

# NECESSARY SYSTEM UPDATE: PRODUCT LIABILITY

Position paper of the Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband – vzbv) on the Proposal for a Directive on Liability for Defective Products (COM(2022) 495 (final))

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# I. SUMMARY

On 28 September 2022, the European Commission published a proposal for a directive<sup>1</sup> on liability for defective products (hereinafter: PLD-P).

The proposal contains some encouraging adjustments from the consumer's point of view. In particular, the elimination of the threshold of 500 euros, the elimination of the maximum liability limit, as well as the clarification that software per se, whether integrated into a physical product or not, is defined as a product, are positive. Likewise, we welcome the fact that no exemption from liability applies if the defectiveness of a product consists in the absence of software updates or upgrades.

It is regrettable, however, that the European Commission has not been bolder. It needs to be, if consumers are to enforce their rights in the future. Particularly with regard to the burden of proof and the responsibility of online marketplaces, the European Commission's proposal falls far short of vzbv's expectations. The European Commission sees the burden of proof on the injured person itself as the "single most difficult stepping stone to receiving compensation for damages"<sup>2</sup> That's why it is truly regrettable that it has not dared to introduce a reversal of the burden of proof. The planned rules for the liability of online marketplace operators also leave a glaring gap. It is important that they are always liable when no other economic operator can be found.

The following is a summary of the requirements from a consumer perspective:

- ❖ The burden of proof must be shifted to the economic operator when the product is used as intended.
- ❖ Operators of online marketplaces should be liable if no other responsible economic operator is tangible.
- ❖ In Art. 4(6)(b)+(c) the alternative "theft" must be added.
- ❖ The definition of "defectiveness" needs to be expanded. Products should also be considered defective if they do not perform as expected.
- ❖ Art. 6(1)(b) should be supplemented with "including foreseeable negligent or intentional misuse by third parties".
- ❖ Art. 7 PLD-P should be formulated in such a way that consumers can choose which economic operator they turn to.
- ❖ Any limitations of liability such as those in Art. 7(5)(a) and (b) must be omitted.
- ❖ The scope of Art. 7(4) must be limited to commercial users.
- ❖ Compliance with mandatory regulations issued by public authorities should not be a reason for exemption from liability. Art. 10(1)(d) should be deleted.
- ❖ Development risks should not exempt from liability. Art. 10(1)(e) should be deleted.
- ❖ The PLD-P must provide for an article to include the PLD-P in Annex I of the European Directive on representative actions for the protection of consumers' collective interests ((EU) 2020/1828).

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<sup>1</sup> European Commission: Proposal for a Directive of the European Parliament and of the Council on liability for defective products COM(2022) 495 final.

<sup>2</sup> Cf. COM(2018) 246 final, p. 5.

- ❖ The limitation periods should be based on the lifespan of the product, and be at least 20 years.

## II. INTRODUCTION

Product liability law in the European Union is based on a directive from 1985.<sup>3</sup> It is outdated and needs revision. vzbv welcomes the European Commission's aim to adapt the rules on liability for defective products to the digital age and to ensure that they reflect the potential risks of products in the digital age and include the circular economy. Unfortunately, in the view of vzbv this goal is not achieved with the proposal. vzbv favors a fundamental reform of product liability law.<sup>4</sup> It is disappointing that the opportunity has not been seized for such fundamental reform. It is not enough to simply deal with the obvious problems. Outdated principles such as the burden of proof at the expense of consumers must also be renewed.

In addition to regulations governing safety before a product is placed on the market, the Product Liability Directive plays an important role in compensating consumers in the event of a defective product. Product liability law serves as a safety net. So it must be reliable. It is essential to avoid legal uncertainty. Consumers must be able to rely on effective protection.

vzbv therefore expressly welcomes, for example, the fact that the previously applicable threshold of 500 euros will no longer apply in the future under the proposed directive. This strengthens consumers' ability to take action and is also necessary. The Commission itself notes that the threshold is a hurdle: in four out of five cases, no compensation is claimed because the damage is below the threshold.<sup>5</sup> The example of an ordinary smartphone illustrates the relevance of eliminating the threshold: If a product defect results in data loss, for example due to damage to the data medium, it is difficult to measure the value of the lost data.<sup>6</sup>

