from the donor, was flushed with a fluid to prepare it for transplantation. However, the fluid was defective, resulting in the kidney being made unusable. The defendant hospital sought to rely on the defence, arguing that the fluid had not been supplied¹⁶ because it had been manufactured by a hospital within the same hospital group strictly for internal use. The CJEU held that the hospital could not rely on the defence as it interpreted “supply” purposively, holding that it included the use of a product during a specific medical service, where the product itself was defective, not the service.¹⁷
- 6.8 The *Veedfald* case therefore exposed a potential gap in the 1985 Directive, where a product is not technically supplied to another person but is used in the provision of services and causes harm that way. In our view, the CJEU adopted an appropriately narrow interpretation of the defence in these circumstances. A stricter reading of the meaning of “supply” would allow a producer to rely on the defence despite having created a defective product and exposed it to others in circumstances akin to supply. That would run contrary to the purpose of the defence and deny the harmed party a remedy on the basis of the particular circumstances of production.¹⁸ We agree with the CJEU that it should not matter whether the product was produced by the service provider itself or acquired from a third party.¹⁹
- 6.9 We therefore provisionally propose that a defendant should not be able to avoid liability under the CPA on the basis that there was “no supply to another” where a defective product was produced by a service provider for its own use and caused

¹³ The equivalent provision under the 1985 Directive was a defence that the person “did not put the product into circulation”: 1985 Directive, art 7(a). See T Huckle (ed), *Butterworths Personal Injury Litigation Service* (looseleaf 2026) para 260. We discuss the meaning of “supply” in Ch 2, from para 2.166; see also CPA, s 46.

¹⁴ D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 13.12.

¹⁵ Case C-203/99 *Veedfald v Århus Amtskommune* [2001] ECR-I-3569.

¹⁶ We use supply here to aid the reader, the actual term used is “did not put the product into circulation” which is the mirroring provision of the 1985 Directive.

¹⁷ Case C-203/99 *Veedfald v Århus Amtskommune* [2001] ECR-I-3569 at [14] to [18].

¹⁸ If the service provider had used a third-party product in the provision of its services, the claimant would have a product liability claim against that third party. It would be arbitrary if the claimant were denied a claim simply on the basis that the service-provider used its own product.

¹⁹ Case C-203/99 *Veedfald v Århus Amtskommune* [2001] ECR-I-3569 at [14] to [18].

harm in the course of providing a commercial service, or a service that is publicly funded.

- 6.10 We consider that NHS and other publicly funded bodies should fall within the ambit of liability. Although publicly funded, the NHS provides healthcare services on a large scale and, in relevant respects, operates in a manner comparable to a commercial provider. We see no persuasive reason why liability should differ between public and private healthcare providers. Where public resources are used to produce a defective product that causes harm, liability should arise. This approach ensures that all consumers²⁰ receive the same level of protection, rather than limiting protection in the healthcare context to those who are privately insured.
- 6.11 This conclusion is consistent with *Veedfald*. The defendant argued that, because the patient's treatment was funded through public resources, there was no direct economic link between the hospital and the patient and therefore no economic or business activity. The ECJ rejected that argument, holding that public funding did not deprive the activity of its economic character and that there was no justification for treating public and private hospitals differently for the purposes of product liability.
- 6.12 Overall, our proposal would maintain the proper operation of the “no supply” defence, ensuring that it is calibrated to provide a fair balancing of interests and avoiding an arbitrary outcome. It would also provide clarity and avoid the possibility of costly proceedings to determine the operation of the defence in these circumstances.
- 6.13 The New Directive similarly addresses the points raised in *Veedfald* expressly. It does this through its definition of the products captured by the regime, which applies to products “placed on the market or put into service”.²¹ The definition of manufacturers also includes those who produce things for their own use.²² Our proposal would therefore be aligned in substance with the approach taken in the New Directive. While we currently approach this by considering defences, it may be that ultimately it is better addressed through the concept of supply. Here, we test consultees’ views on the policy more generally.

²⁰ In this consultation paper, we use “consumer” to refer to persons who use, interact with, or may be affected by a product. It extends beyond consumers who have purchased a product, encompassing all natural persons who suffer harm as a result of a defective product.

²¹ New Directive, art 2(1).

²² New Directive, art 4(10)(c).

Consultation question

Consultation Question 47.

- 6.14 We provisionally propose that a defendant should not be able to avoid liability under the CPA on the basis that there was “no supply to another” where a defective product was produced by a service provider for its own use and caused harm in the course of providing a commercial service, or a service that is publicly funded.

Do consultees agree?

WHERE A DEFECT ARISES AFTER THE PRODUCT WAS SUPPLIED

- 6.15 Section 4(1)(d) of the CPA provides a defence where the defect did not exist in the product at the “relevant time”. The relevant time varies depending on who is liable. Where liability is imposed on producers, own-branders and importers through section 2(2) of the CPA, the relevant time is when that person supplied the product to another. In other cases, such as that of suppliers, the relevant time is the time when the product was last supplied by a producer, own-brander or importer.²³ However, in broad terms, it is generally sufficient to consider it to be the time of the supply.
- 6.16 Section 4(1)(d) therefore provides a defence where the product was not defective when it was supplied. This makes sense for a traditional tangible product, in respect of which a defendant typically relinquishes control once it has been supplied. Where the defendant was not responsible for the product’s safety when the defect arose, it is fair that it should not be liable for any resulting harm.
- 6.17 However, whilst the defence is suitable in many cases, its application as currently drafted could lead to unfair results. This is because it fails to account for products which can be modified by producers post-supply, including modern products such as smartphones which can receive regular updates to maintain and improve their performance. As we set out in Chapter 4 at paragraphs 4.66 to 4.73, in these cases, a producer can cause a product to become defective after it has been supplied. For example, a product could become defective after receiving a faulty software upgrade. Alternatively, a product may become defective because the producer fails to provide software updates or upgrades to resolve a safety risk in the product. In these examples, the defence would be available because the defect in the product arose only after the product was supplied, notwithstanding that the producer was responsible for the product becoming defective. In our view, that outcome is unsatisfactory. Drawing a distinction between defects introduced before and after supply creates an artificial divide: a producer that causes a product to be defective pre-supply is held liable and a producer that does so post-supply escapes liability. It undermines the intention of the defence and ignores the reality of the producer’s continued control over the product post-supply.
- 6.18 In our view, reform is required to rebalance the operation of the defence so that it works as intended. We therefore provisionally propose that the section 4(1)(d)

²³ CPA, ss 2(2) and 4(2).

defence should be amended so that a defendant may not rely on the defence where the producer caused the product to become defective after the relevant time by:

- (1) integrating or connecting a component with the product, or modifying the product (including carrying out a substantial modification), regardless of how this modification is made; or
- (2) authorising or consenting to a third party integrating or connecting a component with the product, or modifying the product (including carrying out a substantial modification), regardless of how this modification is made, but in each case, only where the producer has presented the particular component or modification as part of their product or product offering; or
- (3) failing to supply software updates or upgrades.²⁴

6.19 This reflects the range of ways in which a producer may cause a product to become defective after it has been supplied. Where a producer caused the product to become defective after the relevant time, a defendant will not be able to rely on the defence. If the defendant can show that the defect arose after the relevant time and outside of the producer's control, they will be able to rely on the defence. This approach updates the operation of the defence so that it only shields defendants from liability in respect of defects that arise after the relevant time if they are caused outside of the producer's control.

6.20 Finally, it is important to recognise that our proposals to change the operation of the defence in this way would allow defect claims to be brought on the basis that a product is defective because the producer did not supply software updates or upgrades. Since we address this consequence in Chapter 4 at paragraphs 4.66 to 4.73, we only deal with it briefly here.

6.21 The New Directive prevents defendants from relying on the defence when the defect has been caused by a matter under their control.²⁵ The effect of this is that the New Directive broadly operates in the same way as our proposal. We acknowledge that this aspect of the Directive has been criticised on the basis that it blurs the conceptual boundary between product liability and service liability, by treating ongoing maintenance obligations as part of the product itself.²⁶ We have also heard concerns from some stakeholders that liability may become indeterminate in both scope and duration, since defects may arise from omissions occurring long after the product has been placed on the market. It has been suggested that the absence of clear standards as to the timing, content, and duration of update obligations gives rise to legal uncertainty for producers, while increasing litigation and compliance risk across the

²⁴ This is broadly consistent with our Ch 3 proposals in the context of liability for product modifications.

²⁵ Reliance on the defence is excluded where defect is due to any of the following, provided that it is within the manufacturer's control: (a) a related service; (b) software, including software updates or upgrades; (c) a lack of software updates or upgrades necessary to maintain safety; and (d) a substantial modification of the product. New Directive, art 11(2).

²⁶ B Gsell and A Mayrhofer, "The New Product Liability Directive 2024: Missed Updates or Upgrades for the Interplay with National Liability Rules and for Service Liability" [2025] 14(5) *Journal of European Consumer and Market Law* 205, 205 to 216.

product lifecycle. According to this view, such uncertainty has potential negative implications for innovation and the continued support of legacy products.

- 6.22 In our view, although these concerns are important, the expansion of the regime is best understood as a principled adaptation of product liability to the realities of digital products, which are inherently dynamic and may pose safety risks throughout their lifecycle. Treating failures to provide necessary updates or upgrades as capable of rendering a product defective reflects the reality that, for many products, safety no longer depends solely on their condition at the point of supply, but also upon their ongoing maintenance and performance. The resulting liability is not necessarily indeterminate: it remains anchored to the requirement that the product in question must meet the level of safety which the public is entitled to expect. The courts are well placed to determine when such failures are sufficient to render a product defective, and guidance will emerge from their decisions. Finally, while this approach may increase product maintenance obligations, this is justified by the need to ensure effective consumer protection and to place risk with the party best placed to manage it. Accordingly, we consider that this change, together with amendments to the development risks defence proposed below at paragraph 6.62, is necessary to modernise the regime and support our proposed reforms to product, supply and defect in Chapters 2 and 4.

Consultation question

Consultation Question 48.

- 6.23 We provisionally propose that a defendant should not be entitled to rely on the section 4(1)(d) defence under the CPA (that “the defect did not exist in the product at the relevant time”) if the producer caused the product to become defective after the relevant time by:
- (1) integrating or connecting a component with the product, or modifying the product (including carrying out a substantial modification), regardless of how this modification is made; or
 - (2) authorising or consenting to a third party integrating or connecting a component with the product, or modifying the product (including carrying out a substantial modification), regardless of how this modification is made, but in each case, only where the producer has presented the particular component or modification as part of their product or product offering; or
 - (3) failing to supply software updates or upgrades.

Do consultees agree?

THE DEVELOPMENT RISKS DEFENCE

- 6.24 Section 4(1)(e) of the CPA sets out a defence which is commonly referred to as the “development risks defence”. This defence applies where the state of scientific and technical knowledge was, at the “relevant time” (generally, when the product was

supplied),²⁷ not such that “a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control”.

- 6.25 It reflects difficulties in anticipating the long-term effects of technically innovative products and the belief that producers should not be liable for dangers that were genuinely unforeseeable.²⁸ The intent behind this defence is to encourage innovation, minimise insurance costs and preserve competitive advantages.²⁹
- 6.26 The defence has been controversial since the point of its inclusion in the 1985 Directive.³⁰ It has been suggested that it favours defendants unduly by providing a way to escape liability by simply citing that it was not possible to have known that there was a defect, and that this undermines the strict liability nature of the regime.³¹ The controversy led to the European Commission allowing derogations from the defence,³² and in several EU countries it cannot be used in relation to certain products.³³ The CPA does not contain any such exclusions or limits.³⁴ We note however that the Law Commissions’ 1977 Report had previously concluded that a development risks defence should not be provided on the basis that, if the product was found to be less safe than a person would be entitled to expect, the injured person should be compensated by the producer.³⁵

Whether the “development risks defence” should be retained

- 6.27 While the controversy does not in and of itself mean that we should consider potential reform, this review presents a good opportunity to consider the impact of the defence and test whether it strikes the correct balance between interests. Some stakeholders have called for its removal, while others have expressed strong support for it.³⁶ As we discuss further below, there are also concerns that it may be relied on more and more in this age of increasingly complex products.

²⁷ CPA, s 4(2). For a fuller explanation, see para 6.15 above.

²⁸ D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 13.33.

²⁹ *Clerks & Lindsell on Torts* (24th ed) para 10-72.

³⁰ C Stolker, “Objections to the Development Risk Defence” (1990) *Medicine and Law* 783, https://www.researchgate.net/publication/28638713_Objections_against_the_development_risk_defence.

³¹ P Shears, “The EU Product Liability Directive – twenty years on” [2007] *Journal of Business Law* 884, 886.

³² Contained in the 1985 Directive, art 15(1)(b). See D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 13.35.

³³ Eg, Germany has derogated from the defence for pharmaceuticals. See the full discussion in D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 13.48.

³⁴ Indeed, the defence was included partially at the UK’s insistence: see D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 13.33.

³⁵ To illustrate, the Commissioners referred to the facts of the thalidomide case: Liability for Defective Products (1977) Law Com No 82; Scot Law Com No 45 paras 104 and 105.

³⁶ Including in response to our Initial Scoping Study. See also eg J Borghetti, “Taking EU Product Liability Law Seriously: How can the product liability directive effectively contribute to consumer protection?” (2023) 1 *French Journal of Legal Policy* 136, 180, https://fjlp.assas-universite.fr/sites/default/files/geras2019/borghettiuk_ep5_0.pdf.

- 6.28 It is perhaps not surprising that the defence has been controversial. Fundamentally, the product liability regime is one of strict liability: the injured party need not establish fault on the part of the defendant. The existence of this defence arguably undermines this,³⁷ relieving the defendant of liability because the risk could not have been known. The defence appears to reintroduce considerations of fault. In general, it is for a business to ensure that its products are safe and to take steps to mitigate the risk that they are not. From the perspective of the fair apportionment of risk, businesses are typically better placed than consumers to manage such risks.
- 6.29 The question of who should bear the risk is more important now than ever before. Technology is developing at an exponential rate; it is probable that many risks are genuinely unknowable due to the nascent state of the products or their component parts. The defence may be invoked with increasing frequency by defendants to shield them from liability, potentially leaving the CPA without any “teeth”.
- 6.30 However, we recognise that it can be difficult to predict the long-term effects of new products. Where a defendant did not know, and could not have known, about a defect, it is at least arguable that they should not be liable for this. Further, without the defence, there may be less incentive to develop new products for fear of being liable for an unknowable risk. This could stifle innovation and restrict growth, which is detrimental for business and ultimately detrimental for consumers.
- 6.31 Businesses already undergo rigorous testing and approval processes when bringing their products to market. We have heard from some stakeholders that, in most cases, this provides a sufficient safeguard which ensures that businesses do not bring to market products which they know are defective, or ought to know were defective. Research suggests that the development risks defence plays an important role in keeping insurance costs down, particularly in high-tech and high-risk sectors.³⁸
- 6.32 In any case, despite concerns that this defence will be used by defendants to escape liability, we have not been made aware of any evidence that the defence has been regularly used. Rather, when it has been used, the courts have interpreted it narrowly, and the defendants’ arguments have tended to be unsuccessful.³⁹ It therefore does not seem in practice to be a mechanism for defendants to escape liability easily and regularly. It has been said that the defence is frequently deployed by defendants in correspondence and pleadings, which could deter claimants from pursuing claims, but which could equally encourage compromise on both sides.⁴⁰

³⁷ See P Shears, “The EU Product Liability Directive – twenty years on” [2007] *Journal of Business Law* 884, 886.

³⁸ Fondazione Rosselli (Rosselli Foundation), *Analysis of the Economic Impact of the Development Risk Clause as provided by Directive 85/374/EEC on Liability for Defective Products: Final Report* (Study for the European Commission, Contract No ETD/2002/B5) p 4, https://unece.org/fileadmin/DAM/trade/wp6/SectoralInitiatives/MARS/slovakia_sep06/MARS/Fonazione%20Rosselli%20Analysis.pdf.

³⁹ *Abouzaid v Mothercare (UK) Ltd* [2000] EWCA Civ 348, [46]; *A v National Blood Authority (No 1)* [2001] EWHC QB 446, [2001] 3 All ER 289 at [74] to [77].

⁴⁰ Eg, C Dougherty KC, “Development Risk Defence: Saint or Sinner?” (April 2020) <https://www.2tg.co.uk/webinar-development-risk-defence-saint-or-sinner/>.

- 6.33 On balance, we are persuaded that the defence serves a necessary purpose in striking the right apportionment of risk across all relevant parties. This is because there is little evidence to suggest that the defence has been used extensively to prevent worthy claims, and because other aspects of our consultation paper extend the scope of liability for businesses. In that context, we consider that the defence operates as a necessary mechanism to balance, fairly, business confidence and innovation against consumer and third-party protection.
- 6.34 The New Directive similarly retains the development risks defence,⁴¹ although there are some differences between the defence provided by the CPA and that in the New Directive as we discuss below. Like the 1985 Directive, the New Directive permits EU countries to derogate from implementing the defence, either entirely or in regard to certain products and industries.⁴² We have not (yet) heard arguments to suggest that there are particular industries in which this defence would not be appropriate, or where the fair apportionment of risk would point to its disapplication.

Consultation question

Consultation Question 49.

6.35 We provisionally propose that –

- (1) the development risks defence should be retained; and
- (2) the development risks defence should apply to all products and industries.

Do consultees agree?

Clarifying the “development risks defence”

- 6.36 As well as being controversial in its very existence, the development risks defence is complex in the range of issues it engages. It raises questions including what information is “accessible”;⁴³ what counts as “scientific and technical knowledge”,⁴⁴

⁴¹ New Directive, art 11(1)(e).

⁴² New Directive, art 18. Eg, Finland has announced that it intends to continue its current stance of not providing for a development risks defence. See S Castley, “Transposition Time Updates - Nordic Trio: Denmark, Finland, and Sweden Progress Towards New EU Product Liability Directive Implementation” (CMS, Feb 2026) <https://cms.law/en/gbr/legal-updates/transposition-time-updates-nordic-trio-denmark-finland-and-sweden-progress-towards-new-eu-product-liability-directive-implementation>.

⁴³ In Case C-300/95 *Commission v United Kingdom* [1997] ECR I-2649, the Advocate General distinguished between an American research paper published in an English-language journal which would be regarded as accessible, and something published in Chinese in Manchuria, which (at the time) would not. In 2026, given the prevalence of online publications and the availability of internet-based translation services, significantly more information is likely now to be accessible than it was in the 1980s. See eg, M Palmer and C Moore, “The development risks defence: how future-proof is it?” [2019] 74 *International Products Law Review* 10, 10 to 11.

⁴⁴ Eg, how certain the evidence has to be. See eg M Palmer and C Moore, “The development risks defence: how future-proof is it?” [2019] 74 *International Products Law Review* 10, 10 to 11; see also C Dougherty KC, “Development Risk Defence: Saint or Sinner?” (April 2020) <https://www.2tg.co.uk/webinar-development-risk-defence-saint-or-sinner/>.

and how specific the knowledge has to be with respect to the precise nature of the defect.⁴⁵ These types of questions are highly fact-specific and were not answered in legislation.

