Proposal COM(2022) 495 of 28 September 2022 for a **Directive** of the European Parliament and of the Council **on liability for defective products**

PRODUCT LIABILITY

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LONG VERSION

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A. Key elements of the EU proposal

1 Context and objectives

- Product liability is currently regulated by the Product Liability Directive 85/374/EEC. It provides that natural persons (hereinafter: "individuals") are entitled to compensation if they have suffered physical injury or damage to property due to a defective product (p. 1).
- The Commission wants to revise the Product Liability Directive of 1985 as it sees a need for adjustment with respect to (p. 1-2)
  - existing definitions, e.g. the question of whether software is a product,
  - the burden of proof applicable to individuals when seeking to enforce a claim for damages, especially for complex cases and products such as
    - medicines,
    - "smart products" – such as smart home systems – and
    - artificial intelligence (AI)-based products, and
  - when it comes to asserting claims for damages, for example
    - due to the current € 500 threshold, below which claims cannot be asserted, or
    - when buying products directly from the manufacturer outside the EU.
- The Commission wants to remedy these shortcomings by, among other things, redefining,
  - the conditions under which a right to claim damages arises under product liability law,
  - who is liable under product liability law,
  - when liability ceases to apply and
  - how the claim for damages is to be enforced.
- Product liability law should be largely uniform in the Member States. Therefore, unless otherwise provided, Member States may not introduce or maintain diverging national provisions, even if it is more favourable to injured parties [Art. 3].

2 Distinction between "product liability" and "warranties", "guarantees" and "producer's liability"

- Unlike warranties and guarantees, product liability covers damage that occurs not to the object of purchase but to other objects or to people.
- A "warranty" means that a contracting party – usually the seller – must ensure that its performance – e.g. a car sold – complies with the contract. If that is not the case, the other contracting party may, among other things, require subsequent rectification – e.g. the repair of a malfunctioning windscreen wiper – or a reduction in the purchase price. The relevant provisions are set out in the Sale of Goods Directive [2019/771]. In contrast to product liability,
  - only the contractual partner is entitled to a warranty;
  - warranty claims are directed against the seller, whereas product liability claims are generally directed against the manufacturer.
- The "guarantee", on the other hand, is a voluntary service provided by the manufacturer or the seller – e.g. in the form of a durability guarantee or price guarantee. This does not have to include the entire product but can also be limited to selected parts.
- A claim for compensation against the manufacturer of a product may be based not only on product liability but also on the ordinary law governing compensation ("producer liability"). Producer liability requires fault on the part of the manufacturer. Product liability, on the other hand, is independent of fault on the part of the manufacturer or any other liable parties ("strict liability"); see also section A.4.

3 Requirements: When does a claim for damages arise?

- A right to compensation under the Commission proposal arises if [Art. 5; Art. 9 (1)]
  - a product is defective,
  - a person has suffered damage and
  - the defective product caused the damage.
- A product is a "movable" such as a mobile phone, a table or a medicine. The following are also deemed to be products: [Art. 4 (1)]
  - electricity,

  - software – except for source codes and free and open-source software [Recital 13] – and
  - digital manufacturing files, i.e. files containing the information necessary for automated control of 3D printers or other machines, in order to produce items [Recital 14].
- A product is "defective" if it does not provide the safety which the "public at large" is entitled to expect, taking all circumstances into account. These circumstances include, in particular, [Art. 6 (1)]
  - the presentation of the product including instructions for installation, use and maintenance,
  - the effect on the product of any ability to continue to learn after deployment, for example due to developments in IoT ("Internet of Things") products,
  - the reasonably foreseeable use and any misuse, and
  - the product safety requirements, including cybersecurity requirements.
- Damage means "material" (i.e. not simply insignificant) losses resulting from [Art. 4 (6)]
  - death or personal injury, including harm to psychological health,
  - the loss or corruption of data that is not used exclusively for professional purposes, and
  - harm to, or destruction of, any property, except
    - the defective product itself,
    - property used exclusively for professional purposes, and
    - products damaged by a defective component – i.e. a tangible or intangible item or a digital service that is integrated into the product in such a way that the product could not perform at least one of its functions without it, e.g. the continuous provision of traffic data in a navigation system [(Recital 15), Art. 4 (3) and (4)].
- The Commission wants to abolish the threshold (€ 500) and the maximum liability limit (not less than € 70 million; in German law a maximum of € 85 million for personal injury) that are currently applicable.
- Claims may be brought [Art. 5 (2)]
  - by the injured party and
  - by natural or legal persons
    - who have succeeded, or have been subrogated, to the right of the injured party, or
    - who are acting in accordance with EU or national law on behalf of one or more injured parties, e.g. in the form of a class action.

