
Brussels, 25 April 2017

Orgalime comments on the evaluation of the Product Liability Directive

Orgalime welcomes the opportunity to comment on the evaluation of the Product Liability Directive ([Directive 85/374/EEC](#)¹). The Directive, thanks to its technology-neutral provisions, has created legal certainty while enabling technological development over the past years. Orgalime does not see a need to revise this Directive at this point in time.

The Product Liability Directive is fit for purpose and will continue to meet its objectives of striking the right balance, in terms of liability, for damage caused by a defective product in a fair way.

THE PRODUCT LIABILITY DIRECTIVE - STILL FIT FOR PURPOSE

Under the Directive, in case a defective product causes damage to the property of consumers or personal injury or death, the producer has to provide compensation according to strict liability. Under the Directive, it remains the task of the injured party to prove the defect, the damage and the causality link between the damage and the defect.

As the Product Liability Directive does not require the injured party to establish negligence, it provides a level of ease for the damaged party to claim for damages. Meanwhile, the producer is provided certain safeguards under article 7 limiting liability in such events where damage arises or is related to obvious circumstances beyond the control of a producer exercising due care. Orgalime finds that the Product Liability Directive strikes an operative balance between the interests of the producers and those of the consumers. The level of certainty provided by the Directive contributes to company risk management policies and also helps insurance valuation.

Orgalime further notes the importance of time period limitations, value thresholds for property damage and delimitation of property damage to private property set forth in the Directive. Orgalime finds that for the purposes of maintaining a fair and balanced product liability regime, it is important to maintain these delimitations, noting however that the Directive may not affect any rights which an

¹ Directive on liability of the producer for damage caused by a defective product

Orgalime, the European Engineering Industries Association, speaks for 40 trade federations representing the mechanical, electrical, electronic, metalworking & metal articles industries of 24 European countries. The industry employs some 10.9 million people in the EU and in 2015 accounted for more than €1,900 billion of annual output. The industry accounts for over a quarter of manufacturing output and a third of the manufactured exports of the European Union.

injured person may have according to the rules of the law of contractual or non-contractual liability or such special liability systems existing at the moment when the Directive was initially notified.

Orgalime finds that the Directive, as an essential and technology-neutral part of the framework of liability legislation, is fit for purpose. Orgalime however recognizes that Products are evolving and therefore finds the Commission's review of the Directive timely and appropriate.

It has to be noted that, already now, every specific case needs to be carefully analysed to decide who is liable *vis-a-vis* the consumer, for instance when different components are assembled. When necessary, it has been and will be always up to the judge, with the support of technical experts, to decide in the specific case.

The European legal framework is a complex and comprehensive array of legislation based on both specific mandatory public order legislation and civil law. Besides the Product Liability Directive it includes product safety legislation such as the Machinery Directive ([Directive 2006/42/EC](#)), the Low Voltage Directive (LVD) ([Directive 2014/35/EU](#)), the General Product Safety Directive (GPSD – [Directive 2001/95/EC](#)) and safety at work directives. Such legislation aims to ensure the safety of products used by workers and consumers by rendering the manufacturer liable for the safety of products placed on the market. In spite of an approach which is more intricate than the one used in similar economies such as the USA, Europe has, through its existing, finely tuned and stable regulatory framework, been successful in reducing accident rates to comparable levels, while still enabling European companies to remain competitive on global markets.

PRODUCT LIABILITY IN AN AUTOMATED AND DIGITAL ENVIRONMENT

Orgalime finds that the Product Liability Directive is technology-neutral and does not need to be revised in the context of the ongoing technological developments, be it, for example, for the use of robots in factories or for products working in an Internet of Things (IoT) environment.

Admittedly, with the onset of automated devices, the complexity of products will increase immensely. The result of this will be that more parties will be involved in the chain of liability in case of a defect. Further challenges from the increasing complexity of products will be from having to attribute a particular malfunction to a defect in a complex product. This is, however more a practical problem than a legal one; the more complex and intricate products become, the more parties will have to share liability in case of accidents, malfunctions, defects and related recalls. The Product Liability Directive, as it stands today, provides a practical framework under which these problems are resolved and also provides the context upon which parties to supply chains recognize their own role in relation to a particular incident and damage.

