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Next Generation EU Product Liability – For Digital and Other Products

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Abstract: The new Directive on Product Liability is hard to overestimate, as it is nothing less than a complete overhaul of the 1985 Product Liability Directive (PLD), which still lies at the heart of EU tort law. One focus of the reform act is the challenge posed by digital transformation. To accommodate the new category of digital devices, the concept of product is widened so as to include software and related services, and the strict *ex ante* perspective for the finding of product defect is attenuated to account for continued control of the manufacturer post-marketing. Further to broadening the scope of application, the protective perimeter of the Directive is expanded, namely to include data used for private purposes. The second focus of the reform act, of at least equal importance, are changes to the liability regime for products of any kind, regardless of their digital nature or elements. Thus, e-commerce intermediaries such as platforms are ushered into the scope of the Directive as new defendants, alongside manufacturers, importers, and distributors. With a view to quantum, the € 500 retention for property damage had to go, together with the authority of the Member States to impose a cap on liability under the Directive. Unfortunately, there was no time to revisit the foundations of product liability. Thus, the new Directive holds on to the consumer protection gospel of product liability and excludes commercial property from the scope of protection, even though there is no good reason to discriminate against business interests. As before, national law must and will step in to fill in the gaps in Union law, perpetuating the double-track liability systems that the 1985 Directive helped to create.

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I Product liability in the Golden Era

The Product Liability Directive was the first piece of legislation of the EU in the area of non-contractual liability. And it remained an outlier for a long time. It is only recently that new provisions were added, above all art 82 Data Protection Regulation.

A In the year 1985: product liability and the industrial society

The gestation of the original Product Liability Directive spanned over more than a decade. Internal deliberations within the European Commission date back to the late 1960s, and the first draft was published in 1976.¹ A revised draft followed in 1979.² Taken together, it took almost ten years of logrolling, persuasion, discussion, and deliberation until the Directive was passed and published in the Official Journal of the European Communities in 1985,³ and another three years before the delay set for transposition of the Directive by the Member States had expired.⁴

Such a lengthy period of time was needed because the draft of the proposed Directive was highly controversial.⁵ The most important battleground concerned the fundamental question of the proper nature of the new liability regime. Should it be based on fault, ie on negligence, or should it be strict? The 1970s were characterised by several political currents that exerted their influence on this field of law. One such current identified the post-war economy as one of industrial mass production of commodities. This mode of production was believed to put consumers at the mercy of powerful businesses. From these premises, it was concluded that the liability of the industrial manufacturer should be strict, not based on any form of negligence. This train of reasoning culminated in landmark decisions of the California

1 Communication of the Commission to the Council, Proposal for a Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1976] Official Journal of the European Union (OJ) C 241/9.

2 Amendment of the Proposal for a Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1979] OJ C 271/3.

3 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 [1985] OJ L 210/29.

4 Art 19 (1) Directive 85/374/EEC.

5 *D Fairgrieve/G Howells/P Møgelvang-Hansen/G Straetmans/D Verhoeven/P Machnikowski/A Jansen/R Schulze*, Product Liability Directive, in: P Machnikowski (ed), *European Product Liability* (2016) 17, 21f, 25f.

Supreme Court, led by Roger J Traynor, who became its chief justice.⁶ His most prominent opinions are his concurrence in the 1944 case of *Escola v Coca Cola Bottling Company of Fresno*,⁷ and his majority opinion, almost 20 years later, in *Greenman v Yuba Power Products, Inc.*⁸ In these opinions, Traynor developed product liability as a head of liability in its own right, separate from contractual liability for breach of warranty and traditional forms of tort liability for breach of a duty of care, ie negligence, in order to establish it as a new form of ‘absolute liability’.⁹ The major argument on which Traynor built his notion of strict liability for products was the idea of risk-spreading: Traynor argued that the harm caused by defective products bore heavily on the consumer, while the manufacturer could easily insure it, through either self- or market insurance, and add the costs of insurance to the product price. This way, the costs of product defects can be ‘distributed among the public as a cost of doing business’.¹⁰

On this view, product liability is not a sanction for wrongful behaviour but a risk spreading mechanism, much like market insurance bought by the injured party, together with the physical product. But the accident costs do not and will not remain with the manufacturer. Rather, they will be passed on to all consumers, ie to the public at large, in the form of higher prices. In essence, product liability works similarly to a no-fault scheme, but one that does not rely on other institutions such as private or public insurance carriers. Rather, the manufacturer assumes the role of an administrator of the no-fault scheme, which is financed through higher commodity prices.

B The history of the 1985 Directive

The executive within the Commission who was responsible for the project of drafting a product liability directive, Hans-Claudius Taschner, was deeply influenced by Traynor and the cathedral of case law that had developed in the aftermath of *Escola* and *Greenman*. Taschner fought heavily for Recital 2 of the 1985 Directive, which postulates ‘liability without fault on the part of the producer’ as ‘the sole

⁶ Cf JW Wade, Chief Justice Traynor and Strict Tort Liability for Products (1974) 2 Hofstra Law Review (Hofstra L Rev) 455; for a full account of the development of US-American product liability law cf MA Geistfeld, Products Liability Law (2nd edn 2022) 23ff.

⁷ 24 California Reports, Second Series (Cal 2d) 453 = 150 Pacific Reporter, Second Series (P 2d) 436 (1944).

⁸ 59 Cal 2d 377 = 377 P 2d 168 (1962).

⁹ 24 Cal 2d 453, 462 = 150 P 2d 436, 440 (1944).

¹⁰ 24 Cal 2d 453, 462 = 150 P 2d 436, 441 (1944).

means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production'. Recital 3 then restricts this normative statement to goods 'which have been industrially produced'. Industrialisation, mass production, protection of the consumer, tort liability as a risk-spreading mechanism – these concepts and ideas are characteristic of the decades following World War II, characterised as the Golden Age of Capitalism, at least for Western nations, including the Member States of the EEC.¹¹ During the legislative process in Brussels, the concept of strict liability was heavily contested. The standoff between the Commission, determined to defend the interests of consumers on the one hand, and industry, warning against an opening of the floodgates, on the other, resulted in a compromise. Industry had to accept that the Directive was sold on the ticket of strict liability. This was counterbalanced by elements that were associated with a negligence analysis and thus favoured the position of potential defendants, such as the definition of defect with a view to the situation *ex ante* in art 6 (1) (c) and (2), the acceptance of the so-called development risk defence in art 7 (e), but also restrictions on the scope of compensation, such as a retention to be applied to property damage under art 9 (b), and the option given to Member States to impose an overall cap on damages pursuant to art 16 PLD 1985.

In spite of all this water in the wine, Taschner never tired of defending the liability regime of 'his' directive as being one of strict liability and fiercely rejected the approach to integrate product liability into a broader concept of liability for wrongdoing, including fault or negligence.¹² Even decades after the enactment of the Product Liability Directive, Taschner explicitly embraced the 'insurance solution'¹³ as the answer of the legal system to harm caused by defective products: 'The Commission developed ... the solution whereby the economic loss suffered by the victim, his damage, is transferred to the producer, at least provisionally. The producer insures himself and passes on the cost of the insurance

11 Cf eg, SA Marglin/JB Schor (eds), *The Golden Age of Capitalism: Reinterpreting the Postwar Experience* (1992); World Economic and Social Survey 2017: Reflecting on seventy years of development policy analysis, E/2017/50/Rev 1 ST/ESA/365, 24ff; from the perspective of a German legal historian F Wieacker, *Industriegesellschaft und Privatrechtsordnung* (1974) 56f.

12 HC Taschner, *Harmonization of Products Liability Law in the European Community* (1999) 34 *Texas International Law Journal* (Tex Int'l L J) 21, 28f; HC Taschner, *Basic Problems in a Comparative Perspective*, in: D Fairgrieve (ed), *Product Liability in Comparative Perspective* (2005) 155, 161; in German: HC Taschner, *Die künftige Produzentenhaftung in Deutschland* (1986) *Neue Juristische Wochenschrift* (NJW) 611f; HC Taschner, *Produkthaftung – Noch einmal: Verschuldenshaftung oder vom Verschulden unabhängige Haftung?* (2012) 3 *Zeitschrift für europäisches Privatrecht* (ZEuP) 560.

13 Taschner (1999) 34 *Texas Int'l L J* 21, 28f.

premiums to all users of his products'.¹⁴ This statement echoes Traynor's reasoning all too clearly.¹⁵

II The legislative process leading to the new Directive

A The digital transformation as trigger

The project of reforming the Product Liability Directive lingered in the background for quite some years. Under art 21 of the 1985 Directive, the Commission was held to evaluate the instrument and publish a report about its findings every five years.¹⁶ From these reports, no impetus for reform emerged, at least not one that would have been serious enough to lead to action.

This state of inertia changed only with the advent of digital products. When the Commission headed by Ursula von der Leyen took over in 2019, the digital economy was named as one of the main policy areas for EU action, on the same level as environmental protection and the fight against global warming. Regarding digitalisation, the goal of the Commission was to make Europe 'fit for the digital age'.¹⁷ From the outset, the fitness programme perceived by the Commission not only included investments in research and innovation but also 'designing rules to match'.¹⁸

¹⁴ Cf *ibid.*

¹⁵ For a different account of the gestation and normative background of the 1985 Directive, *P Machnikowski*, Conclusions, in: *idem* (ed), *European Product Liability* (2016) 669, 680.

¹⁶ Cf Green Paper – Liability for defective products, COM(1999) 396 final; Report from the Commission on the Application of Directive 85/374 on Liability for Defective Products, COM(2000) 893 final; Third report on the application of Council Directive, COM(2006) 496 final and Fourth report on the application of Council Directive 85/374/EEC, COM(2011) 547 final; Report on the application of Council Directive 85/374/EEC, COM(2018) 246 final; accompanied by Commission Staff Working Paper, Evaluation of the Product Liability Directive, SWD(2018) 157 final; cf also *Fairgrieve/Howells/Møgelvang-Hansen/Straetmans/Verhoeven/Machnikowski/Janssen/Schulze* (fn 5) 17, 23ff; *D Fairgrieve/R Goldberg*, *Product Liability* (2020) para 7.38ff.

¹⁷ Communication Shaping Europe's digital future COM(2020) 5, 8; available at <https://commission.europa.eu/document/download/84c05739-547a-4b86-9564-76e834dc7a49_en?filename=communication-shaping-europes-digital-future-feb2020_en.pdf>; Political Guidelines of the Commission 2019–2024 COM(2019) 4, 13f available at <https://commission.europa.eu/document/download/063d44e9-04ed-4033-acf9-639ech187e87_en?filename=political-guidelines-next-commission_en.pdf>.

¹⁸ Commission priorities for 2019–2024 available at <https://european-union.europa.eu/priorities-and-actions/eu-priorities/european-union-priorities-2019-2024_en>.

B Manufacturer vs operator liability

This agenda did not translate easily into a reform of the Product Liability Directive, however. On the contrary, for quite some time the development pointed into another direction, namely the introduction of an entirely new legal instrument at the European level for the purpose of harmonising existing national liability systems, not with a focus on manufacturers but on operators, ie users. In October 2020, the EU Parliament submitted a proposal for a regulation on strict liability for Artificial Intelligence.¹⁹ In contrast to product liability law, the Parliament's proposal primarily targeted the operator of AI systems, imposing strict liability on the person in control of their operation.²⁰ After some controversial discussion within the Commission between the Directorate General for Justice and Consumer Protection on one end, and the Directorate General for the Internal Market on the other, the Commission finally opted for an update of the legal rules on manufacturers' liability, and against the introduction of a new form of operators' liability. As a practical matter, the intention was to reopen the Product Liability Directive in order to, yes, make it 'fit for the digital age'. As will be shown below, this is precisely what the new Directive does.

C Reducing two to one

Before delving into the liability rules for digital products, it should be noted that operators' liability is not altogether dead. At the same time as the proposal for an overhaul of the Product Liability Directive was published, the Commission also tabled a proposal for an entirely new Directive on AI Liability.²¹ While this proposal again targeted the manufacturer ('providers'), it was also aimed at the users of AI systems. In doing so, the draft Directive on AI Liability did not aim high, as it merely suggested to introduce rules on access to evidence and presumptions regarding fault and causation into the national tort law. The AI Liability Directive neither created any new causes of action nor did it aim to harmonise the bases of liability that can be found in national law with a view to the production or operation of artifi-

¹⁹ European Parliament, Regulation of Civil Liability for Artificial Intelligence of 20 October 2020, P9_TA-PROV(2020)0276; cf also the report with recommendations to the Commission on a civil liability regime for artificial intelligence, rapporteur Axel Voss, 5 October 2020, A9-0178/2020. For a critical appraisal, cf *G Wagner*, Liability for Artificial Intelligence: A Proposal by the European Parliament, in: H Eidenmüller/G Wagner, Law by Algorithm (2021) 127ff.

²⁰ Art 3 (d), (e), (f), art 4 of the draft Regulation submitted by the Parliament (fn 19).

²¹ Proposal for an AI Liability Directive COM(2022) 496 final; review at *G Wagner*, Liability Rules for the Digital Age (2022) 13 *Journal of European Tort Law (JETL)* 191, 220ff.

cially intelligent digital systems. After the simultaneous presentation of the two proposals on product liability and AI liability, respectively, the legislative process quickly focused on the reform of the Product Liability Directive that was happily completed before the end of the term of the von der Leyen Commission in mid-2024. Whether the AI Liability Directive will ever see the light of day remains to be seen. It is difficult to make out an urgent case for it.²²

D Rapid speed, no pushback

In light of the long gestation of the 1985 Directive that spanned over a decade and included hard-fought battles over many issues, the 2024 revision sailed through Brussels waters quickly, and more than smoothly. A little more than one year after the Commission had unveiled its proposal in September 2022, the three parties who together represent the European lawmaker, Council, Parliament, and Commission, reached agreement on the new Directive at the end of 2023, confirmed in January 2024.²³ In March 2024, the European Parliament adopted the so-called trilogue version of the Directive at first reading.²⁴ After some fine-tuning of the different language versions, the Directive is expected to receive definite approval by the EU institutions, Parliament and Council, late in 2024, ie after the European elections of June 2024. Due to this tight schedule, there was little to no time for discussion, let alone academic input.²⁵ What is hard to explain is why there was no opposition from commercial interests. It remains a mystery why industry let go of hard-won compromises such as the option to limit liability with the help of a cap on damages so easily, with no apparent resistance. One explanation may be that the fears of an opening of the floodgates by the 1985 Directive had turned out to be unwarranted. But another reason comes to mind: The days of the Golden Era are over, and the European manufacturing sector has diminished significantly since then. Back in the late 1970s, European businesses still had a strong position in markets such as consumer electronics, tools, toys, and, to some extent, even garments. Today, these goods are imported from China and other non-EU countries. To a large degree, therefore, the product liability rules of today target off-shore manufacturers. It is understandable that European industry associations felt little inclination to defend them.

²² Wagner (2022) 13 JETL 191, 240.

²³ Cf Council Document 2022/0302(COD), 24.1.2024.

²⁴ European Parliament, 12.3.2024, P9_TA(2024)0132.

²⁵ See however *European Law Institute* (hereafter ELI), Feedback on the European Commission's Proposal for a Revised Product Liability Directive (2022) (hereafter ELI Feedback on Proposal for Revised PLD); Wagner (2022) 13 JETL 191, 199ff.

