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More obligations, more rights: How the new EU Product Liability Directive changes the rules for economic operators and consumers (Part 1)

The new European Product Liability Directive will soon come into force. It has evolved in the course of increasing awareness of product risks, particularly in the context of the digitalisation of products. This article focuses in particular on the extension of the liability regime with regard to digital products, the expansion of the addressees of liability and the extension of the definition of damage by including data loss and the elimination of the self-retention. A second article (to be published in Q4 of the year 2024) analyses the revolutionary changes in the distribution of the burden of proof and the duty to disclose evidence as well as the breaking of the principle that compliance with the state of the art when placing a product on the market leads to exculpation of the manufacturer.

I. Introduction

The first European Product Liability Directive 85/374/EEC (hereinafter "PLD old version") was adopted on 25 July 1985 in the context of a growing awareness of product risks and the compensation of related damages, increased international market competition and the growing political will for European integration. 39 years later, the European Union is facing similar challenges: an increasing awareness of product risks arising from software and AI systems and the growing desire for European harmonisation in product law, which resulted in the new version of the Product Liability Directive from 2024 (hereinafter "PLD").

According to the European Commission, the need to revise the Product Liability Directive arose from the new challenges associated with increasing digitalisation, the Internet of Things, artificial intelligence, the circular economy[1] and the establishment of liability rules for significantly modified products.[2] These challenges are reflected in an extended scope of application in both material and personal terms (see section 2). Another objective was the removal of hurdles for the assertion of claims for damages, not only in the context of digital products. Ensuring legal certainty through better harmonisation of the Product Liability Directive with product safety legislation and the introduction of simplified rules of evidence for private individuals is also crucial.[3]

After the PLD old version was last amended in 1999[4] due to the experience with BSE-contaminated beef,[5] the proposal to revise the Product Liability Directive was published in 2022.[6] After the trilogue negotiations were successfully concluded in December 2023, only the official text of the directive has yet to be published in the Official Journal of the European Union at the time of writing. Based on the European Parliament's document "P9_TA(2024)0132",[7] which already contains the final text, this article series presents and discusses the most significant changes to the Product Liability Directive as amended and its more stringent liability requirements.

This first part of the article focuses on the extension of the liability regime, for example the newly included definition of "software" (Art. 4 No. 1 PLD) or "related services" (Art. 4 No. 3 PLD) or the extension of the definition of damage by including data loss (Art. 6(1) c) PLD) as well as liability for fulfilment service providers (Art. 8(1) c) iii) PLD) and online platforms (Art. 8(4) PLD). In the second part of this series (to be published in *Q4 of the year 2024*), the revolutionary changes in some areas relating to the disclosure of evidence (Art. 9 PLD) and the allocation of the burden of proof (Art. 10 PLD) as well as the breaking of the principle that compliance with the current state of the art in science and technology when placing a product on the market leads to exculpation of the manufacturer (Art. 11(1) lit. e) PLD) are analysed.

II. Extension of the definition of "product"

1. Old dispute – now resolved

A far-reaching extension of the liability for economic operators results from an extended scope of application of the PLD. According to Art. 4 No. 1 PLD, the European product liability regime will in future cover not only tangible products and electricity, but also intangible products like software and digital manufacturing files.[8] One of the most striking changes in this context is the explicit inclusion of software in the definition of a product.[9] As a result, economic operators that were previously not covered by the liability regime of the Product Liability Directive may also fall within the scope of product liability. Recital 13, for example, expressly states that developers or manufacturers of software, including providers of AI

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1 Mayr/Rauner/Schweiger ZfPC 2023, 2 (3), Recital 3 PLD.
2 COM(2018) 246 final, 11; European Commission, Questions and answers on the revision of the Product Liability Directive, QANDA/22/5791, 2022.
3 COM(2018) 246 final, 8.
4 Implemented by Directive 1999/34/EC.
5 Kraft, Der Angleichungsstand der EG-Produkthaftungsrichtlinie, p. 257 et seq.
6 Proposal for a Directive of the European Parliament and of the Council on liability for defective products of 28 September 2022.
7 Text adopted P9_TA(2024)0132, Liability for defective products – European Parliament legislative resolution of 12 March 2024 on the proposal for a directive of the European Parliament and of the Council on liability for defective products (COM(2022)0495 – C9-0322/2022 – 2022/0302(COD)).
8 For the definition of "digital manufacturing file", see Art. 4 No. 2 PLD.
9 Art. 4 No. 1 and Recital 6 PLD.

