PLATTFORM INDUSTRIE 4.0

POSITION PAPER ON THE EUROPEAN COMMISSION'S PROPOSAL FOR A NEW PRODUCT LIABILITY DIRECTIVE

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On 28 September 2022, the European Commission presented the proposal for a new Product Liability Directive to adapt the current Product Liability Directive 85/374/EEC, dating from 1985, to today's industrial reality, particularly under the aspects of digitalisation and the circular economy.

The current liability concept remains largely unchanged. The new directive will continue to provide for harmonised European no-fault liability for personal injury and property damage to privately used objects caused by products with safety defects.

Compared to the present legal situation, which has remained unchanged for almost 40 years, the proposal nevertheless entails numerous problematic increases in liability for the manufacturing industry, the need for which is not readily apparent in view of digital transformation and the circular economy.

This position paper of the Working Group "Legal Framework" analyses five critical modifications that are intrinsic to the European Commission's draft for a new Product Liability Directive.

I. Definition of a product to be expanded to include software and digital manufacturing files

One of the key innovations is that in future, software and digital manufacturing files are also intended to fall within the definition of a product.

1. Software

Including the term “software” in the product definition without further restrictions in Article 4(1) appears problematic for several reasons.

Firstly, the Commission correctly did not want to place open source software (OSS), i.e. software that is openly shared and freely accessible, usable and modifiable, within the scope of product liability, as can be seen from recital 13 of the Commission’s proposal. Open source software should therefore be explicitly excluded from the scope of application in the product definition in Article 4(1). “Making available on the market” in Article 4(9) of the proposal refers to any supply of a product “in the course of a commercial activity” and would thus also include OSS from commercial suppliers. However, OSS as such is not intended or designed to meet specific security requirements. The focus of providing OSS is to freely exchange ideas and promote innovation. Possible risks in the use of OSS should therefore be borne by the market operators that produce products with the help of OSS or offer OSS in return for payment. We therefore suggest aligning the inclusion of OSS in the Product Liability Directive with Article 3(5)(f) of Directive 2019/770, with the result that OSS will be included only if it is provided as part of a remunerated business activity (e.g. if OSS is offered along with paid maintenance services). The exclusion of OSS from the scope of application should be dropped where OSS is provided as part of another product on the market.

In addition, including software in the product definition without further differentiation leads to difficulties in distinguishing between products and services when software is provided as a service on the market (software as a service – SaaS). It is therefore worth considering restricting the term software in the product definition in Article 4(1) and including scenarios relating to the provision of online services (including SaaS) in the Product Liability Directive only insofar as the requirements for a “connected service” are met.

2. Digital manufacturing files

According to Article 4(2), a “digital manufacturing file” means a digital version or a digital template of a movable item. The Commission intended these to be understood as files containing functional information that is necessary for the manufacture of a tangible object, for example by enabling automatic control of machines or tools. This restriction is not reflected in the enacting terms and should be included in the legal definition of the term “digital manufacturing files”.

II. Procedural disclosure obligations to the detriment of the industry

In Article 8, the proposal establishes very far-reaching procedural obligations for the disclosure of evidence.

At the claimant's request, the court will have to order the manufacturer to disclose relevant evidence at its disposal which the injured party needs to support its claim if the injured party has put forward a sufficiently validated claim for damages.

Even if disclosure is to be limited to what is necessary and proportionate, and justified confidentiality interests, in particular the protection of business secrets, are to be taken into account by the courts, the disclosure obligations go too far to the detriment of the industry.

Where the injured party has had difficulties evidencing its claim, product liability law has typically responded by easing the burden of proof, and the Commission's proposal already significantly extends this easing in Article 9 compared to the present legal situation. However, the additional procedural obligations for the disclosure of evidence give the claimant the option of discovery, i.e. a concept that is still basically alien to German civil proceedings. These additional disclosure obligations shift the litigation risk to the manufacturer without any apparent necessity.

III. No deductible for property damage

The current Product Liability Directive sets a deductible of €500 for the injured party in the event of damage to property. According to the Commission's proposal, this deductible is to be abolished in future without any replacement.

The assertion of similar minor property damage claims by a large number of claimants will be considerably boosted in future by the new European representative action. This is in addition to the technical methods of asserting similar claims, which have been developed in connection with what became known as the diesel scandal and have been further advanced in the meantime. These make it possible for a newly established "claimant industry" to burden the judicial system with a large number of lawsuits for alleged property damage, for example in connection with product recalls that have been carried out.

The deductible of €500 for property damage should therefore be retained for no-fault product liability in the future.

IV. Expansion of the definition of liable parties

The Commission's proposal significantly expands the definition of liable parties. In addition to the actual manufacturer, the "quasi-manufacturer" and the importer, the authorised representative will also be liable under product safety law. The authorised representative performs certain (solely formal) tasks of product safety law on behalf of the manufacturer (e.g. holding the EU declaration of conformity). Assuming the risk of no-fault product liability is unacceptable and cannot be insured against in this business model. In fact, there is no need to subject the authorised representative to the stringent regime of no-fault product liability, because even for products manufactured in third countries, there will always be a person domiciled in the EU who can be held liable, namely the importer.

In future, parties who "substantially modify" a product within the meaning of product safety law are also intended to be subject to no-fault product liability. However, the definition of what "substantial modification" really means remains largely unclear, especially in the area of software and new features that can be incorporated via updates and releases, e.g. in combination with third-party software, because this term is usually not defined in the provisions of product safety law. Particularly with regard to the "right to repair", a newly envisaged concept in Europe, as well as in connection with recycling and the use of AI, products will be modified during their life cycle (via software); this will lead to legal uncertainty if the definition of the term "substantial modification" is unclear.

A clear and practical definition of the term "substantial modification" should therefore be included in the directive.

V. Relevant point of time (placing on the market)

The time of placing a product on the market, i.e. the point in time which has always been authoritative for determining the legitimate expectation of safety, would be moved back according to Article 10(2) of the Commission's proposal.

This means that in future, manufacturers of networked products for which software updates are provided will be liable without fault even if the product complied with the state of the art in terms of safety at the time it was placed on the market, but the state of the art evolved after the product was placed on the market and could have been brought up to date with the help of software updates.

The provision in Article 10(2) should therefore contain a reasonableness threshold to prevent manufacturers from having to comprehensively "keep up with" the state of the art in science and technology via software updates in the future

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