bitkom

At a glance

Product Liability for AI

What is this about?

The European Commission has started an Inception Impact Assessment on a revision of the existing liability framework, which consists of the Product Liability Directive 85/374/EEC and national liability rules. One main objective of the initiative is to "modernize liability rules to take account of the characteristics and risks of new technologies and of new digital and circular business models, including AI-equipped products and services".

Bitkom's view

The existing liability framework in the EU offers legal certainty to both innovators and consumers. There is no need to revise the Directive, nor is the current timing for the revision appropriate. In order to establish a coherent liability regime for AI, the AI Act must first be completed.

Core points

- **The current revision of the Product Liability Directive is premature**
  The review of the product liability policy is premature. As long as the work on the AI Act has not been completed, a possible revision of the Product Liability Directive cannot lead to the development of a regulatory and liability regime that is coherent under EU law.
- **The product liability framework in the EU already sufficiently covers risks**

  As the law stands today, it covers compensation for damages resulting from erroneous products, irrespective of whether the product comes with or without AI technology. This makes also perfect sense, since, from a product liability perspective, the decisive point is whether a product provides the safety which a person is entitled to expect and in doing so does not distinguish between technologies used within the respective product in question. Therefore, it should not make a difference whether a product comes with AI or not. Both scenarios are already well covered by the Product Liability Directive as it stands today.

Position Paper

Inception Impact Assessment: Adapting liability rules to the digital age and artificial intelligence

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1 General Remarks

Firstly, we as Bitkom must stress that the current review of the Product Liability Directive is premature. As long as the work on the AI Act has not been completed, a possible revision of the Product Liability Directive cannot lead to the development of a regulatory and liability regime that is coherent under EU law. We urge the commission to halt the revision process until the AI Act has been finalized.

Bitkom welcomes the Commission's objectives to provide legal clarity for innovators in the field of products and services, while ensuring a high level of consumer protection. The commission is correct in recognizing that liability rules must strike a delicate balance between promoting innovation and mitigating risks.

However, the existing European liability framework already sufficiently does exactly that, employing a technology-neutral approach. Thus liability rules are aiming at compensating damages regardless of how the damage has been caused. We urge to consider carefully whether the Product Liability Directive needs revision as a consequence of technological developments such as AI. According to article 1 of the Product Liability Directive, "the producer shall be liable for damage caused by a defect in his product." As the law stands today, it covers compensation for damages resulting from erroneous products, irrespective of whether the product is equipped with or without AI technology. This makes sense, since, from a product liability perspective, the decisive point is whether a product provides the safety which a person is entitled to expect (article 6 of the Product Liability Directive) and in doing so does not distinguish between technologies used within the respective product in question. Therefore, it should not make a difference whether a product comes with AI or not. Both scenarios are already well covered by the Product Liability Directive as it stands today.

Neither software, including AI applications, nor human actions can be expected to be completely free from error. Software, which after all is also created by humans, cannot be subject to higher standards than those already required by the applicable law in order not to hinder innovation. By avoiding human errors (e.g. delayed

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reaction, overlooking essential data/information, subjectivity), AI systems can reduce human errors and thus the risk of damages. To promote and make full use of these opportunities, legislators should not burden operators and manufacturers of AI systems with additional liability risks that exceed the liability risks of other technologies.

2 Proposed policy options

2.1 Proposed options to adapt strict liability rules to the digital age and circular economy

Extension of the product definition

One argument against extending the established concept of product to software, especially if it includes artificial intelligence, is that there have not been any liability gaps in the deployment and use of such systems to date and that the applicable product liability law has proven its effectiveness. It is already recognized by case law that a manufacturer is liable under the applicable principles of product liability if the damage was caused by the malfunction of control software (embedded software) integrated into the product.

An argument against the qualification of stand-alone software as a product is that significant dangers, e.g. security vulnerabilities, depend not only on the original manufacturer of the stand-alone software, but also substantially on the user/operator. In particular, the manufacturer of the software can hardly foresee or control with which other software components the operator/user will connect the software. Furthermore, applying product liability to stand-alone software would impose unacceptable liability risks on the creators of open source software, which would lead to this type of software no longer being offered.

Finally, the requirement to include services in the concept of product and thus in the scope of application of product liability law has so far not been sufficiently substantiated and jeopardizes the necessary balance of interests which the Commission aims to protect. In particular, it is not clear how damage to uninvolved third parties can occur outside the contractual relationship for a service. If the customer of a service is harmed, he can already obtain sufficient compensation for this under current contract law.