4 Liability: Who is liable?

- In principle, the manufacturer of a product is liable. The manufacturer of a product can also be the manufacturer of a component of the product. In addition, other actors may also be liable, e.g. importers and distributors. The Commission's aim is to ensure that there is always a party in the EU that can be held liable.
- The manufacturer of the product is liable [Art. 7 (1)]. "Manufacturer of the product" means
  - natural or legal persons who [Art. 4 (11)]
    - develop, manufacture or produce a product,
    - have a product designed or manufactured or
    - market a product under their name or trademark (“quasi-manufacturers");
  - manufacturers of a defective component of the product, where the defectiveness of the component has caused the defectiveness of the product [Art. 7 (1)]; and
  - natural or legal persons who modify a product that has already been placed on the market or put into service in a way that, under the relevant product safety rules – e.g. the General Product Safety Regulation [see also Trilogue of 29 November 2022 on the Commission proposal COM(2021) 346] – is considered substantial and is undertaken outside the control of the original manufacturer [Art. 7 (4)].
- The importer of the product established in the EU and the manufacturer's authorised representative in the EU are liable if the manufacturer is not established in the EU [Art. 7 (2); Art. 4 (12) and (13)].
- The fulfilment service provider is liable if neither the manufacturer nor the importer nor the authorised representative is established in the EU [Art. 7 (3)]. The fulfilment service provider is a service provider that – with the exception of postal and parcel delivery services and freight transport services – offers at least two of the following services [Art. 4 (14)]:
  - warehousing,
  - packaging,
  - addressing and
  - dispatching of a product.
- The distributor of the product is liable if [Art. 7 (5)]
  - none of the said actors can be identified in the EU and

  - the distributor fails to identify who supplied it with the product, within one month of the claimant's request to do so.
- The provider of an online platform that allows consumers to conclude distance contracts with traders is liable if [Art. 7 (6)]
  - the provider presents the product or enables the transaction in such a way that would lead an average consumer to believe that the product is provided either by the online platform itself or by a trader acting under its authority or control (Recital 28),
  - no manufacturer, importer, authorised representative or distributor can be identified in the EU,
  - the provider of the online platform fails to identify who supplied it with the product, within one month of the claimant's request to do so, and
  - the provider is not itself a manufacturer, importer or distributor. If, for example, the provider of an online platform is also a manufacturer but the requirements for liability as a manufacturer are not met, e.g. because there are grounds for exemption from liability, the claimant cannot base its claim for damages on the liability of the provider of an online platform.

5 Exemptions: When is there no liability?

- Even if all the conditions for liability are met, the claim for damages will fail if the defendant proves that there are grounds for an exemption from liability [Art. 10 (1)].
- An exemption from liability exists, inter alia, where:
  - the manufacturer was objectively unable to detect the defectiveness of the product at the time that it was placed on the market or put into service [Art. 10 (1) (e)], or
  - it is probable that the defectiveness did not exist when the product was placed on the market, put into service or, in the case of a distributor, made available on the market, or that it arose thereafter ("factory gate principle") [Art. 10 (1) (c)].
    - This exception does not apply where the defectiveness is due to software – including updates or upgrades – or the lack of software updates or upgrades necessary to maintain safety, and the software or the updates and upgrades are under the manufacturer's control [Art. 10 (2)].

6 Other provisions: Procedure and limitation period

- In principle, the claimant must prove that [Art. 9 (1)]
  - the product was defective,
  - the claimant has suffered damage and
  - the defectiveness of the product caused the damage ("causality").
- Courts may, at the request of the claimant, order a defendant (e.g. a manufacturer) to disclose the relevant evidence that is at its disposal ("duty of disclosure") if the claimant (e.g. a consumer) has presented facts and evidence sufficient to support the plausibility of its claim for compensation [Art. 8 (1)]. In this regard, courts must
  - limit disclosure to what is necessary and proportionate [Art. 8 (2)] and
  - take into account the legitimate interests of all parties, in particular in relation to the protection of trade secrets, e.g. by restricting access to court hearings to a certain number of people or allowing access only to partially redacted documents [Art. 8 (1), Recital 32].
- The defectiveness of the product is presumed if [Art. 9 (2)]
  - the defendant fails to comply with its duty of disclosure,
  - the claimant establishes that
    - the product does not comply with "mandatory safety requirements" intended to protect against the risk of the damage that has occurred, or
    - the damage was caused by an obvious malfunction of the product during normal use or under normal circumstances.
- The causal link between the product's defectiveness and the damage is presumed if [Art. 9 (3)]
  - the product is defective, and
  - the defect typically leads to damage such as that which has occurred.
- The defectiveness of the product, the causal link between the defectiveness and the damage, or both, are presumed if [Art. 9 (4)]
  - the claimant faces "excessive difficulties, due to technical or scientific complexity," to prove the defectiveness, the causal link, or both; and
  - the claimant has demonstrated that

- the product has contributed to the damage, and
- it is likely that the product was defective and/or its defectiveness is a likely cause of the damage.

- The presumptions are rebuttable [Art. 9 (5)].
- A claim for compensation lapses [Art. 14, Recital 43]
  - within three years from the date on which the claimant became aware or should have become aware of the damage, the defectiveness and the identity of the liable party;
  - within ten years from the date on which the product is placed on the market, put into service or substantially modified;
  - within 15 years from the date on which the product is placed on the market, put into service or substantially modified, if an injured person could not assert the claim within ten years due to the latency of a personal injury – i.e. the time delay before a personal injury, e.g. due to defective medicinal products or chemicals, is perceived.

