

Muddy Road Ahead: European Liability Legislation Remains Unclear for Autonomous Vehicles

IN SHORT

The Situation: The liability regimes for product liability related to driverless cars in various European countries remain far from harmonized, and lawmakers trail behind the faster moving reality.

The Plan: The European Commission intends to update the European Product Liability Directive and will publish guidelines in mid-2019.

Looking Ahead: Until the new European legislation is implemented, carmakers and software providers will need to analyze their liability country by country in order to assess their potential exposure. It remains to be seen whether the Commission will propose an updated Directive or opt for a Regulation in order ensure more common ground across Member States.

Background

The basis for most regulations related to self-driving cars is the 1968 Vienna Convention on Road Traffic. One of its fundamental principles is that a driver must be fully in control of and responsible for the behavior of a car in traffic. In March 2016, the convention was amended to permit autonomous vehicles, but only if the automation technology conformed with the UN vehicle regulations and the driver could override or switch off the technology. While sharing the same fundamental basis, regulations across Europe remain fragmented. This *Commentary* addresses selected national liability rules in Member States, and we will discuss the United Kingdom's rules in a follow-up analysis.

Selected National Rules in Member States

In France, a law dating back as far as 1985 governs the liability for drivers and "*gardiens*" (keepers of the good), but it is unclear who acts as the "driver" in an autonomous vehicle. In particular, while the "*gardien*" might be understood to be the one controlling and directing the vehicle (especially where he or she had the ability to control the vehicle manually), this issue is open to debate in the case of level 5 full automation cars.

French liability law is based—as are all product liability regulations in EU Member States—on the Product Liability Directive 85/374/EEC ("Directive"). The French Civil Code provides that the producer of a good is liable for damages caused by its product, regardless of whether there is a contract. "Producer" is defined widely, and those who suffer damage can bring a cause of action against both the producer of the entire product and/or the producer of a component part. Software designers might also be classed as "producers," but there is no clear jurisprudence on this issue.



Whether the concept of 'producer' extends to the manufacturer of the autonomous vehicle's software remains untested. Much depends on whether the courts conclude that the autonomous system is a component part of the vehicle or that the driverless car is one single product.



The German Road Traffic Act was recently adapted but remains unsatisfactory because it still does not govern level 5 cars, which is a hindrance to further technical evolution. The liability regime remains unchanged, so the vehicle owner as well as the driver are liable for damages. The definition of "driver" under the new law covers the person activating an automated system.

The Product Liability Act governs product liability claims in Germany, and, as in France, claims can be brought against the producer of a defective product or the producer of a component part. Like in France, whether the concept of "producer" extends to the manufacturer of the autonomous vehicle's software remains untested. Much depends on whether the courts conclude that the autonomous system is a component part of the vehicle or that the driverless car is one single product. If the system is considered a component part (like, for example, brakes or emission systems are), the system's producer will be liable for damage to the car and might also be liable for damage to person and property caused by the car crashing due to a defect in the system.

Additionally, claims under German tort law might arise, coming into play if a producer has failed to discharge its obligation to ensure the safety of the product (*Verkehrssicherungspflicht*). Faulty construction, faulty fabrication, or faulty instructions may give rise to a breach of this obligation. With the systems becoming more and more complex, there is an increasing risk of claims brought on the basis

that instructions were insufficient to ensure the safe use of the product, and companies should be especially careful when drafting user instructions.

Commission Report on the Directive

The [report of the Commission on the Directive](#) dated May 7, 2018, should be read against this background. The report proposes that certain legal terms be clarified, including "product," "producer," "defect," "damage," and "burden of proof." The Commission has also highlighted in its report that there are open questions about the delineation between a "product" and a "service." This distinction will be relevant for automated vehicles in the sense that the product interacts with services while driving.

The [first meeting of the Expert Group on Liability and New Technologies](#) was held in June 2018. There were diverging views on whether software should be considered as a "product." In relation to software integrated into products and the internet of things, the question of who should be classed as a "producer" (and therefore liable under the Directive) was identified as an essential one, without the group proposing any solution.

Regarding the concept of a "defect," all members agreed that the starting point should be safety legislation, but beyond that, there were equally diverging views—ranging from the position that no additional diligence on the part of the producer should be necessary, to the view that any damage should always automatically be considered as indicative of a defect.

The breakout group on damages and the burden of proof also has not yet agreed on anything specific. It noted that there was no agreement on whether the scope of damages should be reformed at the European Union level or, if so, what this scope should be. The main question debated by the group was whether or not pure economic loss should be sufficient to give rise to claims. The burden of proof might also further shift to the detriment of producers.

The next meeting of the expert group will take place on September 18, 2018.

THREE KEY TAKEAWAYS

1. The Commission Report and minutes of further meetings of the expert group will provide insight into what regulations or directives to expect on an EU level.
2. Carmakers and software providers should closely monitor further developments and make their voices heard, as necessary.
3. The evolving definitions of "producer," "product," and "defect" will be vital for the industry.



Anna Masser
Frankfurt



Ozan Akyurek
Paris



Dorothee Weber-Bruls
Frankfurt



Vanessa Foncke
Brussels

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