systems according to the AI Act, are to be considered manufacturers.[10]

Even though the EU Commission was already of the opinion at an early stage under the PLD old version that software should be considered as a product,[11] the classification of software has nevertheless been the subject of lively debate since the beginning of European product liability,[12] as there was still a very strong focus on tangible products.[13] This dispute has now finally been settled and is only relevant for the legal history books. For the new version of the PLD, there is no doubt that products can be tangible or intangible. According to the recitals, operating systems, firmware, computer programs, applications or AI systems, for example, qualify as software and thus as a product. The software source code, on the other hand, is not to be covered as pure information in the form of a digital file. Furthermore, it does not matter whether the software is integrated into a product (so-called "embedded software") or not (so-called "standalone software").[14]

2. Difficulties to categorize free and open source software

Art. 2 (2) PLD sets out a special rule for free and open source software. Free and open source software that has not been developed as part of a commercial activity is not to be covered by the scope of application of the PLD. This provision is intended to ensure that innovation and research are not hindered. The regulatory effect is that such software is by definition not placed on the market.[15] Neither the collaborative development of free and open-source software nor the provision of such software in open repositories[16] should be considered placing on the market or making available.[17] However, a commercial activity is always deemed to exist if the software is made available for a price or personal data is used in a way other than exclusively to improve the security, compatibility or interoperability of the software.[18] With open source projects in particular, there are likely to be considerable difficulties in practice in determining whether or not open source software was provided as part of a commercial activity. For example, open source software can be used as a sales vehicle to market other hardware or software. This raises the question of whether the free provision of open source software was not provided as part of a commercial activity due to the underlying economic purpose. It is to be expected that case law will concretize this undefined legal term, which requires further clarification.

In the case that free or open source software initially provided outside of a commercial activity forms a component of a product within the meaning of Art. 4 No. 1 PLD or is integrated into a product, the recitals provide for a clarification respectively exception: In such cases, the manufacturer of the product should be able to be held liable for damage caused by a defect of the corresponding free or open source software. However, the manufacturer of the free or open source software itself should not be held liable, as the conditions for placing it on the market are not met. In this context, the liability of software manufacturers outside the commercial sector is denied with a dogmatic but nevertheless correct argument. The reasoning behind this is that the manufacturer of the end product into which the free or open source software is integrated uses it commercially and should therefore also be liable for any resulting damages.

3. "Related Services" are covered

Also so-called "related services" are covered by the scope of the Product Liability Directive (Art. 4 No. 3 PLD) if the product could not fulfil its functions without such services. Examples of related services are the continuous provision of traffic data in a navigation system, a health monitoring service that relies on the sensors of a physical product to track the user's physical activity or health parameters, a temperature monitoring service that monitors and regulates the temperature of a smart refrigerator; or a voice assistant that enables the control of one or more products by means of voice commands.[19]

Especially in industries with a high affinity for connectivity, this poses new liability risks for OEMs and suppliers in particular.[20] Related services become a potential liability issue for the manufacturer if the service can be considered to be under its control. This requires that the manufacturer not only actually enables the connection of the service to its product, but also authorises or agrees to it.[21] The already discussed question of whether an authorisation also covers future versions of the service[22] should ideally be clarified by the national legislator as part of the implementation of the PLD into national law.

4. Inclusion of "digital manufacturing files"

The definition of product in Art. 4 No. 1 PLD now also expressly includes "digital manufacturing file". According to Art. 4 No. 2 PLD, a digital manufacturing file is a digital version of a movable object or a digital template for it, which contains functional information necessary for the production of a tangible object by enabling the automatic control of machines or tools. This refers in particular to functional information for 3D printing processes (CAD print files).[23] While mere digital files are not in themselves products within the meaning of the PLD and are only taken into account in the context of damage (Art. 6 (1) lit. c) PLD), digital manufacturing files that contain the functional information necessary for the manufacture of a tangible object by enabling the automatic control of machines or tools such as drilling, turning and