7 Main changes to the status quo

- New: software and digital manufacturing files are expressly defined as products.
- New: the € 500 threshold and the ability of Member States to allow for a maximum liability limit are abolished.
- New: damage is defined as "material losses" resulting from any of the causes listed in the Commission proposal: death, personal injury, harm to or destruction of property, loss or corruption of data.
- New: the term "personal injury" also expressly includes harm to psychological health.
- New: the loss or corruption of data that is not used exclusively for professional purposes is defined as damage.
- New: the express statement that damage can also result from a product having been damaged by a defective component of that product.
- New: when assessing whether a product is defective, criteria include both the impact on the product – e.g. an IoT product – of any ability to continue learning after the start of use, and the product's security requirements, including cybersecurity requirements.
- New: the Commission proposal expressly states that anyone who makes a substantial modification to a product is deemed to be a manufacturer.
- New: the manufacturer's authorised representative, fulfilment service providers and online platform providers can be liable parties.
- New: only those who are established in the EU are deemed to be importers.
- New: the distributor must identify within one month who supplied it with the product to avoid being liable itself. Until now, the distributor has to do this "within a reasonable time".
- New: liability is excluded, inter alia, where the manufacturer was objectively unable to detect the defectiveness of the product at the time that it was placed on the market or put into service. Until now, Member States can choose whether or not this should exclude liability.
- New: liability is not excluded where the defectiveness only arose after the product was placed on the market and is due to software or the lack of software updates and/or upgrades and the software or updates and upgrades are under the manufacturer's control.
- New: regulations on easing the burden of proof and on the disclosure of evidence.
- New: the extended limitation period where a claim for damages due to personal injury could not be asserted within 10 years due to the latency period.

B. Legal and political context

1 Legislative Procedure

28 September 2022	Adoption by the Commission
24 January 2023	Opinion of the European Economic and Social Affairs Committee
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

2 Options for Influencing the Political Process

Directorates General: DG Internal Market, Industry, Entrepreneurship and SMEs

Committees of the European Parliament: Legal Affairs: Rapporteur: Pascal Arimont (EVP Group, BE)

	Internal Market: Rapporteur: Vlad Botoș (Renew Group, RO)
Federal Ministries:	Justice (leading)
Committees of the German Bundestag:	Legal Affairs (leading), Economic Affairs, Europe, Consumer Protection
Decision-making mode in the Council:	Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

3 Formalities

Legal competence:	Art. 114 TFEU (Internal Market)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Procedure:	Art. 294 TFEU (ordinary legislative procedure)

C. Assessment

1 Economic Impact Assessment

Preliminaries: Product liability in general

Product liability, as it has existed in the EU since 1985, ensures that loss caused by a defective product is borne by the manufacturer. Product liability thus increases the incentive for manufacturers to bring safe products to the market. Increased product safety is reflected in a higher price. The same applies to an improvement in the legal position of an injured person.[1]

Product liability can have undesirable side effects where socially desirable innovative products are not offered or disappear from the market because the liability risk for manufacturers is too great. This may apply to vaccines.[2] In such cases, the state must at least partially relieve the manufacturer of the risk of liability. In contrast to inadvertent, negative effects, however, product liability achieves its intended effect specifically in cases where dangerous products disappear from the market or when products are made safer.

The effect of product liability on innovation is controversial. On the one hand, it is argued that product liability could reduce the incentive to innovate[3] because new products have to be safe, which makes innovation more expensive. On the other hand, there are indications that product liability produces an incentive to invest in product safety, which facilitates safety innovations. Empirical evidence suggests that companies increase their spending on research and development due to product liability.[4] Thus, product liability could in principle help to ensure the sale of safer products.[5]

The following section individually assesses the specific changes envisaged in the Commission proposal:

The concept of damage

When the current Product Liability Directive was adopted, many of today's acute issues and challenges – from the digital economy, to the basic need to use products for longer in order to save resources such as rare earths, to the protection of mental health – could not have been contemplated. A revision of the Product Liability Directive was therefore necessary. The fact that "material losses"[6] will now include medically recognised harm to psychological health is a result of the Commission's desire to place greater importance on mental health as a whole.[7] This is not only the right step for those affected, but also from an economic point of view because the costs of mental illness are estimated to be more than four percent of the gross domestic product of all Member States (EU28).[8] Since some products could have a negative impact on people's mental health, it is appropriate to broaden the concept of harm in this respect as this will at least give manufacturers an incentive to examine their products for possible effects on mental health and make them safer in this regard.

Furthermore, the proposal provides that damage should now also include loss or corruption of data that is not used exclusively for professional purposes. Again, it is appropriate for the Commission to expand the concept of damage to include this dimension as, in a digitalised world, data plays an increasingly important role even in private life. A concrete example of this is where a natural person suffers a loss of data stored on a USB stick,

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1 Schäfer, H.-B. / Ott, C. (2021), Lehrbuch der ökonomischen Analyse des Zivilrechts, 6. Ed., p. 402.

2 Ibid., p. 416 et seq.

3 Faure, M. G. (2016), Economic Analysis of Product Liability, in: Machnikowski, P. (Eds.), European Product Liability. An Analysis of the State of the Art in the Era of New Technologies, p. 650.