- 6.37 However, the case law highlights certain issues of principle that we think could and should be addressed on the face of the defence to ensure that it operates in a balanced way and minimises unnecessary disputes about its interpretation. Some of these issues stem from differences between the wording of the development risks defence in the CPA and the corresponding provision in the 1985 Directive. Those differences led the EU Commission, in *Commission v United Kingdom*,⁴⁶ to bring proceedings against the UK for the failure to implement the Directive correctly.
- 6.38 The 1985 Directive provides that the defence applied where “the state of scientific and technical knowledge at the time when [the defendant] put the product into circulation was not such as to enable the existence of the defect to be discovered”.⁴⁷ By contrast, the CPA links the state of scientific and technical knowledge available to “a producer of products of the same description as the product in question [who] might be expected to have discovered the defect”.⁴⁸ This difference gave rise to a particular point of tension: the Commission argued that the CPA’s formulation widened the scope of the defence and incorporated a subjective element by referring to what could be known or discovered by a producer in a particular sector, taking reasonable care.⁴⁹
- 6.39 The CJEU dismissed the claim against the UK on the basis that no domestic decisions had interpreted the defence inconsistently with the original wording of the 1985 Directive,⁵⁰ and that there was no evidence that UK courts would not interpret the defence in line with the wording and purpose of the 1985 Directive.⁵¹ The CJEU also made several observations about how the defence was intended to operate.⁵²
- (1) The defence relates to the most advanced level of scientific and technical knowledge at the time when the product in question was put into circulation.
 - (2) The level of knowledge is the objective state of knowledge of which the producer is presumed to have been informed, not what the producer actually or subjectively did or could have known.

⁴⁵ D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 13.40.

⁴⁶ Case C-300/95 *Commission v United Kingdom* [1997] ECR I-2649. See also, D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 13.54, and discussion of the arguments made by the UK and the Commission, as well as the Advocate General’s Opinion at paras 13.53 to 13.50.

⁴⁷ 1985 Directive, art 7(e).

⁴⁸ By contrast, the wording under art 7(e) of the 1985 Directive is: “that the state of scientific and technical knowledge at the time when he put the product into circulation and was not such as to enable the existence of the defect to be discovered”.

⁴⁹ Case C-300/95 *Commission v United Kingdom* [1997] ECR I-2649 at [17].

⁵⁰ At that time, no case requiring the defence’s interpretation had gone before a domestic court.

⁵¹ Case C-300/95 *Commission v United Kingdom* [1997] ECR I-2649 at [37] to [38].

⁵² Case C-300/95 *Commission v United Kingdom* [1997] ECR I-2649 at [25] to [29].

- (3) However, the relevant knowledge must have been accessible when the product was put into circulation.
- 6.40 The defence was considered by the High Court in *A v National Blood Authority* (No 1),⁵³ where the court, relying heavily on *Commission v United Kingdom*,⁵⁴ concluded it was a “very restricted escape route” available for a defendant “who has done all [it] could reasonably be expected to do (and more)”.⁵⁵
- 6.41 Referring to the defence as expressed in the 1985 Directive (as opposed to its equivalent the CPA), the court held that: the state of knowledge is assessed by reference to the most advanced knowledge available and is judged objectively; the defence does not apply where the defect was known or ought to have been known in light of reasonably accessible information;⁵⁶ and the assessment is not concerned with what could be done in relation to a particular product (rather, it focuses on the existence of a known risk, irrespective of the likelihood of detecting the defect in any individual product).⁵⁷
- 6.42 The characterisation of the development risks defence in both *Commission v United Kingdom* and *A v National Blood Authority* (No 1) is persuasive. It maintains the intended protection for defendants, preventing their liability when the state of knowledge means that the defect was unknown and unknowable. Importantly, it does not require a finding of fault on the part of the defendant, or a failure to act reasonably in terms of what it “could be expected” to discover.
- 6.43 The differences in drafting between the CPA and the 1985 Directive which led to *Commission v United Kingdom* persist today. As there is no substantive appellate domestic authority on the application of the defence, a degree of uncertainty arises as to how a court would approach the application of the defence in future. As long as section 1(1) of the CPA provides that its purpose is to implement the 1985 Directive and that it should be construed accordingly, it is likely that the courts will continue to refer to the wording of the 1985 Directive and the caselaw on its interpretation, despite the UK’s exit from the EU. However, since section 1(1) will need to be amended if and when the CPA is otherwise reformed,⁵⁸ it will be less clear after that point how the

⁵³ *A v National Blood Authority* (No 1) [2001] EWHC QB 446, [2001] 3 All ER 289.

⁵⁴ Case C-300/95 [1997] ECR I-2649.

⁵⁵ *A v National Blood Authority* (No 1) [2001] EWHC QB 446, [2001] 3 All ER 289 at [64], [74ii] and [75] to [76].

⁵⁶ The phrase used by the Court was “non-Manchurianly accessible information”. This was a reference to the opinion of the Advocate General in the proceedings that led to *Commission v United Kingdom* concerning the accessibility of research: Opinion of Advocate General Tesauro, Case C-300/95 *Commission v United Kingdom* [1997] ECR I-2649 (paras 23 and 24 of the Advocate General’s opinion).

⁵⁷ *A v National Blood Authority* (No 1) [2001] EWHC QB 446, [2001] 3 All ER 289 at [64]. In Australia, this question was answered differently when the court applied a development risks defence drafted similarly to that in the CPA. In *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54, it was held that, since it was not possible to detect a defect in an individual oyster, the development risks defence (which is very close to that in the CPA) was available.

⁵⁸ We propose an updated purpose for the CPA in Ch 4; see para 4.79 onwards. The reference to the 1985 Directive in s 1(1) will no longer be appropriate; the purpose of the CPA will no longer be to implement the 1985 Directive and other changes and updates to the regime that we propose would mean that a conflict will arise between the amendments and the requirement to construe the CPA as implementing the 1985 Directive.

courts will or should approach the question. It has also been suggested that, given the negative judicial treatment of *A v National Blood Authority* (No 1) on the meaning of defect, the judge's approach to the defence might also be called into question.⁵⁹

- 6.44 We consider that a strict adherence to the wording of the CPA may lead to a lowering of the bar that a defendant is required to meet to rely on the defence. In particular, the reference to “a producer of products of the same description” introduces a comparative standard. Furthermore, considerations of reasonableness are inherent in what such a producer might be “expected to have discovered” if the defect had existed in its products while they were under its control. There is therefore a danger that the inquiry becomes an assessment of whether it was reasonable to expect that a producer of similar products would have discovered the defect, if its own products were defective. In our view, that introduces an element of fault into the analysis. Such an approach is difficult to reconcile with a strict liability regime, under which liability does not depend on proof of fault.
- 6.45 In light of the exponential growth of modern and emerging technologies, and our proposed extension of the regime to cover more products incorporating such technologies, the importance of this defence is likely to increase. Its application must therefore be clear, fair, and properly balanced. Given the greater scope for harm from new products with uncertain risks, it is right that the defence should be applied objectively and strictly.
- 6.46 To resolve the existing uncertainty and avoid potentially costly proceedings on the point, we provisionally propose that the defence be updated to reflect that the question is whether the state of accessible scientific and technical knowledge, assessed objectively, was such as to allow the existence of the defect to be discovered. Reflecting these elements in the defence would increase certainty and clarity and would confirm in statute the position at law as a result of CJEU case law. It does not therefore restrict the availability of the defence in real terms.
- 6.47 In this regard, the defence remains largely unchanged in the New Directive, except that it now expressly states that the assessment is objective, and as such our proposals would be consistent with it.⁶⁰

⁵⁹ Eg, C Dougherty KC, “Development Risk Defence: Saint or Sinner?” (April 2020) <https://www.2tg.co.uk/webinar-development-risk-defence-saint-or-sinner/>.

⁶⁰ New Directive, art 11(1)(e).

Consultation questions

Consultation Question 50.

- 6.48 We provisionally propose that the development risks defence in section 4(1)(e) be updated to reflect that scientific and technological knowledge is to be assessed objectively by reference to accessible knowledge. What a producer of products of the same description as the product in question might be expected to have discovered should not form part of that objective assessment.

Do consultees agree?

The development risks defence when the defect arises after supply

- 6.49 Under the current wording, a defendant can rely upon the development risks defence if they can show that the state of knowledge was such that, at the “*relevant time*”, the existence of the defect could not have been discovered. As noted earlier, the relevant time varies depending on who is liable, but generally it is the time of supply.⁶¹
- 6.50 As set out in the preceding sections, the development risks defence serves a necessary purpose. It shields producers from liability for defects that were genuinely unforeseeable⁶² at the point of supply and provides a mechanism to balance fairly business confidence and innovation against consumer protection.
- 6.51 However, the position is less readily justified where the producer retains an ongoing role in the product’s safety after supply. In particular, it is unclear that the state of knowledge should continue to be assessed at the time of supply in the following cases:
- (1) where the producer modifies a product at a later point, causing it to become defective after it has been supplied; or
 - (2) where the producer has the ability to supply software updates or upgrades and causes the product to become (or remain) defective under the CPA after the relevant time by failing to provide software updates or upgrades.

Where there has been a modification within the producer’s control

- 6.52 In Chapter 3, we discuss the situation where there has been a modification within the “producer’s control”. We define “producer’s control” as, broadly, where the producer has carried out a modification (including a software upgrade) or integrated a component within the product, or has consented to or authorised a third party to do so as part of the producer’s product or product offering.⁶³

⁶¹ CPA, ss 4(2) and 2(2).

⁶² D Fairgrieve and R Goldberg, *Product Liability* (3rd ed 2020) para 13.48.

⁶³ See Ch 3 for a discussion, and consultation question 51 at para 6.62 below for the full definition.

- 6.53 We consider here how the development risks defence should apply where there has been a modification (including a software update or upgrade) within the producer's control, which has caused the defect.
- 6.54 In such circumstances, if the producer knew of, or could have discovered, the defect at the time it arose (post-supply), our view is that it should not be open to them to point to the state of knowledge at the earlier time of supply to avoid liability. This is because the state of knowledge may have developed since the time of supply. Allowing the defence to operate in this way could shield a defendant from liability in circumstances where it was capable of discovering the defect when it arose, thereby affording defendants a greater level of protection than was intended. It would be inappropriate to assess the safety of the product against an earlier (and likely less advanced) state of knowledge. In our view, reform is therefore required.
- 6.55 In such cases of post-supply modification, we think the state of scientific and technical knowledge should be assessed at the point after supply when the product became defective as a result of the modification. In other words, the defence should not be available unless the state of scientific and technical knowledge at the time the defect arose was such that it could not have been discovered.
- 6.56 In this way, the proposal ensures that the defence operates as intended, only where the defect was genuinely unknowable at the point when the producer had control over the product akin to supply. In our view, it therefore restores the intended balance between the interests of producers and those harmed by defective products.
- 6.57 It would be for the claimant to show only that the product was defective. Where there has been a modification, a defendant seeking to rely on the defence would have to show both when the defect arose and that, in light of the state of scientific and technical knowledge at that time, it was not discoverable. If the defendant cannot establish when the defect arose, the defence will not be available.

Where there has been a failure on the part of the producer

- 6.58 The previous section considered cases where the producer has taken a positive step to modify a product. By contrast, here we address the situation in which the producer (itself or through a third party) retained the ability to provide software updates or upgrades to the product, but failed to do so, thereby causing the product to become (or remain) defective. For example, the producer may fail to provide software updates or upgrades necessary to address cybersecurity vulnerabilities and maintain the safety of the product, causing it, over time, to fall below the entitled standard of safety.⁶⁴
- 6.59 In such circumstances, it would again not be logical for the producer to escape liability by pointing to the state of knowledge at the time of supply. That is because the producer's relationship with the product did not end at the time of supply, as in the "classic" case of a product with no smart/connected element. Accordingly, we consider that the state of knowledge for the purposes of the development risks defence should

⁶⁴ New Directive, recital 51.

be assessed at the time the product became (or remained) defective as a result of the producer's failure to supply software updates or upgrades.

- 6.60 The effect of this proposal is likely to be that the development risks defence is rarely, if ever, available in such cases. However, we consider that this outcome is justified. The rationale for the defence lies in the difficulty of predicting the long-term risks of highly technical products when they are initially supplied. In the case of software-linked products where the producer retains the ability to update and improve the product's safety profile in almost real time as knowledge improves, that justification is significantly weaker.
- 6.61 Our proposals differ from those of the New Directive, which provide that the state of knowledge is to be assessed during the period of control.⁶⁵ We consider that this approach creates uncertainty because it is unclear at which point during the period of control the state of knowledge is to be assessed. For example, a defect may have been undiscoverable when the product was first supplied but subsequently becomes discoverable as scientific knowledge develops. If knowledge is assessed at any point during the period of control, the defence may be denied, even where the producer could not have used their control to prevent or remedy the defect. In our view, this would be unfair and would upset the balance of interests that the defence is intended to achieve. By contrast, we consider that our proposal is clearer and that it ensures that the application of the defence strikes a fair balance of interests.

Consultation questions

Consultation Question 51.

6.62 We provisionally propose that where the producer caused the product to become defective under the CPA after the "relevant time" (generally, that of supply) by:

- (1) integrating or connecting a component with the product, or modifying the product (including carrying out a substantial modification), regardless of how this modification is made; or
- (2) authorising or consenting to a third party integrating or connecting a component with the product, or modifying the product (including carrying out a substantial modification), regardless of how this modification is made, but in each case, only where the producer has presented the particular component or modification as part of their product or product offering;

there is a defence if the state of scientific and technological knowledge was such that the defect could not have been discovered at the time the product became defective (rather than at the "relevant time").

Do consultees agree?

⁶⁵ New Directive, art 11(e).

Consultation Question 52.

- 6.63 We provisionally propose that, where the producer caused the product to become (or remain) defective under the CPA after the “relevant time” (generally, that of supply) by failing to provide software updates or upgrades, there is a defence if, at the time the product became (or remained) defective as a result of the producer’s failure to supply software updates or upgrades, the state of scientific and technological knowledge was such that the defect could not have been discovered.

Do consultees agree?

THE LONG-STOP UNDER THE CPA

- 6.64 Claims for personal injury or damage to property under the CPA must generally be brought within three years of the later of either the date when the damage arose or the date when the claimant acquired the relevant knowledge of the injury or damage.⁶⁶ Alongside the three-year limitation period, the CPA also provides that a claimant has 10 years from the “relevant time” to bring their claim, generally the time of supply.⁶⁷ This is known as the long-stop provision. If the claim has not been commenced at court before the 10-year period expires, the claimant’s right to bring a claim is extinguished.
- 6.65 Just as the provision of defences plays an important role in balancing interests to achieve a fair apportionment of risk, so too does the provision of a limitation period and long-stop.⁶⁸ They give the parties certainty as to when claims must be commenced, and prevent defendants from having to defend claims which have been prejudiced by the passage of time.
- 6.66 An important distinction between the limitation period and the long-stop lies in when time begins to run. The limitation period runs from the claimant’s knowledge of the injury or damage and is therefore inherently uncertain, since harm may arise long after supply. By contrast, the longstop runs from the date of supply and imposes a fixed 10-year outer limit, providing finality.⁶⁹
- 6.67 We have not identified any issues arising from the operation of the regime’s limitation period. We have however identified two issues which warrant consideration in relation to the operation of the long-stop. Both arise out of our Terms of Reference, which specifically ask us to consider the long-stop period in the context of latent harm and products that are iteratively updated.⁷⁰ We consider each below.

⁶⁶ CPA, Sch1 and Limitation Act 1980, s 11A(4).

⁶⁷ CPA, Sch 1 and Limitation Act 1980, s 11A(3).

⁶⁸ The 1985 Directive, recitals 10 and 11.

⁶⁹ CPA, s 4(2). Eg, for producers, see s 4(2)(a): “the time when he supplied the product to another”.

⁷⁰ See Appendix 1, para 1.4(4).

The long-stop and products that are modified

- 6.68 Currently, the long-stop runs from the date at which the defective product was supplied. However, as we have discussed elsewhere in this chapter, the post-supply modification of products may introduce new risks of harm that were not present in the product at the time of supply. The long-stop does not take this into account, and might therefore operate to prevent a claim unfairly.
- 6.69 For example, take a product that was first supplied in 2027, at which point the 10-year period begins to run. It is then subject to several software updates, including an update in 2039 (12 years later), after which a person is injured. Under the current law, the injured person would not be able to bring a claim. This is because the long-stop extinguishes all claims after 2037. This leaves a claimant without redress when a product that was brought to market a considerable time ago is updated, becomes defective and causes harm.
- 6.70 Where a product has been substantially modified (including through software updates and upgrades), we consider that the long-stop should reset. This would allow claimants to benefit from the full 10-year period, starting at the point of such modification, rather than from when the product was originally supplied. This would reflect the fact that it may be the modification that introduces the defect rather than the product as originally supplied. This would also uphold the general proposition that, where a person (whether within or outside the original producer's control) makes a sufficiently serious modification to a product, they are better placed than consumers to manage the risk of the product causing harm.⁷¹ Although the long-stop date is designed to prevent open-ended liability, we consider there to be justification for an extended, albeit still finite, period of liability in the case of a product that has been substantially modified.
- 6.71 In Chapter 3, we provisionally describe a substantial modification as being a modification of a product by any person after the relevant time that:
- (1) changes the product's original performance, purpose or type; and
 - (2) as a result, changes what persons generally expect in relation to the product, or changes the nature of the risk.
- 6.72 "Substantial modification" is predicated on there being a change to the risks presented by the product, or to the level of safety which the public is entitled to expect. This ensures that it does not capture changes of a merely superficial nature.
- 6.73 There is a risk that resetting the long-stop where a product has been substantially modified could render the long-stop meaningless in certain circumstances. Where products are subject to ongoing updates and/or upgrades by the original producer throughout their lifespan, this has the effect that the producer's liability is open-ended. In such circumstances, there is a tension between ensuring that producers remain incentivised to issue updates and upgrades which could be beneficial to end users and ensuring that they are not punished for providing them. This might result in producers choosing to cease support for the relevant product entirely, which would

⁷¹ We discuss substantial modifications of a product from para 3.28.

have a detrimental effect on consumers overall. However, we think that this risk can be mitigated by ensuring that only modifications that have a bearing on the risk profile of the product (the central matter with which the product liability regime is concerned) cause the long-stop to be reset, rather than any modification.

6.74 Given our proposed allocation of liability in Chapter 3, there are two situations we must consider in this section, as they are consequential on our earlier proposals.

- (1) The first situation is where a product is substantially modified *within* the original producer's control, in which case the original producer remains liable for the modified product.⁷² Here, we consider that the long-stop should begin to run as soon as the substantially modified version of the product is made available. For example, if a product originally supplied in 2030 is substantially modified within the original producer's control and made available in 2035, then the new long-stop should run from that point.
- (2) The second situation is where a person substantially modifies a product *outside* the original producer's control, and then supplies such modified product in the course of their business and/or with a view to profit.⁷³ As we explain in Chapter 3, liability for the modified product as a whole would rest with the modifier in such a scenario, on the basis that it is effectively a new product.⁷⁴ Here, we consider that the long-stop should begin to run from the date of such supply.

