Data Law Alert

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Digital Product Liability and “Free” Digital Services

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Legance

Italy adopts new product liability rules for software and AI

Legislative Decree No. 211 of 6 November 2026 implements Directive (EU) 2024/2853, replacing the Consumer Code's product liability rules. It enters into force on 6 December 2026; the new regime covers products placed on the market or put into service from 9 December 2026.

Software, including AI, is a product. Related digital services fall within the regime where their absence would prevent an integrated or interconnected product from performing a function. Non-commercial free and open-source software is excluded, but this exclusion does not exempt commercial products incorporating it. Safety assessments consider foreseeable use, cybersecurity and learning capabilities. **Liability can persist after release** for software, related services or missing safety updates under manufacturer control, without creating a general update obligation.

Subject to statutory conditions, liability extends across product and component manufacturers, importers, authorized representatives, fulfilment providers, distributors, qualifying online platforms and operators making substantial modifications.

Claimants need not prove fault, but generally must prove defectiveness, damage and causation. Proportionate disclosure and rebuttable presumptions assist proof. Complexity-based presumptions require both excessive evidential difficulty and a likelihood that the product was defective or that the defect caused the damage. Article 117(4) of the Consumer Code also presumes defectiveness where another product in the same production series has been found defective.

Compensation covers death, medically ascertainable physical or psychological injury, qualifying property damage and destruction or corruption of **non-professional data**. Compensation under this regime does not cover damage to the defective product itself, damage to products caused by components integrated or interconnected under manufacturer control, damage to exclusively professional property, or destruction or corruption of professional data. Other remedies remain available.

Article 121(3) of the Consumer Code allows a manufacturer integrating software to agree to waive recourse against the software-component manufacturer if the latter qualified as a microenterprise or small enterprise when the software was placed on the market. That status is assessed under EU criteria, taking account of partner and linked enterprises. Injured persons' claims remain unaffected.

The three-year limitation period runs from actual or reasonably expected knowledge of damage, defect and the responsible operator's identity. Article 126 sets a **ten-year long-stop period**, extended to **25 years** if latent personal injuries prevented proceedings within ten years. These periods run from the product's placement on the market or entry into service or, for substantially modified products, from its subsequent making available on the market or entry into service following the modification.

Paying with data: Advocate General questions “free” digital service claims

On 19 November 2026, Advocate General Laila Medina delivered her Opinion in Case C-643/25, Verbraucherzentrale Bundesverband (“Free” digital service), concerning whether a **social network** can describe itself as **free when users provide personal data and consent to their commercial use in exchange for access**. Her proposed answer is that payment need not be monetary: such data and consent can constitute consideration under Directive 2005/29/EC on unfair business-to-consumer commercial practices (the “Unfair Commercial Practices Directive”). **The Opinion is not binding on the Court of Justice, whose judgment remains pending.**

The dispute concerns the statement “Facebook is and remains free”, displayed on Facebook’s registration page in February 2015. A German consumer organization challenged the statement, arguing that users effectively pay through their data and permission for its commercial exploitation. After the German courts dismissed the claim on the basis that the prohibition on describing a service as free concerned financial costs, the German Federal Court of Justice referred the issue to the Court of Justice.

The Advocate General considers that the wording, context and purpose of the directive do not confine payment to money. **Personal data**, together **with consent to their commercial use**, **have economic value for a social network** because they generate advertising revenue and finance the service. Other EU rules on digital content, digital services and consumer rights also recognize business models in which consumers receive services in exchange for data rather than money. Although some of those rules postdate the disputed statement, the Advocate General refers to them as illustrating the legislature’s approach, not as retroactively changing the applicable rule.

On that interpretation, **a service cannot be described as "free" where access requires personal data and consent to their commercial use**. The position is different where the data are processed exclusively to provide the service or comply with legal obligations. The Opinion therefore does not equate every collection of personal data with payment. The Advocate General also recalls that describing a service as free when payment is required falls within the directive's practices prohibited in all circumstances: it does not require an individual assessment of whether the average consumer was actually misled.

A separate but important point is the relationship with Regulation (EU) 2016/679 (the "GDPR"). In the Advocate General's view, **the GDPR and consumer protection rules apply cumulatively**: the former governs lawful and transparent processing, while the latter governs the accuracy of commercial representations. Compliance with data-protection requirements would therefore not, by itself, make a service accessed through the provision of such data as "free". In other words, compliance with the GDPR is – according to the AG – one of the cumulative conditions of lawfulness of the service at stake, not a loophole to circumvent the application of different set of EU laws, such as the Unfair Commercial Practices Directive, according to which a service may well be paid with personal data and, hence, be not qualifiable as "free".

Pending the judgment, businesses offering advertising-funded or other data-funded services should review "free" claims against the actual conditions of access and the commercial uses of the data required. Marketing, contractual terms and privacy disclosures should describe the same business model consistently. The immediate takeaway is not a new binding ban, but a reason to assess consumer-facing claims alongside privacy compliance rather than treating them as separate exercises.

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