



Brussels, January 10, 2022

BSA | The Software Alliance's response to the European Commission's consultation on civil liability - adapting liability rules to the digital age and Artificial Intelligence

BSA | The Software Alliance,¹ the leading advocate for the global software industry, welcomes the opportunity to provide its views on the European Commission's consultation on reforms to the EU civil liability regime to adapt to the digital age and artificial intelligence (the "consultation").

BSA members are at the forefront of digital innovation. We recognize the importance of consumer trust in AI and other digital technologies, and understand that robust civil liability rules are important to promote that trust.

We thus agree that it makes sense to regularly revisit the EU's civil liability regime to ensure that consumer protections are not weakened as the digital economy evolves and as the use of AI-enabled products becomes more common. At the same time, it is important that any reforms to the EU's civil liability regime respond to *actual*, clearly identified barriers to consumer redress for defective products. Currently, however, many of the potential barriers identified in the consultation seem speculative; others will likely be impacted (and potentially resolved) by pending legislative proposals on AI and digital services. For these reasons, we encourage the Commission to take more time before legislating, in order to ensure that we are not seeking to fix a problem that does not exist.

More specifically, we recommend that the Commission considers the following as it decides how to proceed:

1. Reforms to the existing civil liability regime should be driven by a clear and demonstrable need to fix actual, identified problems

The Product Liability Directive ("Directive") has worked well for over 35 years in a wide variety of contexts and during a period of significant technological change. It sets out clear, easy-to-understand, and time-tested rules, which are technology neutral and are able to adapt as digital

¹ BSA | The Software Alliance (www.bsa.org) is the leading advocate for the global software industry before governments and in the international marketplace. Its members are among the world's most innovative companies, creating software solutions that spark the economy and improve modern life. With offices in Brussels, and operations in more than 60 countries, BSA pioneers compliance programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy. BSA's members include: Adobe, Akamai, Atlassian, Alteryx, Autodesk, Bentley Systems, BlackBerry, Box, Cloudflare, CNC/Mastercam, CrowdStrike, DocuSign, Dropbox, IBM, Informatica, Intel, Intuit, MathWorks, McAfee, Microsoft, Okta, Oracle, PTC, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Splunk, Trend Micro, Trimble Solutions Corporation, Twilio, Unity Technologies, Inc., Workday, Zendesk, and Zoom Video Communications, Inc.

technologies emerge and evolve. In addition, the Directive is complemented by national civil liability regimes in EU Member States, reflecting Member State legal traditions and principles, including on evidentiary rules and damages. Together, these regimes provide a high standard of consumer protection when seeking redress for defective products, including products that are software-enabled. Before upending this robust regime, further empirical evidence is needed to clearly identify *actual* real-world problems that need fixing, rather than problems that *might* occur. At present, however, many of the problems identified in the consultation appear to be speculative or unsubstantiated.

For example, the consultation states that “the technical complexity of certain products (e.g., . . . emerging digital technologies) *could* make it especially difficult and costly for consumers to actually prove they were defective and that they caused the damage”². However, the consultation fails to cite any substantial empirical evidence that consumers, on the rare occasions that they are harmed by such technologies, are unable to obtain compensation for those harms, or have struggled to prove a causal link between the damage suffered and the defective product. The consultation points to the evaluation of the Directive, which found that failure to prove the product in question caused damage to the consumer “accounted for 53% of rejected compensation claims”³. However, it is unclear that such claims concern AI or other software-enabled products—and indeed, the evaluation report suggests this problem may be centered around medical devices and pharmaceutical products.

We therefore encourage the Commission, as a first step, to compile real-world case studies in order to determine whether the existing civil liability rules are in fact inadequate and impose significant obstacles to consumers obtaining compensation for damage caused by defective software-enabled products.

