An EU product liability regime fit for the digital age

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1. Introduction

The Computer & Communications Industry Association (CCIA Europe) appreciates the European Commission's efforts to update the existing Directive on the liability for defective products (PLD) and to propose a targeted initiative on civil liability rules for artificial intelligence (AI). CCIA Europe took part in the public consultation on adapting liability rules to the digital age and artificial intelligence.[1] We appreciate the European Commission intends to deal with these issues in two separate initiatives and offer the following comments in support of these important undertakings.

2. Revision of the existing Directive on the liability for defective products (PLD)

The EU has already adopted frameworks to deal with online marketplaces' liability. The draft Digital Services Act (DSA) places due diligence obligations on marketplaces regarding illegal content, while preserving the limited liability regime of platforms and the ban on general monitoring.[2] The draft General Product Safety Regulation (GPSR) sets out a list of specific product safety obligations for marketplaces.[3] The Market Surveillance Regulation made online marketplaces liable when there is no European economic operator available for the most high-risk products.[4] EU legislators should await the implementation of the DSA and GPSR and take due consideration of the implementation of the market surveillance regulation before adding an additional layer of legislation.

The explicit inclusion of online marketplaces in a revised PLD needs to be mindful of the existing and upcoming legislative framework. It is also worth noting that online marketplaces companies with a hybrid business model (e.g. combining manufacturing and intermediating between traders and consumers) are already in the scope of the current PLD on their activities. We therefore understand that the revised PLD would look at the *extension* of a strict liability regime to online marketplaces as intermediaries, when no producer nor importer is identified.

We do not consider that a strict liability regime for intermediating online marketplaces is appropriate due to the specificities, responsibilities and abilities of online marketplaces. In addition, strict liability is a concept that deviates from the legal norm according to which liability requires fault. Rather, consistent with recent legislative initiatives such as the DSA and the GSPR, we encourage policymakers to regulate intermediating online marketplaces in a way that recognises their nature, and does not undermine the operation of particular business models as this could have a negative impact on innovation and consumer choice in the EU. For example, due diligence obligations, such as the requirements to increase the traceability of traders selling on online

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[1] The Computer & Communications Industry Association submitted its comments to the European Commission's public consultation "Civil liability – adapting liability rules to the digital age and artificial intelligence", available respectively here and here.
[2] European Commission, Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, 15 December 2020, available here.
[3] European Commission, Proposal for a Regulation on general product safety (GPSR), available here.
[4] Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products (Market Surveillance Regulation), available here.

marketplaces, are a more appropriate way to regulate them.[5] This traceability should ensure that all traders offering their products on an online marketplace are identifiable. We urge caution on collecting information on the compliance of traders' specific products with EU law as this would create conflicts with the DSA's ban on general monitoring. It could also lead online marketplaces to only allow large, established third-party traders on their platforms, as these may be perceived to present a lower risk of non-compliance. This could have adverse impacts, not only on small and medium-size enterprises' (SMEs) ability to scale but also on consumer choice and pricing throughout the EU.

CCIA Europe urges the European Commission to assess how the extension of a strict liability regime to marketplaces could practically impact the functioning of e-commerce for both EU consumers and SMEs.

3. Additional liability rules to adapt to Artificial Intelligence

Any reform of the existing and well-functioning EU civil liability framework should be carefully considered in light of potential overlaps and duplication between regimes. Moreover, any excessive legal requirements could lead to a situation where AI development and deployment in Europe is unnecessarily hampered. Strict liability regimes are a rare exception - reserved for situations that are especially hazardous and bear a risk of severe damage to other persons or property - due to the risk of incentivising litigation, creating hidden costs, providing mandatory insurances, and overall distorting the dynamic within certain industries. Strict liability regimes should therefore be applied with great caution.

There is, to our knowledge, no clear evidence that demonstrates that the protection of consumers, production, distribution, trust or uptake of AI-enabled products and services is adversely affected by a lack of regulation. The current liability framework in combination with Member State rules already provides for robust civil liability protection. The existing EU PLD is technology-neutral and already applies to all unsafe products, including those with embedded software or containing software. The Directive is complemented by national tort and contract laws. Damages due to defects that occurred after a product has been put into circulation are therefore already covered by national legislation.

Given the ongoing legislative work on the EU AI Act proposal, we believe that any adaptation of the civil liability framework should wait until the new AI framework is finalised, so that the applicable legal concepts, principles, and rules from the AI Act are fully understood and meaningfully inform the adaptation of the current liability framework.[6]

If the European Commission goes ahead and changes the liability regime, then we offer the following considerations:

- **Product definition**: The definition of 'product' should not be expanded to include intangible products (e.g. digital content and stand-alone software/AI systems). Applying strict liability is disproportionate and ill-suited to the properties of software and AI systems. Such properties include the fact that standalone

[5] Digital Services Act, op. cit., Article 22: GPSR, op. cit., Article 20.
[6] European Commission, Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (AI Act). Available here.

software and software bugs cannot physically act upon any person or physical property and would therefore not cause personal injury or property damage, that bugs are an inherent feature of software development, and that there is no fixed state when software is "put into circulation" given that software evolves and improves over time. Moreover, software updates are commonly used to extend the lives of digital products and address any software errors. Extending strict liability to software updates and refurbishments would disincentive software development and maintenance. This would also conflict with EU efforts to encourage sustainability in the circular economy.

- **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 (e.g. GDPR[7]). Providing a separate and potentially overlapping basis for compensation would cause confusion, could lead to forum shopping and to double claims for a single harm. Applying strict liability is unnecessary and would put a disproportionate burden on providers as non-material damages are less predictable and difficult to measure than in the case of material damages. This would decelerate innovation, and/or materially increase the price of software for end-users, and would also hinder the uptake of useful AI/software applications by the market. As above, strict liability is intended for grave damages (to life, limb, property) and hence is only appropriate in the clearer cut cases of personal injury and damage to property that have direct and severe consequences for consumers or other concerned parties like innocent bystanders.
- **Reversing the burden of proof**: We are not aware of any evidence showing that the burden of proof of the Directive places consumers at a disadvantage. Therefore, reducing or reversing the burden of proof is a tool that should only be considered for very specific cases and motivated by the profile of harm of a particular product. A one-size-fits-all rule for all AI applications would become an excessive burden on AI developers and users, significantly hampering innovation in the field and affecting the rollout and take-up of AI technologies in the EU.

4. Conclusion

It is important that any reforms to the civil liability regime are based on real-world evidence showing that the Directive prevents consumers from seeking redress and obtaining compensation for injuries or other harms caused by a digital product. As the European Commission drafts its proposals to review this framework, CCIA Europe looks forward to supporting with comments to ensure a balanced and workable civil liability regime for European consumers and SMEs.

[7] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) Available here.