Strict liability is the right way to achieve fair compensation.<sup>7</sup> The control effects are obvious and proven: in North America, an investigation was conducted in relation to traffic accidents after liability was abandoned and an insurance solution was introduced instead. Even without liability, the threat of self-inflicted injury in the event of an accident creates an incentive for drivers to avoid them. Nevertheless, the study concluded that the number of fatal traffic accidents has increased by up to 10%.<sup>8</sup> Liability law thus influences the behaviour of its addressees.<sup>9</sup>

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<sup>3</sup> Directive 85/374/EEC.

<sup>4</sup> [https://www.vzbv.de/sites/default/files/2021-06/21-06-07\\_vzbv\\_Positionspapier%20Produkthaftung\\_neu.pdf](https://www.vzbv.de/sites/default/files/2021-06/21-06-07_vzbv_Positionspapier%20Produkthaftung_neu.pdf) [accessed 02 November 2022].

<sup>5</sup> SWD(2018) 157 final, p. 19.

<sup>6</sup> Cf. Rott, Rechtspolitischer Handlungsbedarf im Haftungsrecht, expert opinion commissioned by vzbv, 4 May 2018, p. 45.

<sup>7</sup> COM(2018) 246 final, 7.5.2018 p. 5.

<sup>8</sup> Dewees/Duff/Trebilcock, Exploring the Domain of Accident Law, 1996, 415f.

<sup>9</sup> Wagner in "Münchener Kommentar zum BGB", 8th edition 2020, BGB before § 823 margin no. 67.

## III. CORE VZBV RECOMMENDATIONS

### 1. REVERSAL OF THE BURDEN OF PROOF

vzbv favors a reversal of the burden of proof in favour of consumers. Unfortunately, this central requirement for consumers has not been implemented. Thus, major hurdles remain which will prevent consumers from being able to enforce their justified claims as easily as possible. Companies have both much easier access to all relevant information and the technical and financial means to investigate possible causes of damage. If the product is used as intended, the burden of proof should therefore lie on the side of the responsible economic operator. The latter could then counter liability by denying the product defect or the causal link between the defect and the damage. Simply easing the burden of proof in favour of consumers will not adequately address the problem of consumers not having access to relevant information. As the European Court of Justice stated<sup>10</sup>, consumers can benefit from presumptions in certain cases. Nevertheless, they may find it difficult to substantiate their claims. As the Commission notes, the most common reasons for rejecting claims relate to proving the defect and its causal link with the damage. They account for 53 percent of rejection cases.<sup>11</sup> It is partly assumed that the burden of proof will be heavier for a person harmed by a digital product than for a person harmed by a conventional product.<sup>12</sup> The complexity and opacity of digital products must not deter consumers from seeking redress, nor should they lead to undue burdens. Therefore, finding out the cause of the damage must be the responsibility of those who in any case have access to the relevant information.

**Example 1:** The Smith family uses a smart home system with programmable roller shutters that are lowered at a specific time. However, a roller shutter falls down uncontrollably for an unknown reason and smashes the window sill. The family would like to assert the claim under product liability law, but the responsible economic operator claims that the damage occurred because the roller shutter was lowered by hand without due care and fell down in the process. The log file of the smart home application could shed light on the matter, but the manufacturer refuses to hand it over.

**Example 2:** Mrs Smith sleeps on the upper floor of her house with the shutters closed. Once again, a smart home system is used whose manufacturer claims that in the event of a smoke alarm being triggered by an interconnected smoke detector, the shutter control is programmed to immediately raise all shutters to allow for a quick exit to the outside. Smoke develops in the kitchen of the house, the smoke detector is activated, but the shutters in the bedroom are not raised. Mrs Smith manages with difficulty to pull up the roller shutter manually and suffers smoke inhalation. The smart home manufacturer denies liability, arguing that the shutters had been installed incorrectly.

<sup>10</sup> Boston Scientific (C-503/13 and 504/13, 5 March 2015 - ECLI:EU:C:2015:148) and Sanofi Pasteur (C-621/15, 21 June 2017 - ECLI:EU:C:2017:484)..

