

IN-DEPTH

Product Regulation And Liability

AUSTRIA

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A decorative graphic consisting of a series of concentric, semi-circular purple lines that originate from a central point on the right side of the page and curve towards the left, creating a sense of depth and movement.

Product Regulation and Liability

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In-Depth: Product Regulation and Liability (formerly The Product Regulation and Liability Review) provides an incisive overview of the product liability frameworks in major jurisdictions worldwide. It also examines the most consequential recent changes and developments, and looks forward to expected future trends. Topics covered include key legislation; regulatory oversight; causes of action; litigation procedures; and much more.

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Introduction

In Austria, product regulation and liability are governed by both national laws and EU regulations, ensuring high standards of consumer protection and safety. The primary legal framework is the Product Liability Act, which implemented EU Directive 85/374/EEC on liability for defective products into national law. Recently, Regulation (EU) 2023/988 on general product safety (the GPSR) came into force, modernising product safety regulations to better address the challenges of digital commerce and online markets. Overall, the legal landscape on product regulation and liability imposes strict obligations on manufacturers and distributors to ensure product safety, holding producers liable for any harm caused by defective products, including personal injury and property damage.

Year in review

There were no changes in legislation during 2024; however, the Austrian Supreme Court rendered notable decisions. The core findings of two of them – both in the medical field – are presented below.^[1]

In its ruling 4 Ob 109/24v, the Austrian Supreme Court addressed the interpretation of 'damage' under the Product Liability Act in conjunction with general tort law under the Austrian Civil Code. The case revolved around a CPAP device for treating sleep apnoea, which contained materials that could degrade, potentially entering the user's lungs or releasing harmful chemicals, or both. While the plaintiff's health had not (yet) been affected by using the device, he expressed fears regarding potentially harmful foam emissions and reported feeling uneasy and anxious when wearing the mask, fearing future illness.

The Supreme Court confirmed that the device failed to meet the legitimate safety expectations of an average user under the Product Liability Act.

Regarding the concept of damage, the Court highlighted that the Product Liability Directive does not preclude compensation for non-pecuniary losses, such as pain and suffering or other emotional harm, where such remedies are available under the applicable national law. In its 2016 decision (4 Ob 48/16m), the Supreme Court clarified in the context of the Product Liability Act that compensation for emotional distress unrelated to physical injury is generally awarded only in exceptional circumstances, such as severe infringements on a person's psychological integrity. Mere irritation, annoyance, fright or feelings of fear are insufficient. A psychological impairment without clinical relevance – manifesting merely as discomfort or unease, as in the present case – according to the latter decision, does not qualify as bodily harm or its legal equivalent.

Another significant decision relating to product liability concerns a case decided under 4 Ob 19/24h involving the death of a four-year-old child following the intake of a codeine-containing cough syrup in 2015. At that time, the cough syrup was subject to prescription- and pharmacy-only requirements but was approved for children aged three and older. The Supreme Court examined the claims brought by the deceased child's surviving family members under the Product Liability Act, focusing on an alleged instructional defect. Specifically, the cough syrup was deemed a contributing factor in the

child's death, and the plaintiffs argued that adequate warnings in the package leaflet would have prevented its intake.

The defendant invoked compliance with statutory and regulatory requirements as a defence, citing the product's authorisation under the Austrian Medicines Act and seeking to rely on the exemption from liability under Section 8, Paragraph 1 of the Product Liability Act (compliance with statutory and regulatory requirements).

The Supreme Court rejected this defence, holding that regulatory approval of a medicinal product – including its package leaflet – does not preclude liability under the Product Liability Act for instructional defects due to insufficient warnings. Since the regulatory framework for package leaflets under the Austrian Medicines Act allows for additional information about the safe use of a product, the manufacturer cannot rely on the liability exemption under Section 8, Paragraph 1 of the Product Liability Act (meaning compliance with statutory and regulatory requirements).

The court further emphasised that the prescription-only nature of the medication and the accompanying duty of care owed by prescribing physicians and pharmacists do not absolve the manufacturer of its obligations under medicinal and product liability law to provide adequate instructions.