6.75 As a final point, we note that our proposed concept of substantial modification is predicated on some positive action taken by a person (whether within or outside the original producer's control).⁷⁵ Consistent with our discussion of "substantial modification" in Chapter 3, it would not therefore capture the continuous learning of an AI system where the system has not been specifically retrained or fine-tuned by a developer to a significant degree. Such self-learning is part of the AI system's expected operation as designed by the original developer. In those circumstances, no person has actively modified the system; rather, the system is operating in the manner intended. We therefore consider it appropriate that the long-stop period should continue to run from the date of supply. Extending the long-stop in these circumstances would expose producers to liability for an excessively long period and undermine the principles of certainty and finality.

6.76 Concerns about unpredictable changes in AI systems are, however, mitigated by the fact that the long-stop will reset whenever a producer or another person makes a substantial modification. Given the nature of AI and software products, substantial retraining or fine-tuning may occur repeatedly over a product's lifecycle. In such cases, a new long-stop period would begin to run from each substantial modification, ensuring that liability remains aligned with significant interventions by the producer or another person affecting the product's behaviour.

⁷² See para 3.41.

⁷³ See para 3.37.

⁷⁴ See paras 3.37 to 3.39.

⁷⁵ See paras 3.30 to 3.35.

- 6.77 In our view, this strikes the appropriate balance between protecting consumers and avoiding open-ended strict liability. Where a person has substantially modified a product, the long-stop may be reset. Where an AI system's behaviour evolves solely through its intended operation, without any significant intervention, we do not consider it proportionate to extend strict liability indefinitely. Any impact on claimants is also mitigated by the availability of negligence claims, which may be brought alongside product liability claims in respect of latent harm or damage that emerges after the long-stop period has expired. We discuss this further in the following section.
- 6.78 Our provisional proposal on the long-stop largely matches the position in the New Directive which says that there is a 10-year long-stop running from (a) the date on which the defective product was placed on the market or put into service; or (b) in the case of a substantially modified product, the date on which it was made available on the market or put into service following its substantial modification.⁷⁶

Consultation question

Consultation Question 53.

6.79 We provisionally propose that, where a product is substantially modified, the 10-year long-stop period should reset as follows.

- (1) If a product is substantially modified within the original producer's control, time should restart from the date when the modified product is made available.
- (2) If the product is substantially modified by a person outside the original producer's control, time should restart from the date when the modifier supplies such modified product in the course of their business and/or with a view to profit.

Do consultees agree?

Latent harm

6.80 A latent personal injury, which we refer to interchangeably as "latent harm", is one that does not become apparent until some time after the event or exposure that caused it. As symptoms do not appear immediately, an individual may not know that they have an injury.

6.81 This delayed onset in injury may be caused by a range of products including:

various chemical substances, in pharmaceutical products, in food additives, in many novel medical devices, as well as in the use of techniques such as nanotechnology, gene technology, and gene therapy. It may also transpire that cloud services, the internet of things, and artificial intelligence will prove harmful in the future. Likewise,

⁷⁶ New Directive, art 17. Rather than long-stop, the New Directive uses the language of "expiry period".

risks may inhere in industrial contaminants such as per- and polyfluoroalkyl substances (PFAS).⁷⁷

- 6.82 Under the current law, the 10-year long-stop applies equally to latent personal injuries as it does to other types of personal injury cases, such that no case can be brought more than 10 years after the relevant time. This means that an individual who suffers a latent personal injury may only have a short period of time in which to initiate proceedings. For injuries coming to light more than 10 years after the product's supply, it will not be possible to bring a claim. We have heard from stakeholders that this creates unfairness, and that there should be reform.
- 6.83 This raises two questions. First, whether the long-stop should be extended in cases of latent harm. Second, if the long-stop is to be extended, how long it should be. We address each of these below.

Should the long-stop be extended for latent personal injuries?

- 6.84 Some stakeholders have suggested that the long-stop should be extended for latent personal injuries. We think that this issue is finely balanced. Having considered the arguments for and against, we provisionally propose that it should be extended in this context for the reasons we explain below.
- 6.85 Latent personal injuries are, by their very nature, injuries that an individual is not immediately aware of. There is therefore a fundamental tension between the reality of a latent personal injury and the concept of a long-stop, precisely because the long-stop is not calculated with reference to the timing of the injury. Although the long-stop gives finality for defendants, it may leave an injured claimant without a claim under the CPA.
- 6.86 In such circumstances, a claimant is likely to have a negligence claim arising from the same facts. As negligence claims are not subject to a long-stop, the claimant may still bring a claim within the applicable limitation period, typically three years from the date on which they become aware of the harm. This reduces the practical significance of the long-stop for defendants, who may be required to defend what are, in cases of latent harm, likely to be complex and technical claims.
- 6.87 The technical and complex nature of such claims supports the argument that they should fall within the scope of the CPA. As we explain in Chapter 1, the CPA establishes a strict liability regime to address the difficulties claimants face in proving fault in such cases.⁷⁸ Excluding claims for latent harm, and thereby leaving claimants reliant on fault-based negligence, risks undermining that objective.
- 6.88 Products such as chemicals and pharmaceuticals are particularly complex and, while it may be known that they may have long-lasting effects, the producer is significantly better placed to anticipate and mitigate those long-term risks than the individual consumer. The current position therefore prevents the harmed individual from

⁷⁷ K Havu and T Havu, "The 'Long-stop' Extinguishment Rule in EU Product Liability: Is It Justified?" [2024] 13(4) Journal of European Consumer and Market Law 162, 162 to 170 (accessed via <https://helda.helsinki.fi/server/api/core/bitstreams/c13bc6cb-a268-4976-a249-ba464b1fadb6/content>).

⁷⁸ See paras 1.22 to 1.26 on the purpose of the CPA.

accessing compensation, even where the harm may have come from a risk known by the producer who was better placed to manage it. Extending the long-stop would remove this unfairness.

- 6.89 On the other hand, a claim brought many years after the product's supply could make it difficult for a defendant to run a defence. After a certain point, witnesses' recollections fade, and evidence may no longer be available. While it is fair to expect defendants to retain records at their own expense, it is not fair to require them to do so indefinitely, and the uncertainty surrounding latent harm may prove challenging for insurance purposes.⁷⁹ Stakeholders have also warned us that this could lead to defensive cultures: businesses may become worried about creating certain documents (in case they later need to disclose them). In this context, it is also important to consider the cumulative effect of our proposals on the practical application of the long-stop. If the long-stop resets after every substantial modification, and claimants have more than 10 years to launch proceedings for latent personal injuries, this may result in a considerable period of time between the product first being supplied and the ultimate litigation.
- 6.90 In spite of the above risks, we maintain that an individual who suffers a latent personal injury should have additional time to bring their claim, before any right is extinguished, such that the long-stop should be extended in relevant cases. However, to balance the interests of claimants and defendants, we think that any extension to the long-stop date should be limited to cases when it has not been possible to initiate proceedings within the initial 10 years due to the latent nature of the injury. This would ensure that claimants benefit from an extension only in cases where it is truly necessary.
- 6.91 We consider that an individual should have initiated proceedings within the initial 10 years where they had knowledge of the following information:
- (1) material facts about the harm in respect of which damages are claimed;
 - (2) that the damage was attributable in whole or in part to the defect in the product which is alleged to constitute the claim under the CPA; and
 - (3) the identity of the defendant.
- 6.92 The above criteria are inspired by section 14A of the Limitation Act 1980 which relates to the special time limit given to negligence claims where facts relevant to the cause of action were not known at the time of injury. Although product liability claims will differ from negligence claims, we nevertheless consider these criteria appropriate for determining whether an individual had sufficient information, such that they should have pursued a product liability claim within 10 years. Ultimately, the criteria strike a fair balance in requiring potential claimants to be aware of key details, without imposing an unduly onerous burden.
- 6.93 The material facts about the damage are those which would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify initiating

⁷⁹ R Winter, "The Liability Insurance Market" [1991] 5(3) *Journal of Economic Perspectives* 115, 122.

proceedings.⁸⁰ It does not matter whether the individual knew that, as a matter of law, the damage caused by the alleged defect in the product gave rise to a claim under the CPA.⁸¹ Knowledge includes such knowledge as an individual might reasonably have been expected to obtain from the facts available to them, or which would be available with the help of reasonably accessible expert advice.⁸²

Consultation question

Consultation Question 54.

6.94 We provisionally propose that for the purposes of a latent personal injury claim, it should be deemed possible for an individual to have initiated proceedings within the initial ten years, where they had knowledge of the following information:

- (1) material facts about the harm in respect of which damages are claimed;
- (2) that the damage was attributable in whole or in part to the defect in the product which is alleged to constitute the claim under the CPA; and
- (3) the identity of the defendant.

Do consultees agree?

How long should the long-stop be for latent personal injuries?

6.95 The next question is therefore what the long-stop should be for cases of latent personal injury. As the Law Commissions noted in their 1977 report on damages for defective products, any long-stop date is by its nature arbitrary.⁸³ At this point, we have not had the benefit of representations from stakeholders as to what would be a suitable period.

6.96 We note that the New Directive includes a 25-year period in cases of latent personal injury. We recognise that this is a long period, and significantly more than the default position of 10 years. However, if the extension is to respond effectively to the nature of latent personal injuries, it must be sufficiently long to accommodate the time it may take for those injuries to manifest. Taking the example of asbestos-related claims, injury or death can follow 20 or 30 years after the time of exposure.⁸⁴ We consider therefore that 25 years is a reasonable period to propose.

6.97 Having been persuaded that the long-stop should be extended for latent personal injuries, our provisional conclusion is that we should align with the New Directive in this regard. Many businesses work across different jurisdictions. If a business is already retaining 25 years' worth of documents for the EU long-stop, and potentially

⁸⁰ See Limitation Act 1980, s 14 A(7).

⁸¹ See Limitation Act 1980, s 14A(9).

⁸² See Limitation Act 1980, s 14A(10).

⁸³ Liability for Defective Products (1977) Law Com No 82; Scot Law Com No 45 para 151.

⁸⁴ R Winter, "The Liability Insurance Market" [1991] 5(3) *Journal of Economic Perspectives* 115, 122.

making necessary insurance arrangements, this is an argument in favour of aligning the regimes in this instance to provide maximum protection for injured individuals. If consultees wish to argue that a different period would be more appropriate, we would ask that they provide arguments and any available evidence to support that alternative period.

- 6.98 Our proposals concerning latent personal injury therefore align with the New Directive. Where the latency of a personal injury means that an injured person has not been able to initiate proceedings, the New Directive provides for an extended long-stop of 25 years.⁸⁵

Consultation Question 55.

- 6.99 We provisionally propose that the 10-year long-stop period for latent personal injury claims should be extended in cases where it was not possible for the individual to initiate proceedings within the initial 10 years. In such cases, the long-stop period should be extended to 25 years.

Do consultees agree?

- 6.100 If consultees consider that the time-period should be other than 25 years, please suggest an alternative period with any supporting evidence.

⁸⁵ New Directive, art 17.

Chapter 7: Practical issues with suing defendants

INTRODUCTION

- 7.1 In this chapter, we consider issues arising from the substitution of defendants after the CPA's long-stop period has expired. We also discuss the inability of claimants to recover damages where a defendant is insolvent or under-capitalised. We explore potential options to mitigate these issues, including piercing the corporate veil, so that shareholders may become financially responsible for a company's liabilities; enterprise liability, under which companies within a group may be treated as a single entity; and rights of injured persons against insurers.
- 7.2 We provisionally propose restoring the courts' discretion under the Limitation Act 1980 to substitute a defendant after the long-stop period has expired, including where the claimant has brought proceedings against the wrong entity within a corporate group. In contrast, we do not propose reforms to address the risk of insolvent or under-capitalised defendants on the basis that this falls outside the scope of the Terms of Reference.
- 7.3 Finally in this chapter, we briefly consider the position of a claimant seeking to bring a product liability claim against a defendant based outside of this jurisdiction. We do not make any proposals for reform in this area.

CLAIMING AGAINST THE WRONG DEFENDANT

The current law on substitution of defendants

- 7.4 A concern raised by consultees responding to our Initial Scoping Questionnaire was that claimants may struggle to identify the correct person to sue under the CPA, particularly where products are manufactured by companies within complex group structures. Where it is unclear which entity is the producer, a claimant may issue proceedings against the wrong company, one which did not manufacture the product and is not otherwise liable under the CPA, leaving the claimant without a valid cause of action.
- 7.5 In such circumstances, the claimant may seek to substitute the correct producer as the defendant in the proceedings. However, this must be considered in conjunction with the CPA's long-stop period, after which no claim may be brought.¹ Difficulties arise where proceedings are issued within the long-stop period, but the application to substitute the correct defendant is made only after that period has expired.
- 7.6 Section 35 of the Limitation Act 1980 governs the substitution of a party after the expiry of the long-stop under the CPA. It gives the court a discretion to allow such a substitution if the following two conditions are met.²

¹ Limitation Act 1980, s 11A(3). We discuss the long-stop from para 6.64..

² Limitation Act 1980, s 35(3) and (4).

- (1) First, the requirements of the Civil Procedure Rules (“CPR”), rule 19.6, must be satisfied. These provide that the court may substitute a party only if the relevant limitation period was current when the proceedings were started; and the substitution is necessary, including where the new party is substituted for a party who was named in the claim form by mistake.³
- (2) Second, section 35(5)(b) of the Limitation Act 1980 provides that the substitution of the new party must be necessary for the determination of the original action. This will only be the case where either the new party is substituted for a party whose name was given in the original claim by mistake; or the original claim cannot be maintained by or against an existing party unless the new party is added or substituted.⁴

7.7 However, the extent to which section 35 of the Limitation Act 1980 can operate to affect the operation of the long-stop period is not expressly addressed in the legislation. Instead, this issue has been shaped by a series of judicial decisions.

7.8 The current position is set out by the Supreme Court in *OB v Aventis Pasteur SA*,⁵ where it was held that the claimant could not substitute a parent manufacturing company for its wholly-owned distributor subsidiary after the expiry of the long-stop.⁶ In reaching this conclusion, the Supreme Court was required to follow a ruling by the Court of Justice of the European Union (“CJEU”) on the matter.⁷ The CJEU had held that national courts must not allow a claimant to substitute the original manufacturer after the expiry of the long-stop period, where the original claim was brought against a different person. This had previously been allowed by the courts in England and Wales under section 35 of the Limitation Act 1980.⁸ The CJEU reasoned that substitution in such circumstances would undermine the 1985 European Product Liability Directive (“1985 Directive”), which permitted interruption of the long-stop period only by proceedings against that specific producer, and weaken the legal certainty underpinning the strict liability regime by lengthening the limitation period.⁹

7.9 However, the CJEU recognised a limited exception where a claim is brought against a supplier which is a subsidiary of the producer. In those circumstances, the producer can be substituted for its subsidiary where the producer in fact determined the circulation of the product.¹⁰ The Supreme Court subsequently clarified that this exception applied only where, by suing the subsidiary, the claimant has in substance

³ CPR, r 19.6(2) and r 19.6(3)(a).

⁴ Limitation Act 1980, s 35(6).

⁵ *OB v Aventis Pasteur SA* [2010] UKSC 23, [2010] 1 WLR 1412.

⁶ *OB v Aventis Pasteur SA* [2010] UKSC 23, [2010] 1 WLR 1412 at [36].

⁷ Case C-358/08 *Aventis Pasteur SA v OB* [2009] ECR I-11305.

⁸ *Horne-Roberts v SmithKline Beecham Plc* [2001] EWCA Civ 2006, [2002] 1 WLR 1662 at [43] and [45]; *The “Sardinia Sulcis” and “AL Tawwab”* [1991] 1 Lloyd’s LR 201. This was on the basis that the claimant intended to sue a person fitting a particular description specific to the case (namely, the manufacturer), but had misnamed that party.

⁹ Case C-358/08 *Aventis Pasteur SA v OB* [2009] ECR I-11305 at [45] and [46].

¹⁰ Case C-358/08 *Aventis Pasteur SA v OB* [2009] ECR I-11305 at [63].

sued the producer (being the parent company of the subsidiary).¹¹ This will be the case where the producer (the parent) was able to decide when the product would be distributed by the supplier (the subsidiary). In such circumstances, the subsidiary is integrated into the manufacturing process and so tightly controlled by the producer that proceedings against the subsidiary can be regarded as proceedings against the parent. The fact of wholly-owned ownership is relevant but not determinative.¹²

- 7.10 Since the position adopted in *OB v Aventis Pasteur SA*¹³ was driven by the need to align domestic law with the CJEU's interpretation of the Directive, the foundation for that approach no longer binds the UK. It is therefore open to question whether that restriction should continue to apply, or whether the earlier interpretation¹⁴ of section 35 should be restored.

Our proposal: substitution of parties outside the long-stop period

- 7.11 We provisionally propose that a court should have the power to substitute a defendant after the expiry of the long-stop, provided the requirements in section 35 of the Limitation Act 1980 are met. In particular, these requirements should be treated as satisfied where the claimant has identified the defendant by the correct description in the circumstances of the case but has used the wrong name. This reflects the existing case law under section 35 and rule 19.6 of the CPR ("CPR 19.6").¹⁵ Accordingly, where the court can ascertain the defendant's identity from the claimant's description without knowing the defendant's name, section 35 should be satisfied. By contrast, where there is doubt as to the identity of the intended defendant, substitution should be refused.¹⁶ In the context of the CPA and our wider proposals for reform, the relevant description is likely to be that of "producer", "own-brander", "importer", "UK authorised representative", "fulfilment service provider" or "Core Participant". Misidentifying a party under one of those descriptions should generally amount to a mistake as to name for the purposes of section 35(6)(a), leaving it to the court to decide whether to exercise its discretion to permit substitution.
- 7.12 We recognise that the CJEU considered that permitting such substitutions could disrupt the balance of interests the regime seeks to maintain and undermine legal certainty.¹⁷ We believe that these concerns are misplaced as section 35 only allows substitution in narrow circumstances and is always subject to the court's discretion.¹⁸ It is already established that where the correct defendant was unaware of the claim until the limitation period expired, the court will likely object to a substitution.¹⁹

¹¹ *OB v Aventis Pasteur SA* [2010] UKSC 23, [2010] 1 WLR 1412 at [28].

¹² *OB v Aventis Pasteur SA* [2010] UKSC 23, [2010] 1 WLR 1412 at [34].

¹³ [2010] UKSC 23, [2010] 1 WLR 1412.

¹⁴ See para 7.8 above.

¹⁵ See para 7.8 above in relation to *The "Sardinia Sulcis"* and *"AL Tawwab"* [1991] 1 Lloyd's LR 201.

¹⁶ This follows the case law under the CPR, rule 19.6(3)(a). See *White Book* (6 April 2025) at para 19.6.2.

¹⁷ Case C-358/08 *Aventis Pasteur SA v OB* [2009] ECR I-11305 at [45] and [46]; and *OB v Aventis Pasteur SA* [2010] UKSC 23, [2010] 1 WLR 1412 at [12].

¹⁸ See *Horne-Roberts v SmithKline Beecham Plc* [2001] EWCA Civ 2006, [2002] 1 WLR 1662 at [44].

¹⁹ *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701, [2008] 1 WLR 585 at [57].