III The normative principles underlying the new Directive

A Liability follows control

The new Product Liability Directive is anything but an ad-hoc overhaul of the existing instrument, adding a few things here and there, but rather a new legal framework built on coherent principles. At the most fundamental level, it is based on the normative assumption that liability rules must follow the shifts in control over risks that occur in the real world.²⁶

Digital products challenge existing liability rules not because the technology is new but because digitalisation diminishes the role of the user of a technological unit – be it a machine, a vehicle or other appliance – and shifts much control to the manufacturer. Self-driving cars are a particularly vivid example. Traditionally, the behaviour of a car is within the control of its user, the driver, who determines its speed and direction of movement. With the advent of autonomous driving technology, the driver will transform into a passenger, and control will shift to the manufacturer who designed and marketed the relevant software. In such a scenario, liability rules must follow suit and zoom in on the party that controls the risk in question, ie the manufacturer.²⁷ The manufacturer of AI technology and other, less advanced software is the entity that decides on the safety features and the behavioural patterns of the relevant product and, in the course of doing so, weighs the benefits and costs of one option against the other. It is essential that manufacturers face the right incentives when making these decisions. Product liability serves as the mechanism to ensure that design choices affecting the safety features of a product reflect the full costs and benefits of product usage. Also, for digital products, it is essential to bring home the full costs of accidents to the party who determined not only its safety features but also its overall behaviour, ie the manufacturer. For these reasons, the Commission made the right choice when it settled on reforming the Product Liability Directive, rather than drafting new legislation that would have targeted other parties, namely users.

²⁶ As to the following, cf *G Wagner*, Robot Liability, in: S Lohsse/R Schulze/D Staudenmayer (eds), *Liability for Artificial Intelligence and the Internet of Things* (2019) 27, 37f, reprinted at: *H Eidenmüller/Wagner*, *Law by Algorithm* (2021) 75, 84f; *G Wagner* (fn 19) 140; *Wagner* (2022) 13 JETL 191, 199.

²⁷ *Wagner* (2022) 13 JETL 191, 196f.

B Consumer protection – still the loadstar of product liability?

As has been explained above, consumer protection was the loadstar of the framers of the 1985 Directive and limited the scope of protection accordingly, notwithstanding the fact that the legal instrument itself created (strict) liability not for harm caused by products, but for harm caused by *defective* products, and the notion of defect incorporated essential parts of the negligence analysis.²⁸ Today, around the world and also in the Member States of the EU, product liability is established as a subdiscipline of tort law, anything but limited to consumers, but available to businesses as well. For reasons that will become clear in the course of this essay, one would have hoped that the framers of the new Directive had shaken off the shackles of its precursor and established European product liability as a special field of non-contractual liability that concerned the responsibility of manufacturers (and related parties) for harm caused by defective products, regardless of whether the victim is a consumer, a professional, or a business enterprise.²⁹

And in fact, Recitals 2 and 3 of the old Directive that allude to the characteristics of the Golden Era – mass production, consumer protection, liability as an insurance mechanism – and that Taschner held so dearly, were deleted. Together with the elimination of Recitals 2 and 3, the concept of consumer protection was scaled down – but not eliminated. The suggestion, submitted during the legislative process, to abandon consumer protection as a loadstar of product liability altogether and to include businesses and professionals in the scope of protection of the new Directive,³⁰ was not followed. Article 1 (2) PLD 2024 proudly proclaims the principle of consumer protection, already contained in Recital 1 and repeated more than a dozen times throughout the Directive, namely that the ‘objective of this Directive is to contribute to the proper functioning of the internal market while ensuring a high level of protection of consumers and other natural persons’. In comparison to the 1985 Directive, two things have changed: One is that the concern for consumer protection is no longer the only or the primary goal. Rather, the Directive is about the harmonisation of national law for the benefit of the internal market, and consumer protection only influences the choices made during such effort. This is perfectly in line with the guardrails provided by art 117 (1) and (3) Treaty on the Functioning of

²⁸ Cf *Fairgrieve/Goldberg* (fn 16) para 10.24f; in German: *G Wagner* in: Münchener Kommentar zum BGB (hereafter MünchKomm) (9th edn 2024) § 3 Prod-HaftG para 3; for a thorough discussion (and rejection) of risk-spreading as the normative basis of the Product Liability Directive, *J-S Borghetti*, *La responsabilité du fait des produits. Étude de droit comparé* (2004) 603ff.

²⁹ *Wagner* (2022) 13 JETL 191, 209.

³⁰ *Wagner* (2022) 13 JETL 191, 209.

the European Union (TFEU). In other contexts as well, consumer protection is a valid policy goal but by far not the only and often not the most important one.

Secondly, the framers added a second category of people deserving the protection of the Directive, ie ‘other natural persons’.³¹ This is intended to clarify that professionals and businesspeople have the same rights under the Directive as consumers proper if they sustained bodily harm, ie in cases of personal injury.³² Thus, claims for personal injury may be brought by anyone, consumers, professionals and business people alike. If the product causes damage to property, however, the liability regime remains divided: Consumers may collect under the Directive, while businesspeople need to rely on national law. At least art 6 (1)(b)(iii) PLD 2024 narrows the scope of the exemption somewhat by excluding property only if it is used ‘exclusively’ for professional purposes.

This ambivalence shows the weakness of the consumer protection rationale. The exemption for damage to commercial property not only discriminates against the owners of such assets, it also brings national law back into play. For the purpose of protecting commercial property, which cannot be left in the wild, national law must step in and fill the void. The result is a bifurcated liability system, with one part dominated by the EU Directive, and the other by national law. Unfortunate, but the state of play for the time being.

IV New liability rules for digital products

The following discussion builds on an overview of the 2022 proposal for a new Product Liability Directive provided earlier.³³ It will be limited to three innovations that pay tribute to the digital transformation: (1) The concept of product that defines the scope of application of the Directive, which was broadened so as to include software and related services, (2) the scope of protection that was widened by accepting data as protected interests under the Directive, and (3) the notion of defect that continues to represent the attribution mechanism on which the liability of the manufacturer is based was stretched beyond the point in time when the product in question was placed on the market. The entirely new rules on disclosure of evidence (art 9 PLD) and presumptions regarding defectiveness and causation (art 10 PLD) are equally

³¹ Cf eg, art 3 Proposal for a Directive of the European Parliament and of the Council on liability for defective products – Letter sent to the European Parliament, 2022/0302(COD) 24.1.2024 (hereafter: Proposal on Product Liability 2024), <<https://data.consilium.europa.eu/doc/document/ST-5809-2024-INIT/en/pdf>>.

³² Cf ELI Feedback on Proposal for Revised PLD (fn 25) 13.

³³ *Wagner* (2022) 13 JETL 191, 199ff.

important from a practical point of view, but do not define the elements of liability. They are the subject of separate analysis.³⁴

A Digital products and related services

1 Extension to software

Article 2 of the current Directive on product liability restricts its scope of application to ‘all movables’, adding that electricity shall be included. This limitation raised serious doubts as to the classification of software. For a long time, commentators had settled on the view that, while the computer code itself is intangible and may therefore remain outside of art 2 PLD 1985, the storage mediums used to transport and disseminate software, such as floppy disks, CDs, DVDs, and USB-sticks surely qualify as movables and therefore pave the way towards an application of the Directive.³⁵ This argument was never convincing³⁶ and became irrelevant after the previously mentioned physical storage mediums simply disappeared from the markets. If software is downloaded from the internet, there is no physical asset on which the software could piggyback into the PLD. The piggyback approach, that looks to the storage medium rather than to the substance of what was stored, was rejected by the CJEU in its judgment in the *Krone* case, where the Court held that information does not qualify as a product even if this information is ‘stored’ in a newspaper that is certainly a tangible thing and therefore within the scope of art 2.³⁷

The focus on the software as incorporeal computer code leads to the question whether the concept of movable strictly requires that the product is tangible, a question which is much debated in the literature.³⁸ The fact that one type of intangible good, namely electricity, is mentioned explicitly may suggest *e contrario* that

³⁴ See the contribution of Zoé Jacquemin, in this volume, 126 ff; cf also Wagner (2022) 13 JETL 191, 216 ff.

³⁵ Fairgrieve/Howells/Møgelvang-Hansen/Straetmans/Verhoeven/Machnikowski/Janssen/Schulze (fn 5) 17, 47.

³⁶ Fairgrieve/Goldberg (fn 16) para 9.102; G Wagner, Software as a Product, in: S Lohsse/R Schulze/D Staudenmayer (eds), Smart Products (2022) 157, 164f.

³⁷ CJEU 10.6.2021, C-65/20, VI v *Krone-Verlag*, ECLI:EU:C:2021:471, para 13 ff; cf also Wagner (fn 36) 157, 158, 171f; as to the law before the judgment in *Krone*, Fairgrieve/Goldberg (fn 16) para 9.89 ff.

³⁸ Borghetti (fn 28) 484f; Fairgrieve/Goldberg (fn 16) para 9.77 ff; Fairgrieve/Howells/Møgelvang-Hansen/Straetmans/Verhoeven/Machnikowski/Janssen/Schulze (fn 5) 17, 40f; Wagner (fn 36) 157, 157; D Wuyts, The Product Liability Directive – More than two Decades of Defective Products in Europe (2014) 5 JETL 1, 3ff.

all other intangible goods are excluded.³⁹ As always, it is also possible to draw the reverse conclusion and argue that electricity is a placeholder for other intangible ‘products’ which shall be brought under the European regime.⁴⁰

While much can be said in favour of including software in the scope of art 2 PLD 1985, the new piece of legislation renders the question moot. Article 4 (1) PLD 2024 states explicitly that the notion of product not only includes electricity, but also digital manufacturing files and software. It is irrelevant whether the software was distributed via a tangible storage device or downloaded from the internet, or even offered in the form of a subscription, ie as a service.⁴¹ Even if the computer programme remains within the sphere of the manufacturer and is simply applied to data supplied by the user, the Directive remains applicable, given that such application counts as placing the product on the market or putting it into service.⁴² It is the computer code itself, which is of a non-physical nature, that is included in the scope of the Directive. Even bespoke software that was programmed according to specifications at the request of another cannot be excluded, as suggested in the literature prior to the 2024 reform.⁴³

While the definition of product in the new Directive seems to resolve the issue as to the classification of software, doubts remain. Recital 13 states that the source code of software, but also the content of digital files, such as media files and ebooks, do not qualify as products as they are nothing more than information. It is not quite clear what this reservation is supposed to mean. As all software runs on source codes, the exclusion cannot apply where software – including the source code – is distributed to the public. Perhaps the best way to make sense of the exclusion is to restrict it to what the Commission called in its own proposal ‘pure information’.⁴⁴ This leads back to the *Krone* decision of the CJEU, where it was held that the information supplied in a newspaper article, ie erroneous medical advice, was outside the scope of product liability. Even under the new Directive, it should remain there. So, if an ebook advising readers on medical issues contains the same erroneous advice as in *Krone*, or a smartphone app provides wrongful advice as to edible mushrooms,⁴⁵ this would not be a case for art 4 (1) PLD 2024. What Recital 13 means

39 *Fairgrieve/Howells/Møgelvang-Hansen/Straetmans/Verhoeven/Machnikowski/Janssen/Schulze* (fn 5) 17, 41; Wuyts (2014) 5 JETL, 1, 4.

40 *Wagner* (fn 36) 157, 158, 170.

41 ELI Feedback on Proposal for Revised PLD (fn 25) 9f.

42 CJEU 10.5.2001, C-203/99, *Henning Veddfald v Århus Amtskommun*, ECLI:EU:C:2001:258, para 14ff.

43 *Fairgrieve/Goldberg* (fn 16) para 9.103; *Wagner* (fn 36) 157, 177f.

44 Proposal on Products Liability COM(2022) 495, Recital 12.

45 Cf the US cases of *Winter v GP Putnam's Sons*, 938 Federal Reporter, Second Series (F 2d) 1033, 1034ff (9th Cir 1991); *Birmingham v Fodor's Travel Publ'ns, Inc*, 833 P 2d 70, 78f (Haw 1992); *Smith v*

when it refers to the ‘content of digital files’ is the meaning of the information stored within these files.⁴⁶

2 Exemption of open source software

But not all software is subject to the product liability regime of the new Directive. Article 2 (2) PLD 2024 carves out an exception for open source software. Provided that such software was developed and supplied outside the scope of a commercial activity, the Directive does not apply at all (Recital 14). This certainly protects so-called nerds who, in their leisure time, contribute to open source software projects. Business entities who sell open source software in ready-made packages to third parties for profit would not come within the purview of the exception, ie they would remain subject to product liability, as Recital 15 confirms. It is essential to realise that the responsibility of the business entity distributing open source software for profit is not restricted to those parts of the software package that are proprietary, but extends to the open source part as well. The privilege of art 2 (2) PLD applies to private open source software developers, ie to a particular group of people, not to open source software, as a special type of product.

This rationale notwithstanding, it remains unclear why a carve-out to the general scope of the Directive was needed at all. After all, parties who distribute products outside of a commercial activity are privileged anyway, as the definition of ‘making available on the market’ in art 4 (7) PLD 2024 is restricted to commercial activities. Without any explanation, the requirement of commercial purpose is missing from the definition of ‘placing on the market’ in art 4 (8) PLD to which the exemption of art 11 (1) (a) PLD 2024 refers. If these definitions were set straight, an exemption for open source software would not be needed at all.

3 Inclusion of service providers

The treatment of providers of related services under the PLD 2024 confirms the framers’ strong commitment to attach responsibility to those actors who control the risk in question – within the unavoidable legal and political constraints. In the present context, the constraint is that product liability must be limited to, yes: products!

Linn, 563 Atlantic Reporter, Second Series (A 2d) 123, 126 (Pa Super Ct 1989); *Jones v J.B. Lippincott Co.*, 694 Federal Supplement (F Supp) 1216 (D Md 1988).

⁴⁶ For discussion, cf *Fairgrieve/Goldberg* (fn 16) para 9.89 ff.

This excludes application of the Directive's liability rules to services at large (Recital 17). Given that European countries are moving towards 'service economies', the restriction of the Directive to products is a serious one. The project of supplementing the Product Liability Directive by a sister Directive on liability for services may be worth coming back to.⁴⁷ The fundamental question here is whether the concept of 'defect' can be transposed to services and serve as a basis for liability there, too.

However, the new Directive aims to include so-called 'related services'. These are of particular relevance for digital products, as such devices increasingly rely on services that are integrated into or connected with them and are essential for their operation. The definition of related service in art 4 (3) PLD 2024 reflects this as a service is related enough if, in its absence, the product would not be capable of performing 'one or more of its functions'. Another requirement, mentioned not in art 4 (3) PLD 2024 but in Recital 17, is that the 'related service' affects the safety of the product in question, as product liability is about deficient safety features, not about low performance more generally. However, to the extent that the mere default, ie the non-performance, of a product causes harm to life, health, or property, it must also be classified as unsafe, as art 7 (2) (i) confirms. Examples of related services mentioned in the Directive include traffic data fed into the navigation system of a vehicle, health monitoring systems that track the user's health data, and smart home appliances that keep apartments warm and safe (again, Recital 17). The services provided by internet intermediaries, such as access providers and hosts, are explicitly excluded from product liability by Recital 17. Thus, the liability shields of arts 4–10 Digital Services Act⁴⁸ do not interfere with the liability rules of the PLD. What is not mentioned in the Recitals is the potential interplay between the expansion of the notion of product to software on the one hand, and the inclusion of related services on the other. Given that even stand-alone software qualifies as a product, services that are connected 'only' to software come within the ambit of product liability law. It will be interesting to see how far this will go.