4 Ibid., p. 650 et seq.

5 In addition to general product liability, there are other regulations that lead to improved product safety. These include, among others, the proposals on the Machinery Regulation [COM (2021) 202] and the General Product Safety Regulation [COM(2021) 346], the adopted Digital Services Act [Regulation (EU) 2022/2065, **cepPolicyBrief** No. 22/2021; **cepPolicyBrief** No. 23/2021 and **cepPolicyBrief** No. 24/2021] and also cyber security legislation [Regulation (EU) 2019/881] and the Cyber Resilience Act [COM(2022) 454; **cepPolicyBrief** No. 1/2023]]. On this, see also European Commission (2022a), Proposal for a Directive of the European Parliament and of the Council on liability for defective products, p. 4 et seq.

6 The English term "material losses" indicates that all losses are calculated in monetary units. Moreover, the losses must not be trivial, such as short-term nuisances, etc.

7 For example, according to its work programme for 2023, the Commission is planning to present a comprehensive approach to mental health. See European Commission (2022b), Commission Work Programme for 2023. A Union standing firm and united, p. 11.

8 OECD (2018), Mental health problems costing Europe heavily. https://www.oecd.org/health/mental-health-problems-costing-europe-heavily.htm, (03.02.2023).

despite having removed it properly, because the stick is defective. In this case, the manufacturer of the USB stick would be liable. Overall, if data is lost or corrupted, the question arises as to what monetary value is attached to the data. This is not a trivial matter and requires further clarification by the legislator.

Software as a product and restricting the factory gate principle

After more than 37 years, it is also necessary to adapt product liability to a new set of circumstances, such as the digital economy. Until now, software has not been unanimously recognised as a product within the meaning of the Product Liability Directive.[9] The uncertainty as to whether it is a product or a service is now being eliminated. In this respect, the Commission proposal contributes to legal certainty.

In addition, it generally makes sense for the Commission proposal to restrict the so-called factory gate principle because, in the digital age, many products, such as software for mobile phones, are subject to the manufacturer's control even after they have been placed on the market. New security vulnerabilities may emerge, to which the manufacturer must respond with appropriate updates and upgrades in order to tackle the ever-changing cybersecurity risks.

In addition, software can always contain bugs. If these pose a risk of causing damage, users can rightly expect them to be remedied.[10] Under product liability, manufacturers can also be held liable for targeted cyber-attacks, if the public at large can reasonably expect the product to withstand such an attack. However, if such a cyber-attack cannot be prevented – despite the best precautions – product liability does not apply. The courts will have to assess this on a case-by-case basis, as the proposed legal text ("public at large", "taking all circumstances into account") remains vague in this respect and will probably have to remain so due to the variation in products.

Despite fears that digital innovations could be inhibited by the Commission's proposal, because innovations will become more expensive as a result of liability risks, this is not generally to be expected. Although the liability risk is more pronounced for innovative products, innovations are unlikely to decline per se, but price increases due to higher production and development costs are possible. It is also appropriate that manufacturers cannot be held liable where supplied updates or upgrades have not been installed. This will give rise to the appropriate (economic) incentives for caution and care – e.g. on the part of the consumer – following notification of the relevant updates or upgrades.

New liable parties

The Commission proposal provides that an authorised representative of the manufacturer, a fulfilment service provider or the operator of an online platform can be held liable if the manufacturer is established outside the EU. This is a sensible way to ensure that product liability will also be enforced with regard to products from third countries. The fact that operators of online platform can also now be held liable is appropriate as this distribution method supports an influx of unsafe and defective products from third countries.[11] The fact that online platforms can be held liable for defective products is likely to mean that they will check products more carefully as regards their safety, and that they will at least be in a position to identify the suppliers from third countries or pass their addresses on to the injured parties.

Threshold and maximum liability limits

The Commission proposal also provides that the € 500 threshold and maximum liability limit of not less than € 70 million[12] are to be abolished without replacement. The idea behind the threshold was to avoid excessive litigation.[13] It is worth noting that the threshold makes it impossible for injured parties to make claims of € 500 or less, and often means, moreover, that it is not worthwhile for them to claim damages or to take legal action where the loss is small.[14] In this respect, abolition will allow relatively low claims to be asserted. This strengthens injured parties and should be regarded as appropriate.

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9 European Commission (2022c), Impact Assessment Report, p. 14.

10 Howells, G. / Twigg-Flesner, C. / Willett, C. (2017), Product Liability and Digital Products, in: Synodinou, T.-E. / Jougleux, P. / Markou, C. / Prastitou, T. (Eds.), EU Internet Law, p. 192.

11 Busch, C. (2021), Rethinking Product Liability Rules for Online Marketplaces: A Comparative Analysis, Research Paper Series No. 21-01, p. 5.

12 In German law, under Section 10 (1) Product Liability Act, there is a maximum liability limit of € 85 million for personal injury.