However, this should not be a reason to prohibit the court from assessing whether to exercise this discretion in the first place.

- 7.13 The requirements under CPR 19.6 as to when the court may add or substitute a new party have also been interpreted narrowly. In particular, the claimant must demonstrate that, had the mistake not been made, the new party would have been named in the pleading.²⁰ Therefore if a claimant deliberately decides to sue a particular person, the fact that this decision may have been mistaken does not fulfil CPR 19.6, as the mistake did not cause the incorrect person to be sued.²¹ CPR 19.6 contains a further limiting condition by allowing substitution only where the claimant started the original proceedings within the limitation period,²² which means the liability of defendants is not limitless.
- 7.14 While section 35 confers a discretion on the court to allow a substitution, we consider that a different approach is justified in the context of group companies. We therefore provisionally propose that, where a claimant has sued the wrong company within a group and the correct defendant is another entity within the same group, the court should ordinarily permit substitution, unless it would be inequitable to do so. This reflects the challenge faced by claimants in identifying which entity constitutes the actual producer. Defendants may be unwilling to give such information and may be able to avoid liability by setting up obscure group structures to take advantage of this. It would also not be unjust to the defendant to allow substitution in these circumstances as the defendant would already be put on notice about the claim, since one of its group entities has been sued. Furthermore, there would be no dispute as to whether the defendant was the manufacturer of the product; the confusion is simply which specific entity was designated as the “manufacturer” within the defendant’s group structure.

Consultation questions

Consultation Question 56.

- 7.15 We provisionally propose that a court should have the power to substitute a defendant after the expiry of the long-stop period where the claimant satisfies the requirements in section 35 of the Limitation Act 1980. These requirements should be treated as satisfied where the claimant has identified the defendant by the correct description in the circumstances of the case but used the wrong name.

Do consultees agree?

²⁰ *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701, [2008] 1 WLR 585 at [55].

²¹ See *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701, [2008] 1 WLR 585 at [69].

²² CPR, r 19.6(2)(a).

Consultation Question 57.

- 7.16 We provisionally propose that, where a claimant has sued the wrong company within a group and the correct defendant is another entity within the same group, the court should ordinarily permit substitution, unless it would be inequitable to do so.

Do consultees agree?

THE INABILITY OF A DEFENDANT TO SATISFY CLAIMS

The issue with the current law

- 7.17 A concern raised by consultees responding to our Initial Scoping Questionnaire is that a claimant may be unable to recover damages under the CPA where the defendant is insolvent or is otherwise unable to meet the claim. This is particularly problematic where the defendant is a large multi-national company with assets split between different group entities with varying levels of product liability insurance. In such cases, the group entity that manufactures the product, and is therefore the defendant in product liability proceedings, may be asset poor and unable to meet a successful claim.²³ This leaves a claimant without any meaningful redress under the CPA.

Options to mitigate this issue

- 7.18 We recognise that these issues are not unique to product liability claims under the CPA, but arise more broadly wherever a defendant is unable to satisfy a claim. A number of potential mechanisms could mitigate this risk, including reforms to corporate governance for companies approaching insolvency; piercing the corporate veil; accessory liability in tort; enterprise liability; and rights of an injured person to claim against the insurer of the defendant where the defendant has product liability insurance.
- 7.19 However, we do not consider that extending these mechanisms would be appropriate within this project. Each raises wider issues, which require detailed and context-specific analysis beyond product liability. In particular, these mechanisms are not confined to CPA claims and any changes to their operation would have consequences across a broad range of legal contexts. For these reasons, we conclude that consideration of such reforms falls outside the scope of our Terms of Reference. We summarise the mechanisms below for completeness.

Reforms to corporate governance

- 7.20 In its 2018 consultation on insolvency and corporate governance, the Government proposed a new power to take action against former directors of dissolved companies for misconduct (without being required first to restore the company to the register),

²³ See eg H James, "Claims against Oculentis intraocular lens", <https://www.hughjames.com/services/harmful-product-claims/oculentis-intraocular-lens-claims/>.

including where directors dissolve companies to leave behind liabilities.²⁴ That proposal was implemented through the Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Act 2021, which also allowed courts to grant compensation orders against such directors who cause loss to company creditors.²⁵ However, the possibility of a claimant under the CPA recovering damages through this power is limited. This would depend on which companies are investigated by the Insolvency Service,²⁶ with only the worst misconduct likely being targeted, especially since there is no office-holder with a duty to investigate a dissolved company.²⁷ A defendant company which is dissolved to shed liability incurred under the CPA may not even be investigated by the Insolvency Service. The Government's consultation also explored how to improve the power to reverse company transactions entered into before insolvency that unfairly extracted value,²⁸ and the transparency of group structures to increase accountability.²⁹

- 7.21 It is clear that the Government is aware of the issue of directors dissolving companies to escape liabilities. We believe that any suggestions for further ways to address these problems should be examined in a wider context than the CPA and fall outside the scope of our Terms of Reference.

Piercing the corporate veil

- 7.22 A company has separate legal personality from that of its shareholders, meaning its rights and liabilities are distinct from those of its shareholders.³⁰ However, a court can disregard the separate legal personality of a company (that is, pierce the corporate veil) in limited circumstances where a person is under an existing liability which they deliberately evade by interposing a company under their control.³¹ The corporate veil may only be pierced to prevent the abuse of corporate legal personality, but it is not an abuse for a company to incur a legal liability in the first place.³² In *Petrodel Resources Ltd v Prest*, the Supreme Court was divided as to whether there could be any further circumstances in which the corporate veil could be pierced,³³ but noted

²⁴ Department for Business, Energy and Industrial Strategy, *Insolvency and Corporate Governance: Government response* (August 2018) paras 4.5 to 4.7; Department for Business, Energy and Industrial Strategy, *Insolvency and Corporate Governance* (March 2018) p 20.

²⁵ See the Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Act 2021, s 2.

²⁶ See Department for Business, Energy and Industrial Strategy, *Insolvency and Corporate Governance: Government response* (August 2018) para 4.8.

²⁷ Freshfields, "New directors' disqualification Act takes aim at directors of dissolved UK companies" (Dec 2021) <https://transactions.freshfields.com/post/102hese/new-directors-disqualification-act-takes-aim-at-directors-of-dissolved-uk-compan>.

²⁸ Department for Business, Energy and Industrial Strategy, *Insolvency and Corporate Governance: Government response* (August 2018) paras 3.4 to 3.11.

²⁹ Department for Business, Energy and Industrial Strategy, *Insolvency and Corporate Governance: Government response* (August 2018) para 1.11.

³⁰ T Grant and D Mumford, *Civil Fraud: Law, Practice & Procedure* (1st ed 2018) para 18-001.

³¹ *Petrodel Resources Ltd v Prest* [2013] UKSC 34, [2013] 2 AC 415 at [35].

³² *Petrodel Resources Ltd v Prest* [2013] UKSC 34, [2013] 2 AC 415 at [34].

³³ *Petrodel Resources Ltd v Prest* [2013] UKSC 34, [2013] 2 AC 415 at [99], [100], [102] and [103].

that even if there were, these cases would likely be novel, very rare and difficult to establish.³⁴

- 7.23 Therefore, the fact that a defendant company is insolvent or asset-poor would not, on its own, justify piercing its corporate veil under existing law, as this is not a case where the controller is evading an existing liability by using a company. It would also not constitute an abuse of corporate legal personality, since it is not an abuse to set up a company with the intention that it is the company, not the individual, who will bear the liability in the first place. That is the whole rationale for limited liability.

Accessory liability in tort

- 7.24 A director or shareholder could be jointly liable in tort with their company for their company's wrongful acts, even where they did not commit the acts, if the following two conditions are met. First, the director or shareholder must have: (i) procured the company to commit such wrongful act; or (ii) assisted the company to commit such wrongful act if the assistance is more than trivial and is given pursuant to a common design between the director or shareholder and the company.³⁵ Second, the director or shareholder must know (or deliberately turn a blind eye to) the essential facts which make the act done by the company unlawful, even if the tort is one of strict liability.³⁶
- 7.25 It is unclear if a director or shareholder could be held jointly liable in tort for defective products produced by their company, as it is unclear if liability under the CPA is a tort under substantive law.³⁷ However, even if they could, this is unlikely to be helpful to a claimant who is unable to obtain a remedy due to the defendant's insolvency or lack of assets. The director or shareholder would have to procure or assist their company in producing, importing or supplying the defective product, and know all the essential facts which have made the product defective. It is unlikely they would have this level of knowledge since the CPA does not set a fixed standard of safety by which they could judge whether their product is safe.

Enterprise liability

- 7.26 Enterprise liability refers to the treatment of members of a corporate group as one entity.³⁸ However, there is no general principle under English law that all companies in a group are to be regarded as one, since each group company is a separate legal entity.³⁹ In the US, some courts have applied enterprise liability in narrow cases, generally requiring such a high degree of unity between entities that their separate existence has ceased, meaning treating the entities as separate would be unjust. The courts often also need proof of an improper and fraudulent motive for using group

³⁴ *Petrodel Resources Ltd v Prest* [2013] UKSC 34, [2013] 2 AC 415 at [100], [102] and [103].

³⁵ *Lifestyle Equities CV v Ahmed* [2024] UKSC 17, [2025] AC 1 at [135] and [136].

³⁶ *Lifestyle Equities CV v Ahmed* [2024] UKSC 17, [2025] AC 1 at [107], [108], [131] and [137].

³⁷ CPA, s 6(7) classes liability under the CPA as liability in tort for the purposes of any enactment conferring jurisdiction on any court, making it unclear whether the CPA is a tort under substantive law. The CPA has been classed as a special liability regime: A Tettenborn and M Jones, *Clerk & Lindsell on Torts* (24th ed 2023) para 10-01.

³⁸ *Adams v Cape Industries Plc* [1990] Ch 433 at 532, as argued by the claimant.

³⁹ *Adams v Cape Industries Plc* [1990] Ch 433 at 532.

structures.⁴⁰ The rationale for enterprise liability is to give effect to what is happening in practice where group companies are not being treated as separate in reality.⁴¹

- 7.27 However, even if English law were to adopt enterprise liability, this may not help a claimant enforcing judgment against an insolvent or asset-poor defendant. In many cases, a corporate group is structured so that different group companies are responsible for different aspects of the business. The requirement of interconnection between group companies may not be met in this circumstance. If enterprise liability were to be introduced without requirements for unity, this would severely cut across the established principle of separate corporate legal personality and would require a strong justification.⁴² Enterprise liability also assumes that the entire corporate group runs an integrated business, and so the whole group should bear the costs that flow from it.⁴³ However, many conglomerates use their subsidiaries to run independent and diverse businesses, rather than pursuing a common goal, meaning the requirement of unity is needed to ensure enterprise liability is not being inappropriately imposed.

Rights of injured persons against insurers

- 7.28 Where a defendant has product liability insurance but becomes insolvent, their insurance money becomes part of their assets to be shared among their creditors, one of whom would be a claimant who has not yet enforced its damages award.⁴⁴ However, an injured person may have a claim directly against the defendant's insurer under the Third Parties (Rights against Insurers) Act 1930 or the Third Parties (Rights against Insurers) Act 2010.⁴⁵ The Acts allow the defendant's rights against their insurer to be transferred to the injured person where the defendant becomes insolvent.⁴⁶ The injured person may then be able to sue the insurer instead of the defendant.⁴⁷
- 7.29 Since the Acts transfer the defendant's rights under the insurance contract to the injured person, the injured person's ability to claim against the defendant's insurer depends on the terms of the insurance policy, and redress is therefore not

⁴⁰ M Petrin and B Choudhury, "Group Company Liability" (2018) 19 *European Business Organization Law Review* 771.

⁴¹ As argued by the claimant in *Adams v Cape Industries Plc* [1990] Ch 433 (which was rejected by the court).

⁴² See M Petrin and B Choudhury, "Group Company Liability" (2018) 19 *European Business Organization Law Review* 771, who advocate the introduction of enterprise liability for group companies to allow tort victims to claim against any group company if one group entity is unable to satisfy claims against it. They suggest that the existence of a group should be established by reference to equity ownership and voting rights, without a requirement that there must be sufficient control between different group entities.

⁴³ As argued in M Petrin and B Choudhury, "Group Company Liability" (2018) 19 *European Business Organization Law Review* 771.

⁴⁴ J Birds, B Lynch and S Paul, *MacGillivray on Insurance Law* (16th ed 2025) para 28-013.

⁴⁵ The Third Parties (Rights Against Insurers) Act 1930 continues to apply to cases where both the liability and insolvency of the insured occurred before 1 August 2016. See para 3 of Sch 3 to the Third Parties (Rights against Insurers) Act 2010 (the 2010 Act came into force on 1 August 2016).

⁴⁶ See Third Parties (Rights against Insurers) Act 1930, s 1(1), and Third Parties (Rights against Insurers) Act 2010, s 1.

⁴⁷ See Third Parties (Rights against Insurers) Act 1930, s 1(4), and Third Parties (Rights against Insurers) Act 2010, s 1(3).

guaranteed.⁴⁸ The Acts apply only where the defendant is insolvent, so a claimant cannot bring a claim against a defendant's insurer where the defendant is asset-poor but not insolvent. Any extension of the rights conferred by the Acts falls outside the scope of this project.

BRINGING CLAIMS AGAINST DEFENDANTS BASED OUTSIDE OF THE JURISDICTION

- 7.30 For completeness, we briefly address the position where a potential defendant is based outside England and Wales. However, as this issue is outside of our Terms of Reference, we do not make any proposals for reform.
- 7.31 The proposals in Chapter 3 relating to the persons liable under the CPA are intended to ensure that, where possible, a claimant can bring proceedings against a potential defendant within the United Kingdom. In some cases, however, the only potential defendant may be based overseas. This may arise, for example, where a claimant purchases a product directly from an overseas supplier. Whether proceedings can be brought in the courts of England and Wales will then be determined by the ordinary rules of private international law.
- 7.32 Under those rules, the courts generally obtain jurisdiction over a defendant through valid service of the claim form. A defendant who is present in England and Wales can ordinarily be served here. A natural person's temporary physical presence may be sufficient, while separate rules determine when a company or other legal person may be served within the jurisdiction.⁴⁹
- 7.33 Where a defendant is outside England and Wales, the claimant will generally require the court's permission to serve the claim form abroad, although there are exceptions.⁵⁰ Permission may be granted only if the claimant satisfies three requirements.
- (1) First, the claimant must show a good arguable case that the claim falls within one or more of the "jurisdictional gateways" set out in Practice Direction 6B of the CPR. The gateways identify the connections between the claim and England and Wales that may justify the exercise of jurisdiction over a foreign defendant. For example, the gateways for claims in tort include cases in which damage is sustained in England and Wales, damage results from an act committed here, or the claim is governed by the law of England and Wales.
 - (2) Secondly, the claim must have a reasonable prospect of success.⁵¹
 - (3) Thirdly, the court must be satisfied that England and Wales is the proper place (or "convenient" forum) in which to bring the claim.⁵² This final requirement

⁴⁸ See *Chitty on Contracts* (36th ed 2026) paras 45-122 and 45-123.

⁴⁹ A Briggs, *The Conflict of Laws* (4th ed 2019) p 99.

⁵⁰ See eg the Brussels I Regulation Recast, art 4(1). A consumer need not apply for permission in the case of a consumer contract (section 15B of the Civil Jurisdiction and Judgments Act 1982) but product liability claims are non-contractual.

⁵¹ CPR, r 6.37(1)(b).

⁵² CPR, r 6.37(3).

allows the court to consider all the circumstances, including the connections between the dispute, the parties and the competing jurisdictions.

- 7.34 The question of whether the law of England and Wales governs the substance of the claim is distinct from the question of whether the courts of England and Wales have jurisdiction. The applicable law will be determined under the relevant choice-of-law rules.
- 7.35 Finally, even where a claimant obtains a judgment in England and Wales, the ability to enforce it against assets abroad will depend on the recognition and enforcement rules applicable in the country concerned, including any relevant international arrangements.

Chapter 8: Assessing the impact of reform and concluding questions

INTRODUCTION

- 8.1 Throughout this consultation paper, we make provisional proposals to reform the law governing product liability. Our principal aims are to:
- (1) update the law to accommodate modern and emerging technologies that can bring both benefits and risks and cause harm;
 - (2) ensure that the regime meets its aim of delivering a fair apportionment of risk; and
 - (3) make the law as fair, modern, simple and cost-effective as possible.
- 8.2 In this chapter, we seek information from consultees on the potential impact of our proposed reforms, including their economic and equality implications.
- 8.3 We also invite views on any specific impacts of reform in Wales, Scotland or Northern Ireland, and on any further reforms that consultees consider we should address.

ECONOMIC IMPACT

- 8.4 In assessing the case for reform, we need to understand both the impact of the current law and the potential impact of our provisional proposals. This evidence will influence the development of our final recommendations and assist the Government in assessing them with a view to implementation.
- 8.5 We are therefore seeking consultees' views and requesting they provide us with any evidence they have on the economic impact of the current law as well as our provisional proposals for reform. We are particularly interested in evidence of monetisable costs and benefits, but where that is not possible, we are grateful for any qualitative insights that consultees can offer.
- 8.6 We caution however that the impacts of reform are not purely financial and may not be easy to monetise. For example, what is fair in terms of who should bear the loss when risks materialise, is not necessarily something that can be calculated as having a net monetary benefit or cost alone.

The current regime

- 8.7 To assess the potential costs and benefits of reform, we need to understand how the current law operates in practice. This includes its benefits and financial impact on

consumers¹ and consumer groups,² as well as on enterprises of all sizes, from small and medium-sized enterprises (“SMEs”) to large businesses, involved in the design, manufacture and/or supply of both tangible goods and software-based goods. The affected sectors are diverse and span across a huge range of sectors, including health and pharmaceuticals, the motor industry, social media, toys and children’s products, and kitchen appliances. The law also affects legal professionals and the court system. We are particularly interested in hearing from these groups.

- 8.8 One argument raised by some stakeholders during the pre-consultation period is that the current regime does not strike the right balance between consumer protection and the promotion of innovation among businesses. They said that the limited number of reported cases suggests that few claims are brought under the regime, and even fewer are successful. This, in their view, indicated that the law imposes disproportionate costs on consumers, leaving the costs of harm caused by defective products to be borne by them. This might be particularly true in relation to harms that would only result in a small claim: it might be that they are not worth pursuing by individual consumers.
- 8.9 However, it is possible that the reported case law does not provide a true picture of how the current law operates in practice. We have heard from other stakeholders that many claims settle, meaning that consumers who suffer harm may receive some redress. Where claims do proceed, we have heard that they often do so in the county courts, and are not reported.
- 8.10 An understanding of how the current law operates in practice, and where costs fall, is therefore essential to assessing the case for reform.

¹ In this consultation paper, we use “consumer” to refer to persons who use, interact with, or may be affected by a product. It extends beyond consumers who have purchased a product, encompassing all natural persons who suffer harm as a result of a defective product.

² Noting that there are other mechanisms that aim to prevent harm from consumer goods, for example, the Office for Product Safety and Standard’s Product Recalls and Alerts: <https://www.gov.uk/guidance/product-recalls-and-alerts>.

Consultation Question 58.