Services that are essential to the safety of the product raise two questions that are both addressed in the new Directive: (1) Can the service provider be held liable for any defects in its services? (2) Is the manufacturer of the product responsible where the physical product itself is flawless, but a related service was defective and caused the malfunction or other failure of the device? The first question, ie the liability of the service provider, is settled in art 8 (1) (b) PLD 2024, which deals with

⁴⁷ *Wagner*, Robot Liability (fn 26) 27, 36f, reprinted at: *H Eidenmüller/G Wagner*, Law by Algorithm (2021) 75, 83; *Wagner* (2022) 13 JETL 191, 202f.

⁴⁸ Regulation (EU) 2022/2065 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1; *M Eifert/A Metzger/H Schweitzer/G Wagner*, Taming the Giants: The DMA/DSA Package (2021) 58 Common Market Law Review (CML Rev) 987, 1005ff.

manufacturers of components. A component manufacturer is liable for any defects in its component, given that (a) the component was integrated into or interconnected with another product, (b) the component manufacturer controlled this process of integration or interconnection, and (c) the component rendered the aggregate product defective. This means that service providers are protected against liability if product manufacturers or users integrate or connect to their services without the consent of the provider. No control, no liability. The same principle governs the responsibility of the manufacturer of the device which benefits from the related service. Under the PLD, the manufacturer of the end-product, ie the product that reaches the consumer market, is responsible for any defects, including those which are caused exclusively by deficient components (art 3 (1) PLD 1985, art 8 (1) (b) PLD 2024). Contrary to the 1985 Directive, the new Directive says explicitly, in its art 8 (1) (b), that the liability of the manufacturer of the finished product also covers damage caused by a defective component, provided, however, that the component was ‘integrated into or interconnected with, a product within that manufacturer’s control’. This requirement that the connection between the component and the finished product was established with the knowledge and consent of the manufacturer of the finished product is particularly relevant with a view to related services. While it is hardly conceivable that the steering wheel of a motor car is built into the vehicle without the consent of the manufacturer of the finished product (often called Original Equipment Manufacturer – OEM), it is much more realistic that services ‘connect themselves’ to the vehicle, or are connected by the owner, without the consent of the OEM. In this context, it is important to keep an eye on the definition of product defect in art 7 and the exemptions set out in art 11 PLD 2024. While the finding of defectiveness, in general, remains fixed to the time of marketing, as epitomised by art 7 (3) and art 11 (1) (c), art 11 (2) (a) PLD 2024 excludes reliance on the exemption of art 11 (1) (c) where the defectiveness of the finished product is caused by ‘a related service’, provided only that this service was ‘within the manufacturer’s control’. Again, the Directive follows the principle that liability requires control over the risk in question.

B Protected interests: data

Legal aesthetes will appreciate the symmetry of the new Directive which not only expands its scope of application to include digital assets, ie software, but broadens its scope of protection accordingly, ie to include data. Article 6 (1) (c) PLD 2024 includes the destruction or corruption of data within the types of damage compensable under the Directive. This is an important move, as digital assets are recognised as private property deserving the same protection against harm – destruction or

corruption – as the destruction of or damage to tangible items of property that were the exclusive focus of art 9 (b) PLD 1985. With that, the European lawmakers answer a problem that is heavily contested in some Member States, such as Germany.⁴⁹ However, the recognition of data as property in digital form remains limited to private data, more precisely: to data that are ‘not used for professional purposes’. Files containing personal photographs from holidays, weddings, and the like, come to mind, but also ebooks and songs that were purchased in the market. The difference in language between art 6 (1) (c) and art 6 (1) (b) (iii) PLD 2024 suggests that data must be used exclusively for private purposes if they are to fall within the scope of the Directive. Thus, data that serve mixed purposes, private and professional, are not protected.

In limiting the scope of protection to private data in the sense just described, the 2024 PLD follows the path of its predecessor in limiting the scope of protection of European product liability to private assets. This is one of the rather unholy consequences of the focus of the 1985 Directive on ‘consumer protection’.⁵⁰ While the inclusion of data in the scope of protection, even if limited to privately used data is a major step on a doctrinal level, it remains of very limited practical import.⁵¹ The corruption or destruction of such data will rarely cause any loss that can be redressed under the new Directive. Where the data can easily be restored from other storage devices, no harm is sustained. Where this is not possible, a loss is caused, but it is non-pecuniary in nature. As such, it remains outside the scope of the Directive.⁵²

C Product defect: a concept stretched over time

The concept of defect is the cornerstone of product liability, as it carries the full burden of attributing harm caused by the product to the manufacturer.⁵³ Under art 6 (1) (c), (2) PLD 1985, the requirement of defect is clearly tied to the date of marketing, ie the time when the product left the sphere of the manufacturer and was put into circulation. This is confirmed by the development-risk defence of art 7 (e) PLD 1985, which allows the manufacturer to exonerate itself by establishing that

⁴⁹ MünchKomm/Wagner (fn 28) § 823 para 285ff; *T Riehm*, *Versicherungsrecht* (VersR) 2019, 714, 722f; cf also CJEU 3.7.2012, C–128/11, *UsedSoft GmbH v Oracle International Corp*, ECLI:EU:C:2012:407, para 46ff.

⁵⁰ MünchKomm/Wagner (fn 28) § 823 para 287.

⁵¹ *Wagner* (2022) 13 JETL 191, 211.

⁵² Cf *ibid*.

⁵³ *Geistfeld* (fn 6) 69ff; *MA Geistfeld*, *Principles of Products Liability* (3rd edn 2020) 29ff, 69ff.

the state of scientific and technical knowledge at the time when the product was put into circulation did not allow the discovery of the defect. In the *Veedfald* case, the CJEU extended the concept of putting a product into circulation to situations where it had not been sold on the market but used for the purpose of rendering a service vis-à-vis the consumer within the sphere of the manufacturer.⁵⁴ But even here, liability was contingent on the existence of a defect at the time that the manufacturer had exposed third parties to the product.

The requirement that the defect must be found at the time when the product is placed on the market or used for supplying a service is built on the implicit assumption that the manufacturer is able to control its features as long as it remains within its sphere of control. Vice versa, products that have already been marketed may be rendered defective for all sorts of reasons beyond the control of the manufacturer. The product may have been damaged during transport, or abused by its user or third parties, or neglected by its owner. Further, products do not last indefinitely but are subject to wear and tear – without being defective for this reason alone. Again, liability follows control – the manufacturer is responsible for any defects that arise within their sphere of control – but not beyond.

This assumption, ie that products leave the sphere of control of the manufacturer once they are put into circulation, is no longer true. Digital technology enables manufacturers to exert control over products that have been marketed already and are now in the field. With the help of wireless networks, manufacturers can interfere with a product, modify its software and, in so doing, change the safety features of ‘their’ products even post-marketing. It is obvious that this change in technology must drag the concept of defect along.

Article 7 of the new Directive does exactly this, ie it adapts the requirements of product defect to the new technological environment that allows manufacturer control even after the product was put into circulation. Article 7 (2) (e) PLD 2024 shifts the requirement of product defect to the moment ‘when the product left the control of the manufacturer’, provided that the latter retained control over the product after initial placement on the market. The exemptions set out in art 11 PLD 2024 follow suit, as the manufacturer is barred from exonerating itself under art 11 (1) (c) PLD 2024 where it retained control over the product even after it was put into circulation. In particular, the manufacturer remains liable for any defects in software updates or upgrades that are supplied post-marketing, art 11 (2) (b) PLD.

A critical issue is whether the manufacturer may even be under a duty to provide such updates and upgrades of software after the time that the product was put into circulation. Article 11 (2) (c) PLD clearly states that a manufacturer cannot ex-

54 C-203/99 *Henning Veedfald*, para 14 ff.

onerate itself where the defectiveness of the product is due to ‘a lack of software updates or upgrades necessary to maintain safety’. Thus, if the manufacturer fails to provide the necessary updates, it cannot point to the fact that the product was safe enough at the earlier time when it was put into circulation.⁵⁵ This can only be read as an implied duty to provide updates, and it is a mystery why, during the legislative process, a sentence was added to Recital 51 which provides that: ‘This Directive does not impose any obligation to provide software updates or upgrades for a product’. The opposite is true, at least if one equates the threat of liability for breach of duty with the creation of such duty. Of course, consumers cannot sue manufacturers, based on the Product Liability Directive, with the aim not to collect damages but to obtain a software update. Such claims for specific performance can only be based on contract, eg on arts 7 (d) and 8 (2) Directive 2019/770 on certain aspects concerning contracts for the supply of digital content.⁵⁶

Article 11 (2) (c) PLD 2024 is particularly remarkable as the European product liability regime under the 1985 Directive failed to impose any duties post-marketing, such as the obligations to monitor the product in its daily use, to collect and review customer complaints about harm caused by the product, and to analyse new scientific and technical information.⁵⁷ Further, the 1985 Directive did not require the manufacturer to act upon such information, eg by warning users against product risks, or by executing a product recall. In the years following the enactment of the Directive, the field of product safety developed rapidly, with all the above-mentioned duties imposed on the manufacturer.⁵⁸ It is essential to note that the new Directive on product liability does not incorporate the far-ranging duties of post-marketing surveillance known from product safety law. The only exceptions are the duty to provide software updates under art 11 (2) (c) PLD 2024, together with the acknowledgment that the existence of a product recall ordered by the competent authority must be taken into account in assessing the defectiveness of a product (art 7 (2) (g)).

⁵⁵ *Wagner* (2022) 13 JETL 191, 206.

⁵⁶ [2019] OJ L 136/1; cf also *Wagner* (2022) 13 JETL 191, 207.

⁵⁷ ELI Draft of a Revised Product Liability Directive – Draft Legislative Proposal of the European Law Institute (2022) 24.

⁵⁸ *HW Micklitz/N Reich/P Rott*, Understanding EU Consumer Law (2009) 218ff; *C Hodges*, European Regulation of Consumer Product Safety (2005) 205ff.

V New liability rules for products of any kind

A Strict liability, really?: defect revisited

1 Strict liability, but only for defective products

Systems of non-contractual liability are commonly divided into liability based on fault and other heads of liability that are strict, where fault is not a requirement. The framers of the 1985 Directive intended to create a category of strict liability, irrespective of fault on the part of the manufacturer.⁵⁹ Is this still true for the 2024 recast? Recital 2 of the new Directive repeats the language of ‘liability without fault’ as ‘the sole means of adequately solving the problem of a fair apportionment of the risks inherent in modern technological production’. Furthermore, Recitals 6, 13, 17 and 42 all talk about no-fault liability or liability ‘irrespective of fault’. This looks like a firm commitment to strict product liability.

However, Recital 2 and its followers should not prevent a fresh look at product liability, in the sense that the true nature of the regime must be derived from the elements of liability, as defined in the provisions of the Directive itself, particularly the definition of product defect in art 7. The classification of a liability system as being fault-based or strict is for scholars and courts to debate and decide, and not an issue for legislators.⁶⁰ As it turns out, product liability is a hybrid regime that combines elements of strict and of fault-based liability. The essential point is that the PLD 2024, like its predecessor, does not impose liability for damage caused by products of any kind, but only for the harmful consequences of defective products – and the notion of product defect incorporates the better part of the negligence analysis.

The defining feature of product liability that clearly distinguishes it from liability in negligence and other fault-based systems is its reliance on the concept of product defect. Liability for fault is typically applied to human behaviour. While it can be debated whether negligence is substandard behaviour or a state of mind,⁶¹ it is clear that it does not relate to the features and properties of an artefact. The

⁵⁹ Above, I.B.

⁶⁰ With a view to the 1985 Directive, cf *J-S Borghetti*, Product Liability in France, in: P Machnikowski (ed), *European Product Liability* (2016) 205, 218f.

⁶¹ *HT Terry*, Negligence (1915) 29 *Harvard Law Review* (Harv L Rev) 40: ‘Negligence is conduct, not a state of mind.’; cf also *HW Edgerton*, Negligence, Inadvertence, and Indifference; The Relation of Mental States to Negligence (1926) 39 *Harvard Law Review* (Harv L Rev) 849; in German: *E Deutsch*, *Fahrlässigkeit und erforderliche Sorgfalt* (2nd edn 1995) 93; as to French law: *P Brun*, *Responsabilité civile extracontractuelle* (6th edn 2023) para 315.

essential characteristic of product liability law which sets it apart from negligence and other variants of liability for fault is the focus on the product – and not on conduct or mental attitude. In that sense, it is true to say that product liability is strict liability for defective products. This means that if the product is found defective at the time of marketing, the manufacturer or the other responsible party is liable, regardless of whether the further requirements of negligence liability, such as substandard conduct, are established.

The exclusive focus of product liability on the defectiveness of the product, rather than on the behaviour of the defendant, is most pronounced with a view to the responsibility of importers and merchants. These defendants are not involved in the manufacturing process and are not guilty of manufacturing a dangerous product. Whether they were able to inspect the product and detect the defect depends on the circumstances of the individual case, and cannot be assumed as a matter of course. Even if importers and merchants do not behave negligently when reselling defective products, they are nonetheless liable under product liability law; cf art 8 (1) (c) (i) and art 8 (3) PLD 2024. As will be discussed below,⁶² the new Directive even targets new defendants that are further removed from the circumstances that caused the product to be defective than importers and distributors, namely fulfilment providers and, under certain conditions, internet platforms that broker contracts between sellers and buyers. For these actors, liability for damage caused by defective products that they helped to distribute on the market in one capacity or another is truly strict, as they have nothing to do with product defects.

2 Types of defects and cost/benefit analysis

The question remains as to which factors determine the concept of defect, and how they relate to the fault/no-fault divide. If a defect were found whenever a product caused damage, ie was implicated in an accident of some sort, then product liability would be truly strict.⁶³ But this is not the law. The manufacturer (and other responsible parties) is only liable for harm caused by products that are defective, and the concept of product defect serves, to some degree at least, as a ‘shortcut’ for a negligence analysis.⁶⁴

⁶² Below, V B 3 c and V B 4.

⁶³ Cf *Geistfeld*, Principles of Products Liability (fn 53) 65ff; *G-T Schwartz*, Understanding Products Liability, 67 California Law Review 435, 441ff (1979); *M Faure*, Economic Analysis of Product Liability, in: P Machnikowski (ed), European Product Liability (2016) 619, 644.

⁶⁴ *G-T Schwartz*, Understanding Products Liability, 67 California Law Review 435, 460f (1979); cf also *P Schlechtriem*, Dogma und Sachfrage. Überlegungen zum Fehlerbegriff des Produkthaftungsge-

The degree of independence of product defect from traditional notions of negligence varies with the type of defect in issue.⁶⁵ For manufacturing defects, the gap between defect of the product and fault of the manufacturer is the deepest, as a finding of a manufacturing defect simply requires a comparison between the safety features of the unit that caused the harm in question and the safety features that the product should have had pursuant to the specifications of the manufacturer.⁶⁶ In the case that the unit in question deviates from the standard set by the manufacturer, a defect is established. Other than in the case of liability for fault, it is not required that the error in the manufacturing process was foreseeable or could have been prevented by applying due care. Perhaps, it is no accident that the judgment of the California Supreme Court that proclaimed strict product liability concerned a manufacturing defect, namely an exploding soda bottle.⁶⁷ Interestingly, the godfather of the 1985 Directive, Hans-Claudius Taschner, defended the strict liability nature of its regime with the help of the argument that the major category of defect, the one that drove the whole field, was manufacturing defects, 'at least in Europe'.⁶⁸ But this is not true, at least not today. Manufacturers use quality controls to minimise manufacturing defects, and are quite successful in this endeavour. Without a doubt, quality controls never work perfectly, but cases involving manufacturing defects are relatively simple and quite rare, precisely because the finding of defect is so straightforward.⁶⁹ Therefore, they mostly settle out of court.