In this particular case, the Supreme Court determined that a cough syrup containing codeine that is prescribed for use in children as young as three and administered by the spoonful is defective if the package leaflet fails to explicitly and comprehensibly warn that the product's active ingredient, codeine, can have fatal consequences – particularly, though not exclusively, in cases of overdose. Package leaflets must also address reasonably foreseeable misuse. The less apparent the danger posed by a medicinal product, the more likely it is that users will inadvertently administer an overdose, necessitating more detailed warnings.

Another noteworthy aspect of the decision is the Court's clarification that both product defects and liability exemptions under the Product Liability Act must be assessed based on the time the specific product causing harm was placed on the market. For mass-produced goods, the relevant point in time is not when the product series was introduced but when the specific harmful unit was distributed.

Legal framework

The Product Liability Act

The Product Liability Act,^[2] which implemented European Directive 85/374/EEC on liability for defective products (the Product Liability Directive) into national law, is a statutory liability regime that governs product liability in Austria. In line with the European Directive, the Product Liability Act provides for a strict (i.e., no-fault) liability scheme. Liability for damages under the Product Liability Act can be neither excluded nor limited in advance.

Under the Product Liability Act, primary liability for damage caused by a defective product is placed on the entrepreneur who either manufactured the product (the producer) or

imported the product into, and put it into circulation in, the European Economic Area (the importer).

According to the definition provided in the Product Liability Act, the producer is the person who has manufactured the finished product, a raw material or a component part. Furthermore, any person who presents themselves as the producer by putting their name, trademark or other distinguishing feature on the product is regarded as the producer.

Where the producer or, in the event of products imported into the European Economic Area, the importer cannot be identified, any supplier who has put the product into circulation is liable, unless they inform the injured party within a reasonable period of the identity of the producer or the importer or the person who supplied them with the product (the preceding supplier).

The liability regime of the Product Liability Act covers liability for death, injury to body or health, and damage to items of property resulting from the defect of a product. Damage to the defective product itself is not covered. Furthermore, damage to an item of property is compensable only if it was not suffered by an entrepreneur who used the item of property predominantly in their business. Thus, damage to items of property is basically compensated only to the extent that the damage was suffered by a consumer. In any case, there is a deductible amount of €500 for damage to items of property, meaning that only the amount exceeding €500 is compensable. There are, however, no caps on liability.

The Product Liability Act contains (in Section 5(1)) a definition of the term 'product defect'. A product is deemed defective if it does not provide the safety that, taking all circumstances into account, could reasonably be expected – in particular, in respect of:

1. the presentation of the product;
2. the use to which the product can reasonably be expected to be put; and
3. the time the product was put into circulation.

However, a product cannot be considered defective for the sole reason that an improved product is subsequently put into circulation.

According to case law of the Austrian Supreme Court, for the assessment of whether a product is to be deemed defective, an objective standard is to be applied based on the safety expectations of an average product user. Expectations of the safety of a product are, in general, justified only if the product user also meets their own individual responsibility, meaning that for unforeseeable or downright absurd uses, product liability usually is not triggered. However, a certain actual, even if improper, use might have to be equitably expected – for instance, if a product is intended for use by children (such as toys or playground equipment).^[3]

'Presentation' of a product is any activity by which a person subject to liability introduces the product to the public or individual users, including advertisements, product descriptions, directions for use and instruction sheets.^[4]

In general, the producer has the duty to instruct users on how to safely use the product and to warn of hazards involved in the use of the product and, under some circumstances, even to warn against possible improper use. However, these duties also depend on the need for protection of (possible) users of the product. Where a product might reach the hands of

persons who are not familiar with the risks involved in the use of a product, or if a product is addressed to different profiles of users, the content and extent of the instructions must be aimed at the least informed and thus most endangered group of (possible) users.^[5]

Whether a product is defective is to be assessed according to the time the individual product was put into circulation. A product is deemed to have been put into circulation once the entrepreneur has transferred it to another person and into the latter's power of disposition or for the latter's use. In the case of a series of products, the point in time at which the individual product causing the damage was put into circulation is decisive.