8.11 We invite consultees to tell us about:

- (1) the costs consumers bear as a result of harms caused by defective products;
- (2) the value of potential claims, including those that settle;
- (3) the proportion of claims that settle rather than proceed to trial;
- (4) the proportion of claims that do not settle but are ultimately withdrawn before proceeding to trial;
- (5) where claims do proceed to trial, which courts they are heard in and whether judgments are published;
- (6) the costs to businesses of complying with the current regime;
- (7) the costs of legal advice and litigation in cases of harm caused by defective products, including the cost of obtaining technical evidence or expertise;
- (8) how such claims are generally funded (for example through self-funding or “no-win, no-fee” arrangements); and
- (9) any access to justice issues associated with product liability claims or potential claims.

We are particularly interested in any evidence consultees can provide about monetisable costs and benefits.

Our proposed reforms

8.12 We have made provisional proposals throughout this consultation paper to improve the law. Our proposed reforms are intended to:

- (1) provide consumers with a straightforward route to securing compensation where they have suffered harm as a result of a defective product;
- (2) promote responsible business practices;
- (3) give businesses, and their insurers, certainty as to the nature of their potential liabilities;
- (4) improve consumer confidence;
- (5) decrease legal and litigation costs by clarifying what a claimant must show to bring a successful claim, ultimately reducing the need for litigation to settle claims; and

- (6) ensure that the law of England and Wales remains at the forefront of product liability internationally, keeping pace with EU Member States, Australia and the US, which have updated, or are required to update, their product liability laws.
- 8.13 We would like to hear from consultees as to what they consider to be the key benefits of any of our provisional proposals, including any specific examples where possible.
- 8.14 We would also like to hear about the potential costs of reform. In addition to the transitional costs to the legal system arising from changes to the law, there may be costs to businesses in complying with our proposed reforms. These may include higher manufacturing costs, for example from higher costs of obtaining materials and parts, higher insurance premiums, and increased risk of liability, which may affect profit margins. These costs are likely to be passed on to consumers through higher prices, or, where imports are affected, through reduced competition in the marketplace.

Consultation Question 59.

- 8.15 We invite consultees to tell us about the costs and benefits of any of our proposed changes to product liability law, including in relation to:
- (1) harms suffered by consumers;
 - (2) consumer confidence;
 - (3) business certainty;
 - (4) business compliance, insurance, and competition;
 - (5) impact on small and medium-sized enterprises (SMEs);
 - (6) alignment of the law of England and Wales with the law of other jurisdictions including the EU, Australia and the US; and
 - (7) legal advisory and litigation costs.

We are particularly interested in any evidence consultees can provide about monetisable costs and benefits.

EQUALITY IMPACT

- 8.16 To assess the benefits of reform, we must also consider whether our provisional proposals could have disparate impacts on particular groups, including impacts linked to the protected characteristics set out in the Equality Act 2010. A disparate impact can be either disproportionately negative or disproportionately positive.
- 8.17 The issues considered in this consultation paper may raise specific considerations for different groups. Below, we outline our initial thinking.

Income and race

- 8.18 Poor quality products and counterfeit goods may not meet regulatory standards and therefore present a higher risk of defect. As these products are often cheaper than products that do meet regulatory standards, people on lower incomes may be more likely to purchase them.
- 8.19 Some minority ethnic groups in the UK are disproportionately represented among lower-income populations, due to factors such as lower wages, higher unemployment, housing costs and types of tenure (ownership versus renting property). Research shows that Bangladeshi, Black African and Pakistani households are most at risk of deep and long-term poverty, being two to three times more likely to experience it compared to white households.³
- 8.20 If people on lower incomes, including members of some minority ethnic groups, are more likely to purchase defective goods, it follows that they may also be more likely to suffer harm as a result.⁴
- 8.21 Barriers to access to justice and distrust of the legal system⁵ may compound this issue. They may make it harder for members of some minority ethnic groups to obtain a remedy for any harms they suffer.
- 8.22 Our proposals to promote responsible business and ensure that people harmed by defective products have a straightforward route to securing compensation may therefore have a particularly positive impact in relation to race, as well as income. People with low incomes and members of some minority ethnic groups may experience the most benefit of reform.

Age and disability

- 8.23 As people age, they are more likely to experience certain health conditions, including hearing loss and cataracts. Older people are more likely to have multiple conditions simultaneously and may present with several complex health states resulting from

³ P Matejic, K Schmuecker, Y Ibison and I Taylor, *Bangladeshi, Black African and Pakistani households at higher risk of very deep, long term-poverty* (Joseph Rowntree Foundation 2024). See also Office for National Statistics, “Ethnicity pay gaps, UK: 2012 to 2022” (29 November 2023), <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/ethnicitypaygapsingreatbritain/2012to2022>; and Joseph Roundtree Foundation, “Ethnicity and poverty” (January 2026), <https://www.jrf.org.uk/uk-poverty-statistics/ethnicity>.

⁴ See Legal Services Consumer Panel, *Briefing note: Experiences of Black, Asian and Minority Ethnic groups in using legal services* (January 2021), https://www.legalservicesconsumerpanel.org.uk/wp-content/uploads/2021/01/2021-01-13_BAME-user-experiences_FINAL.pdf, which provides that, of the legal problems they are likely to experience, Black, Asian and Minority Ethnic consumers are more likely (6% compared to 2%) to face problems with consumer services or goods than white British consumers.

⁵ Eg, due to the overrepresentation of Black, Asian and Minority Ethnic people in the criminal justice system: see *The Lammy Review: an independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System* (2017), <https://assets.publishing.service.gov.uk/media/5a82009040f0b62305b91f49/lammy-review-final-report.pdf>. They are also less likely to be satisfied with their choice of lawyer or use the same lawyer again, and are less trusting of lawyers, than white British people: Legal Services Consumer Panel, *Briefing note: Experiences of Black, Asian and Minority Ethnic groups in using legal services* (January 2021).

multiple underlying factors.⁶ With older age often being associated with more complex health needs, older people may be more likely than younger people to use medical devices and products. People with disabilities, of any age, may also be more likely to use medical devices or products. Older people and people with disabilities may therefore be particularly vulnerable to defective medical products.

- 8.24 Children and young people are prolific users of social media. Half of children aged 3 to 12 use social media, and half of children aged 16 to 17 use all the top five platforms: YouTube, WhatsApp, TikTok, Snapchat and Instagram.⁷ Children and young people may therefore be particularly likely to suffer harms from social media. This appears to be especially true for children who live with a health condition that impacts or limits their daily activities: 29% of 8- to 17-year-olds were exposed to content online that scared or upset them, but among those with an impacting or limiting condition, 40% were exposed.⁸
- 8.25 Given that old and young age and disability may make people more vulnerable to harms caused by defective products, our proposals could have a particularly positive impact in relation to age and disability, by promoting responsibility among businesses resulting in safer products.

Psychiatric harm and the requirement for ordinary fortitude

- 8.26 In Chapter 5, we provisionally propose that psychiatric harm should be recoverable under the Consumer Protection Act (“CPA”). It would be limited to cases where it amounts to a recognisable psychiatric illness and, in cases where the harm is not consequential upon physical injury or the person being psychically imperilled, the illness falls within the natural range of reactions of a person of ordinary fortitude.⁹
- 8.27 We wonder whether these requirements, and the fact that expert evidence will normally be necessary to establish that the requirements are met, may create particular barriers for certain categories of claimant.¹⁰ We welcome any evidence that consultees can provide on this point.

⁶ WHO, “Ageing and health” (1 October 2025), <https://www.who.int/news-room/fact-sheets/detail/ageing-and-health>.

⁷ Ofcom, *Children and Parents: Media Use and Attitudes Report* (19 April 2024) pp 13 and 15.

⁸ Ofcom, *Children and Parents: Media Use and Attitudes Report* (19 April 2024) p 23.

⁹ See consultation questions 37 to 40. (See consultation question 39, in particular, for our proposal in relation to indirect victims of psychiatric harm).

¹⁰ Eg, stigma towards mental illness may vary according to socioeconomic class (see L C Potts and C Henderson, “Moderation by socioeconomic status of the relationship between familiarity with mental illness and stigma outcomes” (2020) 11 *Population Health* 100611), with the result that someone from a lower socioeconomic class could be less willing to be diagnosed and treated.

Consultation question

Consultation Question 60.

- 8.28 We invite consultees to tell us if they believe or have evidence or data to suggest that any of the reforms that we propose could result in advantages or disadvantages to certain groups or based on certain characteristics (with particular attention to age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation).

TERRITORIAL APPLICATION

- 8.29 As the Law Commission of England and Wales, our recommendations for reform only apply to England and Wales. However, and as we explain in Chapter 1, the CPA applies in England, Wales and Scotland. The same regime, albeit under a separate piece of legislation (the Consumer Protection (Northern Ireland) Order 1987), also applies in Northern Ireland. Our review is therefore relevant to Scotland and Northern Ireland.
- 8.30 As such, we would like to hear from consultees about the impact our proposals could have in Scotland and Northern Ireland, if they were implemented there. This information will be helpful in informing the UK Government, together with the Scottish Parliament and Northern Ireland Assembly, about whether and to what degree reforms should be made in those jurisdictions.
- 8.31 We are also interested to hear about any Welsh-specific issues that arise in the law governing product liability or that might arise under our proposed reforms.

Consultation Question 61.

- 8.32 We invite consultees to provide us with any information they have about the impact of our proposals in Wales, Scotland or Northern Ireland. This could include jurisdiction-specific issues that should be taken into account if reforms are implemented, or, in the case of Scotland or Northern Ireland, the impact if reforms implemented in England and Wales were not extended to those jurisdictions.
- 8.33 We are particularly interested in hearing about the potential impacts on businesses if product liability laws were to differ between different UK jurisdictions.

OTHER AREAS OF REFORM

- 8.34 In this consultation paper, we make a wide range of proposals to amend the law of product liability. We have focused on the issues set out in our Terms of Reference, as well as those raised with us by stakeholders and identified through our own research. However, there may be issues that we have not yet identified, and we therefore welcome further suggestions from consultees.

Consultation Question 62.

- 8.35 We invite consultees to tell us whether there are any other ways, not considered in this paper, in which the product liability regime might be improved. Please give details of any suggestion and the anticipated benefits of such a change.

Chapter 9: Consultation Questions

Consultation Question 1.

- 9.1 We provisionally propose that the definition of “product” under the CPA should be expanded to include software however supplied, including software downloaded from the cloud or internet, and software-as-a-service.

Do consultees agree?

Paragraph 2.49

Consultation Question 2.

- 9.2 We provisionally propose that the definition of “product” under the CPA should be expanded to include AI systems however supplied, including AI systems downloaded from the cloud or internet or otherwise supplied in an intangible form.

Do consultees agree?

- 9.3 Do consultees consider that AI models should constitute products in their own right and separately from AI systems?

Paragraph 2.50

Consultation Question 3.

- 9.4 We seek consultees' views as to whether the CPA should seek to identify the core features of "software".
- 9.5 We seek consultees' views on whether the core features of "software" for the purposes of the CPA should include the following two elements:
- (1) the code or other instructions capable of causing a machine to perform or achieve a particular function, task or result; and
 - (2) the resulting functionality produced when those instructions are executed: the function, task or result (or a combination of such functions, tasks or results) that is performed or achieved?
- 9.6 Alternatively, do consultees consider that software should be understood solely by reference to code or other instructions alone?
- 9.7 More generally, we invite consultees' views on the feasibility of this approach and on whether any alternative approaches or formulations would be preferable. In particular, we welcome views on whether identifying core features of software provides a useful means of delineating its scope for the purposes of the CPA, or whether such an approach risks creating distinctions that may become difficult to sustain as technology evolves.

Paragraph 2.64

Consultation Question 4.

- 9.8 We seek consultees' views as to whether the CPA should seek to identify the core features of "AI system".
- 9.9 If consultees consider that identifying these core features would be helpful, do consultees consider that, for the purposes of the CPA, they should be as follows:
- (1) it operates on a machine; and
 - (2) it:
 - (a) generates outputs from the inputs it receives, in circumstances where:
 - (i) such inputs may be provided or designed by a natural person or may be generated autonomously;
 - (ii) such outputs are not pre-determined, controlled or specified by a natural person, in each case, at all or to a significant extent; and
 - (iii) such outputs may include predictions, content, recommendations or decisions that can influence physical or virtual environments; or
 - (b) otherwise displays significant generality and is capable of performing a wide range of distinct tasks or fulfilling a variety of purposes ("general-purpose AI" or "GPAI"); and
 - (3) it has been developed using techniques, including machine learning techniques, and logic- and knowledge-based techniques (and in the case of GPAI, including through large-scale training methods and self-supervised or unsupervised learning), that enable the system's capability to generate such outputs referenced in limb (2)(a) above or otherwise enable the system's capability referenced in limb (2)(b) above; and
 - (4) it may (or may not) continue to learn after deployment automatically, which may result in the system generating different outputs from the same inputs it receives.
- 9.10 More generally, we invite consultees' views on the feasibility of this approach and on whether any alternative approaches or formulations would be preferable. In particular, we welcome views on whether identifying core features of an "AI system" provides a useful means of delineating its scope for the purposes of the CPA, or whether such an approach risk creating distinctions that may become difficult to sustain as technology evolves.

Paragraph 2.74

Consultation Question 5.

9.11 We provisionally propose that the CPA should not include an express exemption for non-commercial open-source software, on the basis that this is unnecessary because such software would already be exempt under section 4(1)(c) of the CPA, which provides a defence where supply of the product was outside the course of business and without a view to profit.

Do consultees agree?

Paragraph 2.85

Consultation Question 6.

9.12 We provisionally propose that the design components and features of social media platforms and other online platforms should constitute “products” under the CPA.

Do consultees agree?

Paragraph 2.123

Consultation Question 7.

9.13 We provisionally propose that the core element of an “online platform” for the purposes of the CPA should be an internet-based system, which at the request of a user, stores and disseminates information to the public; or through which content generated by a user may be encountered by another user, or other users.

Do consultees agree?

Paragraph 2.124

Consultation Question 8.

9.14 We provisionally propose that the CPA should include a residual provision within the definition of “product” to incorporate any other thing (digital or otherwise) that is designed or developed to perform a specific function for users, irrespective of how it is supplied or made available.

Do consultees agree?

9.15 We invite consultees’ views as to whether this approach would be workable in practice and to provide examples supporting these views.

Paragraph 2.130

Consultation Question 9.

- 9.16 We provisionally propose that the definition of “product” in the CPA should include digital manufacturing files and other functional information necessary to produce a tangible product by enabling the automated control of machinery or tools.

Do consultees agree?

Paragraph 2.147

Consultation Question 10.

- 9.17 We invite consultees’ views as to whether there are other categories of information or code that should fall within the definition of “product” under the CPA, particularly where it is supplied in a form intended to be processed by a computer system or connected product, directly influencing the system's operation, behaviour, or outputs. For example, is there a case for treating code and other machine-readable instructions differently from other forms of information?

Paragraph 2.148

Consultation Question 11.

- 9.18 We invite consultees’ views as to whether bespoke software that is provided as a service should be excluded from the CPA.
- 9.19 If the law were to distinguish bespoke software provided as a service from other software, what factors or practical hallmarks should be taken into account when determining whether software is bespoke? Please give reasons for your views and, where possible, examples.

Paragraph 2.156

Consultation Question 12.

- 9.20 We provisionally propose that services that are interconnected with a product, or that are required for a product to function, should be excluded from the scope of the CPA.

Do consultees agree?

Paragraph 2.164

Consultation Question 13.

9.21 We provisionally propose that the CPA should not include a concept similar to the “related service” concept in the New Directive.

Do consultees agree?

Paragraph 2.165

Consultation Question 14.

9.22 We provisionally propose that a product should be considered to be “supplied” under the CPA irrespective of its mode of delivery, even where it is supplied through intangible means.

Do consultees agree?

Paragraph 2.176

Consultation Question 15.

9.23 We provisionally propose that products made available by a person in the course of their business and/or with a view to profit should be considered to be “supplied” under the CPA even where the user has not given money or other consideration for their use of the product.

Do consultees agree?

Paragraph 2.177

Consultation Question 16.

9.24 We provisionally propose that the definition of “producer” under the CPA should be expanded to include the person who developed the product.

Do consultees agree?

Paragraph 3.11

Consultation Question 17.

9.25 We provisionally propose that:

- (1) the definition of “own-brander” in section 2(2)(b) of the CPA should remain unchanged, such that an own-brander is any person who by putting their name or trade mark on the product has held themselves out to be the producer of the product; and
- (2) own-branders should remain liable for damage caused by a defective product under the CPA.

Do consultees agree?

Paragraph 3.14

Consultation Question 18.

9.26 We provisionally propose that:

- (1) the definition of importer in section 2(2)(c) of the CPA should remain unchanged, such that an importer is any person who has imported the product into the UK in order, in the course of their business, to supply it to another; and
- (2) importers should remain liable for damage caused by a defective product under the CPA.

Do consultees agree?

Paragraph 3.19

Consultation Question 19.

9.27 We provisionally propose the following.

- (1) Where a defective component product is integrated into or interconnected with a finished product within the control of the producer of the finished product, then both the producer of the finished product and the producer of the component should potentially be liable under the CPA.
- (2) Where a defective component product is integrated into or interconnected with a producer’s finished product outside of their control, only the producer of the component should potentially be liable under the CPA.

Do consultees agree?

Paragraph 3.27

Consultation Question 20.

9.28 We provisionally propose that the CPA should make provision for liability where a product is substantially modified after the time it was supplied by the producer, own-brander or importer.

9.29 By substantial modification, we mean a modification which:

- (1) changes such product's original performance, purpose or type; and
- (2) as a result, either: (i) changes what persons generally are entitled to expect in relation to such product for the purposes of section 3(1) on "defect"; or (ii) changes the nature of the risk, creates a new risk or increases the level of risk, of the product causing damage giving rise to liability under section 5 on "damages".

Do consultees agree?

Paragraph 3.34

Consultation Question 21.

9.30 We provisionally propose that a person who substantially modifies a product outside the original producer's control and supplies it in the course of their business and/or with a view to profit should be liable for such modified product as the producer under the CPA.

Do consultees agree?

Paragraph 3.43

Consultation Question 22.

9.31 We provisionally propose that “producer’s control” in this context should cover the following circumstances.

- (1) Where the producer of a product themselves integrates or connects a component with their product, or themselves modifies their product (including carrying out a substantial modification), regardless of how this modification is made.
- (2) Where the producer of a product authorises or consents to a third party integrating or connecting a component with the producer’s product, or modifying the producer’s product (including carrying out a substantial modification), regardless of how this modification is made, but in each case, only where the producer has presented the particular component or modification as part of their product or product offering.

Do consultees agree?

Paragraph 3.48

Consultation Question 23.

9.32 We provisionally propose that a fulfilment service provider should be liable under the CPA, but only where a UK producer, own-brander, importer, or UK authorised representative of any of those persons, cannot be identified.

Do consultees agree?

Paragraph 3.57

Consultation Question 24.

9.33 We provisionally propose that a fulfilment service provider under the CPA should be any person offering, in the course of their business, at least two of the following services: warehousing, packaging, addressing and dispatching of a product, in each case without having ownership of that product, excluding postal services, parcel delivery services and freight transport services.