The other two categories of product defect, ie design defects and failure to warn, are of much greater importance both legally and from an economic perspective. The reason is that design defects and failures to adequately inform about the product affect not only a single unit but a whole series of products, or at least a batch of many units. Further, design defects and failures to warn cannot be established without defining a normative standard of non-defectiveness, against which the product in question, including its description, can then be measured.

At this point, two approaches to define that standard compete. One is the consumer-expectations test that asks the question what level of safety consumers are

setzes, Festschrift F Rittner (1991) 545, 550; *H Kötz*, Ist die Produkthaftung eine vom Verschulden unabhängige Haftung? Festschrift W Lorenz (1991) 109, 113ff.

⁶⁵ *Borghetti* (fn 28) 180ff, 452f, 554ff; *MünchKomm/Wagner* (fn 28) § 3 ProdHaftG para 43.

⁶⁶ *Borghetti* (fn 28) 183ff, 455f; cf also BGH 7.6.1988, VI ZR 91/87, BGHZ 104, 323 (326ff) = *Neue Juristische Wochenschrift* (NJW) 1988, 2611f; *MünchKomm/Wagner* (fn 28) § 823 para 1093ff; cf also *American Law Institute*, Restatement (Third) of Torts: Products Liability (1998) § 2(a).

⁶⁷ 24 Cal 2d 453 = 150 P 2d 436 (1944); see also BGH 31.10.2006, VI ZR 223/05, NJW 2007, 762.

⁶⁸ *Taschner* (1999) 34 *Tex Int'l L J* 21, 28.

⁶⁹ Cf BGH 15.5.1994, BGHZ 129, *Borghetti* (fn 28) 554.

entitled to expect, and the other is the risk-utility test that applies a cost/benefit analysis regarding safety measures that would have prevented the type of harm in question. In as much as art 6 (1) PLD 1985 talks about the safety ‘which a person is entitled to expect’, the consumer expectations test comes to mind.⁷⁰ The same language can be found in art 7 (1) PLD 2024, while Recital 30 makes it clear that it is the expectations of the *public at large* that count, not those of the individual victim. This clarification opens the door to an objective interpretation of product defect that looks to the objective requirements of product safety. The criticism of the consumer expectations test, as voiced in the United States, may be summarised in the conclusions that a subjective understanding of consumer expectations leads nowhere, as ordinary people have no specific expectations towards products of different variety, while an objective concept is meaningless, as it is essential to determine which precautions the public is *entitled* to expect.⁷¹ It is clear that the entitlement is not to the maximum standard of safety, as maximum safety is clearly unworkable across the broad range of products that populate the markets. The notion of optimal safety cannot be applied without considering the availability and the costs of safety measures, together with the reduction in risk they promise to achieve, and a cost/benefit analysis provides a rational framework for doing this. Not surprisingly, therefore, a cost/benefit analysis in the form of the risk/utility test has been adopted in a majority of US jurisdictions, and also by the Third Restatement.⁷² If a cost/benefit analysis is truly unavoidable, it is also the hallmark of a negligence analysis.⁷³ Consequently, the German Supreme Court (*Bundesgerichtshof*, BGH) has interpreted the concept of product defect in cases of defective design in light of the risk/utility test,⁷⁴ and the English High Court – before Brexit – leaned in that direction.⁷⁵ It must also be mentioned, however, that the French *Cour de cassation* has rejected the weighing of

⁷⁰ Cf *Fairgrieve/Goldberg* (fn 16) para 10.19.

⁷¹ Cf *Fairgrieve/Goldberg* (fn 16) para 10.30ff.

⁷² *American Law Institute* (fn 66) § 2(b), Comment 1(a); *Geistfeld*, *Principles of Products Liability* (fn 53) 39ff; 107ff; *DB Dobbs/PT Hayden/EM Bublick*, *Hornbook on Torts* (2nd edn 2015) para § 33.9; *DG Owen*, *Products Liability Law* (3rd edn 2015) 300; *Fairgrieve/Goldberg* (fn 16) para 10.40f.

⁷³ For a comparative account under the general law of torts or delict, *Borghetti* (fn 28) 187ff, 191ff. For a comprehensive review of the various approaches to art 6 PLD 1985 prevailing in the several Member States, *M Santos Silva/D Fairgrieve/P Machnikowski/JS Borghetti/ALM Keirse/P Del Olmo/E Rajnerie/C Schmon/V Ulfbeck/V Vallone/H Zech*, *Relevance of Risk-benefit for Assessing Defectiveness of a Product: A Comparative Study of Thirteen European Legal Systems*, *European Review of Private Law* (ERPL) 2021, 91.

⁷⁴ BGH 16.6.2009, VI ZR 107/08, BGHZ 181, 253 No 12.

⁷⁵ *Wilkes v DePuy International Ltd* [2016] England & Wales High Court (EWHC) 3096 Queen’s Bench (QB); cf also *J Stapleton*, *Product Liability* (1994) 236.

risks and benefits of the product when determining the defectiveness of pharmaceuticals.⁷⁶

With a view to design defects and liability for failure to warn, the criteria for finding a product defect set out in art 7 PLD 2024 can best be understood as referencing the perspective of the manufacturer – not of the injured party – and incorporating a cost/benefit analysis.⁷⁷ Article 7 (2) (e) PLD 2024 defines the concept of product defect in terms of non-conformity to the safety requirements at the time the product was placed on the market. Article 7 (3) PLD 2024 entrenches the ex ante perspective in stipulating that the finding of a defect cannot be based on the fact that a better product became available subsequently. Further, art 7 (2) (b) PLD 2024 points to the reasonably foreseeable use of the product, and art 7 (2) (d) to the reasonably foreseeable effects that other products that can be expected to be used together with the product in question may have on the latter. The same ex ante perspective dominates the list of exemptions of art 11 PLD 2024. Article 11 (1) (c) PLD allows the manufacturer or other liable party to exonerate itself upon showing that the product was not defective at the time it was put into circulation. Article 11 (1) (e) PLD 2024 continues the much-debated development risk defence of art 7 (e) PLD 1985, which exempts the defendant where the defect could not have been discovered at the time of marketing. While Member States remain authorised to disallow the development risk defence (art 18 PLD 2024),⁷⁸ which a majority has done, with the notable exceptions of France, Spain and Germany,⁷⁹ the overall commitment of the framers of the Directive to the ex ante perspective remains unaffected. It includes the incorporation of foreseeability of harm as an element of defect, ie the manufacturer or other party is liable only for harm that was reasonably foreseeable at the time the product was put on the market – not for unforeseeable harm.

The fact that the recast of the PLD shifts the time for the ex ante perspective to the point when the manufacturer loses control over the product, rather than strictly sticking to the time when the product was initially placed on the market, does not change this analysis. The shift merely accounts for changed circumstances, ie the ability of the manufacturer to retain control of the product even post-marketing

⁷⁶ *Borghetti* (fn 60) 205, 216; *Brun* (fn 61) para 765, referring to Cour de Cassation, Chambre civile (Cass civ) 1, 26 September 2012, Recueil Dalloz (D) 2012, 2304; Cass civ 1, 10 July 2013, D 2013, 2306.

⁷⁷ *Borghetti* (fn 28) 458ff, 559ff; *MünchKomm/Wagner* (fn 28) § 3 ProdHaftG para 3, 7f.

⁷⁸ Cf ELI Feedback on Proposal for Revised PLD (fn 25) 20.

⁷⁹ As to France *Borghetti* (fn 60) 205, 226; *Brun* (fn 61) para 775; as to Spain *M Martín-Casals/J Solé-Feliu*, Product Liability in Spain, in: P Machnikowski (ed), *European Product Liability* (2016) 407, 444; *M Martín-Casals*, Spanish Product Liability – adapting to the ‘new’ rules, in: D Fairgrieve (ed), *Product Liability in Comparative Perspective* (2005) 42, 56; as to Germany § 1 para 2 no 5 ProdHaftG and *MünchKomm/Wagner* (fn 28) § 1 ProdHaftG para 51ff.

that did not exist as long as the world was populated only by analogous products.⁸⁰ Digitalisation has moved the point relevant for the ex ante perspective forward in time, but it has not affected the normative stint of the analysis.

3 Non-compliance with regulatory requirements

Compared to art 6 (1) PLD 1985, the PLD recast adds another clause to art 7 (1) in that defectiveness may not only be found in deviations from safety expectations of the public but also in non-conformity of the product with the requirements of Union or national law. The question is whether this reference to regulatory law changes the standard that was established under the original version of the Directive.

There are several reasons to doubt that the reference, in art 7 (1) PLD 2024, to violations of European or national regulatory law will make a difference. First, mandatory product requirements always played a role, in that the manufacturer or other liable party could exonerate itself upon showing that the product conformed to such requirements (art 7 (d) PLD 1985). The new version of the Directive, in its art 11 (1) (d), not only retains the regulatory compliance exemption, but even deleted the requirement that the regulation must be mandatory. If compliance with legal requirements serves as a defence, this suggests that non-compliance will imply defectiveness. And this is what art 7 (1) PLD 2024 explicitly provides.

Article 7 (1) PLD 2024 could be interpreted broadly, perhaps inspired by the French concept of *faute absolue*,⁸¹ to the effect that the violation of a legal norm constitutes defect without more, ie without requiring that the violation played out upon the facts of the case at hand. In other words, no protective purpose analysis, which is part of national law, albeit under different names,⁸² would be required so as to limit the liability of the manufacturer to those types of injuries that the infringed safety requirement was designed to avert. In the extreme, one could imagine that the manufacturer of a car equipped with a diesel engine that does not comply with clean-air regulations of the EU would be subject to liability for accidents caused by these vehicles, even though non-compliance with emissions regulations does not increase the likelihood or severity of traffic accidents at all.

There is nothing in the Directive that would justify or require such a bizarre result. In art 7(2) (d) PLD 2024, relevant safety requirements are listed as one factor in the assessment of defectiveness, not as the only factor. Article 7 (1) PLD 2024

⁸⁰ MünchKomm/Wagner (fn 28) § 3 ProdHaftG para 42.

⁸¹ *G Viney/P Jourdain*, Les conditions de la responsabilité (4th edn 2013) para 441.

⁸² As to German law, cf *G Wagner*, Deliktsrecht (14th edn 2021) ch 5 para 90ff; as to French law, *Brun* (fn 61) para 244 ff: 'L'empreinte continue du mal.'

plainly states that defectiveness only looks at safety requirements and does not reference regulatory law in its entirety. The product needs to provide the safety that is required under Union or national law: it need not comply with any regulatory norm that may be applicable. Recital 34 confirms this interpretation, as it points out that product safety and market surveillance legislation ‘should be taken into account in the assessment of defectiveness’, but such legislation should not in itself ‘create a presumption of defectiveness’. For these reasons, the new language added to the definition of defect does not change anything.

4 A regulatory compliance defence?

Another question, not addressed in art 7 (1) PLD 2024 and pointing in the other direction, is whether compliance with regulatory requirements excludes a finding of defectiveness. In national tort law, this is not the case, as the standards defined in administrative law do not define the private law standard of care conclusively.⁸³ Transferred to liability for products, this means that compliance with the requirements of product safety law does not foreclose the establishment of defect.⁸⁴ As art 7 (1) PLD 2024 refers to the safety expectations of the public alongside those of regulatory law, it has left the door open to find defectiveness even where the applicable product safety law was complied with. However, art 11 (1) (d) PLD 2024 may stand in the way of an autonomous private law interpretation of product defect, as it provides for an exemption whenever ‘the defectiveness that caused the damage is due to compliance of the product with legal requirements’. As a mirror image to the framework developed in the context of defectiveness, surely the protective purpose of the respective safety regulation must correspond to the damage incurred by the victim for the exemption to be available. Recital 49 confirms this restrictive interpretation in stressing that an exemption is only warranted where compliance with regulatory law was ‘precisely the reason for the product’s defectiveness’.

The ‘big’ question raised by art 11 (1) (d) PLD 2024 is whether it implements a strong version of the regulatory compliance defence, in the sense that defectiveness cannot be established if the product feature that caused the harm conformed to

⁸³ Cf eg, French law: Cass civ 3, 22.10.1980, Bulletin des Arrêts de la Chambre civile de la Cour de Cassation (Bull civ) III, No 161; *Borghetti* (fn 28) 189; *Borghetti* (fn 60) 205, 226; *Brun* (fn 61) para 774; German law: BGH 7.10.1986, VI ZR 187/85, NJW 1987, 372, 373; BGH 27.9.1994, VI ZR 150/93, NJW 1994, 3349, 3350; MünchKomm/Wagner (fn 28) § 823 para 552ff, 1077f; English law: A *Tettenborn*, in: MA · Jones (ed), Clerk & Lindsell on Torts (23rd edn 2020) ch 10 para 14 (hereafter paras 10–14); Spanish law: *Martín-Casals/Solé-Feliu* (fn 79) 407, 420; US law: *Owen* (fn 72) 76ff.

⁸⁴ *Borghetti* (fn 28) 456.

applicable rules of product safety. While it seems possible that this is what the lawmakers had in mind, it would be surprising if art 11 (1) (d) PLD 2024 introduced such a sweeping change that tied the hands of private law in the face of applicable requirements of an administrative law nature. Such a move would be particularly inadequate in the face of new technologies that may cause risks of a nature still unknown. The AI Act⁸⁵ is a telling example as it settles with rather general requirements which are mostly of a procedural nature, such as transparency and human oversight.⁸⁶

B A line-up of new defendants

1 Manufacturers, component manufacturers, and quasi-manufacturers

Article 8 of the new Directive is the successor to art 3 PLD 1985 in that it lists the parties that are liable for harm caused by product defects. As before, the manufacturer who put the final product into circulation, aptly called an Original Equipment Manufacturer (OEM), bears full responsibility for the consequences of any product defect, regardless of whether it affects the overall product design, a component made by the manufacturer itself or a component sourced from an external supplier (art 8 (1) (a)). While nothing has changed at this point, the expansion of the scope of the PLD to include software and related services has serious ramifications for the manufacturer of the final product. OEMs are now responsible not only for any defects in the software that is embedded in their products but also for flaws in related services that are under their control. Thus, if the navigation system of a car displays the wrong speed limit, and this is the cause of an accident, the car manufacturer may be liable. The European Parliament added a sentence to art 8 (1) PLD 2024 that emphasises the overall responsibility of the manufacturer for all components of the product put on the market. This clause is unfortunate, as it suggests that only the manufacturer of the final product bears such responsibility. The truth of the matter is, however, that the same applies to representatives of the OEM, to quasi-manufac-

⁸⁵ Proposal for a Regulation laying down harmonised rules for Artificial Intelligence (Artificial Intelligence Act), COM(2021) 206 final; as to the version finally adopted during trilogue negotiations in January 2024, cf Council of the European Union, 26.1.2024, 2021/0106(COD), at <<https://artificialintelligenceact.eu/wp-content/uploads/2024/02/AIA-Trilogue-Coreper.pdf>>.