10 Recital 13 PLD.
11 Official Journal No. C 114 from 8th May 1989, p. 42 (Answer given by Lord Cockfield on behalf of the Commission).
12 In any case, the existence of a product was predominantly affirmed in the case of software embodied, for example, on a data carrier. In the case of software not embodied on a physical medium (e.g. software transmitted online or software in the cloud), this was less clear.
13 Instead of many e.g. NK-ProdR/Taeger, § 2 ProdHaftG, Marg. 18 et seq; MüKoBGB/Wagner, § 2 ProdHaftG Marg. 21 et seq; BeckOK BGB/Förster, § 2 ProdHaftG Marg. 22 et seq; Katzenmeier/Voigt, ProdHaftG, § 2 Marg. 16 et seq; Kapoor/Müller, § 2 ProdHaftG Marg. 44 et seq; Foerste/Graf v. Westphalen ProdHaft-HdB/Oster § 57 Marg. 40 et seq; Adelberg ZfPC 2023, 59 (59 et seq.).
14 Recital 13 PLD; Kapoor/Klindt BB 2023, 67 (67).
15 Recital 14 PLD.
16 A repository or repo is a centralised digital storage that developers use to make and manage changes to the source code of an application.
17 Recital 14 PLD.
18 Recital 14 PLD.
19 Recital 17 PLD.
20 See in general instead of many Kapoor/Klindt BB 2023, 67 (69); Müller InTeR 2024, 6 (7 et seq.); Wagner/Ruttloff/Römer CCZ 2023, 109 (109 et seq.); see for the automotive sector Kapoor/Sedlmaier RAW 2023, 8 (11).
21 Recital 18 PLD.
22 Spindler CR 2022, 689 (691); Kapoor/Sedlmaier RAW 2023, 8 (11).
23 Müller InTeR 2024, 6 (7).

milling machines and 3D printers are to be considered products by way of exception.[24] According to the recitals, this is intended to ensure the protection of natural persons in cases where these files are faulty. For example, a faulty computer-aided design file used to produce 3D printed products that causes damage should give rise to liability under the new version of the Product Liability Directive if such a file is developed or provided as part of a commercial activity.[25] Similar to the question of the inclusion of software in the scope of the PLD, this puts an end to an old dispute as to whether CAD files/software or "digital manufacturing files" are covered by the scope of the Product Liability Directive.[26]

III. Extension of the scope of liability addressees

1. Comparison of old and new version of the Directive

Compared to the old version of the Product Liability Directive, the liability addressees have been significantly expanded. Art. 8 PLD now regulates the liability responsibility of the various economic operators according to Art. 4 No. 15 PLD and online platforms according to Art. 4 No. 16 PLD in a new, differentiated manner. With Art. 8 PLD it is also the concept of economic operators in product liability law introduced. This should lead to greater conceptual consistency between the regulatory and liability responsibilities, which have always been interrelated.[27] The approach of the "New Legislative Framework"[28] is thus also being continued in product liability law. While Art. 3 of the old version of the Product Liability Directive still stipulated that any supplier may be treated as the producer if the producer of the product cannot be identified and the supplier does not identify the producer or the person who supplied the product to the injured party within a reasonable time, Art. 8 PLD differentiates in paragraphs 1 to 5 between the responsibility of the manufacturer, importer, authorised representative, fulfilment service provider, distributor, online platform provider and the person who has substantially modified the product. Compared to the old version of the Product Liability Directive, this entails a significant expansion of potential liability addressees for defective products.

2. Authorised representative as liable party

In addition to the non-EU manufacturer and the importer, the authorised representative is now also covered by strict liability under Art. 8 (2) PLD. According to Art. 4 No. 11 PLD, authorised representative means any natural or legal person established within the Union that has received a written mandate from a manufacturer to act on that manufacturer's behalf in relation to specified tasks. Since the definitions of the Product Liability Directive are aligned with those of product safety law,[29] it can be assumed that this is an authorised representative who has been appointed within the framework of a harmonisation regulation under product safety law. If no authorised representative has been appointed for a specific product, no authorised representative exists. It should be kept in mind that product safety law for consumer products now requires an authorised representative in accordance with Art. 16 (1) of the Product Safety Regulation (EU) 2023/988 ("GPSR") in conjunction with Art. 4 (1) of the Market Safety Regulation. Art. 4 (1) of the Market Surveillance Regulation (EU) 2019/1020 ("MSR"), there must always be an economic operator established in the Union. This can be the importer, the fulfilment service provider, but also the authorised representative in accordance with Art. 4 (1) of the MSR, who can now also be generally designated for consumer products in accordance with Art. 10 of the GPSR.