Do consultees agree?

Paragraph 3.58

Consultation Question 25.

9.34 We provisionally propose that Core Participants who meet the following criteria should be liable under the CPA where a UK producer, own-brander, importer, fulfilment service provider or UK authorised representative of any of those persons, cannot be identified:

- (1) the conduct of such person (or of another person whose conduct they control, or could have controlled, either directly or indirectly) was a significant factor in making the product available for sale, or distributing the product, to individuals in the UK, including storing, packaging or delivering the product, or providing a platform facilitating the sale or marketing of the product in the UK;
- (2) such person (or another person in whom such person has a controlling interest) has received a direct or indirect financial benefit from its acts relating to the sale of the product or otherwise conducted such acts in the course of its business and/or with a view to profit;
- (3) such person (or another person whose conduct they control, or could have controlled, either directly or indirectly) has direct or indirect control over, or a decisive ability to influence, the manufacturing or distribution process of the product; and
- (4) such person is not a producer, own-brander, importer, fulfilment service provider or a UK authorised representative of any of these persons.

Do consultees agree?

Paragraph 3.78

Consultation Question 26.

9.35 We provisionally propose that, where a producer, own-brander, importer, fulfilment service provider or Core Participant is established outside the UK, its UK authorised representative should be liable. This would be limited to representatives authorised to act on that person's behalf in relation to the product, including for regulatory, compliance, enforcement, product-related and market-access functions.

Do consultees agree?

Paragraph 3.92

Consultation Question 27.

9.36 We provisionally propose that suppliers should be liable in the following circumstances:

- (1) the person who suffered the damage requests the supplier to identify one or more of the following persons: the producer of the product or of any defective component, any own-brander, the importer, the fulfilment service provider, a Core Participant or the UK authorised representative of any such persons; and
- (2) such a request is made within a reasonable period after the damage occurs and at a time when it is not reasonably practicable for the person making the request to identify all those persons; and
- (3) the supplier fails, within a reasonable period after receiving the request, either to identify its own supplier or comply with the request by identifying:
 - (a) the UK producer of the product or of any defective component product, any UK own-brander or the UK importer; or
 - (b) the first person in the following list who is established within the UK, where the supplier cannot identify a UK established producer, own-brander or importer:
 - (i) any UK authorised representative of one of the following: the producer of the product or defective component product, any own-brander or the importer;
 - (ii) the fulfilment service provider (or where the fulfilment service provider is outside the UK, its UK authorised representative);
 - (iii) a Core Participant (or where such Core Participant is outside the UK, its UK authorised representative).

Do consultees agree?

Paragraph 3.99

Consultation Question 28.

9.37 We provisionally propose that the CPA should include a non-exhaustive list of principles for assessing whether a product has met the entitled level of safety. The principles would operate as alternative bases for establishing the entitled level of safety, meaning that a product would be defective if any one of the principles is satisfied.

9.38 The principles are that the safety of a product is not such as persons are entitled to expect where:

- (1) the product, when used in a manner that could be reasonably expected, caused damage beyond that which was ordinarily and inherently associated with such use;
- (2) the product carried a risk of damage, and insufficient information was provided to enable persons to make a decision as to whether to accept that risk;
- (3) the product carried a risk of damage that could be avoided and adequate instructions or warnings as to how that risk might be avoided were not provided;
- (4) any warning or information provided in respect of a risk of damage posed by the product did not accurately and clearly convey the nature and seriousness of that risk, and/or downplayed or obscured it;
- (5) the risk of damage posed by the product at the time of supply could reasonably (taking into account the cost and feasibility of doing so) have been eliminated or materially reduced, without compromising the product's benefits and, it was not;
- (6) the risk of damage posed by the product is not proportionate to, and justified by, the benefits which the product provides, unless that risk of damage is so well known by the public at large as to be considered socially acceptable; or
- (7) the product, at the time of supply, posed a materially greater risk of damage than other products then available which would have provided comparable or greater benefits.

Do consultees agree?

Paragraph 4.61

Consultation Question 29.

9.39 Where one of our proposed principles is satisfied, should it nevertheless be open to a defendant to show that the product met the entitled level of safety? If so, what should a defendant be required to establish?

Paragraph 4.63

Consultation Question 30.

9.40 We provisionally propose that the following updated and additional circumstances should be added to the circumstances that are relevant to the determination of what persons generally are entitled to expect in relation to a product under the CPA.

- (1) The manner in which, and the purposes for which, the product has been marketed and presented; its get-up, labelling, packaging and the use of any mark in relation to the product; the characteristics of the product, including its design, technical features and composition; and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product, including in relation to its assembly, installation, use and maintenance.
- (2) The specific needs of the group of users for whose use the product is intended.
- (3) In the case of a product whose very purpose, or a primary purpose, is to prevent damage, any failure of the product to fulfil that purpose.
- (4) The product's ability to acquire new features or continue learning after it has been supplied by the producer to another.
- (5) The reasonably foreseeable effect on the product of other products that can be expected to be used together with the product, including by means of inter-connection.
- (6) The relevant product cybersecurity guidance, standards, codes of practice and legal requirements.
- (7) The time when the product was supplied by its producer to another or, where the producer retains control after supply, the time when that control ceased.
- (8) Where the producer retains control after supply, the extent to which that control could have been, and was, exercised by the producer, including the degree to which the product could be modified by update, upgrade or otherwise to address a risk of harm posed by the product.

Do consultees agree?

Paragraph 4.77

Consultation Question 31.

9.41 We provisionally propose that a product should not be regarded as defective under the CPA solely because another product which was supplied or modified later is safer.

Do consultees agree?

Paragraph 4.78

Consultation Question 32.

9.42 We provisionally propose that the purpose of the product liability regime under the CPA should be updated and its purpose articulated through the following three core propositions.

- (1) That the CPA establishes a regime of liability for defective products designed to secure a fair apportionment of the risks inherent in products.
- (2) That it achieves this by allocating those risks, so far as appropriate, to those who create, control, or benefit from them, and by ensuring that persons who suffer damage can obtain effective compensation without needing to prove fault.
- (3) That the regime seeks, where consistent with that fair allocation of risk, to mitigate evidential difficulties that might otherwise undermine its operation.

Do consultees agree?

Paragraph 4.89

Consultation Question 33.

9.43 We invite consultees' views on introducing a rebuttable presumption of a fact relevant to defect and/or causation when a claimant can show that there is an asymmetry of information in the defendant's favour and that it would be fair for the defendant to bear the burden of rebutting the presumption. We are particularly interested in consultees' views on:

- (1) its impact on the balance of interests between claimants and defendants;
- (2) any complexity it might create during litigation;
- (3) its impact on the evidential difficulties faced by claimants; and
- (4) any evidential difficulties it may cause for defendants.

Paragraph 4.116

Consultation Question 34.

9.44 We provisionally propose that the defendant(s) must either elect to accept the alleged defect or assume the burden of rebutting a presumption of defect where the claimant can show that:

- (1) it is arguable that the product is defective;
- (2) the facts relied on are not fanciful;
- (3) they face exceptional evidential difficulties due to the limited availability of evidence; and
- (4) the risk of harm is not so widely known as to be socially accepted.

9.45 Where the defendant elects to accept the alleged defect (and provided that the claimant establishes damage and causation and that no defence is established), we provisionally propose that the court should apportion the risk between the parties on the basis of the following.

- (1) The starting point would be equal sharing, equivalent to an award of 50% of the damages that would have been recoverable had defect been established.
- (2) In determining the appropriate award, the court would take into account:
 - (a) the extent to which an ordinary consumer in the claimant's position could reasonably have understood and accepted the risk, recognising that even adequate warnings may not secure genuine understanding; and
 - (b) the extent to which the claimant's own conduct contributed to the harm.

The award may be adjusted upwards or downwards accordingly.

9.46 Where the defendant elects to assume the burden of rebutting a presumption of defect and fails to discharge that burden (and provided that the claimant establishes damage and causation and that no defence is established), we provisionally propose that damages should be assessed as they would be if defect had been proven.

Do consultees agree?

Paragraph 4.139

Consultation Question 35.

9.47 We provisionally propose that the CPA should require that a minimum threshold of material harm be met before a claim for personal injury may be brought.

Do consultees agree?

Paragraph 5.14

Consultation Question 36.

9.48 We provisionally propose that, where measures are necessary to avert a risk of personal injury posed by a defective product, the resulting pecuniary and non pecuniary losses should constitute compensable damage under the CPA.

Do consultees agree?

Paragraph 5.23

Consultation Question 37.

9.49 We provisionally propose that psychiatric harm suffered by a direct victim, which:

- (1) is consequential upon physical injury, or
- (2) arises from an event caused by the defective product in which the claimant was physically imperilled but not physically injured,

should constitute compensable damage under the CPA when it amounts to a medically “recognised” or “recognisable” psychiatric illness.

Do consultees agree?

Paragraph 5.50

Consultation Question 38.

9.50 We provisionally propose that psychiatric harm otherwise suffered by a direct victim should constitute compensable damage under the CPA when the following two criteria are satisfied.

- (1) The psychiatric harm amounts to a medically “recognised” or “recognisable” psychiatric illness.
- (2) Having regard to all the relevant circumstances surrounding the event caused by the defective product which injured the claimant, the development of a psychiatric illness falls within the natural range of reactions of a person of ordinary fortitude.

Do consultees agree?

Paragraph 5.51

Consultation Question 39.

9.51 We provisionally propose that psychiatric harm suffered by indirect victims should constitute compensable damage under the CPA when the following three criteria are satisfied.

- (1) The indirect victim suffers a medically “recognised” or “recognisable” psychiatric illness consequent on actionable injury (either physical or psychiatric) or the physical imperilment or death of the direct victim.
- (2) The indirect victim has a “close tie of love and affection” with the direct victim.
- (3) Having regard to all the relevant circumstances surrounding the incident, the development of a medically “recognised” or “recognisable” psychiatric illness by the indirect victim falls within the natural range of reactions of a person of ordinary fortitude.

Do consultees agree?

Paragraph 5.74

Consultation Question 40.

9.52 We provisionally propose to adopt a defined list that would specify the relationships in which a “close tie of love and affection” is deemed to exist. That list would include the spouse, parents, children, siblings and cohabitant of the direct victim.

Do consultees agree?

Paragraph 5.75

Consultation Question 41.

9.53 We invite consultees' views on whether the list of relationships which we provisionally propose deems a close tie of love and affection to exist should be expanded and, if so, how.

Paragraph 5.76

Consultation Question 42.

9.54 We provisionally propose that the CPA should be amended to:

- (1) recognise, as compensable damage, any loss of or damage to property, including land, subject to an exclusion for property that was used exclusively for professional purposes at the time that it was lost or damaged; and
- (2) provide that if the property was used for mixed private and professional purposes at the time that it was lost or damaged, the award of damages should be reduced to reflect the extent of the property's professional use.

Do consultees agree?

Paragraph 5.84

Consultation Question 43.

9.55 We provisionally propose that the CPA should be amended to:

- (1) recognise, as compensable damage, destruction and corruption of data (as distinct from data leaks or breaches of data protection rules), subject to an exclusion for data used exclusively for professional purposes; and
- (2) provide that if the data was used for mixed private and professional purposes at the time that it was destroyed or corrupted, the award of damages should be reduced to reflect the extent of the data's professional use.

Do consultees agree?

Paragraph 5.92

Consultation Question 44.

9.56 We invite consultees' views on whether, and in what circumstances, loss of access to data held on, or accessed via, a product should be treated as equivalent to the destruction or corruption of that data.

Paragraph 5.93

Consultation Question 45.

9.57 We provisionally propose that the exclusion of liability and compensation for loss or damage to the product itself under the CPA should cover damage to a product caused by a defective component integrated into or interconnected with that product by the producer of that product or within the producer's control.

Do consultees agree?

Paragraph 5.100

Consultation Question 46.

9.58 We provisionally propose that the CPA should be amended to remove the lower threshold for property damage of £275.

Do consultees agree?

Paragraph 5.107

Consultation Question 47.

9.59 We provisionally propose that a defendant should not be able to avoid liability under the CPA on the basis that there was "no supply to another" where a defective product was produced by a service provider for its own use and caused harm in the course of providing a commercial service, or a service that is publicly funded.

Do consultees agree?

Paragraph 6.14

Consultation Question 48.

9.60 We provisionally propose that a defendant should not be entitled to rely on the section 4(1)(d) defence under the CPA (that “the defect did not exist in the product at the relevant time”) if the producer caused the product to become defective after the relevant time by:

- (1) integrating or connecting a component with the product, or modifying the product (including carrying out a substantial modification), regardless of how this modification is made; or
- (2) authorising or consenting to a third party integrating or connecting a component with the product, or modifying the product (including carrying out a substantial modification), regardless of how this modification is made, but in each case, only where the producer has presented the particular component or modification as part of their product or product offering; or
- (3) failing to supply software updates or upgrades.

Do consultees agree?

Paragraph 6.23

Consultation Question 49.

9.61 We provisionally propose that –

- (1) the development risks defence should be retained; and
- (2) the development risks defence should apply to all products and industries.

Do consultees agree?

Paragraph 6.35

Consultation Question 50.

9.62 We provisionally propose that the development risks defence in section 4(1)(e) be updated to reflect that scientific and technological knowledge is to be assessed objectively by reference to accessible knowledge. What a producer of products of the same description as the product in question might be expected to have discovered should not form part of that objective assessment.

Do consultees agree?

Paragraph 6.48

Consultation Question 51.

9.63 We provisionally propose that where the producer caused the product to become defective under the CPA after the “relevant time” (generally, that of supply) by:

- (1) integrating or connecting a component with the product, or modifying the product (including carrying out a substantial modification), regardless of how this modification is made; or
- (2) authorising or consenting to a third party integrating or connecting a component with the product, or modifying the product (including carrying out a substantial modification), regardless of how this modification is made, but in each case, only where the producer has presented the particular component or modification as part of their product or product offering;

there is a defence if the state of scientific and technological knowledge was such that the defect could not have been discovered at the time the product became defective (rather than at the “relevant time”).

Do consultees agree?

Paragraph 6.62

Consultation Question 52.

9.64 We provisionally propose that, where the producer caused the product to become (or remain) defective under the CPA after the “relevant time” (generally, that of supply) by failing to provide software updates or upgrades, there is a defence if, at the time the product became (or remained) defective as a result of the producer’s failure to supply software updates or upgrades, the state of scientific and technological knowledge was such that the defect could not have been discovered.

Do consultees agree?

Paragraph 6.63

Consultation Question 53.

9.65 We provisionally propose that, where a product is substantially modified, the 10-year long-stop period should reset as follows.

- (1) If a product is substantially modified within the original producer's control, time should restart from the date when the modified product is made available.
- (2) If the product is substantially modified by a person outside the original producer's control, time should restart from the date when the modifier supplies such modified product in the course of their business and/or with a view to profit.

Do consultees agree?

Paragraph 6.79

Consultation Question 54.

9.66 We provisionally propose that for the purposes of a latent personal injury claim, it should be deemed possible for an individual to have initiated proceedings within the initial ten years, where they had knowledge of the following information:

- (1) material facts about the harm in respect of which damages are claimed;
- (2) that the damage was attributable in whole or in part to the defect in the product which is alleged to constitute the claim under the CPA; and
- (3) the identity of the defendant.

Do consultees agree?

Paragraph 6.94

Consultation Question 55.

9.67 We provisionally propose that the 10-year long-stop period for latent personal injury claims should be extended in cases where it was not possible for the individual to initiate proceedings within the initial 10 years. In such cases, the long-stop period should be extended to 25 years.

Do consultees agree?

9.68 If consultees consider that the time-period should be other than 25 years, please suggest an alternative period with any supporting evidence.

Paragraph 6.99

Consultation Question 56.

9.69 We provisionally propose that a court should have the power to substitute a defendant after the expiry of the long-stop period where the claimant satisfies the requirements in section 35 of the Limitation Act 1980. These requirements should be treated as satisfied where the claimant has identified the defendant by the correct description in the circumstances of the case but used the wrong name.

Do consultees agree?

Paragraph 7.15

Consultation Question 57.

9.70 We provisionally propose that, where a claimant has sued the wrong company within a group and the correct defendant is another entity within the same group, the court should ordinarily permit substitution, unless it would be inequitable to do so.

Do consultees agree?

Paragraph 7.16

Consultation Question 58.

9.71 We invite consultees to tell us about:

- (1) the costs consumers bear as a result of harms caused by defective products;
- (2) the value of potential claims, including those that settle;
- (3) the proportion of claims that settle rather than proceed to trial;
- (4) the proportion of claims that do not settle but are ultimately withdrawn before proceeding to trial;
- (5) where claims do proceed to trial, which courts they are heard in and whether judgments are published;
- (6) the costs to businesses of complying with the current regime;
- (7) the costs of legal advice and litigation in cases of harm caused by defective products, including the cost of obtaining technical evidence or expertise;
- (8) how such claims are generally funded (for example through self-funding or “no-win, no-fee” arrangements); and
- (9) any access to justice issues associated with product liability claims or potential claims.

We are particularly interested in any evidence consultees can provide about monetisable costs and benefits.

Paragraph 8.11

Consultation Question 59.

9.72 We invite consultees to tell us about the costs and benefits of any of our proposed changes to product liability law, including in relation to:

- (1) harms suffered by consumers;
- (2) consumer confidence;
- (3) business certainty;
- (4) business compliance, insurance, and competition;
- (5) impact on small and medium-sized enterprises (SMEs);
- (6) alignment of the law of England and Wales with the law of other jurisdictions including the EU, Australia and the US; and
- (7) legal advisory and litigation costs.

We are particularly interested in any evidence consultees can provide about monetisable costs and benefits.

Paragraph 8.15

Consultation Question 60.

9.73 We invite consultees to tell us if they believe or have evidence or data to suggest that any of the reforms that we propose could result in advantages or disadvantages to certain groups or based on certain characteristics (with particular attention to age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation).

Paragraph 8.28

Consultation Question 61.

9.74 We invite consultees to provide us with any information they have about the impact of our proposals in Wales, Scotland or Northern Ireland. This could include jurisdiction-specific issues that should be taken into account if reforms are implemented, or, in the case of Scotland or Northern Ireland, the impact if reforms implemented in England and Wales were not extended to those jurisdictions.

9.75 We are particularly interested in hearing about the potential impacts on businesses if product liability laws were to differ between different UK jurisdictions.

Paragraph 8.32

Consultation Question 62.

9.76 We invite consultees to tell us whether there are any other ways, not considered in this paper, in which the product liability regime might be improved. Please give details of any suggestion and the anticipated benefits of such a change.