13 European Commission (2022c), Impact Assessment Report, p. 22.

14 For example, if the damage amounts to € 550, only € 50 can be claimed.

The abolition of the threshold may lead to an increase in litigation. Even for smaller amounts, there is the possibility of class actions against manufacturers of defective products. The bundling of claims is efficient from the point of view of procedural economy and strengthens the position of the individual. Furthermore, this possibility creates greater incentive for manufacturers to increase the safety of their products. A permanent excess of claims is not expected because the relevant requirements for asserting claims for damages under product liability still have to be met. Furthermore, an effective product liability regime, together with other legislation[15], will lead to safer products overall, thus, in general, the need for litigation is likely to decrease.

The abolition of the maximum liability limit only affects a few Member States, but one of them is Germany. The Commission is striving for EU-wide harmonisation in this regard. Abolition of the maximum liability limit also contributes overall to meaningful harmonisation regarding the rights of injured parties and is also positive in that it may lead to more damage avoidance measures being taken by manufacturers across the EU.

Limitation period

Extending the limitation period from ten to 15 years where the symptoms of personal injury are delayed, is appropriate. This could be the case, for example, where medicines have side effects which only occur, or can only be connected with the medicines, at a later stage. Although such a long delay tends to be rare, one example worth mentioning is the drug Sodium Valproate (Depakine), which was prescribed to pregnant women until 1971. The drug turned out to have side effects – for both mother and child – but these often only became apparent after more than ten years.[16] Besides medicines, delayed detection of side effects is also possible with chemicals, food or building materials such as asbestos. More than a quarter of all product liability cases concern medicines, chemicals and food.[17] In view of this, it is appropriate to extend the limitation period by five years in such cases in order to ensure effective protection.

The limitation period for other products remains at ten years. This will have the following consequences, most notably for the smartphone market, because it will now also apply to software: Smartphone manufacturers will not be obliged to provide updates and upgrades throughout the ten year period, but doing so would enable them to avoid liability. This option therefore in fact creates an incentive to provide updates and upgrades for ten years, as, currently, it is apparent that the manufacturers of the two dominant operating systems, iOS (Apple) and Android, are providing updates and upgrades for a much shorter period of time. Manufacturers using the Android operating system provide an average of two to three, but a maximum of four Android versions, and for security updates, the average period is three to four years, but a maximum of five years.[18] With Apple, on the other hand, there are regular software updates over a period of four to six years, depending on the model. Otherwise, security updates can also be provided over a longer period of time.[19] The Commission is likely to want smartphones to be used for longer, in line with the circular economy, which basically makes sense, especially in view of the raw materials, such as rare earths, which they require. Overall, however, it is important to note that the average useful lifespan of products that use software varies widely. This is another reason why the period for mandatory provision of updates and upgrades should be designed in line with other legislation, such as the Cyber Resilience Act and ecodesign legislation. The Commission's proposal, does not guarantee this and must be adapted because uniform rules will facilitate implementation for the companies concerned and also improve the information available to consumers.[20]

Easing the burden of proof

On the basis of its impact assessment, the Commission concludes that products are becoming increasingly complex and that this is leading to greater information asymmetries[21] between manufacturers and natural persons.[22] The Commission proposal provides for substantial easing of the burden of proof for the injured party, e.g. in some cases by reversing the burden of proof. To this end, the claimant's burden of proof decreases, as the

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15 Such as the Product Safety Regulation.

16 European Commission (2022c), Impact Assessment Report, p. 22.

17 Ibid.

18 Nextpit (2022), So lange gibt's Android-Updates bei Samsung, Xiaomi & Co.!, https://www.nextpit.de/wie-lange-android-updates (30.01.2023).

19 Smarando (2022), iPhone Updates – wie lange du sie bekommst und was du beachten solltest, https://www.smarando.de/blog/wie-lange-bekommt-mein-iphone-updates/ (30.01.2023).

20 Regarding the limitation periods as a whole see also the Legal Assessment.

21 This means that one side has more or better information than the other side.

22 European Commission (2022c), Impact Assessment Report, p. 19.

claimant only has to prove that the product has contributed to the damage and that it is "likely" that the product was defective and/or that the defective product is likely to have caused the damage. Since products are becoming increasingly complex, and since the average injured party cannot be expected to know or understand their technical functioning in detail (information asymmetries), the provisions in the Commission proposal are appropriate.

The ability of national courts to order the disclosure of evidence may involve confidential information and trade secrets. These must be handled carefully during legal proceedings, which, in practice, may prove difficult. The Commission must lay the foundations for courts to be able to strike a good balance, in the individual case, between consumer protection, on the one hand, and the protection of business interests, on the other. Courts should only therefore be allowed to request the disclosure of such evidence in well-justified cases where selected evidence is essential to resolve a specific case. If manufacturers are obliged to disclose trade secrets, they could weigh up from an economic point of view what is better for them in each individual case: to (partially) surrender trade secrets or to pay damages.

Impact on product prices, insurance premiums and product safety

The Commission proposal strengthens the position of individuals when it comes to asserting and enforcing their claims. This in turn will have an impact on product prices, which are likely to rise – at least in part – due to the increased costs of liable parties. This is primarily likely to affect products that are not covered by the current Product Liability Directive. Manufacturers will have to pay higher insurance premiums, which they will then pass on to product prices. Products are not expected to disappear from the internal market as a result of the Commission's proposal. Overall, the revised legislation should contribute to greater product safety.

