Regulatory Due Diligence:

The Background

I spent a weekend in absolute despair. Then Monday dawned, and ideas dawned. As the old saying goes, "Necessity is the mother of invention"—though the despair came from realizing that new regulations render innovation effectively impossible, not because technical challenges are insurmountable, but because liability boundaries are undefined.

The purgatory was caused by a strict re-reading of the NIS 2 directive and PLD 24 directive. While I fully appreciate the importance of consumer protection and cybersecurity, these directives have been handled by people who failed to consult appropriately—or at all, in the case of the £194bn entertainment sector.

The thin rationale may have been that "legislation isn't supposed to deal with overlaps." Yet NIS 2 explicitly regulates supply chains, which are overlaps by definition. PLD 24 addresses software integrated into products—inherently overlapping categories. The supposed rationale contradicts the reality.

I shall dissect this later, but first to the reflex despair, how I worked through it, and came up with controls and a path through.

Why This Potentially Kills Entrepreneurial Innovation

We all dreamed that if we worked hard at school and "learned things," we could become innovative inventor-entrepreneurs. This door seems to have been damagingly closed.

PLD 24 is particularly problematic. Yes, software becomes a product good. But "strict liability" on software? Why don't we haul carpenters before judges for imperfect dovetail joints? With physical craftsmanship, we identify flawed workmanship and take appropriate action—perhaps asking "could you redo that, please?" But PLD 24 imposes strict liability for something it cannot define.

The "Substantial Modification" Problem

The legislation has been conceived by people with no idea what a "substantial alteration" in software actually means. After 30 years writing code, I don't know either.

Is it:

- A function call?
- Writing a function?
- Creating a library?
- Compiling from source?
- Writing binary by hand?
- Designing a new operating system?
- Creating a new microprocessor?

In January 2023, the European Economic and Social Committee explicitly called for "clarification of the notion of substantial modification."[1] The European Parliament's research service acknowledged the "lack of clarity."[2] Yet the directive was adopted in October 2024 without resolving these fundamental ambiguities.

But here's the deeper problem: PLD 24 defines "substantial modification" as changes not foreseen in the manufacturer's "initial risk assessment." Most software—open-source libraries, GitHub projects, solo developer tools—has no such thing. When the directive asks if my modification was "foreseen in the manufacturer's initial risk assessment," the answer is often: there was no initial risk assessment to check against.

The UK Government has enacted the 2025 Product Liability and Metrology Act with only a passing comment in the House of Lords making it to Hansard[3]. There is some perverse dark humour when the “son of a toolmaker” leads a government to act against his father’s 21st century successors!

The Risk Calculation Nobody Acknowledged

The legislation also transforms the fundamental risk equation without acknowledging it:

Traditional software risk: Cost (fix bug, perhaps compensate customer: £0-£10,000) × Frequency = manageable number

PLD 24 risk: Cost (strict liability, GDPR-scale fines: €0-€10,000,000) × Frequency = company-destroying number

This transformation happened without clear guidance on liability boundaries, compliance criteria, or safe harbours for good-faith efforts.

The Tech Mystique Fallacy

Society interprets this through several mistaken assumptions:

- "Computers are clever" (NO)
- "Computer programmers are clever" (not in 2026—it's a normal job)
- "Tech companies have loads of money" (some do; most interesting ones don't)

Interesting, seminal tech companies are certainly not awash with cash. Most importantly, niche tech companies certainly aren't. So why this strict liability perspective with GDPR-breach-scale punishments?

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[1] European Economic and Social Committee, "Opinion: Revision of the Product Liability Directive," adopted January 24, 2023. Available at: https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/revision-product-liability-directive

[2] European Parliament Research Service, "Revised Product Liability Directive," EPRS Briefing EPRS_BRI(2023)739341_EN, 2023. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739341/EPRS_BRI(2023)739341_EN.pdf

[3] Hansard, House of Lords, October 8, 2024, "Product Regulation and Metrology Bill [HL]." Available at: https://hansard.parliament.uk/Lords/2024-10-08/debates/90B79649-7D3C-49AB-A82F-B0DA74985428/ProductRegulationAndMetrologyBill

The Blurred Line Between Legislature and Judiciary

Having filled half a page with footnotes indicating poor consideration and certainly no clear conclusion, the separation of powers between legislature and judiciary becomes rather blurred. Such niceties would be acceptable if this didn't have serious consequences.

The whole issue of strict liability is unpalatable. I fully acknowledge the adage that it's naive to confuse law with justice. However, I was always of the understanding that people who do "bad" things should be held to account, while people trying to create should be encouraged.

Personally, I believe anyone doing their best to bring genuine innovation, especially in a niche, should be given all assistance available—not impeded through backward, poorly conceived legislation absent appropriate stakeholder consultation.

Having presented this analysis—necessarily incomplete given the legislation's own ambiguities- one interpretation could be: if you are able, get out of Europe and the UK. This makes genuine start up business, and innovation close to impossible, and significantly dulls the appetite for risk of investors. As a fair counterpoint – the UK, being a common-law jurisdiction, has a good ability to apply a degree of common sense. Judicial duties are to enforce the law, not to “fix” broken laws. The Irony of expecting judges to make “substantial alterations” in the relief of strict liability legislation is risible!

Happier conclusion

I think I have “found a way” to continue. This is by abandoning innovation, but through a fair amount of “risk shifting”. Time that could have been spent better making something excellent! And I'm one of the lucky ones; 30 years' experience; established reputation; financial reserves to weather uncertainty. What about the 25-year-old with a brilliant idea but no safety net? What about the bootstrapped startup that can't afford legal uncertainty? They won't 'find a way'—they'll simply never start.

This is how innovation dies: not with dramatic failures, but with ideas never attempted. The true cost isn't measured in ceased businesses; but in products never built; problems never solved; and innovations never attempted.