<sup>11</sup> SWD(2018) 157 final, p. 25.

<sup>12</sup> Examples in: Gerhard Wagner, "Robot Liability", 2019, p. 14, <https://www.rewi.hu-berlin.de/de/lf/oe/rdt/pub/working-paper-no-2> [accessed on: 21 November 2022].

**VZBV RECOMMENDS**

The burden of proof must be shifted to the economic actor when the product is used as intended.

**2. GREATER RESPONSIBILITY OF ONLINE MARKETPLACES**

Online retail and especially online marketplaces are the biggest gateway for dangerous products to enter the EU internal market. However, consumers do not benefit from the same level of protection when shopping online as they do when buying in a local shop, as they cannot trust that the products are safe and comply with European rules. This is especially true for direct imports via traders from third countries, because even fewer control instances are interposed. Online retail is booming, and online marketplaces are generating more and more revenue.<sup>13</sup>

It is therefore time to make the operators of online marketplaces liable in the event of damage if no other economic operator is tangible. This should apply regardless of whether the online marketplaces act as if they were the merchants themselves or whether they exert special influence on the merchants. This is the only way to ensure that consumers are able to enforce their rights.

**VZBV RECOMMENDS**

Make operators of online marketplaces liable if no other responsible economic operator is tangible.

**IV. OTHER RECOMMENDATIONS**

In addition to its central recommendations, vzbv comments on the following relevant points from the Commission's proposal:

**1. GOOD: SOFTWARE INCLUDED AS A PRODUCT**

vzbv expressly welcomes the clarification in Art. 4 (1) PLD-P that software – regardless of whether it is integrated into another product or not – is a product within the meaning of the Product Liability Directive. Given the increasing relevance of software as a source of damage, this is right and important. It is equally true that digital manufacturing files that enable the automatic operation of, for example, milling machines for the manufacture of a material object<sup>14</sup>, will also fall under the definition of a product in the future.

**VZBV RECOMMENDS**

It is essential to maintain the clarification that software as a product is covered by the Product Liability Directive.

<sup>13</sup> HDE Online Monitor 2022, p. 7, [https://einzelhandel.de/index.php?option=com\\_attachments&task=download&id=10659](https://einzelhandel.de/index.php?option=com_attachments&task=download&id=10659) [accessed 01 December 2022].

<sup>14</sup> See recital 14 PLD-V.

## 2. NO CONSIDERATION OF (DATA) THEFT

It is unclear whether Art. 4(6)(b) and (c) also cover the theft of data and assets. Recital 18 only mentions the "damage to or destruction of property and data loss or corruption". If, for example, consumers have their notebooks stolen after a door lock is hacked, any damage must be covered by the product liability directive. This concerns on the one hand the theft of the notebook as a physical object, and on the other the theft of the data on it. This should also be clarified accordingly in the text.

### VZBV RECOMMENDS

In Art. 4(6)(b+c) PLD-P the alternative "theft" must be added.

## 3. TOO NARROW UNDERSTANDING OF DEFECTIVENESS

vzbv calls for a broader understanding of the defectiveness of a product. The definition is too narrow, especially in the context of AI-based products. A smart refrigerator that orders independently can serve as an example.<sup>15</sup> If it orders 200 packs of milk instead of two, product safety is not affected, but this can still lead to considerable financial damage.

### VZBV RECOMMENDS

The definition of defectiveness needs to be expanded. Products should also be considered defective if they do not perform as expected.

## 4. GOOD: NEW CRITERIA OF EXPECTABLE SAFETY

vzbv welcomes the non-exhaustive list of criteria for the objective assessment of the expected safety.

### 4.1 Good: Expected safety adapted to the digital age

In particular, vzbv welcomes the fact that with the insertion of letters a, c and f in Art. 6(1), aspects have been included that are of central importance in connection with product liability for the Internet of Things, robotics and Artificial Intelligence (AI). In a security test of 16 smart devices, 54 vulnerabilities were found, in particular gateways for possible hacking.<sup>16</sup> According to a survey, 46 percent of consumers refuse to use smart home applications because of concerns about hacking.<sup>17</sup> Particularly important in this context is therefore the link to product safety regulations established by Art. 6(1)(f). From the consumer's point of view, however, the regulation can only have its full effect if sufficiently stringent product safety requirements are in place.