2 Legal Assessment

2.1 Competence and subsidiarity

Competence and subsidiarity are unproblematic. The Commission proposal is rightly based on Art. 114 TFEU (Competence for harmonisation of the internal market). Since the existing Product Liability Directive already contains provisions under European law, these provisions can only be changed by action of the EU legislator.[23]

2.2 Proportionality with Respect to Member States

Duty of disclosure: Existing provisions

The proposed rules on the disclosure of evidence and allocation of the burden of proof represent significant encroachment upon national law of civil procedure. Thus, the duty of disclosure contained in the Commission proposal is similar to the concept of disclosure seen in common law jurisdictions such as England.[24] This is not a first, however, as – in addition to the duty of disclosure in Art. 3 of the Commission proposal for a Directive on liability for AI [COM(2022) 496] – similar disclosure obligations already exist under EU law and the related national transposition provisions, namely in the Representative Actions Directive [(EU) 2020/1828; see cep**PolicyBrief** No. 28/2018][25], the Directive on the enforcement of intellectual property rights [so called Enforcement Directive (2004/48/EC)][26] and in particular the Damages Directive [2014/104/EU; see cep**PolicyBrief** No. 45/2013]. According to Art. 5 of the Damages Directive, courts may oblige defendants and also third parties to disclose relevant evidence within their control. For this the claimant is required to base its request for disclosure on a reasoned justification containing facts and evidence sufficient to support the plausibility of its claim.

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[23] Tietje, C, in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 59. Update 2016, Art. 114 AEUV, para. 68.

[24] See e.g. Stempfle, C. (2022), Entwurf für eine neue Produkthaftungsrichtlinie in der EU, https://www.psp.eu/de/entwurf-produkthaftungsrichtlinie-eu (14.12.2022); Kapoor, A. / Klindt, T. (2022), Verschärfung der Produkthaftung in Europa, https://www.noerr.com/de/newsroom/news/verscharfung-der-produkthaftung-in-europa (14.12.2022).

[25] According to Art. 18 of the Representative Actions Directive, a court or an administrative authority may, at the request of a so-called qualified entity, order the defendant or a third party to disclose evidence within their control. As a condition for this, the qualified entity must have provided reasonably available evidence sufficient to support a representative action and have indicated that additional evidence lies in the control of the defendant or a third party. Conversely, the defendant may also request the disclosure of evidence by the qualified entity or third parties.

[26] Art. 8 of the Enforcement Directive provides that courts may, under certain circumstances, require the defendant or other persons to provide information on the origin and distribution networks of goods or services infringing an intellectual property right.

The following section looks briefly at implementation of the duty of disclosure under the Damages Directive in Austria and Germany in order to evaluate the provisions in the present Commission proposal.

Germany has implemented Art. 5 of the Damages Directive in Section 33g of the GWB[27, 28] by creating an independent substantive right to the disclosure of evidence. This can thus be raised and enforced independently of an action for damages. Austria, on the other hand, in Section 37j of the KartG[29], has chosen the option of granting a right to disclosure solely as part of damages proceedings and not outside of them. Both are compatible with the Damages Directive which requires the disclosure claim to be part of the damages proceedings, as implemented in Austria, but does not prohibit going beyond that, as has been done in Germany.[30] In fact: Art. 5 (8) of the Damages Directive expressly states that rules which would lead to wider disclosure of evidence are permissible.

Duty of disclosure in the Commission proposal for a new Product Liability Directive

The Commission proposal does not grant this freedom because its duty of disclosure relates to the case where there is already a claimant, i.e. a person claiming compensation for the damage caused by a defective product. An action for damages is thus already before the court.

Under the Damages Directive, the duty of disclosure also refers to "proceedings relating to an action for damages". The Commission proposal, however, unlike the Damages Directive, contains a clause in Art. 3 that prohibits any divergence from the Directive's provisions during implementation by the Member States, even if – as in the case of Section 33g GWB – it is in favour of the injured parties ("full harmonisation").

The fact that the Member States are not given any scope to pass diverging national product liability provisions is nothing new. The existing Product Liability Directive already represents full harmonisation and does not allow for any divergence, unless otherwise specified in the Directive itself.[31] It does not, however, contain any procedural provisions such as those applicable to the duty of disclosure. The combination of full harmonisation and procedural provisions such as the duty of disclosure makes the proposed Product Liability Directive disproportionate; it encroaches too far upon the sovereign rights of the Member States.

The Directive should, in fact, leave Member States free to decide how best to integrate the duty of disclosure into their national procedural law. There is no indication that variations in the implementation of the duty of disclosure under the Damages Directive has caused any problems that would suggest a need for uniform implementation of the Product Liability Directive. The legislative process must safeguard the Member States' freedom in this respect.