It is to be expected that this extension of liability for the authorised representative will make this role less attractive as a business model in the future. Particularly in view of the fact that there is no specific exemption from liability for the authorised representative in Art. 11 (1) PLD and the authorised representative can therefore only invoke the general grounds for exemption from liability such as Art. 11 (1) lit. d) PLD, the extension of liability to the authorised representative, who in principle bears no material responsibility for the product, appears to be quite extensive.

3. Fulfilment service provider

The scope of possible liability addressees has been expanded, particularly in view of the wide range of business models that arise mainly from online trading and that simply did not exist when the Product Liability Directive was established in 1985. For instance, Art. 8 (2) lit. c) iii) PLD extends the liability responsibility in import scenarios by providing that the fulfilment service provider within the meaning of Art. 4 no. 13 PLD can also be held liable for damage caused by the defective product or component, provided that the manufacturer of the defective product is not established in the EU and neither the importer nor the authorised representative can be held liable under Art. 8 (1) lit. c) i) and ii) PLD. In cases solely within Europe, it remains that the fulfilment service provider cannot be held liable – even if another economic operator cannot be found. In this respect, dogmatically, it is modelled after the importer's liability.[30]

This stipulation intends to address the increasing problem that products from third countries can be ordered directly (via digital platforms) and shipped directly to consumers without intermediaries within the EU who fall under the definition of economic operators in accordance with Art. 4 No. 15 PLD and thus have their own responsibilities within the physical supply chain with regard to the conformity of the products.[31] This applies in particular to fulfilment service providers, who perform many of the same functions as importers but do not always meet the traditional definition of importer under Union law.

Remarkably, the fulfilment service provider has no inherent product responsibility and does not carry out any sales activities of its own. Rather, the support of a third-party sales activity is sufficient to become the subject of liability.[32] This is justified by the overriding objective of sparing the injured

24 Recital 16 PLD.
25 Recital 16 PLD.
26 See in more detail Müller/Haase InTeR 2017, 124 (127 et seq.); MüKoBGB/Wagner, § 2 ProdHaftG, Marg. 27 et seq; Oechsler NJW 2018, 1569 (1569 et seq).
27 Handorn MPR 2023, 16 (19); Müller InTeR 2024, 6 (7 et seq); Kapoor/Klindt BB 2023, 67 (67); Kapoor/Sedlmaier RAW 2023, 8 (9 et seq).
28 See in particular Decision No 768/2008/EC.
29 Recital 12 PLD; COM(2022) 495 final, 14.
30 Müller InTeR 2024, 6 (8).
31 Handorn MPR 2023, 16 (20); Recital 37 und 38 PLD.
32 Recital 37 PLD; Meyer RDi 2023, 66 (68 et seq).

party costly and probably futile legal action in non-European countries. Large global platform providers such as Amazon in particular are likely to be affected by this regulation, as a large part of their turnover is generated by brokering third-party products.[33]

IV. Liability of online platforms

1. Liability of the distributor

Another new provision can be found in Art. 8 (4) PLD, according to which providers of online platforms can now also be held liable. Providers of online platform that enables consumers to conclude contracts with distributor are liable according to the same principles as distributor under Art. 8 (3) PLD.

Art. 8 (3) PLD incorporates the subsidiary liability for the distributor, which was already laid down in Art. 3 (3) of the old version of the Product Liability Directive. According to this, every supplier was treated as the manufacturer if the manufacturer of the product could not be identified and the supplier named the manufacturer or the person who supplied the product to the injured party within a reasonable period of time. This also applied to imported products if the importer could not be identified. According to Art. 8 (3) PLD, any distributor within the meaning of Art. 4 No. 14 PLD can be held liable if no economic operator established in the European Union according to Art. 8 (1) PLD (manufacturer, importer, authorised representative, fulfilment service provider) can be identified. Under the conditions that

a. the injured person requests the distributor to identify the economic operator or the person who supplied the distributor with the product and
b. that distributor does not identify the economic operator or the person who supplied the distributor within one month of receiving the request.