In a case concerning the explosion of a glass bottle of carbonised mineral water causing personal injury, the Austrian Supreme Court held that the producer of serial products must pay due regard to experience gained after the series was first launched on the market and to take these experiences into account in the further production, such as by modifying the construction, changing the production process or improving instructions to the product users.^[6]

Other bases of liability

Apart from the Product Liability Act, liability for a defective product notably may arise out of general tort law, contract law and the concept of 'contract with protective effect for third parties'. Liability under both general tort law and contract law, as well as under this concept, is fault-based.

The producer is usually a legal entity. Liability based on general tort law would require that either the producer's statutory bodies or other persons in a leading or supervisory position are at fault.^[7] For the conduct of other persons whom the producer employs or engages, the producer is liable only towards third persons within very narrow limits – namely, if those persons are habitually unable or unfit for the assigned work.

Under contract law, the counterparty is responsible for damage caused by a fault of its employees or any other persons used to fulfil its duties as if it acted itself, and there is a presumption of fault in the event of non-fulfilment of a contractual obligation, in which case the burden of proof shifts to the defendant to prove the absence of fault.

As it is characteristic for many product liability cases that no contract exists between the person suffering damage and the producer, relying on liability under contract law might often not be possible.

However, according to doctrine and case law developed prior to the introduction of the Product Liability Act in 1988, the contract between the producer and the first purchaser of the product unfolds protective effects through a chain of contracts towards the end customer, with the consequence that the end customer (as well as persons deemed to belong to their sphere, such as family members or employees) may seek redress against the producer as if they were in a contractual relationship. Thus, the producer is responsible for damage caused by fault of its employees or any other persons used to fulfil its duties as if it acted itself, and the end customer benefits from the reversal of the burden of proof (i.e., the producer has to prove absence of fault).

Since the introduction of the Product Liability Act, the concept of contract with protective effect for third parties has practical relevance mainly in cases where damage is not compensable under the Product Liability Act (such as, in particular, damage to property

suffered by entrepreneurs) or where claims under the Product Liability Act have already become time-barred.

Liability could also arise out of the violation of a 'protective law'. For instance, the Product Safety Act is deemed a protective law by scholars.^[8]

Regulatory oversight

On 13 December 2024, the GPSR came into force. This Regulation replaces the previous national regulations on product safety in the EU Member States and harmonises the rules within the European Union. Accordingly, this Regulation to a large extent replaces the Austrian Product Safety Act. Products placed on the market before 13 December 2024 may continue to be sold under the Austrian Product Safety Act. The aim of this Regulation is to strengthen consumer protection and adapt the outdated product safety law to the digital age and the conditions of online commerce. At the same time, national and European regulations should be aligned, and the conditions for recalls and notifications should be harmonised. However, the Regulation does not contain any specific provisions for artificial intelligence.

The scope of the GPSR is particularly broad. The Regulation applies to all products placed on the market or made available, as long as there are no specific provisions under EU law regarding the safety of the relevant products pursuing the same objective. Thus, the Regulation applies to all consumer products on the European market, with exceptions for certain product groups, such as pharmaceuticals or food. Whether products are actually purchased by consumers is irrelevant: as long as products are intended (or suitable) for consumers, they fall under the Regulation. Only products that are not intended for consumers and are not reasonably foreseeable to be used by consumers are exempt.

The Regulation stipulates that only safe products may be placed on the market, but it does not precisely define what 'safe' means. Aspects such as the characteristics of a product, its impact on other products and cyber risks serve as a guide for the required risk analysis and assessment that manufacturers and importers must carry out. Even for products with low safety risks, a comprehensive risk analysis is necessary. Absolute safety is not required, and disclosure of the results is not necessary.

Manufacturers, importers and dealers, including online and mail order traders, have extensive information obligations. Information about the manufacturer and the product must be provided both on the products and packaging and online. Additionally, comprehensive warnings and safety information must be directly and visibly displayed on the product. Links, QR codes and PDFs are not permitted.