2.3 Compatibility with EU Law in other respects

Lack of clarity

The Commission's proposal lacks clarity in several places. Thus, for the duty of disclosure to apply, the facts and evidence submitted by the claimant must sufficiently support the plausibility of the claim. However, the Commission's proposal does not give any indication as to how the concept of plausibility is to be interpreted. Section 33g GWB, Germany's implementation of the duty of disclosure contained in the Damages Directive, requires the claimant to make a credible case ("glaubhaft machen") for the damages claim, which is easy to deal with because it is a familiar and established concept. However, it is unclear from the Commission proposal whether this also meets the requirements of the future Product Liability Directive. If the term "plausibility" is retained, the final Directive must clarify what it means.

Similar problems arise in relation to the provisions on the burden of proof. The Commission proposal does not provide any indication as to when technical or scientific complexity makes it "excessively difficult" to prove defectiveness and/or the causal link. It is also unclear which standard will be used to assess whether the claimant

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27 German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen).

28 On implementation see Preuß, N. (2017), Chapter 10. Kartellschadensersatz: Beweismittel, in: Kersting, C. / Podszun, R. (Eds.), Die 9. GWB-Novelle, S. 245-290; Podszun, R. / Kreifels, S., Kommt der Ausforschungsanspruch? – Anmerkungen zum geplanten § 33g GWB, Gesellschafts- und Wirtschafsrecht 2017, p. 67-72; Klöppner, C. / Preuße, A., Informationsasymmetrie zu Lasten der Kartellanten – Auskunfts- und Herausgabeansprüche nach § 33g Abs. 2 GWB bei Sammelklagen, Neue Zeitschrift für Kartellrecht 2022, S. 494-499.

29 Austrian Federal Act on Cartels and other Restraints of Competition (Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen).

30 On the different implementations and their compatibility with the Directive see Podszun/Kreifels, GWR 2017, pp. 67-72 (p. 69 et seq.)

31 Welser, R. (2007), Bürgerliches Recht II, 13th Ed., p. 379; ECJ, Case No. C-127/04 (O'Byrne), ECLI:EU:C:2006:93, para 35.

has proven the likelihood of defectiveness and/or the causality. In view of the different terminology used, likelihood must have a different meaning to plausibility but no indications are provided as to exactly where this difference lies.

In summary, it is the case that, regarding both the duty of disclosure and the burden of proof, the provisions fail to clarify essential key concepts. Admittedly, a certain level of abstraction is necessary, as the legislator cannot regulate every conceivable (individual) case. Moreover, this allows the national transposition to be more precise than the Directive. Nevertheless, the European legislator is required to provide guidance on the interpretation of the terms, e.g. by way of examples in the recitals. These should be included.

Equality of arms between the parties

In line with the principle of equality of arms in court proceedings, which forms part of the right to a fair trial under Art. 47 (2) CFR,[32] the final Directive should also provide that a court may order the claimant to disclose evidence at the request of the defendant. This is also how the duty of disclosure is regulated in the Damages Directive.[33] By granting only the claimant the right to make an application, the Commission proposal gives the claimant more procedural options than the defendant, contrary to the principle of equality of arms. This needs to be adjusted.

Software updates: Commission proposal increases uncertainty

So far, product liability law has been governed by the so-called factory gate principle. Manufacturers are not liable for defects that occur after the product is placed on the market. The Commission proposal deviates from this as regards software because it stipulates that manufacturers must also be liable for defects that occur subsequently if these are due to the software – including updates and upgrades – or have arisen due to a lack of safety updates.

Although this does not oblige manufacturers to provide updates, it does create an incentive for them to do so by limiting the exemption from liability. In principle, this incentive is to be welcomed. In terms of time, however, the exemption is not expressly but only implicitly limited by the ten-year limitation period from the date on which the product was placed on the market, which is a very long time for some software.

By comparison: The proposal on the Cyber Resilience Act [COM(2022) 454; cep**PolicyBrief** No. 1/2023] specifies an update obligation for a maximum of only five years after the product has been placed on the market [see there, Art. 10 (6)]. A different time limit is also contained in the draft ecodesign requirements for smartphones, tablets and mobile phones.[34] The ecodesign requirements stipulate that updates for the operating system must be provided for at least five years from the end of placement on the market. These periods should be harmonised. A uniform update period under the Cyber Resilience Act, ecodesign law and Product Liability Directive would not only be more coherent but would also make it easier for companies to apply. Care must be taken to ensure that the update period is not too long, as incentives for software updates based on outdated hardware may tend to inhibit innovation.

Liable parties: The only genuinely new provisions concern authorised representatives, fulfilment service providers and online platforms

The Commission proposal introduces some categories of liable parties that are not mentioned in the existing Product Liability Directive. There is no major change in the substance, however. The fact that someone who makes a substantial – namely safety-relevant – modification to the product is then deemed to be a manufacturer is already recognised,[35] albeit not explicitly stated in the Product Liability Directive. Likewise, it is at least the view of many commentators that the manufacturer of a defective component is liable for all of the damage caused by

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[32] Blanke, H.-J. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Ed., Art. 47 GRC, para. 16; Jarass, H. (2021), Charta der Grundrechte der EU, 4th Ed., Art. 47, para. 49; Eser, A. / Kubiciel, M. (2019), in: Meyer, J. / Hölscheidt, S. (Eds.), Charta der Grundrechte der Europäischen Union, 5th Ed., Art. 47, para. 37.

[33] The same is also true of the Representative Actions Directive.

