

Annex - A product liability regime fit for the digital age

The Computer & Communications Industry Association (CCIA Europe) welcomes the opportunity to respond to the European Commission's public consultation on adapting liability rules to the digital age and Artificial Intelligence (AI). In addition to our response to the questionnaire we offer the following comments.

The background of this initiative is the European Commission's concern that certain elements of emerging technologies like AI pose new challenges to the application of liability rules. For this reason, the Commission plans to revise the existing Directive on the liability for defective products (PLD) to explicitly include digital technologies, like AI.

CCIA Europe believes that a possible review of the already well-functioning civil liability framework should be carefully considered as excessive legal requirements could lead to a situation where AI development and deployment is hampered.

The existing liability framework consists of the PLD and national liability rules. The Directive provides a harmonised system at EU level for claims against the producer for damage caused to a consumer due to the defectiveness of a product. It is important to recall that the Directive is technology-neutral and applies to all movable products regardless of the technology they use, and therefore it also applies to AI-driven products. The Directive is complemented by national tort and contract laws, therefore, damages due to defects that occurred after a product has been put into circulation, are already covered by national legislation.

The current liability framework in combination with Member States' rules already provides for a robust protection in terms of civil liability. Moreover, in order to ensure the effective enforcement of this framework, Member States adopt rules for penalties applicable to infringements of the national provisions implementing the Directive. Introducing a strict liability regime could have profound consequences for already-highly-regulated and well functioning sectors. For example, in the automotive sector, there are already national laws that cover issues related to responsibility for collisions or compensation for injuries. However, adding a strict liability regime would make litigation more time consuming and complicated than necessary.

The Commission has not provided real-world evidence showing that the Directive prevents consumers from seeking redress and obtaining compensation from injuries or other harms caused by a digital product. Strict liability and burden shifting should be based on solid evidence of proven flaws in the current liability framework. For this reason, the current review is not justified and the problems that the Commission's initiative aims to tackle are purely speculative. Adapting the current liability framework will not provide additional protection to consumers, nor solve problems for the production, distribution, trust or uptake of AI-enabled products and services, in fact, it may create additional issues to many businesses by increasing legal and financial burden on companies.

Moreover, the timing of the review is premature. As long as the work on the AI Act has not been completed, a possible revision of the Directive could lead to redundant or conflicting legal concepts, principles and requirements and add unnecessary, additional complexity.

Finally, it is important to recall that the EU has already adopted frameworks to deal with marketplace liability. Before adding another layer, and potentially creating confusion, we would urge EU legislators to wait for the implementation of these frameworks. The Digital Services Act (DSA) puts due diligence obligations on marketplaces regarding illegal content. The General Product Safety Regulation completes and specifies the DSA's provisions on marketplaces' liability by setting a list of specific obligations for marketplaces on product safety. The Market Surveillance Regulation makes online marketplaces liable where there is no European economic operator. Therefore, there is no need for the PLD to cover online marketplaces' liability as this is already covered by a series of regulations and proposals.

PRODUCT DEFINITION

It should be carefully evaluated whether the definition of 'product' should be expanded to include intangible products, such as stand-alone software, digital content and other AI/automated-decision making processes, even services.

A strict liability regime is ill-suited to the properties of software and AI systems. Due to the complexity of writing code, it is not realistic to expect a software that is 100% free of errors. If software developers are subject to strict liability for any error in their code, it would deter software development in Europe, and disproportionately impact European companies.