Additionally, the Regulation governs market surveillance and product safety recalls. Manufacturers, importers and dealers must issue recalls or safety warnings under certain circumstances when products pose danger and must inform the affected consumers in writing. If a dangerous product has already reached the market, manufacturers and dealers must promptly and directly inform affected consumers. A clear and understandable recall notice must be published, including remediation measures such as repair, replacement or reimbursement. Furthermore, the European Commission has been granted extended powers. It can issue specific traceability requirements and take direct measures to remove

dangerous products from the market. A rapid alert system or Safety Gate portal for reporting safety violations is planned to ensure the quick removal of dangerous products from the market and make recalls more effective.

The Regulation poses practical challenges, especially for dealers and online marketplaces, particularly in fulfilling information obligations. Overall, the GPSR makes an important contribution to the harmonisation of European product safety law.

Causes of action

Causes of action for product liability claims in general have their basis in civil law, such as the Product Liability Act, general tort law, contract law and the concept of contract with protective effect for third parties described above. In addition, a product liability claim may be based on a violation of a protective law.

The placing of a defective product on the market or violations of product safety requirements may also constitute a criminal offence under the Austrian Criminal Code if, for instance, this causes bodily injury or death of a person, (substantial) environmental damage, danger to life and health to a larger number of persons, or danger to another's property to a significant extent. Apart from the responsible individual or individuals in Austria, legal entities can also be liable for criminal offences under certain conditions (as set out in the Austrian Corporate Criminal Liability Act).

Damaged persons may join criminal proceedings as private parties, which gives them the advantage of gaining access to the criminal file (although access to certain documents might be restricted) and using the documents in (subsequent) civil proceedings. In rare cases, damages are awarded by the criminal court in the course of criminal proceedings. Furthermore, in a civil proceeding, damages might be awarded more easily and swiftly if the claim can be based on a criminal conviction.

Litigation

Forum

Product liability claims are determined in civil court proceedings before state courts by professional judges. Austria does not have jury trials in civil proceedings.

Provided that there is an arbitration agreement between the parties involved, product liability (related) claims may also be determined in arbitration proceedings. Under Austrian arbitration law, arbitration agreements between an entrepreneur and a consumer can be validly concluded only for disputes that have already arisen. Consumers normally assert product liability claims in civil proceedings before state courts.

Burden of proof

If the claim is based on the Product Liability Act, the plaintiff has to prove the damage, the defect and the causal relationship between the defect and the damage. Because liability under the Product Liability Act is based on strict liability, the issue of fault is of no relevance.

If the defendant raises the defence that it has not put the product into circulation or not acted as its entrepreneur, then the burden of proof for that rests with it. Furthermore, if the defendant relies on the defence that the defect that caused the damage did not exist at the time it put the product into circulation, it must show that, with regard to all circumstances, this is plausible (*prima facie* evidence).

If the claim is based on liability in tort, then the plaintiff has to prove the damage, causation and unlawfulness; that the conduct causing the damage was unlawful; and that the conduct causing the damage was at least negligent. The same holds if the claim is based on breach of contract or on contract with protective effect for third parties, with the exception that the defendant has to prove the absence of fault (negligence or intent).

In civil proceedings, the general standard of proof is 'highly probable'.

For causation, the *conditio sine qua non* test is applied by asking the hypothetical question of whether the damage would have occurred irrespective of the conduct (or, respectively, the product defect) at issue. If this were the case, the conduct (or, respectively, the product defect) was not causal. However, doctrine and case law, in addition, apply the theory of adequate causation, meaning that damage that is the result of a totally atypical and extraordinary chain of circumstances of cause and effect is excluded from liability.

However, *prima facie* evidence may serve to the benefit of the plaintiff. If facts are established that, according to general experience, allow conclusions on a certain course of events, such as the existence of a product defect and the causal relationship between defect and damage, the judge may regard this as proven, unless the defendant can show that the damage might have occurred owing to an atypical course of events.^[9]

Defences

Under the Product Liability Act, liability can be excluded by proving:

1. that the defect can be attributed to a specific mandatory legal provision or official instruction with which the product had to comply;
2. that the state of scientific and technical knowledge at the time the product was put into circulation by the person against whom an action is brought was not such as to enable the existence of the defect to be discovered ('state of the art' defence); or
3. that if the person against whom an action is brought has produced merely a raw material or a component part, the defect was caused by the design of the product in which the raw material or component part was fitted or by the instructions given by the producer of the product.

