From: [redacted]
Sent: jeudi 21 juillet 2022 08:37
To: CAB BRETON ARCHIVES
Subject: FW: follow up - authorised representative - liability of on-line marketplaces
Attachments: Online retailers 2021.pdf

From: [redacted]
Sent: Wednesday, July 20, 2022 6:05 PM
To: PRINZ Maurits-Jan (CAB-BRETON) <Maurits-Jan.PRINZ@ec.europa.eu>; SUPERTI Valentina (GROW) <Valentina.Superti@ec.europa.eu>
Cc: [redacted]
Subject: follow up - authorised representative - liability of on-line marketplaces

Dear Mr Prinz, Dear Ms Superti,

I would like to thank you and your colleagues from DG GROW and DG CNECT for taking the time for the very informative call on Monday 18 July on the upcoming product liability and AI liability proposals.
To follow-up on this call, we would like to provide you with some figures and a concrete example to illustrate why we are convinced that the obligation for online marketplaces to have **authorised representatives** will not ensure sufficient protection of consumers. Apologies already for a far too long e-mail !

As you can see in the **attached presentation** (page 12) our member Consumentenbond checked 50 products sold online to see whether the contact details of an authorised representative were given on the packaging, the product or in the manual. 27 out of the 50 products should have been CE marked but only 15 products had this marking. Only 4 out of these 27 products gave clear information about an authorised representative. However, two out of those four were UK representatives. On the two remaining products with EU authorised representatives, we have done within BEUC a quick in-house desk research. One product stemming from China is represented through a company called [redacted] located in Germany
A look into the German public trade registry reveals that in 2017 this company has been founded as [redacted] with the objective to operate a karaoke bar. In 2018, the name of the company was changed into [redacted] and objective, managing director and location of the company were changed as well. As of this moment the objective of the company was the "import and export of food and electrical appliances, production of Asian noodles and karaoke bar". In 2021, location and managing director of the company [redacted] again. As of this moment the company was run only by one person for which the residence is indicated as Guangzhou (China). Through internet research we could not find a phone number, email address or information about opening hours related to this company. Lastly, it is important to note that the company was set up as a "GmbH", which means that the liability of this company for losses is limited to 25.000 € (the company has been set up only with the minimum financial capital which is obligatory for this company form) before it may be dissolved because of insolvency.

The other authorised representative is [redacted], based in Dublin, Ireland. The company has only been founded around the time when an authorised representative became mandatory for CE-marked products (8.7.2021) and is represented also by only one person. We could also not find any website, phone number, email address or opening hours related to this company. It is important to consider that for such private limited liability companies there are no requirements related to the minimum share capital and shareholders cannot be held liable for debts of the company.
Moreover, some websites advertise services **to set up such "ltd" companies** for less than 300 €. The client would receive for this amount the necessary documents such as the certificate of incorporation, a company seal, a free domain name for one year, minutes of the first directors meeting and members certificates. This raises the question if such companies may just be set up as letter box companies while no law enforcement is possible against a company that has been set up without any capital and which may not generate considerable economic value based on its business operations.
Considering all the afore mentioned circumstances we have serious doubts as to whether such companies should be allowed to become authorised representatives.
But even if only trustworthy companies would be engaged as authorised representative, there is **no minimum duration** for the mandate of authorised representatives, which means that third country producers may cancel the private contracts with their authorised representatives as soon as their products passed the customs clearance into the EU.

Beyond these concerns, we also would like to share with you in writing our main points regarding the content of the revised **Product Liability Directive** and the **AI liability rules**, some of which we have already presented during our call.
Regarding **online marketplaces**, we were glad to learn that you are considering holding them subsidiarily liable under certain conditions. Therefore, we would like to emphasise that, in our view, online marketplaces should become subsidiarily liable under the revised Product Liability Directive if one of the following conditions is fulfilled:
• The producer, importer or authorised representative cannot be identified,
• The online marketplace fails to inform the harmed person of the identity of the producer, importer or authorised representative,
• The marketplace has predominant influence or control in the transaction chain, or if
• The producer or importer who are based outside the EU, or the authorised representative in the EU do not take any action to remedy the harm.
Online marketplaces greatly benefit from growing demand and provide infrastructure for dissemination of millions of defective products. At the same time, they can no longer be considered as mere intermediaries because they recruit traders and nudge consumers via their recommendation systems. The Market Surveillance Regulation, the proposed General Product Safety Regulation and the Digital Services Act will not solve the problem because they focus on risk mitigation, but do not set rules on liability. Therefore, the Product Liability Directive is the appropriate piece of legislation to make online marketplaces subsidiarily liable for harm caused to consumers – a view shared inter alia by the European Law Institute.
Regarding **providers of software or other digital content,** we are of the opinion that they should also be liable under the Product Liability Directive, because in our view any economic operator in the supply chain should be held liable if its activities affect the safety of a product on the market.
Regarding the **notion of defec**t, we are convinced that it should be broader. In the current Product Liability Directive, the notion of defect focuses on safety expectations of consumer, which refers to physical risks. However, we believe that the notion of defect should also take into account the particular situation of connected products, for instance by covering cybersecurity flaws or loss of connectivity.

Regarding the **burden of proof**, we were glad to learn that you are considering at least to alleviate it in some cases, because we are convinced that the burden of proof should be shifted to the seller, especially in case of complex products. Already now approximately 50% of liability claims are rejected because consumers are not able to prove the defect. This percentage will only increase given the growing information asymmetry between consumers and producers.
Regarding **harm**, we are of the opinion that all harm should be compensated, including immaterial harm, such as loss or destruction of data, to reflect the growing relevance of connected devices. We further believe that harm caused to property items that are used for professional purposes should also be compensated, because consumer increasingly use private items such as laptops or smartphones for their professional tasks, in particular in times of teleworking. We agree with your services that the 500-Euro threshold should be abandoned. Since the Product Liability Directive is listed in the Annex of the Representative Action Directive, the current threshold would be particularly detrimental for consumers in case of representative actions that claim only small amounts for each represented consumer.
Regarding the **exclusion of liability**, we are convinced that the risk-development defence should be abandoned, at least in case of products with a digital element, because producers are able to provide updates and thus remain in control of the functionality of their products during its entire lifespan.
Regarding **liability caps**, we believe that they should be abandoned, or that a higher minimum amount should be set, because liability caps may hinder consumers to receive full compensation. In case liability caps would be maintained, it would be important to clarify that they apply only to individual claims but not to the sum of claims brought forward via representative actions.
Regarding the **scope of the AI liability rules,** we are of the opinion that they should cover all sorts of AI, not only high-risk AI, because consumer should be able to claim compensation, regardless of whether they have been harmed by high-risk, low-risk or no-risk AI.
Regarding the **liable persons**, we would like to emphasise that only professional users of AI should be held liable, not consumers who use AI.
Regarding the **burden of proof**, we believe that it should be shifted or at least alleviated, because otherwise, given the opacity, complexity and autonomy of AI systems, consumers would not be able to substantiate their claims in practice.
Regarding **harm** caused by AI, we are of the opinion that all harm, including immaterial harm, should be compensated and we believe that mandatory insurances would help ensuring that harmed consumers receive compensation.
We thank you in advance for your time and consideration and remain at your disposal for further exchange on these matters.

Kind regards and wishing you a wonderful summertime,