⁸⁶ Cf art 52 and art 14 COM(2021) 206 final; *M Veale/FZ Borgesius*, Demystifying the Draft EU Artificial Intelligence Act (2021) 22 *Computer Law Review International* (CRI) 97ff; in German: *P Hacker/A Berz*, Der AI Act der Europäischen Union – Überblick, Kritik und Ausblick (2023) *Zeitschrift für Rechtspolitik* (ZRP) 226, 227.

turers, importers, fulfilment providers, and distributors, as will be explained below. The only category of parties whose responsibility is limited to parts or segments of the final product is the one of component manufacturers. Manufacturers who only contributed an isolated part to the final product bear responsibility for any defects affecting ‘their’ component, including its interaction with the final product. This means that they are not liable for defects of the final product that are caused by other components, ones that they do not make.⁸⁷ Again, this also applies to providers of software and related services that are integrated into or connected with the final product.

As indicated already, responsibility for defects of the final product remains channelled to the OEM. However, it is by no means the sole party who bears full responsibility. Surprisingly, outside of art 8 PLD 2024, the definition of the term manufacturer in art 4 (10) provides for additional liable parties. Under its first prong, the concept of manufacturer is defined broadly, so that developers are included, alongside ‘producers’, art 4 (10) (a) PLD 2024. It is not quite clear how producers differ from manufacturers, and it is questionable whether it is wise to address ‘developers’ as such, ie parties who do not themselves place a product on the market but only help in its development. The best interpretation of the term ‘developer’ seems to be that it relates to software only, as computer programmes are not produced but rather developed. Thus, the category should not be expanded to include business entities that simply provide services to the manufacturer in the course of developing a new product, as this would create liability for services outside the scope of art 4 (3) PLD 2024. Article 4 (3) PLD 2024 requires that the service is ‘related’ to the product operating in the field and within the control not only of the OEM but also of the service provider (art 8 (1) (b), art 8 (1) (cl 2)). As a matter of statutory interpretation, the immunity of the product developer who simply contributed to the layout of the product follows from art 11 (1) (a) PLD 2024, which grants an exemption to manufacturers who ‘did not place the product on the market or put it into service’.

The second prong of art 4 (10) targets so-called quasi-manufacturers, ie parties who hold themselves out as manufacturers without actually being one.⁸⁸ This applies to businesses which attach, or agree to others attaching, their name, trademark or other distinguishing feature on the product. This class of defendants is familiar from art 3 (1) PLD 1985.

⁸⁷ MünchKomm/Wagner (fn 28) § 4 ProdHaftG para 32f.

⁸⁸ Fairgriev/Goldberg (fn 16) para 8.16ff; MünchKomm/Wagner (fn 28) § 4 ProdHaftG para 34ff.

2 Refurbishment and detailing

The PLD 1985 did not address the liability of actors who interfere with the product after it was put into circulation. This is common for cars, where there is a whole industry offering ‘tuned’ vehicles, but also for software. Where the safety features of the product remain unchanged by the modification or manipulation, the OEM remains responsible for defects, together with the other liable parties of art 4 (10) and art 8 (1) PLD 2024. However, if the safety of the product deteriorates with the intervention, the question as to the liability of the manipulator arises. Under the 1985 Directive, liability only attaches to the person who reconditioned the item in question if the intervention was so fundamental that it created a new product.⁸⁹ Below this high threshold, the liability of repair shops and reconditioners remained an affair of national law, ie liability in contract and/or tort, depending on whether the victim had consented to the modification, perhaps by delivering the product to a repair shop or a detailer.

Under the 2024 Directive, nothing changes with a view to the responsibility of the OEM and their substitutes. These parties remain liable for any defects that existed at the time the original product was placed on the market. Further, one may conclude from the exemption granted by art 11 (2) (d) PLD 2024 that the manufacturer is answerable even for damage caused by ‘new’ defects, caused only during reconditioning, provided that the ‘substantial modification’ of the original product occurred ‘within the manufacturer’s control’. For example, large auto manufacturers will be liable for defects caused by the performance tuning and detailing specialists that are associated with them. Unfortunately, the exemption of art 11 (2) (d) conflicts with the definition of ‘manufacturer control’ provided in art 4 (5) (ii) PLD 2024 in as much as the latter includes *any* modification of the product, while the former remains limited to ‘substantial’ modifications. This contradiction must be ironed out in favour of art 4 (5) (ii), ie OEMs shall remain liable for any modification of the product by third parties that they authorised or consented to.

The major novelty is, however, that the liability regime for the manipulator is now pulled into the framework of EU law. Pursuant to art 8 (2) PLD 2024, any natural or legal person who substantially modifies a product and then makes it available on the market again shall be considered as a manufacturer. Given the function of product liability to channel the costs of defects to those parties who control the risks in question, the responsibility of product manipulators must be limited to cases where the injury was caused by a feature of the product that was subject to the intervention. Article 11 (1) (g) PLD 2024 says as much but reverses the burden of

⁸⁹ Cf *Fairgrieve/Goldberg* (fn 16) para 8.09; *MünchKomm/Wagner* (fn 28) § 4 ProdHaftG para 25.

proof so that the manipulator must establish ‘that the defectiveness that caused the damage is related to a part of the product not affected by the modification’.⁹⁰ Again, art 8 (2) PLD 2024 must be interpreted in conjunction with art 11 (1) (g) PLD in that any modification affecting the safety features of at least a part of the product shall count as a ‘substantial’ modification.

The reference of art 8 (2) PLD 2024 to ‘any natural or legal person’ suggests that it reaches private parties just the same as commercial entities. If so, users who interfere with the physical properties of the product after its acquisition and then sell it on to third parties would be within the scope of the Directive. However, this does not seem to be the case, as art 8 (2) PLD 2024 still requires that the modified product is then made available on the market or put into service, and the definitions of these two concepts in art 4 (7) and (9) insist that the product is put back into the stream of commerce in the course of a ‘commercial activity’. As a consequence, the owner of a pickup truck who spends their leisure time on transforming it into a sportscar and then sells it on to someone else is liable only under national tort (and contract) law, whereas a professional car tuner is, of course, liable under the Directive.

Looking beyond businesses that tune cars or remodel other products for stronger performance, the framers of the new Directive also intended art 8 (2) PLD to reach the refurbishment industry, as Recital 39 explains. With concerns for sustainability gaining weight, the refurbishment market is bound to expand. Again, refurbishment triggers liability only if the defect that caused the harm in question was caused during this procedure, with the burden of proof resting on the refurbisher (art 11 (1) (g) PLD 2024). There is no convincing reason to extend product liability to refurbishment even where these requirements are not met, eg if the safety features of the product remained unaffected.⁹¹

3 Domestic intermediaries stepping in for off-shore manufacturers

a Background, purpose, and scope

There are more entities who may be targeted as defendants, and they are divided into two groups: one where the parties are liable alongside the manufacturer of the final product, and the other where liability is of a subsidiary nature in that it is engaged only if no ‘primary defendant’ can be found. Concurrent liability alongside the manufacturer of the final product attaches if the manufacturer is domiciled outside the EU. In that case, art 8 (1) (c) PLD 2024 directs liability towards authorised

⁹⁰ *Wagner* (2022) 13 JETL 191, 215.

⁹¹ For the opposing view, ELI Feedback on Proposal for Revised PLD (fn 25) 11f, 17.

representatives of the manufacturer inside the Union, importers, and, where there is no importer, fulfilment service providers. While concurrent liability of the importer is familiar from art 3 (2) PLD 1985, the same responsibility of authorised representatives and fulfilment service providers is new and is introduced only by the 2024 PLD. Both concepts were developed within the law of product safety and codified by art 3 (11) and (12) of Regulation 2019/1020 on market surveillance and compliance of products.⁹² The definitions of the two concepts of authorised representative and fulfilment service provider in art 4 (11) and (13) PLD 2024 closely track those in art 3 (11) and (12) Market Surveillance Regulation.

Within the context of the public law of product safety, too, the issue arises as to how those manufacturers that are domiciled in far-away jurisdictions and are not subject to the police power of the EU or, rather, its Member States can be held accountable. The solution developed within the law of product safety is to target importers and – where an importer with a seat inside the Union is missing – fulfilment service providers, and to require the off-shore manufacturer to appoint an authorised representative within the EU. Thus art 5 (1) Market Surveillance Regulation proudly says that no product must be placed on the internal market unless ‘there is an economic operator established in the Union who is responsible for the tasks ... in respect of that product’, and art 5 (2) Market Surveillance Regulation lists manufacturers with a seat inside the Union alongside importers, authorised representatives, and fulfilment service providers.

The justification for attributing responsibility to these parties is not that they owe a duty of care towards others, or that they can effectively control the processes of production and quality control.⁹³ Rather, within the context of product safety law, the function of the authorised representative is to serve as a safe and reliable interface for communication between the authorities of the Member States and the off-shore manufacturer, and, for purposes of receiving injunctions, as its alter ego (cf, eg art 11 (3) Medical Device Regulation). The same applies to importers and fulfilment service providers.

The role of importers and fulfilment service providers within the law of product liability is different, as liability is not about effective communication but about private enforcement. The sole purpose of art 8 (1) (c) PLD 2024 is to ensure that the victim can enforce their claim against an entity within the EU. Insofar as art 8 (1) (c) (ii) PLD 2024 exposes authorised representatives, importers, and fulfilment service providers to liability for harm caused by product defects, it offers the victim a ‘domestic’ target for their damages claims. In other words, the liability of authorised

92 [2019] OJ L 169/1.

93 (EC) No 2019/1020 Market Surveillance Regulation [2019] OJ L 169/1, Recital 13.

representatives, importers, and fulfilment service providers is motivated by notions of procedural expediency and effectiveness of enforcement. The injured party need not take legal action against a foreign manufacturer in a distant court but is free to enforce its claim in a European jurisdiction. The enforcement rationale behind art 8 (1) (c) PLD 2024 informs the interpretation of the term ‘established outside the Union’. This should be understood to refer to the seat of the manufacturer, as it is defined in art 60 Brussels I Regulation, for purposes of attaching general jurisdiction under art 4 Brussels I Regulation.⁹⁴ The question remains whether this is worth the effort. If the manufacturer with a seat outside the EU is not added as another respondent, the ultimate success of the claimant depends on the financial strength of the authorised representative, importer or fulfilment service provider, ie their ability to pay up the damages claim of the victim that prevailed in court.

While the framers went to some lengths to ensure the enforcement of claims against off-shore manufacturers, even if only indirectly, the liability scheme of the Directive remains limited to products and related services distributed on the ‘Union market’, as defined in art 4 (7), (8), and (9) PLD 2024. Products that were marketed elsewhere and then brought into the Union by their respective buyers or third parties are therefore not subject to the EU regime. This is so even though art 5 Rome II Regulation⁹⁵ allows for the application of EU law to products marketed outside the Union, if only under quite restrictive requirements. It is submitted that the better solution would have been to dispense with any link of a territorial nature at the level of substantive law, ie of the PLD, and to leave the conditions necessary for the Directive to apply to products marketed outside the internal market to conflicts law.

b Authorised representatives

Under art 4 (11) PLD 2024, any natural or legal person established within the Union may serve as an authorised representative of the manufacturer, provided that they are equipped with a written mandate to act on the manufacturer’s behalf. The tasks of the authorised representative are described in art 5 Market Surveillance Regulation. The duty of off-shore manufacturers with no seat inside the EU to appoint such representative is created by special legislation in the field of product safety law. For example, art 11 Medical Device Regulation⁹⁶ requires manufacturers established

⁹⁴ Cf *P Vlas* in: U Magnus/P Mankowski, ECPII – European Commentaries on Private International Law, Brussels Ibis Regulation (2016) art 63 para 3.

⁹⁵ Reg (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40.

⁹⁶ Reg (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices [2017] OJ L 117/1.

outside the EU to designate a single representative before they are allowed to place their product on the internal market. In addition to the representative authorised by the manufacturer itself, importers and fulfilment service providers bear responsibility under the product safety law of art 4 (2) (b) and (c) Market Surveillance Regulation.

c Fulfilment service providers

The responsibility of the fulfilment service provider serves as something as a last-ditch effort to ensure that an entity established within the Union may be held accountable where the manufacturer is domiciled abroad, an authorised representative within the Union has not been appointed, and an importer is absent. The concept of fulfilment provider targets online platforms which allow off-shore manufacturers or merchants to market their products directly to European buyers, without involving an importer with a seat inside the EU. This happens increasingly with sellers who are based in Asia, eg in China, including Hong Kong. In principle, the risk of effective enforcement of damages claims for harm caused by defects of products acquired in this way rests with the European buyer. However, if the intermediary does more than simply bring the parties together on its platform, and helps the off-shore seller to execute, ie ‘fulfil’, the transaction, the platform acts as a quasi-importer of the goods in question and thus shall be treated as such. It is not easy to draw the line between mere assistance in the performance of a contract, and involvement as a fulfilment provider. The definition in art 4 (13) PLD 2024 requires that the respective entity is engaged in a commercial activity, and provides services such as warehousing, packaging, addressing, and dispatching of a product, with two of these four activities being sufficient to warrant classification as fulfilment provider. Postal services are explicitly excluded.

4 Distributors

Under art 3 (3) PLD 1985, the mere merchant-seller of a product is not liable for defects; the manufacturer is the party who bears responsibility. However, sellers are liable in a secondary manner, on the condition that they are unable to identify the manufacturer or, as the case may be, the importer of the product.⁹⁷ Article 8 (3) PLD 2024 continues this head of liability and adapts it to the new line-up of parties who bear primary responsibility for product defects. Under the new regime, the so-

⁹⁷ *Fairgrieve/Goldberg* (fn 16) para 8.32ff; *MünchKomm/Wagner* (fn 28) § 4 ProdHaftG para 1.

called distributor, a term defined in art 4 (14) PLD 2024, can be held liable for product defects if they fail to identify, within one month of receiving the claimant-victim's request for such identification, an 'economic operator', ie the manufacturer domiciled within the Union or, in the opposite case of an off-shore manufacturer, the importer, authorised representative or fulfilment service provider. Article 8 (3) (a) PLD 2024 allows the distributor to exonerate themselves by identifying their own supplier who then is in the same position regarding the identification of the manufacturer. Within the context of art 8, this option of the distributor to protect themselves from liability must be limited to the identification of a supplier that has its own seat within the EU. To grant immunity to the distributor even if they identified a supplier outside the EU would counteract the policy behind art 8 (3) PLD 2024, to ensure that the victim may always go against a liable party with a seat inside the EU. Technically, in the case of an off-shore supplier, the distributor may rise to the level of importer, so that they become primarily liable under art 8 (1) (c) (i) PLD 2024, irrespective of art 8 (3).

5 Online platforms

Article 8 (4) PLD expands this system of secondary liability to providers of online platforms that allow consumers to conclude distance contracts with traders and that do not, in themselves, qualify as manufacturers, authorised representatives, importers, or fulfilment service providers. Secondary liability under art 8 (4) PLD requires that the platform created the (wrong) impression, in an average consumer, that the product on offer was to be provided either by the online platform itself or by a party acting under its authority or control, as defined in art 6 (3) of Regulation (EU) 2022/2065 (Digital Services Act, DSA).⁹⁸ The liability regime incumbent on online platforms thus rests on three different pillars: (1) A platform that sells products which it manufactured itself or which it imported from countries outside the EU is liable as manufacturer or importer under art 8 (1) (a), (c) (i) PLD 2024. The same applies if the operator of the platform acts as authorised representative of the off-shore manufacturer (art 8 (1) (c) (ii)). (2) If the platform confines itself to enabling sales transactions between intra-EU buyers and extra-EU sellers, but also helps to execute the transactions through warehousing, packaging, addressing, and dispatching services, as is often done in business practice, it is primarily liable as a

⁹⁸ Reg (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1.

fulfilment service provider under art 8 (1) (c) (iii) PLD 2024. (3) Platforms brokering contracts between buyers and sellers that are both domiciled within the EU or that mediate transactions between intra-EU buyers and off-shore sellers but fail to rise to the level of fulfilment service providers bear secondary liability as quasi-distributors if an average consumer was led to believe that the platform itself was their contracting partner, art 8 (4) PLD 2024.