Further defences available to the defendant are that it did not put the product into circulation or did not act as its entrepreneur, or that the defect that caused the damage did not exist at the time it put the product into circulation.

Outside the Product Liability Act, the defendant can invoke any defences that might serve to disprove the allegations of the plaintiff and fault.

A further defence both under and outside the Product Liability Act is contributory fault by the damaged party or a person for whose conduct the damaged party is responsible, which – if successful – might lead to a reduction of the damage the defendant has to compensate.

Furthermore, the defendant may plead the statute of limitations. There are relative and absolute statutes of limitations. The relative statute of limitations is three years and begins to run from the time the damaged party became aware (or at least could reasonably have become aware) of the damage and the person who caused the damage. The absolute limitation period under the Product Liability Act is 10 years, starting from the time the party liable for compensation put the product into circulation. For damage claims outside the Product Liability Act, the absolute statute of limitation is 30 years, starting from the time the damage occurred.

Personal jurisdiction

Austrian jurisdiction for product liability (related) claims is an issue if the defendant does not have its seat in Austria, or (as is the case in most product liability cases) there is no contractual relationship between the damaged party and the defendant from which Austrian jurisdiction (e.g., because of a jurisdiction clause in favour of Austrian courts) derives.

If the defendant has its seat outside the European Union^[10] or in a state that is not party to the Lugano Convention^[11] (i.e., in a third state), the question of Austrian (international) jurisdiction is to be determined based on the Austrian Law on Jurisdiction. Pursuant to Section 92a of the legislation, Austrian jurisdiction for damage claims is given if the act causing the damage occurred in Austria. According to the Austrian Supreme Court, within the meaning of this provision, if the place where the act causing the damage and the place where the damage occurred are not identical, solely the place where the act causing the damage occurred is of relevance.^[12] In product liability cases, this is basically the place where the defective product was manufactured. This is without prejudice to any liability of the importer of the product.

Notwithstanding the above, jurisdiction for claims against a producer based in a third state might be given in the case of a 'joinder of parties' – for instance, if the producer is sued together with the importer that has its seat in Austria. A precondition for the establishment of a place of jurisdiction based on joinder of parties is that the parties in the joinder are joined parties within the meaning of Section 11 of the Austrian Code of Civil Procedure, meaning that they are linked by equal legal or factual grounds, or that they are jointly and severally liable. In a case such as this, the applicable law might also have to be looked into. According to Regulation (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), the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

- 1.

the law of the country in which the person sustaining the damage had their habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,

2. the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,
3. the law of the country in which the damage occurred, if the product was marketed in that country.

However, the applicable law shall be the law of the country in which the person claimed to be liable is habitually resident if they could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under items (a), (b) or (c), above.

As regards claims against a defendant domiciled in a Member State of the European Union, the provision that a person domiciled in a Member State may be sued in another Member State, in matters relating to tort, delict or quasi-delict, 'in the courts for the place where the harmful event occurred or may occur', is of main relevance in product liability cases lacking a contractual relationship between the damaged party and the defendant. Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) contains this provision in Article 7(2), and its predecessor, Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in Article 5(3). Likewise, the Lugano Convention (in Article 5(3)) refers to the courts of the place where the harmful event occurred or might occur.

According to the interpretation of the European Court of Justice (ECJ), in a case where the place of occurrence of the event that might give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression 'place where the harmful event occurred' must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, so the defendant may be sued, at the option of the plaintiff, in the courts for either place.^[13]

The Austrian Supreme Court, in a decision of 28 November 2012,^[14] made a request for a preliminary ruling to the ECJ regarding the determination of the 'place of the event giving rise to the damage' in relation to product liability by posing the question of whether this is the place where:

1. the producer is established;
2. the product was put into circulation; or
3. the product was acquired by the end user.

