

Consultation on the inception impact assessment for adapting liability rules to the digital age and circular economy

Google's Comments

Google welcomes the consultation on the inception impact assessment (IIA) regarding adapting liability rules for software and artificial intelligence, and the opportunity to provide feedback as part of a multi-stakeholder discourse on this important issue.

Overall, Google believes that Europe's current liability framework remains fit for purpose, being both effective and technology neutral, so sweeping changes should be approached with caution. While the evaluation of the Product Liability Directive (the Directive) identified hypothetical challenges under the existing framework, we have yet to see real-world evidence of problems that warrant altering such a fundamental underpinning of European law and running the risk of severe unintended consequences. In particular, a strict liability regime is unnecessary and ill-suited to the properties of software and AI systems, and would have a profound chilling effect on innovation and digitization in Europe, disproportionately impacting European SMEs.

In addition, any potential changes to liability rules should take into account the effects of the recently proposed AI Act (AIA). The AIA introduces additional obligations on providers and users of high-risk AI applications intended to increase the safety and trustworthiness of AI systems put on the EU market. This will address many of the potential problems identified in the evaluation and IIA. Rather than prematurely adding new rules on liability that could create redundant or conflicting requirements and add additional complexity, the Commission should, at a minimum, evaluate the impact of the AIA on the gaps identified in the evaluation before introducing any changes to liability frameworks.

Additional points in response to the two categories of policy options proposed by the Commission in the IIA are included below:

1. Options to adapt strict liability rules to the digital age and circular economy

Any initiative to introduce “strict liability” for AI systems/digital content/software should be approached with great caution. Globally, strict liability frameworks are reserved for abnormally hazardous situations, as they preclude any consideration of intent or negligence. Introducing strict liability would mean that anyone involved in developing or operating an AI system could be held liable for problems they had no awareness of or influence over. This could lead to misplaced responsibility if the AI system was simply a conduit rather than the source of harm (such as if an operator used an automatic translation system to mistranslate medical advice even though the system is not intended to be used for medical purposes).

Furthermore, while software providers do extensive testing and debugging before releasing software, bugs almost always become apparent over time and are fixed by updates or in later releases. This includes bugs that create cyber vulnerabilities in software that can be exploited by malicious actors. Despite decades of effort, it has proven impossible to entirely eradicate bugs from software due to the complexity of writing code, and this is generally accepted as an inherent feature of software development. **If software developers are subject to strict liability for any bug in their code, it could effectively forestall the deployment of virtually all software in Europe, and disproportionately impact European SMEs.**

Applying strict liability to software updates and refurbishments would further disincentivize software deployment and maintenance by effectively removing any time-limitation on strict liability, making it harder for producers to extend the useful lives of digital products and address bugs and vulnerabilities in software. Such a drastic change would destroy the current well-functioning balance struck between business innovation and consumer protection, and is unnecessary.¹ Damages due to defects that occurred after a product has been put into circulation can already be covered under national tort or delicts laws. In addition, software providers have limited control over security updates actually being accepted by end users, meaning this approach could make software providers directly liable for the omissions of other market participants.

There are also fundamental issues with the notion of extending the types of damage for which losses are recoverable via strict liability to non-material damages. Doing so would put a disproportionate burden on software developers. For example, if a software crash lead to the loss of a term paper and a student failing their class, the software developer could be sued for compensation of all the consequential damages, e.g. an additional year of studies and lost

¹ See e.g. Astrid Seehafer and Joel Kohler: Künstliche Intelligenz: Updates für das Produkthaungsrecht? EuZW He 6/2020, 213.

income. Where non-material damages are claimed under a fault-based or breach of contract claim, they are only recoverable if the claimant can prove that the losses were caused by the relevant failure of standard of care or breach of contract, and were not too remote (amongst other factors). **Applying strict liability equitably to these less proximate forms of damage will be effectively impossible without the kind of detailed analysis (factual and legal) of the relationship between cause and effect that occurs in a fault-based or contract claim.** Strict liability is only appropriate in the clearer cut cases of personal injury and damage to property that have direct and severe consequences for consumers.