In addition, the Directive would need to address the fact that AI-powered products (but not only) often become "unsafe/defective" only after they are put onto the market. Currently, remedies are available under national law if damages occur after a product has been put into circulation. Also, conformity rules in Directive 2019/771 (and 770) already address the provision, limitations and users redress rights on software updates in consumer goods. We also note that the Commission has announced a number of security-related initiatives under the forthcoming EU Cyber Resilience Act next year. Therefore, applying strict liability to software updates and refurbishments is unnecessary and would further disincentive software development and maintenance by making it harder for producers to extend the lives of digital products and address software errors. This would ultimately undermine innovation and efforts to encourage sustainability in the circular economy, for example, by discouraging producers from providing spare parts. We believe that the proper vehicle to dissipate any legal uncertainty should be security-centric regulations such as the upcoming EU Cyber Resilience Act. Given the societal and economic importance of security updates to the resilience and security of the entire ICT network, it is essential that any requirements related to updates will contemplate the unique technical and security challenges associated with proposed requirements. Proposals that may limit the ability of vendors across the ICT supply chain to produce updates and facilitate their

adoption (by end users) in a timely manner can result in undermining the security of the entire ecosystem.

Moreover, it should be taken into account that software providers have limited control over security updates - often accepted by the users themselves- however, they would still be strictly liable for omissions of other market participants. In this line, it is important to bear in mind that the AI ecosystem and value chain are highly complex. Expanding responsibilities for defective products beyond the producer to, for example, the engineer, deployer, developer, or whoever is in charge of the updated software would need to consider the different life cycles of AI products, and who is responsible for what at each stage. The Commission's proposed AI Act, once adopted, will impose regulatory obligations to the different actors in the AI ecosystem. The AI Act should be adjusted to better address the balance of obligations for different entities in the value chain, otherwise anyone involved in the development of the AI system could be held liable for problems they had no awareness of or influence over. It is clear that the AI Act will directly impact the civil liability regime, therefore, in order to ensure that these two regimes are fully aligned, any reform of the EU product liability regime must wait until the AI Act legislative process is concluded.

In the same line, we also believe that applying strict liability to services would also be disproportionate as the way services are used (and its risks) depends on the user's deployment.

SCOPE OF DAMAGES

Extending the range of damages to non-material damages (e.g. privacy infringements, psychological harm) would increase legal uncertainty over other pieces of legislation that already cover non-material damages, for example, damages for privacy infringements can be compensated under the General Data Protection Regulation (GDPR). On the other hand, other types of damages such as emotional damage are already covered by national legal rules. Applying strict liability is unnecessary and would put a disproportionate burden to providers as non-material damages are less predictable and difficult to measure than in the case of material damages.

REVERSING THE BURDEN OF PROOF

There is no evidence showing that the burden of proof of the Directive places consumers at a disadvantage. Changing the burden of proof does not appear necessary and carries substantial risks. Moreover, it is not evident why products that use AI should go through different procedures than products that do not use AI. Just because a product is AI-enabled does not mean that it is more likely to cause injury for which the customer is unable to seek redress or compensation. Such an assumption risks overbroad and inflexible liability rules which may ultimately discourage innovation and investment in AI technologies in the EU.

In this regard, alleged victims should continue to be required to prove the causation and the damage in order to prevent frivolous and fraudulent claims and cause disproportionate harm to businesses with extensive liability claims.

The burden of proof should only be reduced or reversed if, given the properties of the specific AI system, establishing proof would create an unreasonable obstacle for the alleged victim. In making this determination, it should be taken into account the likelihood that the technology contributed to the harm, the nature and scale of the harm and the degree of ex-post traceability of contributing processes within the technology. Moreover, the main argument that justifies reversing the burden of proof is the difficulty that customers face when making compensation claims due to certain characteristics of AI technologies (e.g. opacity, complexity) However, it should be noted that the upcoming AI Act will introduce mandatory requirements that will address these issues, therefore, this should eliminate the need to reverse the burden of proof. To the extent AI technology, or other specific products (e.g., autonomous cars) create greater risks or cause greater difficulties for consumers making claims and getting compensation, this should be addressed by targeted legislation, addressing the specific risk. The general framework approach to liability in the Directive, which already provides substantial protection, should not change. Such changes would disproportionately affect, in particular, smaller producers and products that pose less risk.