The case underlying this request involved a dispute between a bicycle producer based in Germany and an Austrian plaintiff (a consumer) who had bought the bicycle from an Austrian-based company. While riding this bicycle in Germany, the plaintiff suffered a fall and was injured. He subsequently sued the German producer for damages under the Product Liability Act before a court in Austria. According to the plaintiff, his fall from the bicycle was caused by the fact that the fork ends had detached themselves from the wheel

fork owing to a manufacturing defect. For the purpose of establishing jurisdiction of the Austrian court, the plaintiff relied on Article 5(3) of Regulation No. 44/2001, claiming that the place of the event giving rise to the damage was located in Austria because the bicycle was bought there, in the sense that the product was made available to the end user by way of commercial distribution.

In its judgment of 16 January 2014, the ECJ ruled on the request by the Austrian Supreme Court that Article 5(3) of Regulation No. 44/2001 must be interpreted as meaning that, where a producer faces a claim of liability for a defective product, the place of the event giving rise to the damage is the place where the product in question was manufactured.^[15] Given that Article 7(2) of Regulation No. 1215/2012 is identical to Article 5(3) of Regulation No. 44/2001, it seems safe to say that the same interpretation applies. This also holds for Article 5(3) of the Lugano Convention.

Expert witnesses

The judge can appoint experts at its discretion to assist in establishing the facts of the case. In product liability cases, it is usual that the judge appoints an expert. The parties may propose experts and reject an expert on the grounds of bias; however, the final decision rests with the judge.

The parties may present private expert opinions, but courts regard a private expert opinion only as a private document attesting to the author's opinion. A private expert opinion might serve as an instrument to question or to raise doubt as to the court-appointed expert's opinion.

Discovery

Austrian law does not provide for (pretrial) discovery proceedings.

In Austrian civil proceedings, it is each party's responsibility to produce the evidence necessary to support their case. There are only very limited conditions under which a party might be obliged to disclose certain evidence upon the other party's request. These conditions are specified in the Austrian Code of Civil Procedure, according to which documents are subject to disclosure if:

1. the opponent itself relied on the document in the course of the proceedings;
2. the opponent is obliged to hand the document over by a substantive law; or
3. the document is qualified as a joint deed between the parties.

Joint deeds are documents created in the interest of the party requesting disclosure, documents that contain information regarding reciprocal rights and obligations between the parties, and any documents that are, in fact, written negotiations between the parties.

The party requesting disclosure has to clearly specify the evidence (i.e., the document or documents) that it wishes to see; requests to produce 'all relevant' documents are prohibited. If the above criteria are met, the court can order the opposing party to produce the requested documents. However, a court order to the opposing party to produce documents is unenforceable. Failure to comply with the order may be sanctioned only

inasmuch as the court can take this behaviour into account in its evaluation of the entire case.

Witnesses have the duty to appear before the court and to answer truthfully. Parties (including a company's statutory representatives, such as the CEO) are generally treated as witnesses, but they are under no duty to appear before the court or to give testimony. Furthermore, Austrian law provides for grounds of refusal by parties or witnesses to answer questions during testimony in specific circumstances (e.g., confidentiality, business or trade secrets, and if examinations expose the party or witness to the risk of criminal prosecution).

Apportionment

The Product Liability Act provides for joint and several liability where two or more persons are liable for the damage caused by a defective product. As explained in 'The Product Liability Act', above, this can be the producer of the finished product, raw material or a component part, or the person who presents themselves as the producer, importer or supplier who did not (in a timely fashion) exempt themselves from liability. Thus, if more than one person is liable under the Product Liability Act, the person who has suffered losses can choose whether they seek redress against one or all of them. If a person liable for compensation under the Product Liability Act has paid damages, though neither the person themselves nor one of their employees has caused the defect, they are entitled to claim full reimbursement from the producer of the defective finished product, raw material or component part. If several parties are liable for reimbursement, the liability towards the person compensating the damage is, again, joint and several. If several parties liable under the Product Liability Act have contributed to the defect, the extent of the claim for reimbursement of the person who has compensated the damage against the other parties depends on the circumstances – in particular, on the extent to which one or the other party is responsible for the damage or to which the damage was caused by bringing about a product defect.

Outside the Product Liability Act, joint and several liability may, inter alia, arise if two or more persons unlawfully and negligently contributed to the damage but the proportion to which each contributed cannot be determined.

Austrian law does not provide for market share liability.