Furthermore, many of the specific types of non-material damages referenced in the IIA raise their own challenges. For example, damages for privacy infringements are notoriously difficult to quantify and the procedural burdens for all parties involved would be disproportionate. These risks to consumers are also already covered by the GDPR, which imposes severe penalties, providing a strong incentive for producers to protect their customers' privacy and personal data. Environmental damages, as another example, would raise particularly complex issues of causation and remoteness that would be difficult to address under a strict liability regime. It is also hard to imagine how environmental damage could be associated with an individual consumer in a way that would be appropriate to a consumer protection framework like the Directive.

Rather than revise the Directive as proposed and risk exposing a wide swath of intangible products, including software, to strict liability, a sensible middle ground would be to clarify when software should be treated as a quasi-product. In Google's view, this should apply to software that is used in a manner more like a product than a service, and which has the potential to cause physical damage to persons or property. Such software will normally be subject to special regulation already. An example is software used as a medical device, which is already treated as a quasi-product under the Medical Devices Regulation. Adherence with relevant safety standards under existing regulation could serve as the basis for case-by-case exemptions, similar to the approach taken in the AIA. To deter unreasonable claims against AI system operators, there should also be an exemption for cases where evidence shows that an accident was caused by another party or "force majeure".

As far as the harmonisation of strict liability of operators/users of AI-systems is concerned, clarity around scope would be vital to provide legal certainty for AI system operators. While having potentially conflicting definitions of "high risk" compared to the AIA is not ideal, it is a reasonable compromise given that the assessment of liability by nature requires a narrower, compensation-oriented framing than more general ex-ante regulation. A possible approach could be to provide an exhaustive list of "high risk" AI applications which play a significant role in situations where strict liability already applies (e.g., nuclear power plants, aviation). Adherence to existing safety standards that mitigate the heightened risk could provide

exemptions on a case by case basis, similar to the approach taken in the AIA. It should be acknowledged, however, that most AI systems referred to as having a “specific risk profile” are already subject to national sectoral strict liability rules, many of which remain unharmonized. Even motor vehicle liability, presented by the Commission as a guiding example, is not harmonized, even though it presents severe safety risks.

2. Other options to address proof-related and procedural obstacles to getting compensation

As a general rule, we believe that alleged victims should continue to be required to prove what caused them harm under the liability framework. The strict liability regime of the Directive is designed to protect consumers, not to provide a simple route for consumers to obtain judicial remedies, beyond the strict liability itself. Any proposals to reduce obstacles should consider the advantageous rights and remedies claimants already have under the Directive.

The burden of proving causation should only be altered if, given the properties of a specific AI system, establishing proof would create an unreasonable obstacle for the alleged victim. In making this determination, factors to take into account include the likelihood that the technology contributed to the harm (e.g., if there are known defects), the nature and scale of the harm claimed, and the degree of ex-post traceability of contributing processes within the technology.

The proposed AIA is designed to address many of the perceived challenges relating to how the properties of AI impact the burden of proof by introducing mandatory requirements around risk management, data and data governance, technical documentation, record-keeping, transparency and provision of information to users, human oversight, as well as accuracy, robustness and cybersecurity. For example, requirements around documentation, transparency and the provision of information to users are specifically designed to address the issues around opacity and complexity, which should eliminate or drastically reduce the need for the proof-related and procedural amendments to the liability framework. **Any changes to the liability framework should reflect a rigorous analysis of real-world problems that persist after the AIA is in place.**

Finally, changing the conditions under which claims can be made under the directive is unnecessary and carries substantial risks. The rationale for a minimum damage threshold in the Directive was to avoid overburdening the courts with frivolous litigation. This risk is arguably greater for software-related claims, given that a defect in a single line of code (out of millions) that was used in millions of devices could (under this proposal) be the basis for a strict

liability claim from each individual user. It is also unnecessary, since nothing would prevent consumers from bringing actions in the national courts for lower value claims, they just cannot rely on strict liability under the Directive when doing so. Similarly, the Directive stresses that it is in the interests of both the injured person and of the producer to have a uniform period of limitation for bringing a claim. The limitation period provides an incentive to diligently pursue damages claims and provides legal certainty to all parties involved.

Google thanks the Commission for the opportunity to provide feedback, and would welcome the opportunity to discuss these points further.

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