Paragraph 8.35

Appendix 1: Terms of Reference

Introduction

- 1.1 The central statute for product liability (**PL**) in Great Britain is the Consumer Protection Act (**CPA**) (specifically Part I thereof).¹ The CPA came into force in 1987, pursuant to the EU's Product Liability Directive of 1985.² It is no longer fit for purpose, in part due to technological progress since its inception, including, but not limited to, artificial intelligence (**AI**). Numerous stakeholders have expressed concerns that the UK's PL regime requires reform, including specialist PL lawyers, law firms, industry and consumer groups, and insurers.³ The EU has also updated its product liability regime. A clear and efficient legal regime is necessary for PL, particularly with respect to emerging technologies, to balance business confidence and innovation against consumer and third-party protection. A PL regime that is fit for purpose also enables insurers adequately to price risk of emerging technologies to instil further market and user confidence.
- 1.2 Given the importance of PL to many different groups, and the public at large, this review will be conducted in close consultation with Governmental and non-Governmental stakeholders. The Commission will publish a report with recommendations for law reform.
- 1.3 The review will be informed by consultation. The Law Commission will work closely with the Department for Business and Trade in its review of the PL regime, and with the Department of Science, Innovation and Technology, specifically with respect to emerging technologies, such as AI.

Scope

- 1.4 The Law Commission will review and analyse the existing PL regime in England and Wales as contained in Part 1 of the CPA with a view to developing recommendations for reform that better achieve the purposes of the PL regime (particularly in relation to emerging technology, including AI). Issues to be considered will include, but are not limited to, the following.
 - (1) Whether the CPA's definition of "product" needs to be reformed to accommodate the intangibility of digital technologies, and in particular whether it should be widened to include software even if it is provided in an intangible format (such as by download over the internet), and whether reforms are

¹ The Consumer Protection (Northern Ireland) Order 1987 applies the same regime.

² Officially, the 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 (**PLD**).

³ The Law Commission itself has also noted the need for a project on PL in other project reports. The EU has also updated the PLD, which changes took effect on 8 December 2024 (Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC (**NPLD**)). Among other things, the NPLD's amendments provide for emerging technologies, including AI.

required to reflect the situation in which a product has been modified by either its producer or a third-party.

- (2) Whether the CPA's definition of "defect" needs to be reformed to account for difficulties for claimants to establish that a "product" is defective, and to account for the nature of emerging technologies, including AI.
 - (3) To consider whether the purposes of the PL regime can be better achieved by reforming **(i)** the CPA's definition of "producer" and **(ii)** the range of economic operators which may be held liable under the CPA.
 - (4) The CPA provides for "long-stop" dates, such that a claim cannot be brought more than ten years after a product is supplied. There is a question as to whether the ten-year period should be extended for latent harm, and whether products that are iteratively updated (such as some forms of software) pose any difficulties with the long-stop date.⁴
 - (5) The PL regime contains a "State of the Art" defence, such that a product is not defective just because another similar product, supplied at a later time, is safer. Whether a product is defective is determined by the state of knowledge and the market at the time it is supplied. Given that much software is capable of being updated over time, the "Start of the Art" defence may need amending to account for the fact that some products can be updated iteratively.
 - (6) Whether the burden for claimants to bring a successful claim is too onerous under the existing PL regime, including whether the nature of emerging technologies, particularly AI, is such that it may be very difficult to show that some products are, or software is, defective. For example, claimants may face difficulty bringing claims because: **(i)** AI is opaque, even to experts or AI developers; **(ii)** AI displays autonomy and adaptiveness that may make it difficult for claimants to establish that a product is defective, given the "entitled expectations" test for determining whether a product is defective; and **(iii)** given that "defect" is currently assessed at the time a product is supplied, latent defects may arise in emerging technologies for which no claims are available.
 - (7) Whether the PL regime's definition of "damage" needs to be reformed to account for the types of harm caused by emerging technologies, such as AI. In particular, whether the meaning of damage should be extended to include data destruction or corruption.
- 1.5 While this review is being undertaken by the Law Commission of England and Wales, it will endeavour to consult with stakeholders in Scotland and Northern Ireland to record any relevant differences between the law of England and Wales and the law of Scotland and the law of Northern Ireland respectively. The Law Commission will also seek to liaise with the relevant devolved administrations to obtain relevant input.
- 1.6 The PL regime is a critical piece of legal infrastructure. Its aim is to impose a clear and efficient regime to manage harms caused by defective products, such that persons

⁴ On the assumption a review recommends intangibly supplied software is recognised as a "product" for the purpose of the PL regime.

are protected, while business and industry are not discouraged from innovation and growth and are clear as to their obligations and potential liability. Ensuring that balance is achieved will be a central focus of the review. In particular, given the significance of emerging technologies, including AI, to the review, promoting innovation and adoption of emerging technologies will be a consideration within the review.

Appendix 2: Comparison with the EU

This appendix sets out a high-level comparison between our provisional proposals for law reform (“proposals”) in Chapters 2 to 7 of this consultation paper, on the one hand, and the New Directive,⁵ on the other. We have included this comparison for information purposes only, to aid the review by consultees of our proposals.

No.	Our proposal	Comparison	Comment
Chapter 2: Definition of a “product” under the CPA			
1.	The definition of “product” under the CPA should be expanded to include software however supplied, including software downloaded from the cloud or internet, and software-as-a-service.	Convergence	The New Directive states that software is a product irrespective of the mode of its supply or usage, and whether it is stored on a device, accessed through a communication network or cloud technologies, or supplied through a software-as-a-service model.⁶ The New Directive does not make an exception for bespoke software supplied as a service. We seek consultees’ views on whether the CPA should adopt a similar approach, or whether bespoke software provided as a service should instead be excluded from the CPA, in the same way as any other service.
2.	The definition of “product” under the CPA should be expanded to include AI systems however supplied, including AI systems downloaded from the cloud or internet or otherwise supplied in an intangible form.	Convergence	AI systems are defined as products under the New Directive. ⁷
3.	The CPA should not include an express exemption for non-commercial open-source software, on the basis that this is unnecessary because such software	Divergence	The New Directive provides that free and open-source software developed or supplied outside the course of a commercial activity

⁵ Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC.

⁶ New Directive, art 4(1) and recital 13.

⁷ New Directive, art 4(1) and recital 13.

	would already be exempt under section 4(1)(c) of the CPA, which provides a defence where supply of the product was outside the course of business and without a view to profit		should not fall within its scope, as otherwise this would hamper innovation and research. But where software is supplied in exchange for a price, or for personal data used other than exclusively for improving the software, this is considered a commercial activity, to which the New Directive applies. ⁸
4.	The design components and features of social media platforms and other online platforms should constitute “products” under the CPA.	Potential convergence	The New Directive does not expressly include online platforms within the definition of “product”. However, the European Law Institute’s report on the interpretation of the New Directive supports our approach.⁹ It identifies three potential routes by which social media platforms could be brought within the scope of the New Directive, two of which broadly align with our proposal. First, the report suggests that social media platforms themselves could constitute “software” and therefore fall within the New Directive. This accords with our view that the design components and features of social media platforms should constitute “products” under the CPA, on the basis that they can themselves be regarded as software. The European Law Institute also suggests an alternative route where social media is considered to be a service rather than a product. In that case, software developed by the platform operator to provide its social media service may itself fall within the New Directive, even if the social media service as such lies outside its

⁸ New Directive, art 2(2) and recital 14.

⁹ European Law Institute, *1st Supplement to the European Law Institute’s work on the new EU framework on product liability, Liability for Defective Software Under the New EU Product Liability Regime* (2026).

			scope. Although we have not justified our proposal on the same grounds, ¹⁰ this supports our view that it is irrelevant whether a platform operator also provides services alongside the provision of its platform. The provision of services does not affect the analysis and does not undermine the classification of the relevant platform components themselves as “products” under the CPA.
5.	The CPA should include a residual provision within the definition of “product” to incorporate any other thing (digital or otherwise) that is designed or developed to perform a specific function for users, irrespective of how it is supplied or made available.	Divergence	There is no equivalent provision in the New Directive, which defines “product” as “all movables, even if integrated into, or inter-connected with, another movable or an immovable; it includes electricity, digital manufacturing files, raw materials and software”. ¹¹
6.	The definition of “product” in the CPA should include digital manufacturing files and other functional information necessary to produce a tangible product by enabling the automated control of machinery or tools.	Convergence	The New Directive provides that a “product” includes a digital manufacturing file, which is defined as “a digital version of a movable containing the functional information necessary to produce a tangible item by enabling the automated control of machinery or tools”. ¹²
7.	Services that are interconnected with a product, or that are required for a product to function, should be excluded from the scope of the CPA.	Divergence	The New Directive clarifies that, although it does not apply to services as such, it does apply to integrated or interconnected digital services. ¹³ To this end, it introduces the concept of a “related service”, which is defined as “a digital service that is integrated into, or inter-connected with, a product in such a way that its absence would prevent the

¹⁰ The European Law Institute have justified their approach by applying the CJEU ruling in *C-203/99 Veedfald v Århus Amtskommune* [2001] ECR-I-3569.

¹¹ New Directive, art 4(1).

¹² New Directive, arts 4(1) and 4(2).

¹³ New Directive, recital 17.

			product from performing one or more of its functions.” ¹⁴ The New Directive defines a “component” as including a related service that is integrated into or interconnected with a product, ¹⁵ meaning providers of related services may be liable as component manufacturers.
8.	A product should be considered to be “supplied” under the CPA irrespective of its mode of delivery, even where it is supplied through intangible means. Products made available by a person in the course of their business and/or with a view to profit should be considered to be “supplied” under the CPA even where the user has not given money or other consideration for their use of the product.	Convergence	The New Directive uses the concept of “making available on the market”, which means any supply of a product for distribution, consumption or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge. ¹⁶
Chapter 3: Persons liable under the CPA			
9.	The definition of “producer” under the CPA should be expanded to include the person who developed the product.	Convergence	The definition of “manufacturer” in the New Directive includes anyone who “develops, manufactures or produces a product”. ¹⁷
10.	The definition of “own-branders” under the CPA should remain unchanged. Own-branders should remain liable for damage caused by a defective product under the CPA.	Divergence	Under the New Directive someone who, by putting their name, trademark or other distinguishing features on a product, presents themselves as its manufacturer, may be liable as the manufacturer. ¹⁸ This is consistent with our proposal. However, the New Directive goes further and includes anyone who “has a product designed or

¹⁴ New Directive, art 4(3).

¹⁵ New Directive, art 4(4).

¹⁶ New Directive, art 4(7).

¹⁷ New Directive, art 4(10)(a).

¹⁸ New Directive, art 4(10)(b).

			manufactured” ¹⁹ within its definition of a “manufacturer”.
11.	There should be no change in relation to the definition and liability of “importers” under the CPA.	Divergence	The New Directive holds an importer of a product liable where the manufacturer of a product or component is established outside the EU. ²⁰ In contrast, the CPA provides that an importer of a product is jointly and severally liable for damage alongside the producer and own-branders. ²¹
12.	The liability of a supplier under the CPA should be retained. The list of liable persons whom a supplier can identify to avoid liability should be expanded. The supplier must identify another liable person in accordance with a prescribed order of priority. Where the identified person is not the supplier's own supplier, that person must be established in the UK.	Broad convergence	Distributors are liable under the New Directive where: (1) the injured person requests that the distributor identify a person potentially liable under Article 8(1)²² and established in the EU, or its own distributor; and (2) that distributor fails to identify such a person or its own distributor within one month of receiving the request.²³ This largely aligns with our proposal, save that our proposal sets out the order in which the supplier must identify another liable person to avoid liability. The persons which are required to be identified also differ. This is a reflection of the differences in our approaches to who should incur liability for defective products under the separate regimes.
13.	Where a defective component product is integrated into or interconnected with a finished product within the control of the producer of the finished product,	Broad convergence	The New Directive provides that the manufacturer of an overall product is liable for a defective component, where it was

¹⁹ New Directive, art 4(10)(b).

²⁰ New Directive, art 8(1)(c)(i).

²¹ CPA, s 2(2) and 2(5).

²² That is, the manufacturer of the product or component (whether the original manufacturer or the person who carried out a substantial modification), the importer, the authorised representative or the fulfilment service provider.

²³ New Directive, art 8(3).

	then both the producer of the finished product and the producer of the component should potentially be liable under the CPA. Where a defective component product is integrated into or interconnected with a producer's finished product outside of their control, only the producer of the component should potentially be liable under the CPA.		integrated into, or interconnected with, its product within that manufacturer's control.²⁴ However, where a component is integrated into, or interconnected with, a product outside the control of the manufacturer of that product, a claimant can seek compensation from the component manufacturer where the component itself is a product under the New Directive.²⁵ Note that, unlike our definition, the New Directive's definition of "component" encompasses components regardless of whether they constitute products in their own right.²⁶
14.	The CPA should make provision for liability where a product is substantially modified after the time it was supplied by the producer, own-brander or importer. Substantial modification should mean a modification which: (1) changes such product's original performance, purpose or type; and (2) as a result, either: (a) changes what persons generally are entitled to expect in relation to such product for the purposes of section 3(1) on "defect"; or (b) changes the nature of the risk, creates a new risk or increases the level of risk, of the product causing damage giving rise to liability under section 5 on "damages".	Broad convergence	Under the New Directive a substantial modification means a modification of a product after it has been placed on the market or put into service: (1) that is considered substantial under relevant Union or national rules on product safety; or (2) where relevant Union or national rules on product safety lay down no threshold on what is to be considered a substantial modification, that: (a) changes the product's original performance, purpose or type, without that change having been foreseen in the manufacturer's initial risk assessment; and (b) changes the nature of the hazard, creates a new hazard or increases the level of risk.
15.	A person who substantially modifies a product outside the original producer's control and supplies it in the course of their business and/or with a view to	Convergence	The New Directive provides that any person who substantially modifies a product outside the manufacturer's control and makes

²⁴ New Directive, art 8(1).

²⁵ New Directive, recital 36. See also New Directive, art 8(1)(b).

²⁶ New Directive, art 4(4) and recital 36.

	profit should be liable for such modified product as a producer under the CPA.		it available on the market is held liable as a manufacturer of that product. ²⁷
16.	“Producer’s control” should cover the following circumstances: (1) where the producer of a product themselves integrates or connects a component with their product, or themselves modifies their product (including carrying out a substantial modification), regardless of how this modification is made; and (2) where the producer of a product authorises or consents to a third party integrating or connecting a component with the producer’s product, or modifying the producer’s product (including carrying out a substantial modification), regardless of how this modification is made, but in each case, only where the producer has presented the particular component or modification as part of their product or product offering.	Broad convergence	The New Directive provides that “‘manufacturer’s control’ means that: (a) the manufacturer of a product performs or, with regard to actions of a third party, authorises or consents to: (i) the integration, inter-connection or supply of a component, including software updates or upgrades; or (ii) the modification of the product, including substantial modifications; (b) the manufacturer of a product has the ability to supply software updates or upgrades, themselves or via a third party”. ²⁸
17.	A fulfilment service provider under the CPA should be any person offering, in the course of their business, at least two of the following services: warehousing, packaging, addressing and dispatching of a product, in each case without having ownership of that product, excluding postal services, parcel delivery services and freight transport services.	Convergence	The New Directive provides that a ‘fulfilment service provider’ means any natural or legal person offering, in the course of a commercial activity, at least two of the following services: warehousing, packaging, addressing and dispatching of a product, without having ownership of that product, excluding postal services, parcel delivery services and any other postal services or freight transport services.
18.	Fulfilment service providers should be liable under the CPA, but only where a UK producer, own-brand, importer, or UK authorised representative of any of those persons, cannot be identified.	Broad convergence	The New Directive provides that a fulfilment service provider is liable where the manufacturer of the product or the component is established outside the EU and where there is no importer

²⁷ New Directive, art 8(2).

²⁸ New Directive, art 4(5).

			established within the EU or authorised representative of the manufacturer.²⁹ We consider that our approach better reflects the rationale underpinning our wider proposals. The purpose of extending liability to fulfilment service providers is to ensure that claimants are not left without an identifiable defendant in the UK against whom they can bring a claim. By focusing on whether an appropriate defendant can be identified, rather than on the location of particular economic operators, our proposal provides a simpler route to redress. It also avoids requiring claimants to establish the location and status of multiple parties within the supply chain before a fulfilment service provider can be held responsible.
19.	Core Participants (including online marketplaces) who meet the following criteria should be liable under the CPA where a UK producer, own-brand, importer, fulfilment service provider or UK authorised representative of any of those persons, cannot be identified: (1) the conduct of such person (or of another person whose conduct they control, or could have controlled, either directly or indirectly) was a significant factor in making the product available for sale, or distributing the product, to individuals in the UK, including storing, packaging or delivering the product, or providing a platform facilitating the sale or marketing of the product in the UK; (2) such person (or another person in whom such person has a controlling interest) has received a direct or indirect financial benefit from its acts relating to the sale of the product or	Divergence	Online marketplaces are only liable under the New Directive if: (1) the manufacturer, the importer, the authorised representative and the fulfilment service provider within the EU cannot be identified; (2) the marketplace holds itself out as providing the product; and (3) the marketplace fails to identify a relevant economic operator within the EU or its own distributor within one month of receiving such request from the claimant.³⁰

²⁹ New Directive, art 8(1)(c)(iii).

³⁰ New Directive, art 8(4).

	otherwise conducted such acts in the course of its business and/or with a view to profit; (3) such person (or another person whose conduct they control, or could have controlled, either directly or indirectly) has direct or indirect control over, or a decisive ability to influence, the manufacturing or distribution process of the product; and (4) such person is not a producer, own-brander, importer, fulfilment service provider or a UK authorised representative of any of these persons.		
20.	Where a producer, own-brander, importer, fulfilment service provider or Core Participant is established outside the UK, its UK authorised representative should be liable. This would be limited to representatives authorised to act on that person's behalf in relation to the product, including for regulatory, compliance, enforcement, product-related and market-access functions.	Divergence	The New Directive only holds the authorised representative of the manufacturer liable where the manufacturer is outside the EU. ³¹ This would include the authorised representative of an own-brander where they fall under the definition of a manufacturer. ³² The New Directive provides that an authorised representative means any natural or legal person established within the Union who has received a written mandate from a manufacturer to act on that manufacturer's behalf in relation to specified tasks. ³³
Chapter 4: Defect and causation under the CPA			
21.	The CPA should include a non-exhaustive list of principles for assessing whether a product has met the entitled level of safety. The principles would operate as an alternative basis for establishing the entitled level of safety, meaning that a product would be defective if any one of the principles is satisfied. They would include the following: (1) normal and reasonably expected use; (2) provision	Divergence	The New Directive does not include any provisions equivalent to the principles we propose. However, it provides that safety is assessed not only by reference to what "a person is entitled to expect", but also by what is "required under Union or national law". ³⁴

³¹ New Directive, art 8(1)(c)(ii).

³² New Directive, art 4(10)(b).

³³ New Directive, art 4(11).