2. Specifics of Art. & Sec. 3 of the Digital Services Act

In addition to the requirements of Art. 8 (3) PLD, there is another requirement for the liability of online platform providers, namely Art. 6 (3) of Regulation (EU) 2022/2065 ("Digital Services Act"; hereinafter "DSA"). An essential prerequisite for their liability is the lack of transparency of their role as an intermediary.[34]

According to Art. 6 DSA, hosting providers are not responsible for the content posted by users on their platform if they have no actual knowledge of the illegality or of the circumstances from which the illegality arises (Art. 6 (1) lit. a) DSA) or if they block or remove the content immediately as soon as they become aware of it (Art. 6 (1) lit. b) DSA). This does not apply if the user is under the control or supervision of the hosting provider, Art. 6 (2) DSA.

New is the particular provision of Art. 6 (3) DSA, according to which the liability privilege of Art. 6 (1) DSA described above does not apply if an average consumer can assume that the product was provided by the provider of the online platform itself or by a user under its control. If the company is actually under the control of the provider or is supervised by the provider, liability already exists under Art. 6 (2) DSA.[35] It should be sufficient for supervision that the provider monitors the companies and has means of exerting pressure to bring about a change in behaviour.[36] According to another view, a possibility of influence is required that goes beyond economic or entrepreneurial dependence.[37]

Whereas under the old legal situation in accordance with Art. 14 (2) E-Commerce Directive 2000/31/EC, hosting providers were only liable if third parties were actually subject to them or acted under their control, under Art. 6 (3) DSA, the appearance from the perspective of an average consumer is now sufficient. The DSA is based on the familiar consumer model. Accordingly, proper information is not required, but it is sufficient if an informed, reasonably attentive and reasonable consumer could recognise that the hosting service provider wanted to act as an intermediary and not as a seller.[38] Providers of online platforms should nevertheless adequately label the offers of platform users as third-party offers.

From a historical perspective, the liability regulation of Art. 6 (3) DSA originates from the contractual liability regime. In the Wathelet case, on which the provision of Art. 6 (3) DSA is based,[39] the ECJ ruled that an intermediary acting on behalf of a private individual is to be regarded as a seller within the meaning of the Consumer Sales Directive if he has not properly informed the buyer that the actual seller is a private individual.[40] This is not a special case for German law, as general principles of interpretation would have led to a contractual liability of the intermediary according to the principles of prima facie liability, §§ 133, 157, 164 (2) German Civil Code.[41] With the explicit reference in Art. 7 (6) PLD, the liability regulation is now also declared applicable for non-contractual strict liability in accordance with the Product Liability Directive (new version). This is intended to protect marketplace operators from escalating product liability that could potentially jeopardise their business model. This is reflected in a partial transfer of the liability privileges of hosting providers to the area of product liability, which would not normally be covered by the DSA.[42]

V. Responsibility for the "substantial modification" of a product (Art. 8 (2) PLD)

1. Like a manufacturer

Art. 8 (2) PLD addresses persons who substantially modify (Art. 4 (18) PLD) a product outside the control of the original manufacturer (Art. 4 (5) PLD) and subsequently place it on the market (Art. 4 (8) PLD). These persons are deemed to be the manufacturer of the product for liability purposes within the meaning of the PLD, provided that the modification made can be categorised as substantial in accordance with the app-

33 Statista, Fulfillment methods used by third-party sellers on Amazon in 2020 and 2022, available at: https://beck-link.de/nk6yk.
34 Meyer RDi 2023, 66 (69).
35 Formerly according to Art. 14(2) E-Commerce Directive 2000/31/EC (= § 10 S. 2 TMG).
36 Dregelies VuR 2023, 175 (177).
37 Spindler/Schmitz/Spindler, Telemediengesetz, § 10 TMG Marg. 61.
38 Dregelies VuR 2023, 175 (177).
39 Dregelies VuR 2023, 175 (177).
40 EJC 9.11.2016 – C-149/15, ECLI:EU:C:2016:840 Marg. 45 – Wathelet.
41 Pfeiffer LMK 2016, 384085.
42 Meyer RDi 2023, 66 (69).

licable Union or national product safety regulations. The concept of "substantial modification" is already familiar in the practical application of machinery law.[43]

The regulation should be seen against the backdrop of the "Green Deal"[44] proclaimed by the European Commission. The aim is to strengthen the circular economy by increasingly designing products in such a way that they are more durable, reusable, repairable and upgradable (e.g. in accordance with the Ecodesign Regulation[45] or the Battery Regulation (EU) 2023/1542). Secondly, the right to repair is to be further strengthened for European consumers. As part of the transition from a linear to a circular economy, the expansion of the definition of producer is intended to ensure that consumers can also obtain compensation for damage caused by such products.[46]

It is not simple to determine when a significant change has occurred and requires a case-by-case assessment.[47] It is striking that the assessment of whether a substantial modification exists is now to be measured against product safety law provisions. The extent to which a change to the original product is to be regarded as substantial is to be based on the (sectoral) product safety regulations.