This system of platform liability certainly has logic to it. If one distinguishes between manufacturers, importers, and distributors, then it makes sense to equate platforms with importers if they act as ‘fulfilment providers’ and to place them on an equal footing with distributors where they create the impression, in a reasonable consumer, that the platform itself is offering the product in question, ie that it acts as a seller and not as a broker. The counterargument obviously is that the many distinctions bearing on the liability of platforms make the enforcement of claims by injured parties quite complex, and therefore more risky and less likely. The bold step would therefore have been to simply impose product liability on platforms such as Amazon, regardless of who manufactured the product in question, and whether it was offered by the platform in its own name or in the name of a third-party seller, ie whether Amazon acts as seller or merely as a broker, as it does on its ‘Amazon Marketplace’. This alternative was embraced by the California Court of Appeals in the case of *Loomis v Amazon.com*.⁹⁹ It is comparatively easy for a US court to develop the law thus far, as product liability the American way targets any commercial seller of the product, placing the burden to walk back the chain of distribution up to the manufacturer on the defendant seeking recourse against the party who bears the ultimate responsibility.¹⁰⁰ This solution has the beauty of simplicity to it but is incompatible with the nuanced system of attribution enshrined in art 3 PLD 1985, which is more reflective of a negligence analysis than a system of strict seller liability for product defects. Furthermore, the distinction between platforms acting as fulfilment service providers, and others that do not, was not pulled out of thin air but tracks the respective choice made in product safety law, while the equation of transaction platforms with sellers, provided that they mislead consumers with a view to their proper role, goes back to the Digital Services Act. And ultimately, one may well question the policy of holding platforms that organise a marketplace for others accountable in the same way as store owners who sell pro-

⁹⁹ *Loomis v Amazon.com*, 277 California Reporter, Third Series (Cal Rptr 3d) 769 (Cal Ct Ap 2021); concurring, with enthusiasm *CM Sharkey*, *The Irresistible Simplicity of Preventing Harm* (2023) 16 *Journal of Tort Law (JTL)* 143, 145ff.

¹⁰⁰ *Geistfeld* (fn 6) 563ff; *MD Green/J Cardy*, *Product Liability in United States of America*, in: P Machnikowski (ed), *European Product Liability* (2016) 575, 593, 595; arguing in favour of such a system, *Borghetti* (fn 28) 490f.

ducts in their own name. Other than suggested by the court in *Loomis v Amazon.com*,¹⁰¹ it is by no means clear that marketplace-type platforms really are the ‘cheapest cost avoiders’ when it comes to product safety, even though they never held the products sold over the platform in their own hands. Full liability of online platforms for the harmful consequences of product defects simply goes to the heart of a business model that confines the platform to the role of a mere broker of transactions between third parties. Provided that the platform made this clear and did nothing to mislead the average buyer into believing that it assumed the role of the seller, there is no good reason to impose the full array of product safety obligations on such a platform, even if through the guise of product liability law.

C Scope of protection and scope of compensation

1 No protection of personality rights and against pure economic loss

Article 9 PLD 1985 follows the tradition of German as well as (at the time) English law and other legal systems to limit the scope of protection of liability for defective products to infringements of the basic human interests in life, health, bodily integrity and property. This list is important for what it does not include, namely infringements of non-physical personality rights, such as the right to privacy and human dignity, and pure economic loss. The exclusion of the so-called personality rights from the scope of protection was as innocent as unimportant back in 1985, when defective cars, microwave ovens, medical devices, and foodstuffs were causing harm to the interests protected by art 9 PLD 1985, but never threatened the privacy or dignity of an individual. With the arrival of the internet and, more recently, chatbots, perhaps even artificially intelligent ones, together with other online tools, this has changed. Now privacy issues have become an issue for product liability law.

Given that the reform of the existing product liability framework of the EU was approached with the goal of making Europe ‘fit for the digital age’¹⁰² one could have expected dignitary and privacy interests to be included within the scope of protection of the new Directive. If software is recognised as a ‘product’ under the Directive, then why not protect those interests which are particularly at risk with the advent and rise of digital technologies? Such a move to expand the scope of protection, attractive as it might seem at first sight, would have been a serious mistake.

¹⁰¹ *Loomis v Amazon.com*, 277 Cal Rptr 3d 769, 787ff (Cal Ct Ap 2021; Wiley, J concurring); *Sharkey* (2023) 16 JTL 143, 149ff.

¹⁰² European Commission Priorities for 2019–24, available at <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age_en>.

The traditional rights to life, health, bodily integrity, and property have a long legacy, their scope of protection is well understood, and the differences between the legal systems are minor. In contrast, personality rights, ie interests in the non-physical interests of the person, are relatively new, their scope of protection is relatively unclear, differences between national law are large, and, first and foremost, the exact content and scope of the right to personality in any given situation depends on the weight that it carries vis-à-vis the competing interests in free speech and freedom of information. These interests are protected by the constitutions of the Member States, as well as by arts 8 and 10 European Convention on Human Rights. As the CJEU pointed out convincingly in its judgment in the *Krone* case, the law of product liability is simply inadequate to incorporate and digest the necessary balancing of the interests of the victim in protection of their privacy and dignity and the interests of the tortfeasor as well as the general public in freedom of information.¹⁰³ It seems impossible to incorporate such a balancing of interests requirement into the concept of product defect, but it is equally impossible to do without such a proviso, as this would violate important guarantees of European human rights law and national constitutions. Further, even on its own terms, the concept of defect is ill-suited to accommodate infringements of personality rights, eg by chatbots, as defect looks to the features of a product, not to the wrongfulness of a communication in light of competing constitutional values.

A similar analysis applies to pure economic losses. Again, it is untenable to protect victims against pure economic loss of any nature. One important function of the discrimination of pure economic loss in the law of torts is that an unlimited liability for economic harm would undermine the risk allocation inherent in the contracts that the parties have committed to.¹⁰⁴ Not surprisingly, French law, which famously does not distinguish between physical harm and pure economic loss, must protect contractual allocation of risk in other ways: The *non cumul* principle excludes reliance on the law of tort or delict within contractual relationships.¹⁰⁵ A special problem, also engaging the relationship between contract and tort, is posed by harm that represents physical damage, but the thing that is negatively affected is the product itself. This case has been addressed in the Product Liability Directive itself.¹⁰⁶ It is thus necessary to distinguish between the different ways in which pure economic losses are caused. Again, the concept of product defect is ill-suited to re-

¹⁰³ CJEU 10.6.2021, C-65/20, *VI v Krone – Verlag Gesellschaft mbH*, ECLI:EU:C:2021:471, para 37.

¹⁰⁴ *S Whittaker*, Liability for Products – English Law, French Law and European Harmonization (2005) 184f; *G Wagner*, Comparative Tort Law, in: M Reimann/R Zimmermann (eds), *Oxford Handbook of Comparative Law* (2nd edn 2019) 995, 1007.

¹⁰⁵ *Brun* (fn 61) para 109 ff; *Whittaker* (fn 104) 28f; *Wagner* (fn 104) 1007f.

¹⁰⁶ Cf art 6 (1) (b) (ii) PLD 2024.

flect the complexity of pure economic loss and to provide a mechanism for distinguishing between those situations where liability is warranted, and others where it is not.

For these reasons, it seems perfectly adequate that the new Directive remains centred on the traditional ‘Acquilian’ rights to life, health, bodily integrity, and property. The inadequacy of product liability for the purpose of protecting non-physical personality rights and purely financial interests helps to explain why the EU Commission, in September 2022, tabled two proposals for new directives, with one suggesting an overhaul of the 1985 Product Liability Directive, and the other one proposing a new Directive on AI Liability.¹⁰⁷ Even though it was not said explicitly, this latter instrument was needed only for the protection of personality rights and purely financial interests.¹⁰⁸ With this being so, it becomes immediately clear why the proposed Directive on AI Liability was not meant to impose strict liability, but settled with the fault principle. Furthermore, the draft did not create new heads of liability, but simply referred to national law, which was inevitable given the diversity between the legal systems of the Member States with a view to the scope of protection against infringements of personality rights and against pure economic losses.

2 Personal injury

Impairments of health and bodily integrity lie at the core of any system and branch of extra-contractual liability. As a matter of course, such injuries remain within the scope of protection of the Product Liability Directive, with art 6 (1) (a) PLD 2024 serving as the successor to art 9 (a) PLD 1985. The courts in France also grant compensation for loss of a chance where the elements of liability under the national law transposing the 1985 Directive are established.¹⁰⁹ However, loss of a chance of recovery from personal injury or a disease should not be viewed as an interest separate from those of health and bodily integrity but rather as a special form of proportional liability that protects these interests ‘in proportion’ to the increase in risk for which the defendant bears responsibility.¹¹⁰ The new Directive adds that ‘medically

¹⁰⁷ Above, II C (fn 21).

¹⁰⁸ Wagner (2022) 13 JETL 191, 231ff.

¹⁰⁹ Borghetti (fn 60) 205, 223f.

¹¹⁰ As to the commonalities and differences between the doctrine of *perte de chance* and proportional liability, cf C Joisten, *L’incertitude causale en droit de la responsabilité civile* (2024); G Wagner, *Schadensersatz – Zwecke, Inhalte, Grenzen*, in: E Lorenz (ed), *Karlsruher Forum* 2006 (2006) 80ff;

recognised damage to psychological health' also counts as personal injury, which reflects the position of the tort law systems of the Member States.¹¹¹

While the new Directive explicitly includes psychological harm, ie injury to mental health, as a protected interest, it excludes emotional suffering from the scope of compensation. Pursuant to art 6 (2) PLD 2024, the scope of compensation is limited to so-called material losses, ie pecuniary losses, and authorises the Member States to provide for compensation of non-pecuniary harm. It is regrettable that, at this point, no agreement was reached to offer money damages for pain and suffering and other non-pecuniary losses associated with personal injury. The obvious solution would be for Member States to grant such a remedy in the course of transposition, ie to broaden the scope of compensation under the national law transposing the Directive rather than providing for a separate cause of action.¹¹²

3 Property damage

a Overview

Within the tort law systems of the Member States, damage to property is usually on the same footing as personal injury, ie it is recognised as compensable harm as a matter of course. But here, the Product Liability Directive does not follow. Rather, the 1985 Directive, in its art 9, imposed a couple of restrictions. Liability under the PLD 1985 only protects property that was intended for private use or consumption and mainly used for this purpose, so that property used for commercial purposes remains outside the scope of protection. Further, liability under the 1985 Directive excludes any damage to the product itself, regardless of whether the product was used for private or for commercial purposes. And thirdly, even where property damage is covered, liability remains subject to a retention of € 500. Of these three exceptions to the recoverability of property damage, the last one, ie the retention, had to go. The other two are confirmed by the 2024 Directive, albeit with a narrower definition of the exception for commercially used property.

G Wagner, Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden (Gutachten A für den 66. Deutschen Juristentag (2006) 58f.

¹¹¹ MünchKomm/Wagner (fn 28) § 823 para 243; Whittaker (fn 104) 508; Fairgrieve/Goldberg (fn 16) para 16.12ff.

¹¹² ELI Feedback on Proposal for Revised PLD (fn 25) 10. As to German law, cf sec 8 (cl 2) Produkthaftungsgesetz (Product Liability Act).

b No retention

The framers of the 2024 Directive deserve credit for having abolished the € 500 retention.¹¹³ It was absurd from the very beginning, as there is simply no reason to limit the recoverability of property damage in this way. The retention owed its existence to the standoff between interest groups preceding the 1985 Directive, and its misleading characterisation as a form of strict liability. In essence, the retention was designed to balance the far-reaching liability regime imposed on industry. However, as was explained earlier, the liability regime of the Directive is not really strict, and even if it were, there is no good reason to restrict the recoverability of property damage that is otherwise recoverable as a matter of course. No wonder, then, that the courts of some Member States hesitated to apply art 9 (b) PLD 1985 as written and interpreted it not as a deductible but as a threshold, so that the limitation would step aside if the harm incurred by the victim exceeded € 500.¹¹⁴

c Damage to the product itself

The exclusion of damage to the defective product itself, as established by art 9 (b) PLD 1985, has been continued in art 6 (1) (b) (i) PLD 2024. Other than the € 500 retention, this limitation has not been developed particularly for the purpose of the harmonised regime of the EU, but resolves a problem that arises in any legal system that implements a system of non-contractual liability for defective products. In essence, the question is whether liability for damage to the product itself should not be left to contract, ie whether the principle of *non cumul* should apply at least with a view to this type of harm. As the US Supreme Court has put it succinctly, allowing tort claims for damage to the product itself risks that ‘contract law would drown in a sea of tort’.¹¹⁵ This rationale applies not only in the relationship between the injured party and the manufacturer of the final product but also with a view to component manufacturers which contributed to the production of the final product.¹¹⁶ The object of a sales transaction lies at the centre of the contractual *quid pro quo*, so that any harm to the object of sale should be the exclusive affair of the risk allocation that the parties had agreed in their contract or that is being supplied by contract law. It is only where it was the user itself who, after the acquisition of the final product, added the component that caused the destruction of or the damage to the

¹¹³ ELI Feedback on Proposal for Revised PLD (fn 25) 11.

¹¹⁴ Commission Staff Working Paper, Evaluation of the Product Liability Directive, SWD(2018) 157 final, at 25; MünchKomm/Wagner (fn 28) § 11 ProdHaftG para 3f.

¹¹⁵ *East River Steamship Corp v Transamerica Delaval, Inc* (1986) 476 United States Supreme Court Reports (US) 858, 866 (Blackmun, J); cf also *Geistfeld* (fn 6) 482f.

¹¹⁶ For the opposing view, cf ELI Feedback on Proposal for Revised PLD (fn 25) 11.

product that a different analysis is warranted. Examples include automobiles which are equipped with additional appliances and outfits by their users which, if defective, may cause harm to the automobile itself. In such cases, the contract for the sale of the appliance does not exclude tort claims for damage to the automobile. The judgment of the US Supreme Court in *Saratoga Fishing Co v J M Martinac & Co*¹¹⁷ concerned the sinking of a yacht that was defective upon purchase but had been equipped with valuable outfits by its user, such as a skiff, a fishing net, and spare parts. The court denied recovery for the loss of the ship but awarded damages for the value of the equipment that had been added by the user.

d Property used for commercial purposes

Both, from a theoretical and practical perspective, the limitation of the scope of protection to property items used for private purposes is of greatest importance. It has no parallel in the tort law systems of the Member States, it lacks a reasonable justification, and it leads to rather absurd consequences.¹¹⁸ It was introduced by the PLD 1985 as another concession to industry, in exchange for their acceptance of a liability regime that was supposedly strict, and in furtherance of the ill-advised focus of the Directive on ‘consumer protection’. The effect of the exclusion of commercially used property is that the application of the Directive depends on a feature of the physical object that was damaged. This feature remains invisible to and unpredictable for the tortfeasor and bears no relation at all to the causes of the accident in question. Imagine a traffic accident where two motor vehicles collide in an effort to avoid crashing into a bicycle that had run off track as a consequence of a mechanical failure. Assuming that the bicycle was defective, its manufacturer is liable to the two owners of the two vehicles. However, if it turns out that one of the vehicles was used for professional purposes, the manufacturer is off the hook vis-à-vis the owner of this vehicle only. It is impossible to justify that the owner of the privately used car shall receive compensation, but the owner of the commercially used car is sent away empty handed.