Orgalime believes that today's Product Liability Directive still provides for the needed and consistent legal framework for liability claims, if such damage is caused by a defective "ordinary" product as well as by a robot or any another automated system.

For instance, the Product Liability Directive asserts that:

*"The producer shall be liable for damage caused by a defect in his product"*². In the event that an autonomous system is involved in an occurrence that causes damage, the underlying technical defect will result in compensation, just as it would do for any other product;

A product is *"defective when it does not provide the safety which a person is entitled to expect"*³. In the event that a newly learnt robotic behaviour results in damage, the question is: can a particular behaviour from the robot be expected by the damaged party given the nature of the product and, among others, its surrounding environment? Based on the evaluation, the product can be deemed defective or the defect may be attributed to the one exercising control over the robot. As far as automated products go, the Directive puts pressure on the supplier to articulate to the user what can reasonably be expected given the correct use and the right parameters - and also what reasonably cannot be expected. It is important to note that product liability can also be based on the breach of an express or implied contractual term concerning the quality or safety of a product.

*"The producer shall not be liable if he proves...that it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation"*⁴. One may argue that autonomous systems are exempt by definition. However, one should note that it must be considered as a defect any damage arising from an automated process where such damage is due to a parameter (algorithm, or the like) inherent in the device: such an outcome could not have been expected by the user, and could have been discovered by the Producer given the state of scientific and technical knowledge at the time.

In the event that defect, damage and causality are established, accrued damages to private property or personal damage are compensated under the Directive regardless of what kind of device is in question. Moreover, it is more than questionable that a mandatory insurance scheme for robots as well as a special civil law for robots would be the best solution going forward. The EU Parliament in its report with recommendations to the Commission on Civil Law Rules on Robotics of 16 February 2017, suggests an analogy to car insurance to support the idea that robotics would benefit from a mandatory insurance scheme that would cover damages much in the same way as in traffic accidents. Orgalime does not accept an argument comparing robotic manufacturers to car owners that have been imposed a mandatory insurance out of necessity to cover damages that a person would likely not be able to cover in the event of an accident. In contrast to a robotics company, it is more than likely that a corporation is able to cover individual incidents, unless of course the damage is outstandingly large. However, in the event that a mandatory insurance were imposed on robots, it is likely that the premiums alone would work to stifle innovation in one of the European flagship sectors. Usually, manufacturers have an insurance covering product liability. In practice, our companies often are already covered, on a voluntary basis, by several insurance schemes (general liability, all risks liability, product liability, recall insurances, etc.).

As always, maintaining a balance between ensuring consumer safety and promoting innovation will be central to the development of new revolutionary technologies, such as advanced automation and

² See Article 1

³ See Article 6.1

⁴ See Article 7.b

IoT. In the same vein, it is equally important to make sure that the development of regulatory policy is sufficiently flexible to accommodate the needs of a constantly evolving industry.

CONCLUSIONS

Given the complexity of future products and level of autonomy, the task of attributing a particular damage to a defect will become increasingly difficult. Orgalime finds that the answer to this problem will not be resolved in legislation alone, but more in the supply chain of new innovative products and services. It is more and more important to consider contractual and non-contractual liability at the very beginning of each automation or IoT venture, and to find meaningful ways to cover them contractually by using existing regulations and applying relevant legal principles. In the world of complex devices and services, additional flexible contract solutions will be needed in case unpredictable circumstances arise. Orgalime emphasizes that product liability can also be based on the breach of an express or implied contractual term concerning the quality or safety of a product.

Orgalime finds that technical solutions are needed. In automated devices where risks that property or personal damage may occur, data recording and storage devices will most likely be installed in order to establish the chain of events that resulted in causing the damage. Sector specific standards will likely be needed to address what is the minimum set of data needed to establish liability.

In the past thirty years, the Product Liability Directive has ensured legal certainty while enabling technological development in Europe, enabling the European engineering industries to innovate and develop new technologies and remain competitive. Going forward, Orgalime would like the Directive to keep true to its aim of striking a fair balance between the different interests involved.

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