2. Specifics of the Product Safety Regulation (EU) 2023/988

As part of the new Product Safety Regulation (EU) 2023/988 on the product safety regulation of consumer products, a regulatory approximation to the term "substantial modification" is made in Art. 13 (3) of the Product Safety Regulation. It states:

A modification of a product, by physical or digital means, shall be deemed to be substantial where it has an impact on the safety of the product and the following criteria are met:

(a) the modification changes the product in a manner which was not foreseen in the initial risk assessment of the product;

(b) the nature of the hazard has changed, a new hazard has been created or the level of risk has increased because of the modification; and

(c) the modifications have not been made by the consumers themselves or on their behalf for their own use.

It is also possible that an artificial intelligence (AI) in the sense of a software product is to be regarded as such a digital modification through training or further development and is to be categorised as "substantially modified", especially if the modification is part of the nature of the AI.[48]

3. Specifics of the AI Act

The topic is even addressed in the AI Regulation. According to the legislator of the AI Regulation, in the context of artificial intelligence, it is appropriate for an AI system to undergo a new conformity assessment if a change occurs that could affect the AI system's compliance with the AI Regulation or if the intended purpose of the AI system changes. In addition, in relation to AI systems that continue to learn (i.e. they automatically adapt how the functions are performed) after being placed on the market or put into service, rules must be laid down according to which changes to the algorithm and its performance that have been predetermined by the provider and assessed at the time of the conformity assessment should not constitute a substantial change (see Art. 43 (4) of the AI Regulation and Recital 66 of the AI Regulation).

This means that high-risk self-learning AI systems can continue to develop to the extent envisaged in the original conformity assessment procedure without further conformity assessment procedures. However, any changes beyond this would require recertification, which corresponds to the assumption of a "substantial change".[49]

VI. Extension of the concept of damage – data loss as damage (Art. 6 (1) lit. c) PLD)

1. A new element

In addition to the already known compensable damages, such as injury to life, limb and psychological damage (Art. 6 (1) lit. a) PLD) and the loss of or damage to property (Art. 6 (1) lit. b) PLD), the focus lies on the new damage category of data loss as damage in accordance with Art. 6 (1) lit. c) PLD.

Art. 6 (1) lit. c) PLD introduces a new element to the Product Liability Directive, according to which the loss or irretrievable damage of data that is not used for professional purposes is recognised as damage. The provision only applies to data used exclusively for private purposes. In order to avoid an excessive number of legal disputes, data already in mixed professional/private use no longer falls within the scope of the Directive.[50] With regard to compensation for damage to property, the scope of the Directive is broader in that no compensation is to be paid only for property used for professional purposes.[51]

The European Parliament's last draft still stipulated a threshold of EUR 1,000, which had to be reached in order to be able to claim damages to data at all. However, this threshold was not incorporated into the final version. Compensation for damage to data is intended to adequately protect consumers from the risks arising from the increasing digitalisation and networking of products. According to Art. 4 No. 6 PLD, data are data within the meaning of Article 2 No. 1 of Regulation (EU) 2022/868 of the European Parliament and of the Council. This defines data as any digital representation of actions, facts or information and any compilation of such actions, facts or information, including in the form of audio, visual or audiovisual material.

2. Considerable economic or personal value of data

Data can have a significant economic or personal value that can be impaired by a faulty product. For example, photos, videos, music, documents or other files stored on a smart-

43 See Blue Guide 2022, section 2.1 and the interpretation paper on the subject of "Significant modification of machinery" published by the BMAS on 9 April 2015 – IIIb5-39607-3 – in GMBl 2015, no. 10, pp. 183-186.
44 Recital 29 PLD.
45 See final draft 2022/0095(COD).
46 Mayr/Rauner/Schweiger ZfPC 2023, 2 (5).
47 See the comprehensive commentaries BeckOK Produktsicherheitsrecht/Hess, Art. 13 ProdSVO and NomosHK EU-Produktsicherheitsverordnung/Schucht/Wiebe, Art. 13 ProdSVO (both works currently in publication).
48 Mayrhofer RDi 2023, 20 (22 et seq).
49 Thiermann/Böck RDi 2022, 333 (336).
50 Recital 22 PLD.
51 As well as Art. 6 (1) lit. b) ii) PLD; in this respect, property used for mixed professional/private purposes is already covered.

