

## **WG2 conclusions/recommendations on “liability and data storage / recording needs”**

The group recognizes that public confidence in automated and connected Vehicles is dependent upon how the liability [and privacy](#) issues are clarified. This paper represents the conclusions of the group based on consensus reached for vehicles expected by 2020.

The group will continue discussing liability issues in particular for vehicles expected beyond 2020. In particular, liability assignment could become more complicated with the multiplication of actors in the development higher levels of connectivity and automation. The group will also look at the differences concerning the liability regimes in the Member States (e.g. road and traffic law, civil law, strict liability regimes, and national implementation of the product liability directive) which could impair the deployment of highly automated and connected vehicles. The group will look at the best approach to overcome these difficulties.

### **1) Motor insurance and product liability directives are sufficient for upcoming systems**

An accident involving automated and connected vehicles might occur as a result of a mistake of the driver, a faulty system or due to external factors. Irrespectively of the accident’s cause, it is decisive for the traffic victim to ensure compensation in an easy way. Therefore, the protection currently afforded to victims of road traffic accident must be maintained in any event. The Motor Insurance Directive (MID) is an effective system which effectively delegates complex legal actions to insurers and other stakeholders, providing fast, simple and efficient means of compensation for victims of road traffic accidents, thus ensuring swift compensation for such victims, even where an automated vehicle is involved. These potential legal actions include a possible recourse of an insurer (having settled the traffic victim’s claim) vis-à-vis an OEM in case of a malfunction of the automated driving system in the context of the Product Liability Directive (PLD).

There is no need to amend either the MID or the PLD for upcoming systems. The two instruments are complementary. The MID will continue to be the system where injured road users claim while the PLD (for defective products) and national law will allocate the liability. Whilst some parties in the discussions see a benefit in promoting and extending specifically the principle of “strict liability” (e.g. strict liability under civil law, separate strict liability regime under road and traffic laws, etc), combined with a compulsory insurance for vehicles (the latter already existing under the MID), there is no change currently needed on this topic for 2020 systems.

### **2) Data storage to be included in the type-approval legislation to clarify liability. It shall cover the minimum set of data needed to clarify liability and mechanisms to regulate the data access.**

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**Comment [A1]:** I do not share their assertion.

-The standard for product liability is **the safety that a person is entitled to expect** (article 6-b). What safety could anybody (not just the user, but also other participants in the traffic) expect? Since there is no experience with automated cars an analogy with a product with which experience does exist needs to be found. It is extremely difficult for the time being to understand what degree of safety should be expected for autonomous cars as there is no previous experience of a similar product.

-Besides, the safety a person is entitled to expect also depends on **the presentation of the product**. As we can see with Tesla, the benefits and new uses of cars are stressed. This push the expectation with regard to safety that the automated car offers up. The justified expectations of the safety can be lowered by attaching disclaimers to the product. However, disclaimers cannot be used to lower the safety expectations of the public arbitrarily.

So the question is open and may lead to very concrete issues in respect of design defects for instance the car should have been designed in this manner to reduce or avoid this foreseeable risk of harm. To establish this successfully one can either use the consumer expectation tests, or more popular and established, is the risk utility test. Currently, consumer expectation test is usually not used as a test as it would be more difficult to be convinced as the court usually looks to what a reasonable consumer would expect from a product. For our case, a reasonable consumer would expect that the autonomous car they purchased is able to break appropriately. The advertising, marketing etc will lead to allow a typical consumer to think that the car is safe and can operate safely without much driver intervention. The court should re-look on how they view this as a reasonable test again as a reasonable consumer would assume that the car is safe to drive. Of course, the court should also view what a reasonable driver would be. Besides consumer expectation test, the more popular test is risk-utility test for the traditional vehicle. Under this test, the plaintiff is required to submit and present a reasonable alternative design that would have prevented the accident. The current law may prohi...

It is expected that at some stage of automated driving (AD), the use of Event Data Recorders (EDRs) will become mandatory, for establishing the factual operating circumstances in the occurrence of an accident and/or a significant safety related event related to a highly automated vehicle, i.e. whether the driver or a malfunction of the highly automated driving system caused the accident (“operating circumstances”). These Event Data Recorders Automated Driving (EDR-AD) will therefore need to fulfil specific requirements which are quite distinct from the EDRs which are currently in use. The EDR-AD should be subject to the Type Approval Regulatory framework and a set of Minimum Requirements for EDR-AD therefore needs to be reformulated for data recording.

Specific consideration will need to be given to a number of aspects including: Data privacy (in line with the General Data Protection Regulation - GDPR), Data Integrity (to validate EDR) and Cyber Security (methodology needed for a risk assessment). The setting of these requirements may need further research.

A mechanism will also be needed to regulate the access to this data. The conditions surrounding this access would thus depend on the user (law enforcement authorities, repairers, insurers, manufacturers, parts suppliers, software companies) and the existence of a legitimate interest to access this data (e. g. determination of responsibility). Such mechanism would also need to be developed in line with the GDPR (Art. 6), with some parties calling for a binary distinction between two categories of users, having either unconditional or conditional access to the data. The format in which this data is to be collected and stored would also need to be discussed. The extensive work already done in the context of the C-ITS Platform on some of these topics should also be incorporated.

### **3) Different national liability regimes – difficult to harmonise for 2020.**

Besides the already harmonised the EU product liability regime and MID, there are some differences concerning the liability regimes in the Member States (e.g. road and traffic law, civil law, strict liability regimes, and implementation of product liability). There are diverging views as to whether it is necessary or even desirable to harmonise the different EU liability regimes, or whether this is even an EU competence.

The agreement this stage is that any such harmonisation is neither needed nor feasible for the upcoming systems in 2020. These aspects will however be looked at in more details in the second phase of the WG2 (January-June 2017)