The Product Liability Act does not contain a provision regarding successor liability for companies that have acquired the product manufacturer or other persons in the distribution chain. Thus, the general rules apply.

Section 1409 of the Austrian Civil Code contains a mandatory provision that provides for the statutory assumption of liabilities by the acquirer of a business or substantial part of assets for debts pertaining to the business or assets of which the acquirer knew or should have known at the time of the transfer. The acquirer becomes jointly liable with the seller for these debts; however, the acquirer's liability is limited to the market value of the acquired assets.

Pursuant to Section 38 of the Austrian Commercial Code, a person who acquires (by way of singular succession) and continues a business assumes all business-related relationships of the seller, including all connected rights and liabilities, as of the date of the transfer of the

business. The seller, however, remains liable for these liabilities only as far as they become due during a period of five years from the date of the transfer. The acquirer's liability is not limited; however, the acquirer and the seller may agree on exclusions of liability. An agreement such as this is effective in relation to third parties only if it was registered in the commercial register or published in a commercially customary manner or notified to the third party on an individual basis.

Mass tort actions

In July 2024, the Collective Redress Directive Implementation Amendment came into effect, significantly delayed, finally implementing the Collective Redress Directive ((EU) 2020/1828). The previous 'auxiliary instruments' to achieve a form of mass tort action (see below) remain unaffected and continue to be possible.

What is understood by the term 'redress' is not defined, but, according to the underlying Directive, it includes compensation for damages, repair, replacement, price reduction, contract termination or reimbursement of the paid price. The basis must be unlawful business conduct that adversely affects the collective interests of consumers. Claims for remedies are asserted by a qualified entity acting as a representative for consumers, who must actively join the lawsuit (opt-in model). The prerequisite is that the claims arise from essentially similar circumstances and the lawsuit includes claims from at least 50 consumers. The current legislation leaves some questions unanswered, and it remains to be seen how the implementation of the Collective Redress Directive Implementation Amendment will be handled in practice.

Apart from that, the Austrian procedural law (still) offers other instruments that permit the bundling of a series of related claims or proceedings under certain conditions, thus enabling a number of plaintiffs to bring their claim against one defendant. This instrument is, in particular, a formal joinder of parties, which presupposes that the subject matter of the claims is based on similar factual grounds, and jurisdiction of the court is given for each individual claim. Furthermore, Austrian case law has in the preceding years developed the 'class action of Austrian style', under which, if the claims are first assigned to another person or legal entity, this person (legal entity) may then bring the claims as sole plaintiff in one action, provided that the bases of the claims, as well as the questions of fact and law, are, in principle, the same.

Damages

In cases of personal injury under the Product Liability Act and fault-based liability under general civil law, compensation covers medical treatment costs, loss of income and appropriate damages for pain and suffering (which may also include mental damage and suffering owing to the loss of a close relative). In the praxis of courts, as measurement criteria for damages for pain and suffering, certain amounts for days of severe, moderate and mild pain and suffering are applied, and these are usually calculated by a court-appointed medical expert.

As regards damage to property, under the Product Liability Act, there is a deductible amount of €500, and damage to the defective property itself is not covered. Furthermore, under the Product Liability Act, pure financial losses are not recoverable.

Austrian law does not allow for punitive or exemplary damages.

For criminal liability, see 'Causes of action'.

Outlook and conclusions

On 18 November 2024, the new EU Product Liability Directive 2024 was published in the Official Journal of the European Union and came into force on 9 December 2024. EU Member States now have until 9 December 2026 to transpose the new product liability regulations into national law. The previous Product Liability Directive (Directive 85/374/EEC) will be repealed with effect from 9 December 2026. However, it will continue to apply to all products placed on the market or put into service before the relevant date.

The European product liability law will continue to be based on the strict principle of no-fault liability.

The new Directive aims to expand the definition of 'product' to include digital construction plans, raw materials and software. The software covered can include operating systems, firmware, computer programs, applications and artificial intelligence systems. Neither the method of provision nor its use matters (i.e., it does not matter whether the software is placed on the market as a stand-alone product, accessed via cloud technologies or provided under software-as-a-service models).