phone, tablet or computer can be destroyed or damaged by a software error, a hacker attack or a hardware defect. Despite Art. 6 (1) lit. b) iii) PLD, according to which damage to items used for mixed private and business purposes is now also compensated, the loss of data used for business and even mixed professional/private purposes, which can regularly be of considerable value, is not eligible for compensation.[52]

However, compensation for the loss of or irretrievable damage to data must be distinguished from compensation for the unlawful disclosure of data or for breaches of data protection regulations, such as under the General Data Protection Regulation (EU) 2016/679 or the ePrivacy Directive 2002/58/EC.[53] These legal standards provide that data subjects have the right to an effective remedy and compensation if their data protection rights are violated, regardless of whether the violation has resulted in a personal data breach or not.[54]

3. Difficulties to properly calculate damages in case of loss of data

However, the question arises as to how to calculate damages in the event of data loss.[55] In the case of loss of data on a computer used for business purposes, German case law has used the impairment of business operations caused by the loss and the costs incurred by the injured party to reconstruct at least a small part of the data as the basis for estimating the value of interest.[56] Only the costs that could have been avoided by adequate data protection are taken into account. Since there is no "loss of business" in the case of purely private data and private data usually has no commercial value, the case law will first have to develop a casuistry for the calculation of damages. It would be desirable for the national legislator to provide guidance in this regard, e.g. in the explanatory memorandum to the law.

It should also be noted that the loss or damage of data does not automatically result in a material loss for the injured party if, for example, a backup copy of the data is available, or the data can be downloaded again, or if an economic operator temporarily restores or recreates unavailable data, e.g. in a virtual environment. In this context, the principle of contributory negligence (in Germany § 254 BGB) is particularly important. According to this principle, the liability of the economic operator causing the damage may be limited or excluded if the injured party has contributed to the damage through his own negligence, e.g. if it is reasonable to expect that certain digital files are regularly backed up to a second location.[57]

VII. Removal of the deductible

Another remarkable change in the PLD is the elimination of the so-called deductible. The "deductible" of ECU[58] 500 known from Art. 9 (2) of the Product Liability Directive (old version), according to which "minor damage" of up to EUR 500 was not compensated, has now been abolished without replacement. This means that economic operators are fully liable from the first cent of damage.

The original purpose of this lower limit was to prevent small claims, i.e. to reduce the burden on the courts.[59] However, as most consumer disputes are small claims, the EU Commission assumed that the previous deductible would excessively restrict consumer rights.[60] In this context, the EU Commission found that the old version of the Product Liability Directive was hardly applied in the member states. Instead, national law was used, which regularly does not provide for a threshold of EUR 500. This result contradicts the EU's objective of harmonising product liability law. The non-implementation of the "deductible" of ECU 500 provided for in Article 9 (1) lit. b) in France and Greece was declared contrary to the Directive. The ECJ argued that recourse to national law with the aim of diminishing the significance of Community law would ultimately impair its unity and effectiveness and was therefore not permissible.[61]

The removal of the deductible represents a considerable aggravation for economic operators. With regard to the rules on representative actions based on the EU Representative Actions Directive (EU) 2020/1828, i.e. actions brought by representative bodies to protect the collective interests of consumers, economic operators may now be confronted with a large number of actions, each of which relates to a relatively small claim for damages, but which can have a significant impact in total.[62]

VIII. Final consideration

Looking at the changes and expansions in European product liability already outlined in the first part of this article shows, on the one hand, that there will be a noticeable expansion of liability. On the other hand, it is to be expected that the new regulations will lead to difficult legal and factual problems in practice.

Firstly, it is clear that the new Product Liability Directive introduces a broader definition of products, which also includes intangible products such as software, digital services and digital manufacturing files. In practice, difficulties will mainly arise from the blurring of the boundaries with services, e.g. in connection with SaaS software or the provision of connected services. In the course of the transformation of the Product Liability Directive as amended into national law, it would be desirable for the national legislator to provide guidance on this.