### VZBV RECOMMENDS

The provisions of Art. 6(1)(a), (c) and (f) of the PLD-P must be retained at all costs.

<sup>15</sup> <https://t3n.de/news/amazon-smarter-kuehlschrank-project-pulse-essen-einkaufen-tracking-1413952/> [accessed on 28 November 2022].

<sup>16</sup> <https://www.test-achats.be/hightech/smart-home/news/hackable-home> [accessed 29 November 2022], see also: <https://press.which.co.uk/whichpressreleases/more-than-100000-hackable-cameras-in-uk-homes-warns-which/> [accessed 30 November 2022].

<sup>17</sup> <https://www.vzbv.de/pressemitteilungen/digitales-zuhause-fuer-viele-ohne-mehrwert> [accessed 29 November 2022].

## 4.2 Lack of consideration of misuse by third parties

vzbv also supports the clarification in the wording of Art. 6(1)(b) of the proposal. In Germany, a product must already be designed in such a way that it does not cause damage even in the event of foreseeable misuse.<sup>18</sup> With this addition, the level of protection is now firmly established throughout the EU. However, the wording should also include misuse by third parties, for example through cyber attacks, and the words "including foreseeable negligent or intentional misuse by third parties" should be added for this purpose.

### VZBV RECOMMENDS

Art. 6(1)(b) PLD-P should be supplemented with "including foreseeable negligent or intentional misuse by third parties".

## 5. NO JOINT AND SEVERAL LIABILITY FOR ECONOMIC OPERATORS

The aim of the proposed directive is that one economic operator can always be held liable.<sup>19</sup> For this purpose, the directive provides for a subsidiarity principle: the manufacturer is always primarily liable; if this cannot be determined, other economic operators are liable. This liability cascade basically leads in the right direction. Nevertheless, consumers are faced with two fundamental problems: first, the ambiguity of the claimant and, second, the likelihood of success in enforcing their rights. The proposed directive does not offer full protection for consumers.

One solution can and should be joint and several liability. If a manufacturer cannot be identified, legal action remains unnecessarily burdensome.<sup>20</sup> Consumers should be able to choose their lawsuit opponent. Moreover, there is no enforceable right to information; rather, the regulations merely favour the rational self-interest of economic operators in avoiding liability.<sup>21</sup> Another hurdle is that the retailer can escape liability by naming the upstream supplier:<sup>22</sup> In this respect, consumers have no choice but to make repeated requests for information. The resulting loss of time could turn into a loss of rights if the claim is time-barred by the time action is brought against the manufacturer.<sup>23</sup>

### VZBV RECOMMENDS

Art. 7 PLD-P should be formulated in such a way that consumers can choose which economic operator they turn to.

Consequently, the requirements of Art. 7(5)(a) and (b) must be deleted. With a joint and several liability such restrictions must not be part of the directive.

### VZBV RECOMMENDS

Any liability restrictions such as those in Art. 7(5)(a) and (b) must be omitted.

<sup>18</sup> RegE, BT-Drs. 11/2447, p. 18; OLG Bamberg, judgement of 26 October 2009 - 4 U 250/08 margin no. 22.

<sup>19</sup> See fn. 1, p. 2.

<sup>20</sup> See OLG Düsseldorf, NJOZ 2012, p. 1408.

<sup>21</sup> Wagner in "Münchener Kommentar zum BGB", 8th edition 2020, ProdHaftG § 4 margin no. 56.

<sup>22</sup> BT-Drs. 11/2447, p. 20 f.

<sup>23</sup> Wagner in "Münchener Kommentar zum BGB", 8th edition 2020, ProdHaftG § 4 margin no. 62.



## 6. LACK OF RESTRICTION TO COMMERCIAL USERS

According to Art. 7 (4) PLD-P, natural persons can now also become liable. There is no limitation to commercially acting persons ; recital 29 merely mentions "the person". In line with the proposal on AI Act<sup>24</sup> and the Machinery Regulation<sup>25</sup>, the scope of application should be limited to commercially acting persons.<sup>26</sup> It is not comprehensible why privately acting users should be liable. The Commission itself only mentioned "business models" and "companies" here when it published the questions and answers on the revision of the Product Liability Directive<sup>27</sup>.