[34] See BMUV/BMWK (2022), Smartphones and tablets will be easier to repair in the future, Press release No. 161/22, 18.11.2022 and https://ecostandard.org/wp-content/uploads/2022/11/FINAL-ED-regulation-for-mobile-phones-and-tablets.pdf.

[35] See Wagner, G. (2020), in: Säcker, F. J. / Rixecker, R. / Oetker, H. / Limperg, B. (Eds.), Münchener Kommentar zum BGB, 8th Ed., § 4 ProdhaftG, para. 12; Ehring, P. (2022), in: Ehring, P. / Taeger, J. (Eds.), Produkthaftungs- und Produktsicherheitsrecht, § 4 ProdhaftG, para. 8; Pehm, J. (2017), Austria, in Karner, C. / Steininger, B. (Eds.), European Tort Law Yearbook 2017, p. 1-20 (16); Foerster, C., in Hau, W. / Poseck, R. (Eds.), BeckOK BGB, Stand 01.11.2022, § 4 ProdHaftG, para. 7.

the product.[36] Importer's liability is already expressly set out in the existing Product Liability Directive [Art. 3 (2)], as is that of the quasi-manufacturer [Art. 3 (1)] and of the distributor [Art. 3 (3)] referred to there as supplier.

Genuinely new provisions are those on the liability of the authorised representative, the so-called fulfilment service provider and the provider of an online platform. The idea behind this is to ensure that there is always a party that can be held liable, even when companies from third countries sell their products in the EU.

On almost all points, the liability of the fulfilment service provider corresponds to that of the importer, and the liability of the provider of an online platform corresponds to that of a distributor. The difference is only that the fulfilment service provider is only liable if there is no importer established in the EU, and the provider of an online platform is only liable as long as the said provider is not at the same time a manufacturer, importer or distributor.[37] Under the envisaged liability conditions, the Commission proposal imposes hardly any additional burden on the provider of an online platform because, in order to escape liability, it only has to indicate who supplied the product. This, in fact, hardly amounts to an additional burden, as an obligation for online platforms to know which distributors are active on the platform and which products they offer is already contained in the General Product Safety Regulation and – for certain platform providers – in the Digital Services Act [Regulation (EU) 2022/2065; see cep**PolicyBriefs** No. 22/2021, No. 23/2021 and No. 24/2021].

D. Conclusion

The Product Liability Directive has been established and recognised for almost forty years. Adapting it to digitalisation and the circular economy is appropriate because the way in which products are manufactured, distributed and operated has changed significantly over time.

The Commission proposal strengthens legal certainty, especially with regard to software which will now be recognised as a product throughout the EU. However, key concepts, regarding both the duty of disclosure and the burden of proof, lack sufficient clarity. This in turn gives rise to legal uncertainty. The Commission proposal also adds to the confusion regarding the length of time for which manufacturers must provide updates.

It is appropriate that, by adapting the legal provisions on liable parties, at least one party can always be held liable by the injured party, because any claims must also be enforceable, especially in the case of products from third countries. The provisions contained in the Commission proposal do not bring about any major change to the current legal position. However, they may help to ensure that, overall, safer products are placed on the internal market. However, manufacturers will put a price on the easier enforcement of claims, mainly due to higher insurance premiums. As a consequence, higher prices for (some) products are likely.

Moreover, the Commission proposal encroaches too far upon the sovereign rights of the Member States because it does not leave them the freedom to decide how to transpose the duty of disclosure into their national law. Another criticism is that, contrary to the principle of equality of arms in court proceedings, the claimant can request the disclosure of evidence but the defendant cannot.

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[36] See Schmidt-Salzer, J. (1986), Kommentar EG-Richtlinie Produkthaftung, Art. 3, para. 94 et seq; Katzenmeier, C. / Voigt, T. (2020), ProdHaftG Kommentar, 7th Ed., § 4, para. 21; Graf von Westphalen, F. (2020), in: Foerste, U. / Graf von Westphalen, F. (Eds.), Produkthaftungshandbuch, § 49 Endhersteller – Teilehersteller – Importeur – Quasi-Hersteller – Lieferant, para. 29 and on the national transposition laws Oechsler, J. (2021), in: Hager, J. (Ed.), J. v. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, §§ 826-829; ProdhaftG, § 4 ProdhaftG, para. 16; Welser, R. / Rabl, C. (2004), Produkthaftungsgesetz Kommentar, § 3, para. 18; Ehring, P. (2022), in: Ehring, P. / Taeger, J. (Eds.), Produkthaftungs- und Produktsicherheitsrecht, § 4 ProdhaftG, para. 15; Lenz, T. (2014) in Lenz, T. (Ed.), Produkthaftung, § 3 Zivilrechtliche Haftung: Produzentenhaftung – Produkthaftung, para. 337.

[37] Furthermore, it should be noted that one of the conditions mentioned for the liability of the fulfilment service provider is that neither the importer nor the authorised representative are established in the EU. However, both the importer and the authorised representative are, according to the definition of the Commission proposal, persons established in the EU. It would be more coherent to refer solely to whether there is an importer or authorised representative, as this includes establishment in the EU.