Furthermore, the Directive considerably expands the circle of potential liability addressees. In addition to traditional

52 However, liability under fault-based national contractual and non-contractual liability laws remains possible in this context (see Müller InTeR 2024, 6 (9)).
53 Recital 20 PLD.
54 See Paal MMR 2020, 14 and NJW 2022, 3673 instead of many.
55 Kapoor PHi 2023, 72 (73); Kapoor/Klindt BB 2023, 67 (70).
56 BGH NJW 2009, 1066 Marg. 17 et seq.
57 Recital 20 PLD; Auer-Reinsdorff/Conrad, IT-R-HdB, § 16 Marg. 110.
58 ECU = European Currency Unit.
59 See on the development of the EU Commission's perception of the deductible Kapoor/Kapoor ProdHaftG § 11 ProdHaftG Marg. 1 et seq.
60 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of the Council Directive on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products (85/374/EEC), COM(2018)246, 6; Commission Staff Working Document – Evaluation of 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, SWD(2018)157(EN), 61.
61 EJC 25.4.2002 – C-52/00, Slg. 2002, I–3856, Rz. 26 et seq – Commission/France; EJC 25.4.2002 – C-154/00, Slg. 2002, I–3887 Rz. 22 et seq. – Commission/Greece.
62 Kapoor/Klindt BB 2023, 67 (71); Kapoor PHi 2023, 72 (77).

manufacturers, authorised representatives, fulfilment service providers and online platforms are now also considered liable. This extension is particularly relevant in the context of increasing online trade and the globalisation of supply chains. The economic operators concerned are therefore well advised to review their compliance systems and, if necessary, supplement them with the requirements of product compliance.

After all, the Product Liability Directive extends the definition of damage. From now on, the loss of private data is also considered damage, even without a de minimis threshold. In practice, the main problem here will be how to calculate the damage caused by the loss or destruction of data. The casuistry, which is currently in its infancy, will presumably have to develop further and develop concrete standards.

Overall, the changes presented show that the new EU Product Liability Directive will have a significant impact on the rules of the game for economic operators and consumers. The second part of the article will deal with other important aspects of this directive and provide in-depth insights into its implications. In particular, the areas of disclosure of evidence, the burden of proof and the breach of the principle of the existence of the state of the art in science and technology when placing a product on the market will be emphasised.

Zusammenfassung

Die neue europäische Produkthaftungsrichtlinie wird in Kürze in Kraft treten. Sie hat sich im Zuge der zunehmenden Sensibilität für Produktrisiken, insbesondere im Kontext der Digitalisierung von Produkten, evolutionär weiterentwickelt. Der vorliegende Beitrag beschäftigt sich hauptsächlich mit der Ausweitung des Haftungsregimes im Hinblick auf digitale Produkte, der Ausweitung des Haftungsadressatenkreises sowie der Erweiterung des Schadensbegriffs um Datenverluste und den Wegfall des Selbstbehalts. Ein zweiter Beitrag (erscheint in der zweiten Jahreshälfte 2024) analysiert die revolutionären Änderungen im Rahmen der Beweislastverteilung und der Offenlegungspflicht für Beweismittel sowie der Durchbrechung des Prinzips, dass das Einhalten des aktuellen Standes von Wissenschaft und Technik bei Inverkehrbringen eines Produkts zur Exkulpation des Herstellers führt.

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Damages Arising from Delayed Payments for Claims on Foreign Currencies in the Framework of Iranian Legal System

One of the significant issues in most of the long-term commercial contracts is the debtor's commitment to pay the debt on due date. There are specific regulations enacted in Iran in order to avoid the negative effects caused by the delayed payment of debts. On one hand, jurists of Sharia law argue that this type of damage is loss of profit damages and cannot be claimed. On the other hand, it is common sense between a majority of lawyers that delayed payment leads to devaluation of the money and must be compensated. Though delayed payment damages have been accepted according to Article 522 of Civil Procedure Code of Iran ("CCPI"), it has been debatable once the debt owed is not in local currency, i.e. Iranian Rial ("IRR"). In most of the cases presented to the Iranian courts, the claims for delayed payment damages based on foreign currency have been rejected. International Arbitration awards, however, have indicated other opinions. This study investigates whether under Iranian law it is possible to make claims for damages arising from delayed payments for foreign currencies.

I. Introduction

Based on Iranian laws, the creditor would be entitled to demand delayed payment penalty for the incurred damage resulting from the delay in debt settlement. It should be noted

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