An update obligation for providers of digital products has already been introduced by Art. 7(3) of Directive (EU) 2019/771, but – rightfully so - limited to contractual relationships. Only if a contractual relationship exists and the software manufacturer has data on the software customers, is it possible for him to install updates to the necessary extent on the customers' devices. In addition, software updates serve to maintain the functionality of the program and thus to preserve the user value. This interest in equivalence is protected by contract law. Product liability, on the other hand, serves to protect third parties not involved in a contractual relationship in the integrity of their legal interests. However, this does not necessarily require software updates, but a danger to the legal interests of third parties could be ensured, for example, by warnings, recall or - especially in the case of machine learning systems - by switching off the learning function.

In addition, it must be kept in mind that the maintenance of software requires considerable effort on the part of the manufacturer. The more complex and specific the software is, the greater is the effort needed. For this reason, software maintenance services are regularly provided in business transactions between companies only on the basis of special contractual arrangements and in return for payment. Within the scope of software maintenance, the specific operating environment of a software product, the interaction with other hardware and software components, and current technical progress as well as current cyber security threats can be taken into account appropriately and on a customer-specific basis. A similar update obligation based on product liability would not only deprive manufacturers of an important business segment, but such an obligation would simply not be feasible for them in terms of the necessary customer individualization. A legal obligation to guarantee that updates are free of errors that goes even further would further increase costs and would no longer be calculable for manufacturers.

Ultimately, the manufacturer of software, and in particular of AI systems, can only be expected to accept strict liability to the extent that he has direct and immediate influence on the course of events. However, such controllability of the course of events is only given on the basis of a contract or until a product is placed on the market.

Extension of the scope of application to non-material damages

Product liability is subject to comparatively low requirements in order to provide adequate protection primarily for consumers, irrespective of existing contracts. To compensate for this, damages can only be claimed in the event of infringements of particularly important legal interests. This balance must not be eliminated by an unrestricted expansion of the protected legal interests.

Infringements of data privacy and personal rights with the aid of digital tools are already sanctioned outside of product liability in data privacy law, anti-discrimination law and tort liability. There are therefore no gaps in protection in this respect. It would not make sense to double the already severe sanctions for companies. A necessary risk-oriented approach to liability also means that there should not be multiple liability for any damage under the same conditions. It must therefore remain the case that data loss only leads to product liability if the data loss can also be seen as material damage to the data carrier.

2.2 Proposed options to address proof-related and procedural obstacles to getting compensation

Change of the burden of proof

First of all, it should be pointed out that difficulties in proving justified claims for damages can arise not only with software and AI systems, but with any type of product. Potentially existing difficulties of proof are not increased by the fact that software/AI systems are integrated in a product.

Also, according to the case law of the applicable law, the injured party already benefits from simplifications of proof such as prima facie evidence and presumption of fault. The injured party does not have to name the specific type of defect or explain the technical background of the defect. Thus, a product defect is regularly assumed if a product has caused personal injury or property damage despite proper use. If the product does not comply with the relevant statutory safety regulations or technical standards, this also gives rise to a rebuttable presumption of defectiveness. The sometimes criticized opacity of machine learning processes is therefore primarily to the disadvantage of the manufacturer, as he has to prove that no fault in the

system he placed on the market was responsible for any damage that occurred. For this reason, manufacturers have been working for a long time and in their own interest to develop methods and test procedures to increase transparency.

Reduction of the minimum threshold

The minimum threshold for making claims for damage of property under the Product Liability Directive should remain at EUR 500 in order to avoid litigation in an excessive number of cases, as stated in Recital 9 of the Product Liability Directive. In accordance with the applicable fault-based law, an injured party can always pursue any claim for lesser damages under the applicable fault-based law, so that there is no gap in legal protection.

Bitkom represents more than 2,700 companies of the digital economy, including 2,000 direct members. Through IT- and communication services alone, our members generate a domestic annual turnover of 190 billion Euros, including 50 billion Euros in exports. The members of Bitkom employ more than 2 million people in Germany. Among these members are 1,000 small and medium-sized businesses, over 500 startups and almost all global players. They offer a wide range of software technologies, IT-services, and telecommunications or internet services, produce hardware and consumer electronics, operate in the digital media sector or are in other ways affiliated with the digital economy. 80 percent of the members' headquarters are located in Germany with an additional 8 percent both in the EU and the USA, as well as 4 percent in other regions of the world. Bitkom promotes the digital transformation of the German economy, as well as of German society at large, enabling citizens to benefit from digitalisation. A strong European digital policy and a fully integrated digital single market are at the heart of Bitkom's concerns, as well as establishing Germany as a key driver of digital change in Europe and globally.