DeutscherAnwaltVerein

Position Paper

of the German Bar Association by the Committees on European Law and Civil Law

on the Public Consultation on adapting liability rules to the digital age and artificial intelligence

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The German Bar Association (Deutscher Anwaltverein – DAV) is the professional body comprising more than 61.000 German lawyers and lawyer-notaries in 252 local bar associations in Germany and abroad. Being politically independent the DAV represents and promotes the professional and economic interests of the German legal profession on German, European and international level.

Artificial Intelligence (AI) applications and products lead to new risks for users and render it much more difficult to identify the exact root cause and responsibility if something goes wrong. It is undisputed that this requires changes to the liability law. Based on the already known proposals from stakeholders on the EU and national level, the legislator will rightfully respond with a higher degree of consumer protection, both in the field of substantive law and procedural law.

If all or most of the current proposals were implemented cumulatively, however, AI has clearly the potential to change the most fundamental principles of German liability law, more specifically the triad of breach, causal nexus and damage. At the same time, the *Rosenberg* rule on the burden of proof will no longer fully apply in liability disputes and the implementation of the Collective Redress Directive will introduce a European-wide class action scheme. The legislator needs to make sure that AI is not the entrance door for US liability law and class action standards that it has rightfully prevented so far. Not all of the changes of law currently discussed are inevitable and some of them could stop innovation or create an unfair playing field for companies from different parts of the world. The Civil Law Committee of the German Bar Association has identified the following areas of concern, not each of them isolated but at least in cumulation:[1]

[1] For a more detailed view on individual aspects, see DAV Position Paper No. 40/2020 of June 2020 on the consultation of the European Commission to the Whitebook Artificial Intelligence Com(2020) 65 final.

- AI's embedment into technological ecosystems, huge data volumes and self-learning algorithms renders it much more difficult, if not impossible, to identify the responsible legal entity (developer, manufacturer, supplier, dealer, app developer, data provider). Changing the law in a way that each of them is jointly and severally liable for a damage is, however, not the right answer. The legislator would accept the concept that innocent players are fully liable although they have not commited any breach nor contributed to the event. The liability of the innocent is so far unknown in German liability law. In addition, a claimant might always pick European debtors to avoid enforcement in, for example, China. And all debtors would react with third-party notices in litigation so that civil court proceedings would become much more complex. The current approach of holding only the manufacturer liable and allowing selective recourse is more sophisticated compared to a joint and several liability of everybody involved.

- The networking, as well as the use of algorithms and the fact that human control is reduced to a minimum, carries new risk potential. A general increase in complexity is accompanied by phenomena such as non-transparency, multicausality and autonomy. If the definition of a product defect is "dynamised" so that each update, change or new application can render a product defective, the state-of-the-art defence for unforeseeable developments becomes more important and should not be fully abolished, at least not for lower risk AI applications. A mere suspicion of a defect should not justify liability. With respect to the user's justified safety expectations, it should be avoided to support the view that AI is or will become, due to self-learning, absolutely perfect. The German law principle of the self-dependent consumer should survive to the extent possible.

- In the field of AI, facts cannot be easily reproduced ex post. Alleviating or shifting the burden of proof, introducing new factual or legal presumptions, providing for more strict liability, adding information and document production claims have, however, the potential to affect severely the current principle of "equality of arms" in liability disputes. Modifications of the burden of proof should only go so far as to restore equality of arms in cases where this burden is excessively high for the victim of a

damage caused by AI, due to the technical specificity of AI. In case strict liability of developers and operators of high-risk applications is introduced, it will be sufficient for the injured party to prove that the damage occurred during the operation of the AI, as is the case for motor vehicle liability. Outside high risk applications, the injured party should benefit from certain facilitations of the burden of proof, yet this should not lead to the abolishment of the principle according to which the claimant has to demonstrate the qualifying requirements of his claim (damage, defect and causal nexus). The goal must be to find the right balance. It is unknown under German law to allocate the burden of proof according to difficulty and cost aspects only.

- Also in the field of AI, misuse and ignoring instructions need to be valid liability exclusions. In addition, contributory negligence, for example if software updates are not implemented or safety features are circumvented, needs to play a role.

- Increasing instruction and product monitoring obligations in the field of AI will lead to more testing, benchmarking, risk assessment and documentation in the development and manufacturing process. While this makes sense under many aspects, overregulation prevents innovation.

- The legislator should be reluctant to introduce new damage positions that are currently discussed in the field of AI. This applies to the loss of cognitive capabilities, depression, insomnia and psychological issues due to virtual reality applications. Again, the concept of the self-dependent consumer is a legitimate characteristic of German liability law.