The restriction to property used for private purposes is bad enough in itself, but it gets even worse. The reason is that the Product Liability Directive, while conclusive in its field of application, does not foreclose resort to national law outside its purview. And harm to property used for commercial purposes lies outside its purview. Thus, resort to national law is open. The result is a bifurcated liability regime, depending on whether the damaged item in question was used for private or for

¹¹⁷ *Saratoga Fishing Co v J M Martinac & Co*, 520 US (1997) 875.

¹¹⁸ Less harsh, ELI Feedback on Proposal for Revised PLD (fn 25) 11.

commercial purposes. In the above example of a traffic accident with two damaged motor cars, the harm sustained by the private victim may be recovered under the PLD, but the harm caused to the owner of the commercially used car cannot, so that recourse to national law is unavoidable.

It seems that the Commission, when drafting the recast of the PLD, came to the same conclusion and implicitly acknowledged the dysfunctional nature of limiting the scope of protection to property used for private purposes. In art 9 (1) (b) (iii) PLD 2024, it managed to narrow the exclusion by excluding commercial property only if it is used ‘exclusively for professional purposes’.¹¹⁹ The encouragement to shake off the shackles of the past, namely to dispense with consumer protection as a policy principle underlying the law of product liability so as to include property used for any purpose within its scope of protection,¹²⁰ remained unheard. Perhaps it came too late, perhaps the Commission felt bound by the history of the 1985 Directive, perhaps it was thought that art 114 TFEU, on which the Commission based the authority of the Union to legislate in the area of product liability, required a nexus to consumer protection as a policy goal.¹²¹ But art 114 TFEU has no such orientation towards consumer protection. While it is true that, pursuant to art 114 (3) TFEU, consumer protection is an important concern when deciding between legislative options, nothing in art 114 TFEU requires the Commission to limit its efforts at harmonisation of legal rules to the field of consumer protection. Further, art 114 (3) TFEU does not imply that the secondary law of the EU, if necessary for the approximation of national law relevant to the functioning of the internal market, must draw a distinction between consumer and business transactions or consumers and businesses as victims of wrongful or other behaviour giving rise to liability. Even more so, the CJEU has characterised the 1985 Directive not primarily as a measure of consumer protection but as an effort to harmonise the divergent liability rules of the Member States to ensure fair competition on a level playing field.¹²²

In conclusion, the levelling of the scope of protection with a view to property used for any purpose would have been the right thing to do. With the EU having missed a chance, it is for national law to clear up the mess and provide protection for commercially used property.

¹¹⁹ Cf art 4 (6) (b) of the Commission Proposal, COM(2022) 495 final, at 24f.

¹²⁰ *Wagner* (2022) 13 JETL 191, 209.

¹²¹ Cf Commission Proposal, COM(2022) 495 final, at 5f.

¹²² CJEU 25.4.2002, C-183/00, *María Victoria González Sánchez v Medicina Asturiana SA*, ECLI:EU:C:2002:255, para 27; *Fairgrieve/Howells/Møgelvang-Hansen/Straetmans/Verhoeven/Machnikowski/Janssen/Schulze* (fn 5) 17, 30; *Borghetti* (fn 60) 205, 217; *D Fairgrieve*, Product Liability in the United Kingdom (2019) 8 Journal of European Consumer and Market Law (EuCML) 170, 211f; *MünchKomm/Wagner* (fn 28) Einl ProdHaftG para 3.

D The role of national law

1 Unrelated services

The scope of application and the scope of protection of product liability law remain limited. Such limitations are inevitable features of a liability regime that is not general in nature, ie does not apply to any activity. Restrictions on the scope of application are particularly straightforward. The 1985 version of the Product Liability Directive is limited to ‘movables’, so that any item that does not qualify as such lies outside the purview of the Directive. The 2024 recast of the Directive expands the scope of protection to include software, digital manufacturing files, and related services. These expansions are important, but they are not without their own limits. Every activity that does not involve the marketing of a product with the meaning of art 4 (1) or related service pursuant to art 4 (3) PLD 2024 lies outside its scope. Outside this scope of the Directive, national law applies. Where the activity in question does not fall within one of the categories of strict liability, as established in the applicable national law, the wrongdoer is liable only for fault, ie negligence and intent. Fault-based liability is the bedrock of the law of tort or delict in all the Member States, and it applies without question outside the scope of the PLD.

The role of national law becomes much more critical within the field of application of the Directive, ie where it concerns the marketing of a product or related service, as defined in art 4 (1) and (3) PLD 2024. One might think that the Directive pre-empts national law full swing, but this is not the case. To be sure, art 3 PLD 2024 prohibits Member States from maintaining or introducing ‘in their national law, provisions diverging from those laid down in this Directive’ in order to ‘achieve a different level of protection for consumers and other natural persons’ than offered by the Directive, ie regardless of whether the national rules are more or less stringent. The conclusiveness of European product liability law in both directions reflects the jurisprudence of the CJEU, which placed the harmonising effect of the 1985 Directive on first rank among its purposes and interpreted to aim at full harmonisation, rather than representing a compromise that can be improved upon through national legislation.¹²³ This may sound as if the application of national tort law is excluded altogether.

¹²³ C-183/00 *María Victoria González Sánchez*, para 27; *Fairgrieve/Howells/Møgelvang-Hansen/Straetmans/Verhoeven/Machnikowski/Janssen/Schulze* (fn 5) 17, 35f; *Borghetti* (fn 60) 206, 217; *Fairgrieve* (2019) 8 EuCML 170, 211f; *MünchKomm/Wagner* (fn 28) *Einl ProdHaftG* para 3.

2 Special liability regimes for products

The truth of the matter is more nuanced. Article 3 PLD 2024 adds the proviso of ‘otherwise provided for in this Directive’, which refers to the limitations of art 2 PLD 2024. Pursuant to art 2 (3) PLD 2024, nuclear accidents remain outside the scope of product liability law, and art 2 (4) (c) PLD preserves any national product liability regime that already existed at the time when the 1985 Directive was enacted, ie on 30 July 1985. This is an implicit reference to the German Drug Act (*Arzneimittelgesetz*) that subjected manufacturers of pharmaceuticals to a regime which is slightly stricter than that of the Product Liability Directive.¹²⁴ The background of this legislation was the so-called Contergan tragedy, ie the marketing of the drug Thalidomide, which caused very severe birth defects in the children of mothers who had ingested the drug during pregnancy. In the face of so much human suffering, the German government saw itself unable to cut back on the liability of manufacturers of pharmaceuticals. The CJEU accepted this privilege, already enshrined in art 13 of the 1985 Directive.¹²⁵

3 Liability under the general law of contract and tort or delict

More generally, art 2 (4) (b) PLD 2024 preserves ‘any right an injured person has under national rules’ regardless of whether it grows out of contract or tort, provided only that it is based on grounds ‘other than the defectiveness of a product as provided for in this Directive’. The scope and reach of this general proviso in favour of national law is already familiar from the first prong of art 13 PLD 1985, but is still subject to doubt. Only the reference to national contract law is sufficiently clear.¹²⁶ The law of sales protects the buyer against delivery of defective goods, but the concept of defect is not the same. While product liability is restricted to defects that render the product unsafe, in the sense that they pose risks of personal injury or property damage, contract law sanctions defects of any kind, including those that render the product merely worthless or useless. The tender of non-conforming goods constitutes a breach of contract and entitles the buyer to damages. Importantly, contract damages, of course, include compensation for harm to the product itself, as the product forms an essential component of the benefit of the bargain; it is

¹²⁴ *Borghetti* (fn 28) 134 ff; *MünchKomm/Wagner* (fn 28) § 15 ProdHaftG para 1.

¹²⁵ CJEU 20.11.2014, C-310/13, *Novo Nordisk Pharma GmbH v S*, ECLI:EU:C:2014:2385, para 21 ff.

¹²⁶ *Fairgrieve/Howells/Mogelvang-Hansen/Straetmans/Verhoeven/Machnikoswki/Janssen/Schulze* (fn 5) 17, 37.

the reason why the buyer has agreed to pay the price.¹²⁷ On the other hand, contract damages are by no means limited to harm to the product itself, but also include compensation for consequential losses sustained by the buyer. Where a defective product causes harm to other interests of the buyer, in the form of personal injury or property damage, associated losses are readily recoverable under the law of contract.¹²⁸ Such remedies remain in place, and are unaffected by the Product Liability Directive. The latter is primarily concerned with the liability of the manufacturer, not with the responsibility of the seller, and this does not change if the two roles coincide upon the facts of the case at hand. Thus, there may well be concurrent liability under both, the Product Liability Directive, and the applicable national law of contract.

One may assume that legislation at the Union level that purports to harmonise an important part of non-contractual liability, as the Product Liability Directive does, and with conclusive effect, as provided for in art 3 PLD 2024, excludes application of the national law of tort or delict. But art 2 (4) (b) PLD 2024 provides otherwise and allows application of the national law of non-contractual liability, provided only that it is not based on the defectiveness of the product. Thus, national law remains unaffected in as much as it attaches liability to wrongful behaviour of another nature, such as negligent driving, poor maintenance of a product, and allowing for a dangerous condition of private property or public spaces.

But what about rules of national law that target the manufacturer and hold them liable for harm caused by a defective product that they exposed others to by putting the product into circulation? Such special rules of tort or delict, tailored to manufacturers, exist in several Member States.¹²⁹ It may be argued that they conflict with the Directive, as they attach liability to the marketing of a defective product.¹³⁰ Such a conclusion would be mistaken. The fundamental difference between the liability regime of the Directive and national rules on the liability of the manufacturer under the general law of tort or delict is that the former is based on ‘the defectiveness of a product’, to use the language of art 2 (4) (b) PLD 2024, while the latter is based on the wrongful behaviour of the manufacturer or other entity. The fact that liability for defective products and liability for wrongful behaviour in dealing with such products is not the same thing is reflected in the characterisation of the Direc-

¹²⁷ *Fairgrieve/Howells/Mogelvang-Hansen/Straetmans/Verhoeven/Machnikowski/Janssen/Schulze* (fn 5) 17, 103 ff; *Fairgrieve/Goldberg* (fn 16) para 5.23.

¹²⁸ *MünchKomm/Wagner* (fn 28) § 1 ProdHaftG para 3.

¹²⁹ As to Germany, *MünchKomm/Wagner* (fn 28) § 823 para 1033 ff; as to England and Wales, *K Oliphant/V Wilcox*, Product Liability in England and Wales, in: P Machnikowski (ed), *European Product Liability* (2016) 173, 174 f.

¹³⁰ Cf C-183/00 *María Victoria González Sánchez*, para 30 ff.

tive as imposing a form of ‘strict liability’.¹³¹ Mistaken as this characterisation may be,¹³² it remains true that liability under the Directive is strictly based on a finding of product defect, while liability of manufacturers under the general law of tort or delict attaches to negligent behaviour.¹³³

In all honesty, the distinction between liability based on product defect or on wrongful marketing of a (defective) product may appear as the proverbial splitting of hairs.¹³⁴ But in truth it is inevitable.¹³⁵ The Directive itself limits its scope by excluding damage to property that is exclusively used for professional purposes, and destruction or corruption of data that are not only used for private purposes. Moreover, art 6 (2) PLD 2024 limits the scope of compensation to pecuniary losses, and leaves damages for non-pecuniary losses, such as pain and suffering, to national law. There is no doubt at all that Member States remain authorised to fill the lacunae in the scope of protection offered by the Directive with the help of their own legal systems as, otherwise, these interests would be left without any protection at all.¹³⁶ The Product Liability Directive certainly does not pre-empt the national law of non-contractual liability of manufacturers, importers, distributors and parties for wrongful behaviour associated with the marketing of defective products beyond its own scope.

This is not to say that it makes sense to operate two different systems of non-contractual liability with a view to personal injury and property damage caused by defective products. When thinking about the transposition of the new Directive, Member States should seriously consider expanding the regime of the Directive to include damage to property used for professional purposes, perhaps also the destruction or corruption of commercially used data, and, if found compelling, even damage to the defective product itself. This is the same solution that has already been adopted by some Member States, including France and Germany, if only with a view to compensation for non-pecuniary loss in personal injury cases.¹³⁷ Such generalisation of the harmonised regime would reduce legal complexity and would provide industry with a uniform and seamless framework, at least with a view to the elements of liability. The French legislator adopted such an approach under the 1985 Directive, levelling the distinction between property used for private and that

¹³¹ Above, I B.

¹³² Above, V A 1.

¹³³ Cf C-183/00 *María Victoria González Sánchez*, para 31.

¹³⁴ *Borghetti* (fn 28) 575f.

¹³⁵ For one account of the difference between product defect and ordinary negligence, cf *Geistfeld*, *Principles of Products Liability* (fn 53) 77f.

¹³⁶ Cf *Borghetti* (fn 28) 494.

¹³⁷ *Borghetti* (fn 28) 537, with ref to art 1386-2 Code civil (art 1245-1 Code civil nF), § 8 (cl 2) ProdHaftG.

used for commercial purposes in the law transposing the 1985 Directive,¹³⁸ and the CJEU accepted it and allowed Member States to expand the scope of protection so as to include damage to commercially used property.¹³⁹ Article 3 PLD 2024 confirms this view, as it asserts conclusive force over national law only for the ‘protection of consumers and other natural persons’ – and not beyond. This leaves the door open for Member States to break the cage of consumer protection and to extend the full protection of the Product Liability Directive to property rights of businesses.

E Prescription and extinction

1 Overview

The Product Liability Directive of 1985 operates a dual-track regime of limitations of actions. Article 10 PLD 1985 provides that claims become time-barred within three years after the victim became aware or should reasonably have become aware of the damage, the defect, and the identity of the producer. Irrespective of such awareness, pursuant to art 11 PLD 1985, claims become ‘extinguished’ after ten years from the date when the product that caused the harm in question was put into circulation. An exception is applied if the injured person had initiated legal proceedings against the producer in the meantime.

The 2024 version of the PLD continues the dual-track regime but with some important modifications of the long-stop period that leads to an extinction of claims. Article 16 PLD 2024 replicates the three-year regime of the 1985 Directive, adding the clarification that national law on suspension or interruption of limitation periods shall apply, as was clear anyway.¹⁴⁰ In addition to the subjective, ie knowledge-, or rather: negligence-based, limitation period of art 16 PLD 2024, the 2024 Directive, in its art 17 (1), also replicates the ten-year extinction period that runs irrespective of knowledge or awareness of the victim regarding damage, product defect, and identity of the liable party. The relevant trigger to set off the expiry period is the ‘date on which the defective product which caused the damage was placed on the market or into service’. Where the incriminated product was substantially modified post-marketing, the expiry period begins to run anew.

¹³⁸ *Borghetti* (fn 60) 205, 222.