Of great importance is also the extension of liable entities. The new Directive consolidates 'economic operators liable for defective products'. New is that the following entities will also be liable in the future: the authorised representative if the manufacturer of the defective product is established outside the European Union and the fulfilment service provider if the manufacturer of the defective product is established outside the European Union and there is neither an importer established in the European Union nor an authorised representative.

Relevant are also the changes regarding recoverable damages. The option in EU Member States to limit the manufacturer's total liability for damages resulting from death or personal injury caused by identical items with the same defect is abolished without replacement. Likewise, the option of a deductible in the event of property damage is abolished without replacement. Furthermore, only damage of assets used exclusively for professional purposes will be excluded from compensation.

A presumption of defectiveness is also provided for if the plaintiff proves that the product does not comply with binding requirements of Union law or national law. Thus, the underlying product safety law is referenced. There is also a specific presumption of causality between defect and damage. A national court is then to assume defectiveness or causality between defect or damage, or both, if it is excessively difficult for the plaintiff to provide the corresponding proof due to the technical or scientific complexity – in particular, if the defendant can rebut the presumptions.

The Directive also provides for the introduction of disclosure of evidence and documents. Specifically, EU Member States are to ensure that the defendant, at the request of a damaged party who seeks compensation for damage caused by a defective product in a court proceeding and has provided facts and evidence sufficiently supporting the

plausibility of a compensation claim, must disclose relevant evidence under certain conditions. This 'exploration' can involve, for example, technical documents, including a risk assessment.

In summary, the new EU Product Liability Directive brings significant innovations that will have a particular impact on civil procedural law. In combination with the Collective Redress Directive ((EU) 2020/1828), it will most likely lead to an increase of product liability cases.

Endnotes

- 1 Austria Supreme Court, Cases No. 4 Ob 109/24v of 22 October 2024 and No. 4 Ob 19/24h of 22 October 2024. [^ Back to section](#)
- 2 Federal Act of 21 January 1988 Governing the Liability for a Defective Product, BGBl. No. 99/1988, as amended. [^ Back to section](#)
- 3 Austrian Supreme Court, Cases No. 1 Ob 62/11s of 28 April 2011 and No. 9 Ob 59/15i of 28 October 2015. [^ Back to section](#)
- 4 Christian Rabl, *Produkthaftungsgesetz* (LexisNexis, 2016), p. 147f. [^ Back to section](#)
- 5 Austrian Supreme Court, Cases No. 7 Ob 49/01h of 30 March 2001 and No. 1 Ob 216/11p of 24 November 2011. [^ Back to section](#)
- 6 Austrian Supreme Court, Case No. 6 Ob 215/11b of 13 September 2012. [^ Back to section](#)
- 7 Austrian Supreme Court, Case No. 6 Ob 108/07m of 27 February 2009. [^ Back to section](#)
- 8 Rabl, p. 10. [^ Back to section](#)
- 9 Hanns Fitz, Alexander Grau and Peter Reindl, *Produkthaftungsgesetz* (MANZ Verlag Wien, 2004), p. 257; Rabl, p. 203. [^ Back to section](#)
- 10 If the defendant is domiciled within the European Union, to proceedings instituted after 10 January 2015 Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) applies, and to proceedings instituted before 10 January 2015, its predecessor, Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, is applicable. [^ Back to section](#)
- 11 The Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters applies in relation to Switzerland, Norway and Iceland. [^ Back to section](#)

- 12 Austrian Supreme Court, Cases No. 7 Ob 541/92 of 23 April 1992, No. 2 Ob 157/04h of 1 July 2004, No. 7 OB 173/17t of 20 June 2018 and No. 3 Ob 152/19p of 11 September 2019. ^ [Back to section](#)
- 13 European Court of Justice, Case C-51/97 (*Réunion Européenne*); Case C-189/08 (*Zuid-Chemie*). ^ [Back to section](#)
- 14 Austrian Supreme Court, Cases No. 7 Ob 187/12v and No. 7 Ob 19/14s of 28 November 2012. ^ [Back to section](#)
- 15 European Court of Justice, Case C-45/13 (*Andreas Kainz*). ^ [Back to section](#)

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