### VZBV RECOMMENDS

The scope of Art. 7(4) must be limited to commercially acting persons

## 7. TOO MANY LIABILITY EXEMPTIONS

vzbv expressly welcomes the fact that Article 10(2) PLD-P excludes exemption from liability for economic operators in certain cases. Even after placement on the market, economic operators must continue to bear responsibility for updating their products.

### 7.1 Defence of development risk not abolished

According to the current directive, the member states have the option under Art. 15(1)(b) to provide that the manufacturer is also liable if they prove that it could not have detected the defect in the light of the state of the art when they placed the product on the market. The recital of the current Product Liability Directive states that "it should (...) be possible for a Member State" to have the option to regulate that development risk is not exempt from liability and that otherwise this "may be felt (...) to restrict unduly the protection of the consumer".<sup>28</sup> It is therefore all the more important that there is no negative deviation from this in the new product liability directive. We therefore call for the deletion of Art. 10(1)(e) PLD-P. The frequently raised argument of hostility to innovation and the risk of ruinous consequences can be countered with § 84 of the German Medicines Act (AMG): In the event of adverse effects of medicinal products, this regulates the obligation of pharmaceutical companies to assume liability regardless of the recognisability of the damage at the time the product went on the market.<sup>29</sup> The same applies to manufacturers of products containing or consisting of genetically modified organisms.<sup>30</sup> While it is true that historically only a few proceedings exist in which the defence of development risk has been raised, especially with the emerging proliferation of interconnected and AI-supported products the raising of the defence of development risk is becoming increasingly likely, as the Expert Group on Liability and Emerging Technologies established by the European Commission also noted in its report.<sup>31</sup>

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<sup>24</sup> COM/2021/206 final, Art. 3 No. 4.

<sup>25</sup> COM 2021/0105(COD), 21 June 2022, art. 15(3), <https://data.consilium.europa.eu/doc/document/ST-9801-2022-REV-1/x/pdf> [accessed 24 November 2022].

<sup>26</sup> Borges, Der Betrieb No. 45 2022, p. 2651.

<sup>27</sup> Question 2: [https://ec.europa.eu/commission/presscorner/api/files/document/print/de/qanda\\_22\\_5791/QANDA\\_22\\_5791\\_DE.pdf](https://ec.europa.eu/commission/presscorner/api/files/document/print/de/qanda_22_5791/QANDA_22_5791_DE.pdf) [accessed 18 November 2022].

<sup>28</sup> Council Directive dated 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC).

<sup>29</sup> Wagner in "Münchener Kommentar zum BGB", 8th edition 2020, ProdHaftG § 1 margin no. 51; Taschner, NJW 1986, p. 612f.

<sup>30</sup> Wagner in "Münchener Kommentar zum BGB", 8th edition 2020, ProdHaftG § 15 margin no. 17.

<sup>31</sup> Report from the Expert Group for Liability and New Technologies – New Technologies Formation, 2019, p. 29.

## VZBV RECOMMENDS

Development risks should not exempt from liability. Art. 10(1)(e) should be deleted.

### 7.2 Exemption from liability due to compliance with regulations not abolished

Art. 10(1)(d) PLD-P provides for the exclusion of liability if the economic operator proves that the defectiveness is due to the fact that the product complies with binding regulations issued by public authorities. However, due to the enormous pace of development, official regulations can quickly become outdated. Nevertheless, it is important to note that manufacturers are required to identify new hazards on an ongoing basis. Compliance alone should not relieve manufacturers of the liability for defective products.

## VZBV RECOMMENDS

Compliance with mandatory regulations issued by public authorities should not be a reason for exemption from liability. Art. 10(1)(d) should be deleted.

### 7.3 Good: New obligation for product safety updates included

vzbv welcomes the regulations drawn up in Art. 10(2)(a-c) PLD-P. The manufacturer has the possibility to keep the products up to date through updates, thus ensuring the safety of the product throughout its life cycle. They can subsequently close detected security gaps and fix bugs. This is also necessary, since there is no such thing as error-free software, especially with more complex systems.