³⁴ New Directive, art 7(1).

	of information and acceptance of risk; (3) instructions and warnings to avoid harm; (4) presentation of risk; (5) avoidability of risk at the time of supply; (6) relationship between risks and benefits; and (7) comparison with available alternatives.		
22.	The following updated and/or additional circumstance should be added to the circumstances that are relevant to the determination of what persons generally are entitled to expect in relation to a product under the CPA: the manner in which, and the purposes for which, the product has been marketed and presented; its get-up, labelling, packaging and the use of any mark in relation to the product; the characteristics of the product, including its design, technical features and composition; and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product, including in relation to its assembly, installation, use and maintenance.	Broad convergence	Article 7(2)(a) of the New Directive provides that, in assessing the defectiveness of a product, one of the circumstances that shall be taken into account is: the presentation and the characteristics of the product, including its labelling, design, technical features, composition and packaging, and the instructions for its assembly, installation, use and maintenance.
23.	The following updated and/or additional circumstance should be added to the circumstances that are relevant to the determination of what persons generally are entitled to expect in relation to a product under the CPA: the specific needs of the group of users for whose use the product is intended.	Convergence	Article 7(2)(h) of the New Directive provides that, in assessing the defectiveness of a product, one of the circumstances that shall be taken into account is: the specific needs of the group of users for whose use the product is intended.
24.	The following updated and/or additional circumstance should be added to the circumstances that are relevant to the determination of what persons generally are entitled to expect in relation to a product under the CPA: in the case of a product whose purpose, or a primary purpose, is to prevent damage, any failure of the product to fulfil that purpose.	Broad convergence	Article 7(2)(i) of the New Directive provides that, in assessing the defectiveness of a product, one of the circumstances that shall be taken into account is: in the case of a product whose very purpose is to prevent damage, any failure of the product to fulfil that purpose.

25.	The following updated and/or additional circumstance should be added to the circumstances that are relevant to the determination of what persons generally are entitled to expect in relation to a product under the CPA: the product's ability to acquire new features or continue learning after it has been supplied by the producer to another.	Broad convergence	Article 7(2)(c) of the New Directive provides that, in assessing the defectiveness of a product, one of the circumstances that shall be taken into account is: the effect on the product of any ability to continue to learn or acquire new features after it is placed on the market or put into service.
26.	The following updated and/or additional circumstance should be added to the circumstances that are relevant to the determination of what persons generally are entitled to expect in relation to a product under the CPA: the reasonably foreseeable effect on the product of other products that can be expected to be used together with the product, including by means of interconnection.	Convergence	Article 7(2)(d) of the New Directive provides that, in assessing the defectiveness of a product, one of the circumstances that shall be taken into account is: the reasonably foreseeable effect on the product of other products that can be expected to be used together with the product, including by means of interconnection.
27.	The following updated and/or additional circumstance should be added to the circumstances that are relevant to the determination of what persons generally are entitled to expect in relation to a product under the CPA: the relevant product cybersecurity guidance, standards, codes of practice and legal requirements.	Broad convergence	Article 7(2)(f) of the New Directive provides that, in assessing the defectiveness of a product, one of the circumstances that shall be taken into account is: relevant product safety requirements, including safety-relevant cybersecurity requirements.
28.	The following updated and/or additional circumstance should be added to the circumstances that are relevant to the determination of what persons generally are entitled to expect in relation to a product under the CPA: the time when the product was supplied by its producer to another or, where the producer retains control after supply, the time when that control ceased.	Broad convergence	Article 7(2)(e) of the New Directive provides that, in assessing the defectiveness of a product, one of the circumstances that shall be taken into account is: the moment in time when the product was placed on the market or put into service or, where the manufacturer retains control over the product after that moment, the moment in time when the product left the control of the manufacturer.
29.	The following updated and/or additional circumstance should be added to the circumstances that are relevant to the determination of what persons generally are entitled to expect in relation to a product under the CPA: where the	Divergence	There is no such mirroring circumstance in the New Directive, though elements of our proposal are present in recitals 17 to 19, 32, and 50.

	producer retains control after supply, the extent to which that control could have been, and was, exercised by the producer, including the degree to which the product could be modified by update, upgrade or otherwise to address a risk of harm posed by the product.		
30.	We propose no mirroring provision. We consider that including such a provision in the CPA is unnecessary. Where a recall or similar intervention relates to the risk of harm complained of, it would in any event be considered a relevant circumstance by the court. Adding a specific provision would therefore offer little practical benefit.	Divergence	Article 7(2)(g) of the New Directive provides that, in assessing the defectiveness of a product, one of the circumstances that shall be taken into account is: any recall of the product or any other relevant intervention relating to product safety by a competent authority or by one of the persons liable for defective products as referred to in Article 8.
31.	A product should not be regarded as defective under the CPA solely because another product which was supplied or modified later is safer.	Convergence	Article 7(3) of the New Directive provides that a product shall not be considered to be defective for the sole reason that a better product, including updates or upgrades for a product, has already been or is subsequently placed on the market or put into service.
32.	The purpose of the product liability regime under the CPA should be updated and its purpose articulated through the following three core propositions. (1) That the CPA establishes a regime of liability for defective products designed to secure a fair apportionment of the risks inherent in products. (2) That it achieves this by allocating those risks, so far as appropriate, to those who create, control, or benefit from them, and by ensuring that persons who suffer damage can obtain	Divergence	The New Directive does not include an express statement of purpose, but achieves a similar effect through its recitals, including those recognising that liability without fault supports a fair apportionment of risk in modern technological production. ³⁵

³⁵ See recital 2 of both the 1985 Directive and New Directive.

	effective compensation without needing to prove fault. (3) That the regime seeks, where consistent with that fair allocation of risk, to mitigate evidential difficulties that might otherwise undermine its operation.		
33.	We provide for a presumption of defect under a risk-sharing mechanism where the claimant faces exceptional evidential difficulties. The presumption would arise subject to strict thresholds, applying only where the claimant can satisfy the court that it is arguable that the product is defective; that the facts relied on are not fanciful; that the claimant faces exceptional evidential difficulties due to the limited availability of evidence; and that the risk of harm is not so widely known as to be socially accepted. The defendant must either elect to accept the alleged defect or assume the burden of rebutting the presumption of defect. Where the defendant elects to accept the alleged defect (and provided that the claimant establishes damage and causation and that no defence is established), the court should apportion the risk between the parties. The starting point would be equal sharing, equivalent to an award of 50% of the damages that would have been recoverable had defect been established. In determining the appropriate award, the court would take into account: (1) the extent to which an ordinary consumer in the claimant's position could reasonably have understood and accepted the risk, recognising that even adequate warnings may not secure genuine understanding; and (2) the extent to which the claimant's own conduct contributed to the harm. The award may	Divergence	The New Directive contains no corresponding provision for a risk-sharing mechanism under which a defendant may elect either to accept an alleged defect or to assume the burden of rebutting a presumption of defect. The New Directive does, however, provide for a rebuttable presumption of defect (see the entry below).

	be adjusted upwards or downwards accordingly. Where the defendant elects to assume the burden of rebutting a presumption of defect and fails to discharge that burden (and provided that the claimant establishes damage and causation and that no defence is established), we provisionally propose that damages should be assessed as they would be if defect had been proven.		
34.	We also invite consultees' views on the impact of introducing rebuttable presumptions in relation to specific and discrete factual issues relevant to proving defect. Such a presumption would arise when the claimant can show that: (1) an asymmetry of information exists in the defendant's favour; and (2) that it would be fair for the defendant to bear the burden of rebutting the presumption.	Divergence	The New Directive provides for a presumption of defectiveness, rebuttable by the defendant, where: (1) the claimant faces excessive difficulties, particularly due to technical or scientific complexity, in proving defect and can show that defect is likely;³⁶ (2) the defendant fails to disclose relevant evidence as required by Article 9(1); (3) the product does not comply with mandatory safety requirements intended to prevent the type of damage suffered; or (4) the damage results from an obvious malfunction during normal or reasonably foreseeable use.³⁷
35.	We do not propose introducing a rebuttable presumption of causation, but we invite consultees' views on the impact of introducing rebuttable presumptions in relation to specific and discrete factual issues relevant to proving causation. Such a presumption would arise when the claimant can show that an asymmetry of information exists in the defendant's favour and that it would be fair for the defendant to bear	Divergence	The New Directive provides for a rebuttable presumption of causation where: (1) the product is shown to be defective and the damage is of a kind typically consistent with that defect;³⁸ or (2) the claimant faces excessive difficulties, particularly because of technical or scientific complexity, in proving causation and can show that a causal link is likely.³⁹

³⁶ New Directive, art 10(4).

³⁷ New Directive, art 10(2).

³⁸ New Directive, art 10(3).

³⁹ New Directive, art 10(4).

	the burden of rebutting the presumption.		
Chapter 5: Damage giving rise to liability			
36.	The CPA should require that a minimum threshold of material harm be met before a claim for personal injury may be brought.	Divergence	No such threshold is provided for by the New Directive. Our understanding is that to the extent that any such threshold exists, it is a matter for the national courts, subject to the requirement that in the application of their national rules, they do not undermine the regime established by the New Directive. ⁴⁰
37.	Where measures are necessary to avert a risk of personal injury posed by a defective product, the resulting pecuniary and non-pecuniary losses should constitute compensable damage under the CPA.	Likely broad convergence	No such provision arises in the New Directive, however in our view that is because such a provision is unnecessary in this context as, absent any conflicting authority, the principle of recovery of such losses provided for by <i>Boston Scientific</i> ⁴¹ would be followed.
38.	Psychiatric harm suffered by a direct victim, which: (1) is consequential upon physical injury; or (2) arises from an event caused by the defective product in which the claimant was physically imperilled but not physically injured, should constitute compensable damage under the CPA when it amounts to a medically recognised or recognisable psychiatric illness. Psychiatric harm otherwise suffered by a direct victim should constitute compensable damage under the CPA when the following two criteria are satisfied: (1) the psychiatric harm amounts to a medically recognised or recognisable psychiatric illness; and (2) having regard to all the relevant	Divergence	The New Directive recognises as recoverable personal injury medically recognised and medically certified damage to psychological health affecting the victim's general state of health and potentially requiring treatment, taking into account, among other things the International Classification of Diseases of the World Health Organization. ⁴²

⁴⁰ New Directive, art 6; Case C-203/99 *Veefald v Århus Amtskommune* [2001] ECR I-03569 at [27].

⁴¹ Joined Cases C-503/13 and C-504/13 *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt – Die Gesundheitskasse* [2015] EU:C:2015:148.

⁴² New Directive, recital 21 and art 6(1)(a).

	circumstances surrounding the event caused by the defective product which injured the claimant, the development of a psychiatric illness falls within the natural range of reactions of a person of ordinary fortitude.		
39.	Psychiatric harm suffered by indirect victims should constitute compensable damage under the CPA when the following three criteria are satisfied: (1) the indirect victim suffers a medically “recognised” or “recognisable” psychiatric illness consequent on actionable injury (either physical or psychiatric) or the physical imperilment or death of the direct victim; (2) the indirect victim has a “close tie of love and affection” with the direct victim; and (3) having regard to all the relevant circumstances surrounding the incident, the development of a medically “recognised” or “recognisable” psychiatric illness by the indirect victim falls within the natural range of reactions of a person of ordinary fortitude. The CPA should adopt a defined list that would specify the relationships in which a “close tie of love and affection” is deemed to exist. That list would include the spouse, parents, children, siblings and cohabitant of the direct victim.	Divergence	The New Directive makes no specific provisions for indirect victims, save that recital 27 provides that the right to compensation for damage arising as a result of damage caused directly to another by a defective product, is a matter for national laws.
40.	The CPA should be amended to: (1) recognise, as compensable damage, any loss of or damage to property, including land, subject to an exclusion for property that was used exclusively for professional purposes at the time that it was lost or damaged; and (2) provide that if the property was used for	Minor divergence	The New Directive compensates damage to mixed-use property and excludes only property used exclusively for professional purposes.⁴³ Like the New Directive, we also propose an exclusion for property used exclusively for professional

⁴³ New Directive, recital 25.

	mixed private and professional purposes at the time that it was lost or damaged, the award of damages should be reduced to reflect the extent of the property's professional use.		purposes. However, where mixed-use property is concerned, we consider that, in the interest of maintaining a fair balance, it is appropriate to limit recovery in mixed-use cases to the extent of the property's private use.
41.	The CPA should be amended to: (1) recognise, as compensable damage, destruction and corruption of data (as distinct from data leaks or breaches of data protection rules), subject to an exclusion for data used exclusively for professional purposes; and (2) provide that if the data was used for mixed private and professional purposes at the time that it was destroyed or corrupted, the award of damages should be reduced to reflect the extent of the data's professional use.	Divergence	Under the New Directive, destruction or corruption of data is, in principle, compensable damage. ⁴⁴ The New Directive also excludes the destruction or corruption of data used exclusively for professional purposes. ⁴⁵ However, the New Directive does not compensate data used for mixed private and professional purposes. ⁴⁶
42.	The exclusion of liability and compensation for loss or damage to the product itself under the CPA should cover damage to a product caused by a defective component integrated into or interconnected with that product by the producer of that product or within the producer's control.	Convergence	The New Directive maintains the exclusion of recovery for the defective product itself and also excludes recovery for a product damaged by a defective component that is integrated into, or interconnected with, that product by the manufacturer of that product or within that manufacturer's control. ⁴⁷
43.	The CPA should be amended to remove the lower threshold for property damage of £275.	Convergence	The New Directive no longer includes a minimum threshold for property damage.
Chapter 6: Defences, limitation and long-stop			

⁴⁴ New Directive, art 6(1)(c).

⁴⁵ New Directive, art 6(1)(c) and recital 22.

⁴⁶ New Directive, recital 22.

⁴⁷ New Directive, art 6(1).

44.	A defendant should not be able to avoid liability under the CPA on the basis that there was “no supply to another” where a defective product was produced by a service provider for its own use and caused harm in the course of providing a commercial service, or a service that is publicly funded.	Convergence	The New Directive addresses this point through its definition of the products captured by the regime, which applies to products “placed on the market or put into service”. ⁴⁸ The definition of manufacturers also includes those who produce things for their own use. ⁴⁹ Our proposal would therefore be aligned in substance with the approach taken in the New Directive. While we currently approach this by considering defences, it may be that ultimately it is better addressed through the concept of supply.
45.	A defendant should not be entitled to rely on the section 4(1)(d) defence under the CPA (that “the defect did not exist in the product at the relevant time”) if the producer caused the product to become defective after the relevant time by: (1) integrating or connecting a component with the product, or modifying the product (including carrying out a substantial modification), regardless of how this modification is made; or (2) authorising or consenting to a third party integrating or connecting a component with the product, or modifying the product (including carrying out a substantial modification), regardless of how this modification is made, but in each case, only where the producer has presented the particular component or modification as part of their product or product offering; or (3) failing to supply software updates or upgrades.	Convergence	The New Directive prevents defendants from relying on the defence when the defect has been caused by a matter under their control. ⁵⁰ The effect of this is that the New Directive broadly operates in the same way as our proposal.

⁴⁸ New Directive, art 2(1).

⁴⁹ New Directive, art 4(10)(c).

⁵⁰ Reliance on the defence is excluded where defect is due to any of the following, provided that it is within the manufacturer’s control: (a) a related service; (b) software, including software updates or upgrades; (c) a lack of software updates or upgrades necessary to maintain safety; and (d) a substantial modification of the product. New Directive, art 11(2).

46.	The development risks defence should be retained and should apply to all products and industries.	Convergence	The New Directive similarly retains the development risks defence. ⁵¹
47.	The development risks defence in section 4(1)(e) should be updated to reflect that scientific and technical knowledge is to be assessed objectively by reference to accessible knowledge. What a producer of products of the same description as the product in question might be expected to have discovered should not form part of that objective assessment.	Convergence	The New Directive now expressly states that the assessment concerns the “objective” state of scientific and technical knowledge, and as such our proposals would be consistent with it. ⁵²
48.	Where the producer caused the product to become defective under the CPA after the “relevant time” (generally, that of supply) by: (1) integrating or connecting a component with the product, or modifying the product (including carrying out a substantial modification), regardless of how this modification is made; or (2) authorising or consenting to a third party integrating or connecting a component with the product, or modifying the product (including carrying out a substantial modification), regardless of how this modification is made, but in each case, only where the producer has presented the particular component or modification as part of their product or product offering, there is a defence if the state of scientific and technological knowledge was such that the defect could not have been discovered at the time the product became defective (rather than at the “relevant time”).	Divergence	Our proposals differ from the New Directive, which provides that the state of knowledge is to be assessed during the period of control. ⁵³
49.	Where the producer caused the product to become (or remain) defective under the CPA after the “relevant time”	Divergence	Our proposals differ from the New Directive, which provides that the state of knowledge is to be

⁵¹ New Directive, art 11(1)(e).

⁵² New Directive, art 11(1)(e).

⁵³ New Directive, art 11(1)(e).

	(generally, that of supply) by failing to provide software updates or upgrades, there should be a defence if, at the time the product became (or remained) defective as a result of the producer's failure to supply software updates or upgrades, the state of scientific and technological knowledge was such that the defect could not have been discovered.		assessed during the period of control. ⁵⁴
50.	Where a product is substantially modified, the 10-year long-stop period should reset as follows: (1) if a product is substantially modified within the original producer's control, time should restart from the date when the modified product is made available; and (2) if the product is substantially modified by a person outside the original producer's control, time should restart from the date when the modifier supplies such modified product in the course of their business.	Convergence	Our proposal largely matches the position in the New Directive which says that there is 10-year long-stop running from: (1) the date on which the defective product was placed on the market or put into service; or (2) in the case of a substantially modified product, the date on which it was made available on the market or put into service following its substantial modification. ⁵⁵
51.	The 10-year long-stop period for latent personal injuries should be extended in cases where it was not possible for the individual to initiate proceedings within the initial 10 years. In such cases, the long-stop period should be extended to 25 years.	Convergence	Where the latency of a personal injury means that an injured person has not been able to initiate proceedings, the New Directive gives an extended long-stop of 25 years. ⁵⁶
52.	For the purposes of a latent injury claim, it should be deemed possible for an individual to initiate proceedings, where they had knowledge of the following information: (1) material facts about the harm in respect of which damages are claimed; (2) that the damage was attributable in whole or in part to the defect in the product which is alleged to constitute the claim under the	Divergence	There is no mirroring provision in the New Directive.

⁵⁴ New Directive, art 11(1)(e).

⁵⁵ New Directive, art 17. Rather than long-stop, the New Directive uses the language of "expiry period".

⁵⁶ New Directive, art 17.

	CPA; and (3) the identity of the defendant.		
Chapter 7: Practical issues with suing defendants			
53.	A court should have the power to substitute a defendant after the expiry of the long-stop period where the claimant satisfies the requirements in section 35 of the Limitation Act 1980. These requirements should be treated as satisfied where the claimant has identified the defendant by the correct description in the circumstances of the case but used the wrong name. Where a claimant has sued the wrong company within a group and the correct defendant is another entity within the same group, the court should ordinarily permit substitution, unless it would be inequitable to do so.	Divergence	The New Directive provides that an injured person is no longer entitled to compensation upon the expiry of the long-stop (ten years generally, subject, in specified circumstances, to extension to 25 years for latent personal injuries) unless that injured person has, in the meantime, initiated proceedings against one of the parties bearing liability for defective products.⁵⁷ Note that, under the 1985 Directive, the CJEU held that national courts must not allow a claimant to substitute the original manufacturer after the expiry of the long-stop period, where the original claim was brought against a different person.⁵⁸ However, the CJEU recognised a limited exception where a claim is brought against a supplier which is a subsidiary of the producer. In such cases, substitution may be permitted, if the producer in fact determined the circulation of the product.⁵⁹

⁵⁷ New Directive, art 17.

⁵⁸ Case C-358/08 *Aventis Pasteur SA v OB* [2009] at [44].

⁵⁹ Case C-358/08 *Aventis Pasteur SA v OB* [2009] at [63].