¹³⁹ CJEU 4.6.2009, C-285/08, *Moteurs Leroy Sommer v Dalkia France and Ace Europe*, ECLI:EU:C:2009:351, para 27ff.

¹⁴⁰ *MünchKomm/Wagner* (fn 28) § 12 para 13ff.

2 The long-stop of art 17 PLD 2024

As before, art 17 (1) PLD 2024 categorises the long-stop period not in terms of limitations of actions or prescription but talks about ‘expiry’, instead of the former ‘extinction’. This is unfortunate as it forecloses recourse to established doctrines of the law of prescription, such as the national rules on suspension and interruption referenced in art 16 (2) PLD 2024.¹⁴¹ For the purpose of preventing the outcome, absurd indeed, that the damages claim expires while legal proceedings are ongoing, art 17 (1) (cl 1) PLD 2024 adds the qualification that expiry does not occur if the injured person has, before the completion of the ten-year period, initiated proceedings against a party liable under art 8. This clarification is indeed indispensable, but it would have been better to copy art 16 (2) PLD 2024 and to invoke, once again, the national law on suspension or interruption of limitation periods. It contains many more grounds of suspension or interruption than only the initiation of legal proceedings in a court of law. As written, art 17 (1) (cl 1) must be interpreted to include a variety of ways to initiate proceedings, particularly as the qualification ‘before national courts’ was deleted in the course of the legislative process. In particular, participation in collective actions or use of a mechanism of alternative dispute resolution should suffice to arrest the expiry period.

Now that such reference is lacking, it is for the courts to apply these rules to the expiry period of art 17 PLD 2024 *per analogiam*. Regardless of the concept of ‘expiry’ employed by art 17, the substance of the matter remains the same as in art 16, ie a limitation of actions with a view to time. Thus, the same problems familiar from the law of prescription also affect expiry periods in the style of art 17 PLD 2024 – and they need to be resolved in the same manner. To take an example, under German law and other legal systems, pending negotiations between the tortfeasor and the victim suspend the limitation period.¹⁴² This is essential for providing the parties with the necessary time to explore chances for an amicable settlement without being forced to rush to the courthouse for the purpose of preventing the expiry of the limitation period. The same policy concern that is relevant in the context of art 16 is also relevant for art 17 PLD 2024.

¹⁴¹ ELI Feedback on Proposal for Revised PLD (fn 25) 23.

¹⁴² MünchKomm/Wagner (fn 28) § 12 ProdHaftG para 11f; Borghetti (fn 60) 205, 230; Martín-Casals/Solé-Feliu (fn 79) 420, 450; G Comandé, Product Liability in Italy, in: P Machnikowski (ed), European Product Liability (2016) 275, 305; Oliphant/Wilcox (fn 129) 173, 196f.

3 Latent diseases

The long-stop period of ten years seems to be long enough, but it may actually seem too short in some cases, ie in those involving latent diseases or long-term consequences of bodily injuries. Sometimes the disease or other adverse consequence become manifest only later than ten years after the product was put into circulation. Here, the victim never had a chance to enforce their claim within the ten-year expiry period. With a view to such scenarios, art 17 (2) PLD 2024 extends the expiry period to 25 years, again calculated from the date that the incriminated product (or its refurbished variant) was put into circulation. Article 17 (2) only applies to cases involving latent causes of personal injury, and provided that the victim was unable to initiate legal proceedings within the ten-year period of art 17 (1). It is laudable that the European lawmakers extended the expiry period in this way. The limitation of actions in respect of the lapse of time is a valid concern, but it must not lead to an outcome that essentially nullifies the claim of the victim and runs counter to the policy of the Directive in that the victim of defective products shall obtain redress for their harm. A rigid time bar of ten years does not ensure that claims involving diseases with a long latency or long-term consequences of bodily injury can ever be enforced. Raising the bar to 25 years makes things (much) better, but does not go to the root of the problem, as it may still occur that the latency period exceeds 25 years. In cases involving Swiss law, the European Court of Human Rights (ECtHR) has held that the application of prescription periods must not frustrate claims that, as a matter of fact, could not have been brought earlier.¹⁴³ It seems that the better solution would have been to dispense with the long-stop in cases involving latent personal injury altogether.

F (No) cap or ceiling

When the Product Liability Directive was negotiated in the late 1970s and early 1980s, placing a cap on the overall liability of the manufacturer was a serious issue. While fault-based liability is typically unlimited, strict liability is not, at least not in some legal systems, such as the German. As the framers of the Directive believed to impose strict liability, the argument for a cap seemed to be strong. But this was a delusion, as the arguments that were advanced in favour of a cap were weak from

¹⁴³ ECtHR *Howald Moor and Others v Switzerland*, 11.3.2014, nos 52067/10 and 41072/11; ECtHR *Jann-Zwicker and Jann v Switzerland*, 13.2.2024, no 4976/20; *B Winiger*, Product Liability in Switzerland, in: P Machnikowski (ed), *European Product Liability* (2016) 459, 475.

the beginning. As has been explained above, liability under the Directive is misunderstood if it is characterised as a form of strict liability. While it is true that attribution under the Directive does not require a finding of fault, it is not true that it attaches regardless of defect. In product liability law, the wrong remains hidden in the concept of product defect, which draws upon factors that are more than familiar from the analysis of negligence, namely foreseeability and preventability of harm in the state *ex ante*, together with a cost/benefit analysis.¹⁴⁴

But even if it were otherwise and the liability scheme of the Directive would correctly be described as strict, there is no necessary linkage between strict liability and caps on quantum, as legal systems exist that combine strict liability and unlimited quantum. French law, which operates a general clause of strict liability for ‘things’, without limiting the amount of damages that may become due, provides an important example.¹⁴⁵ This explains why art 16 (1) PLD 1985 did not itself impose a cap in the order of ECU/€ 70 million, but authorised the Member States to do so. Not surprisingly, Germany made use of this authorisation and imposed a cap,¹⁴⁶ while France did not.¹⁴⁷ Another argument that was advanced in favour of caps states that ceilings on liability facilitate the purchase of third-party insurance, as insurance policies are limited without exception. While this is true, the limitation of insurance does not mean that the law of tort or delict must necessarily follow. Quite the contrary, liability for fault, which lies at the heart of the law of tort or delict, is unlimited while standard insurance policies covering the resultant risk are not.

In conclusion, the framers of the new Directive deserve credit for having done away with an anachronistic rule in that they simply deleted art 16 (1) PLD 1985 without any further ado. What is surprising, however, is that this did not meet with any resistance from those stakeholders that had fought vigorously, if for the wrong reasons, for the cap back in the 1980s, namely representatives of industry and of the insurance sector.

¹⁴⁴ Cf above, V A 2.

¹⁴⁵ Cf *D Fairgrieve*, *L'exemption française? The French law of product liability*, in: D Fairgrieve (ed), *Product Liability in Comparative Perspective* (2005) 84, 88; *Whittaker* (fn 104) 52ff.

¹⁴⁶ Cf § 10 ProdHaftG, and commentary by MünchKomm/Wagner (fn 28) § 10 ProdHaftG para 1ff.

¹⁴⁷ *WH van Boom/J-S Borghetti/A Bloch-Ehlers/E Karner/D Nolan/K Oliphant/A Scarso/V Ulfbeck/G Wagner*, *Product Liability in Europe*, in: H Koziol/MD Green/M Lunney/K Oliphant/L Yang (eds), *Product Liability: Fundamental Questions in a Comparative Perspective* (2017) 255, 264; *Fairgrieve/Ho-wells/Møgelvang-Hansen/Straetmans/Verhoeven/Machnikowski/Janssen/Schulze* (fn 5) 17, 29.

VI Conclusions

A The bright side

The digital transformation, which is on the brink of developing artificially intelligent systems or, depending on the definition of intelligence and the assessment of the current capabilities of software technology, has moved even beyond this point, challenges the legal system. In Europe, regulation ranks high on the political agenda. One reason for this regulatory focus may be that European citizens and the politicians as their representatives tend to associate innovations more with risk than with opportunities. A more sanguine way to look at it would be to celebrate the EU for defending human rights in the digital age, and to ensure a more equal distribution of the gains that technological innovation promises.¹⁴⁸ But differences in mentality are hard to measure and pin down. A public choice analysis of the European preference for regulation could point to the fact that there is hardly anything else the EU can do in the digital arena. Contrary to public belief, the EU Commission is not a large bureaucracy with a high head-count, executing government programmes and providing public services. In truth, the Commission is a rather lean legislative machine. This means that the announcement of the new Commission, back in 2019, to make Europe ‘fit for the digital age’ could not easily be translated into programmes for more research by European universities, for the digital transformation of the large public sectors existing in the several Member States, or for subsidies to support European start-up enterprises which are lagging far behind their peers in Silicon Valley and in China. Perhaps not the only, but the most obvious thing the EU can do is – to regulate.

Starting from this institutional set-up, the recast of the Product Liability Directive deserves much applause. If one wanted to do something, this was the right thing to do. Compared to heavy-handed regulation through administrative law such as the AI Act,¹⁴⁹ liability rules come with a relatively light touch, and at low cost. In contrast to command-and-control regulation, liability rules do not force a particular behaviour on industry, but operate with general standards, in this case the concept of product ‘defect’. What defectiveness, or rather, its avoidance, requires in terms of product layout and safety need not be defined by the lawmakers *ex ante* but can be left to the courts for determination *ex post*, when harm has occurred already. Such a strategy of ‘*ex post* regulation’ through liability rules is preferable where it is

¹⁴⁸ Cf A Bradford, *Digital Empires – The Global Battle to Regulate Technology* (2023) 110f, 127.

¹⁴⁹ Proposal for a Regulation laying down harmonised rules for Artificial Intelligence (Artificial Intelligence Act), COM(2021) 206 final.

difficult for the government, in this case, the EU Commission, to define and specify the appropriate safety requirements *ex ante*.¹⁵⁰ Liability rules shift the decision as to what is required in a given situation to the time when that situation has already arisen, so that the level of information about the magnitude and probability of harm and the means to prevent it from occurring is much higher than at the time of law-making. Moreover, liability rules harness the information about risk that is distributed in society and rely on a decentralised decision-maker, namely the courts, to gather and evaluate such information.

The difficulty, or even impossibility, to define the specific requirements that digital products have to meet *ex ante*, before any harm occurs, is apparent from the briefest glance at the AI Act. Apart from the hard prohibitions of art 5 AI Act, which are mostly directed at the governments and law enforcement agencies of the Member States, the Act imposes extremely soft and malleable requirements even for high-risk AI systems. Providers must ensure adequate risk management, documentation and record-keeping, transparency, human oversight, as well as accuracy, robustness, and cybersecurity of AI systems (arts 9–15 AI Act). It is safe to predict that these duties will impose high costs of documentation, primarily for providers and importers of AI systems, to a lesser degree also for its users (cf arts 16–29 AI Act). Whether they actually help to prevent harm to third parties remains doubtful, however, because of their unspecific nature which, in turn, is unavoidable at this point in time, when we have very little knowledge about the benefits and risks of AI, and also of the availability and cost of technology designed to avoid such risks.

Another fundamental decision that deserves support was between updating and perhaps tightening the responsibility of manufacturers of digital technology, together with other entities within the ‘camp’ of the manufacturers, or doing the same for the users of digital devices in their capacity as drivers, operators, keepers and the like of AI systems. The Commission was right to zoom in on the supply side of the digital product market, and not on the users. One important characteristic of digital technology is that it shifts control from users to manufacturers.¹⁵¹ Liability rules must track shifts in control and in that sense follow the risk. It is therefore laudable that the Commission did not catch the ball, thrown in the air by the European Parliament, to introduce strict liability for the users (operators) of AI technology, but went back to the Product Liability Directive of 1985, in order to adapt it to the digital age.¹⁵² In addition, the framers used the momentum to correct some of the wrong choices made back in 1985. This is true for the € 500 retention for damage to

¹⁵⁰ S Shavell, Liability for Harm versus Regulation of Safety (1984) 13 The Journal of Legal Studies (J Leg Stud) 357, 359.

¹⁵¹ Above, III A.

¹⁵² Wagner (fn 19) 127ff.

property, as well as the option of Member States to impose a cap of no less than € 70 million for losses caused by a line of products that all suffer from the same defect.

B The dark side

As always, there is also a dark side to new legislation. One rule or another may be criticised for going too far or not far enough. The author of this essay found very little to bemoan in this regard, but others surely will find more. There is one thing, however, that one may feel truly sorry about, and that is the missed chance of cutting product liability loose from its roots in the policy of consumer protection. To flag out the Product Liability Directive as an exercise in consumer protection was wrong even in 1985. The United States, as the international frontrunner in this area of the law, never limited the scope of protection to consumers, and even in Germany, the landmark case that introduced non-contractual liability for defective products involved property damage to a business.¹⁵³ It is regrettable that the Commission did not find the time – or could not overcome counteracting forces – to engage in a thorough revision of the old Directive, quite irrespective of the challenges of the digital transformation.

Another point, already mentioned before,¹⁵⁴ concerns the style of the new legislation. Compared to its precursor of 1985, the new Directive comes across as an exercise in administrative law, or as an executive order. This is also true in other areas. For example, the definition of defect in the new Consumer Sales Directive requires no less than three articles spread over one and a half pages,¹⁵⁵ while the civil codes of the Member States needed one sentence to say what was necessary. Perhaps it is naïve to believe it possible, at the European level, to aim for the elegance of the French *Code civil*, copied in many jurisdictions, or for the conceptual clarity and precision in the abstraction which characterises the German Civil Code, to name those two only as examples which epitomise the style of European legislation in the area of civil law. It may be true that the EU must be more specific, as it needs to weave divergent threads in the Member States into a single tow. However, it remains possible to do better, as the 1985 Directive clearly demonstrated.

¹⁵³ BGHZ 51, 91 = BGH, NJW 1969, 269.

¹⁵⁴ Wagner (2022) 13 JETL 191, 243.

¹⁵⁵ Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods [2019] OJ L 136/28, arts 6–8.

C A final thought

A fundamental question remains, namely whether it was necessary to legislate at all, at this particular stage of legal and technological development. European legislation is increasingly characterised by the pressure to ‘do something’ instead of relying on the courts to find the right answers under more general principles of the existing law. European legislation in civil law more generally is in danger of losing its breath. One piece of legislation follows the other, and some are reformed even before the CJEU even had a chance to say what the prior rule had meant. The major innovations of the 2024 PLD concern the scope of application of product liability, which is extended to software and related services, the acceptance of data as a protected interest, the introduction of new responsible parties to ensure enforcement against a defendant with a seat in the internal market, and the dynamization of the fundamental concept of product defect which was stretched over time. Much of this could have been obtained through interpretation of the existing 1985 Directive as well. Thus, the concept of ‘movable’ under art 2 PLD 1985 could have been interpreted to include software, or even related services, the CJEU could have recognised data as private property protected under art 9 (b) PLD 1985, it could have equated fulfilment service providers with importers for the purpose of art 3 (2) PLD 1985, and certain online platforms with suppliers within the meaning of art 3 (3) PLD 1985. Finally, the CJEU, which has not specified the concept of product defect as of yet, could have adapted it to digital products, moving the relevant point in time for a finding of defect into the future where the manufacturer retained control even after the product was put into circulation (art 6 (1) (c) and (2) PLD 1985). But, as it seems, these are not the times for an attentive approach with a view to digital technologies. While Europe failed to generate a vibrant digital industry, its capacity to legislate is stronger than ever. Accepting the need to do something, the new Product Liability Directive is the best one could hope for.