

Product liability, safety, and compliance: What you should know before launching an innovative product

10 January 2018

Before any new product is released into the market, companies should assess its product liability, safety, and compliance. But the launch of an innovative product presents a unique set of challenges: typically, they involve state-of-the-art technology, engineering, and design. When products break new ground in making something easier, or allow users to do something they've never been able to do before, new safety and quality standards and expectations might also have to be assessed and established.

Dr. Sebastian Polly, a partner at Hogan Lovells in Munich, discusses liability, safety, and compliance issues associated with the launch of innovative products, and how addressing these issues early in the process can help avoid litigation later on.

What is the definition of an innovative product?

Polly: When my team and I work on cutting-edge technology, particularly in the automotive, consumer goods, and electronics industries, we typically refer to a company's product as innovative if it does something better, different, or new. In the automotive and mobility industry, for example, innovations are currently often linked to autonomous or automated driving as well as to connectivity, electrification, and mobility services. In the consumer goods and electronics industry, it may involve products such as 3-D printing, augmented reality (AR), or virtual reality (VR). These examples illustrate that innovation is often something that — not long ago — people were imagining from a science fiction perspective.

What are some of the liability challenges that companies face when launching innovative products?

Polly: We want to make sure that if we place an innovative product on the market, we protect a.) the company, b.) its brands, and c.) its decision makers. The latter is particularly crucial, because we need to ensure that the people who actually sign off on an innovative product's marketability do not take any unnecessary personal risks. In particular, this is one of the main challenges.

Regarding product liability, there are tests like "alternative feasible design," "reasonable safety expectation," and "state of the art." However, if a product is innovative, there is often no previous experience or existing standard. Hence, anticipating potential requirements is already a challenge in itself.

For example, if a company wants to put an autonomous vehicle on the market, what is the reasonable safety expectation? Is it enough if the vehicle is as good as an average driver? If not, how good does the vehicle actually have to be?

In doing so, product liability and product safety generally go hand-in-hand: if you have a safe product, its manufacturer is typically not liable for it; if you have an unsafe product, it is typically defective and its manufacturer might be liable for it.

Hence, when launching an innovative product, we particularly help companies to answer questions such as: What may customers reasonably expect? What is the right benchmark? What is the state of the art? How do you navigate the "big unknown"?

How do you help clients navigate that “big unknown” of liability?

Polly: Each case is different. My team and I are very passionate when it comes to a client's products. Once we have understood the potential, in particular, we analyze market entry requirements, we assess risks, and we help draft proper documentation. Also, we provide support regarding specifications, including labels, manuals, and warnings. It is crucial to outline what a product can and — even more important — what a product cannot do. Moreover, we help train engineers and managers. The right awareness and guidance is crucial to avoid unnecessary risks in the first place.

Do you see the firm’s role in this process as innovative, just like the product you are helping to bring to market?

Polly: Yes, that’s the overall aim — I can’t stress that enough. A traditional lawyer might primarily advise a company on legal exposure. This is neither particularly helpful nor innovative. Typically, our clients are quite aware of potential product risks. My job is not to highlight these risks but to come up with creative and valuable solutions to mitigate these risks in a way that allows the business to succeed with their plans. In doing so, we are also relying on certain innovative legal tech solutions.

There are also liability-related safety issues that are linked to the launch of innovative high-tech products. What are some examples?

Polly: Typically, there is a connection between both areas: a defective product is typically unsafe, while a safe product is typically free from defects. A company might be liable for a defective product, and at the same time a company generally needs to make sure that it only places safe products on the market. Either way, as a general rule, a product generally has to comply with the "reasonable safety expectation" test.

However, with safety, it is often a more crucial issue, because civil liability typically only comes into play if there is an actual issue with losses. For example, an accident with personal injury may result in civil liability claims. However, a potential safety case might start much earlier, for

example, when a company places a product on the market. This is because — regardless of an actual issue with losses — all products must be safe.

To illustrate safety challenges, let us first think about a traditional product like a pair of scissors. As we all know, there are certain hazards tied to a pair of scissors. These hazards are inevitable and known to the public. Still, everybody typically agrees that a pair of scissors is safe and can be placed on the market. However, if a company wants to place a completely innovative and new product on the market, there are obstacles. Maybe — due to a lack of previous experience from the field — potential hazards are yet unclear. Also, because the public is often not familiar with innovative products, it might be hard to anticipate user expectations or reactions. Hence, if a company takes an innovative product that is new to the market and users, decision makers might want to consider potential product safety implications very diligently.

What about the final element associated with a product launch: compliance? Are those challenges similar to liability and safety?

Polly: From a compliance perspective, there are different ways to look at it.

The first angle, of course, is that the product itself needs to be compliant, meaning that it is in-line with all applicable mandatory legal provisions. Besides, depending on the individual case, a company might also want to consider certain voluntary technical standards or guidelines as well as some other tests.

Then there are things like labeling, which is also very important to a product's marketability. For example, a company should avoid any shortcomings linked to instructions, labeling, marking, and packaging aspects.

Furthermore, product compliance is also about how a company and its decision makers manage the internal paper trail. In particular, a company might have to raise certain awareness among its engineers and managers about how to accurately and properly document issues. As an example, exaggerations or understatements as well as irony, jokes, or speculations should be avoided. Stakeholders need to understand that inaccurate or improper communication — including emails — can be a compliance issue in itself.

Another element of a product launch is proper technical documentation and proper authority communication. Depending on the respective product, a company might need certain approvals or certificates.

Besides, there may also be certain product monitoring obligations. Particularly if a product is new to the market, there is typically no or only very little experience from the field. Hence, a company might have to consider certain product monitoring activities, particularly to identify certain issues that might occur after the launch.

Based on our experience, the most jeopardizing product crisis typically occurs right after the launch. If there is a design or production issue, it often takes a certain amount of time before there are failure reports from the field. Besides, sometimes there are certain misuse reports that

need to be assessed. Having respective internal processes in place — to handle potentially incoming consumer claims — is generally also a part of a company's product compliance system.

How does Hogan Lovells educate clients about compliance?

Polly: We have a whole menu of services that we offer; this means every major element tied to a product launch. Conducting trainings is a very important element in our portfolio. We are happy to train everybody who is involved in product liability, product safety, and product compliance — particularly engineers, managers, executive managers, and in-house counsel. We also help build entire internal product compliance processes and systems.

About Dr. Sebastian Polly

Dr. Sebastian Polly's key focus is on product liability, product safety, and product compliance law. He is particularly experienced in the automotive, chemicals, consumer goods, electronics, and energy industries. Sebastian has assisted numerous clients with the rollout of innovative products. He assesses legal risks, develops preventive liability mitigation strategies, and is experienced in dealing with European market entry requirements.

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