## VZBV RECOMMENDS

The provisions of Art. 10(2)(a-c) must be retained at all costs.

## 8. LACK OF INCLUSION IN THE ANNEX TO THE DIRECTIVE ON COLLECTIVE ACTIONS

From vzbv's point of view, the fact that the PLD-P is not to be included in the annex to the directive on representative actions for the protection of the collective interests of consumers is incomprehensible. Consumers benefit considerably when consumer protection organisations enforce their rights in court, in addition to the enforcement of rights by competent authorities and public bodies.<sup>32</sup> Currently, Directive 85/374/EEC is part of Annex I of the European Directive on representative actions for the protection of the collective interests of consumers ((EU) 2020/1828).<sup>33</sup> This must also apply to the new Product Liability Directive. Inclusion of the AI Liability Directive alone<sup>34</sup> in Annex I of the Directive<sup>35</sup> is not sufficient.

<sup>32</sup> Verbraucherzentrale Bundesverband: Mehr Sammelklage wagen - Kurzpapier des vzbv (2021), <https://www.vzbv.de/pressemitteilungen/mehr-sammelklage-wagen> [abgerufen am 22.11.2022]; Verbraucherzentrale Bundesverband: vzbv-Klage gegen VW führt zu Deutschlands größtem Massenvergleich (2020), <https://www.vzbv.de/urteile/vzbv-klage-gegen-vw-fuehrt-zu-deutschlands-groesstem-massenvergleich> [abgerufen am: 22.11.2022].

<sup>33</sup> Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

<sup>34</sup> Proposal for a Directive of the European Parliament and of the Council adapting the rules on non-contractual civil liability to artificial intelligence.

<sup>35</sup> See Art. 6 AILD-V.

## VZBV RECOMMENDS

The PLD-P must provide for an article to include the PLD-P in Annex I of the European Directive on representative actions for the protection of consumers' collective interests ((EU) 2020/1828).

## 9. STATUTE OF LIMITATIONS TOO SHORT

As the European Court of Human Rights stated in a ruling<sup>36</sup>, a ten-year statute of limitations can mean a violation of the right of access to a court<sup>37</sup>. The proposed increase in the time limit in Art. 14 (2) PLD-P to 15 years but only in certain cases, while the principle of the ten-year limitation period continues to apply, is merely a minimal implementation of the status challenged by the ECtHR and cannot be the legislative intent. It is incomprehensible why it should not be possible to claim damages for a product that lasts and should last for decades, be it ovens or roof tiles.

**Example:** The clay roof tiles<sup>38</sup> on the house of the Smith family become porous after only 16 years due to a manufacturing defect and individual tiles fall down and seriously injure the children playing on the pavement below.

It is not understandable why the manufacturer should not be liable in this case. The concern for more sustainable consumption and long product life is in line with the European Green Deal<sup>39</sup> and the right to repair. It is in line with the idea of responsibility that products that are supposed to last a long time must not have any defects. The time limits within which manufacturers can be held liable should correspond to consumers' expectations for durable products. The limitation period for liability should therefore be lifelong, based on the average product life. The drawing of boundaries is in any case rather artificial. The European Parliament proposed a limitation period of 20 years.<sup>40</sup>

## VZBV RECOMMENDS

The limitation periods should be based on the service life of the product, and be at least 20 years.

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<sup>36</sup> ECtHR, *Howald Moor et al. v. Switzerland*, 52067/10 and 41072/11, <https://hudoc.echr.coe.int/fre?i=001-169034> [accessed 28 November 2022].

<sup>37</sup> Art. 6(1) ECHR.

<sup>38</sup> Clay roof tiles usually need to be replaced every 60 to 80 years, cf.: <https://www.test.de/Alternative-zum-Solarpanel-Sonnenstrom-aus-dem-Dachziegel-5936867-0/> [accessed 30 November 2022].

<sup>39</sup> COM(2019) 640 final.

<sup>40</sup> <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=OJ:C:1998:359:FULL&from=DE> [accessed 28 November 2022], p. 30.