2. Any reforms to the product liability regime must align with changes to other EU regulatory frameworks, including the proposed AI Act and the Digital Services Act

The consultation on reforms to the EU’s civil liability regime coincides with other significant EU legislative proposals that will impact providers of digital technologies and services, including the proposed AI Act and the proposed Digital Services Act (“DSA”). Both of these proposals include product safety rules. Product safety and product liability regimes are complementary legal frameworks designed to pursue complementary policy goals: product safety rules seek to encourage the development of safe products by requiring those in the design and distribution chain to take steps to ensure that the products they create, sell, and market are safe, while liability rules enable consumers to have a means of redress against damage caused by products that are defective despite these rules. For this reason, it is important that any reforms to the product liability regime are closely calibrated to the product safety regime.

Until the AI Act and DSA are finalized, however, alignment between regimes will not be possible. For example, the AI Act imposes its primary obligations on “providers”, defined as the person that “develops an AI system or that has an AI system developed with a view to placing it on the market or putting it into service”⁴; the allocation of responsibilities under the Act is currently being debated by the EU institutions, however⁵. If the Commission does not wait for the final text of the

² Section I of the [consultation](#), ‘Reducing obstacles to getting compensation’, emphasis added.

³ Ibid.

⁴ Proposal for a regulation of the European parliament and of the council laying down harmonised rules on artificial intelligence (artificial intelligence act) and amending certain union legislative acts (hereinafter, the “[AI Act](#)”), Article 3(2).

⁵ The guiding principle should be that the entity that determines the purposes and means by which an underlying model is trained and/or used should bear greatest responsibility. It is important to consider that - especially in the B2B space – AI is (continued...)

Act, it is possible that the parties who bear primary responsibility for ensuring that high-risk AI systems are safe under the AI Act will not align with the parties who face primary liability under the revised civil liability regime. The AI Act also contemplates future standards and specifications for high-risk AI systems (see Articles 40-41), which presumably should establish a presumption that compliant systems are safe, but the consultation makes no reference to such standards or specifications. To give another example, the consultation proposes a number of changes to address the perceived lack of transparency into the functioning of AI systems, including by shifting burdens of proof. The AI Act, however, will impose a range of transparency obligations on AI providers and users, and these requirements may moot the concerns identified by the Commission, thus cutting against the suggested reforms in this consultation.

Similarly, as the consultation recognizes, the DSA (and proposed revisions to the General Product Safety Regulation) may impose obligations on online marketplaces in relation to products they offer; aligning these obligations with any new liability rules will be essential. While the consultation suggests that any new liability measures for marketplaces may apply only where there is no EU-based producer or importer, that limitation does not eliminate the problem of potentially conflicting or misaligned rules applicable to the marketplace itself.

The AI Act and DSA are not the only frameworks that are evolving. For example, only now are Member State courts beginning to consider damages awards under the GDPR for data breaches, for destruction of personal data, and for immaterial harms such as loss of control over personal data; similarly, consumer protection rules on software updates and digital content have only recently entered force, and it remains too soon to know whether these new rules will provide adequate redress to consumers for product defects.

The consultation states that the Commission will be taking a “staged approach” to legislating, at least where AI is involved. We would hope that this staged approach means that the new rules in the AI Act, the DSA, and other EU rules affecting digital products and services will be allowed to enter force, and an assessment will be made of their impact and effectiveness, before changes to the civil liability regime are contemplated. Failure to align in this way will lead to a number of the risks that the consultation highlights—including greater legal complexity, diminished investment in innovation, and reduced appetite to develop or use AI and other new technologies.

If the Commission chooses to proceed with reform of the civil liability regime to accommodate software and AI systems despite the concerns expressed above, we recommend it consider the following when drafting any new rules:

1. Any reforms to the civil liability regime should recognize the difference between physical products and software

The consultation queries whether the EU’s existing product liability regime should be extended beyond physical products to encompass software, “digital services” and “digital content” (it is unclear what specific technologies are included in these categories or how they differ). In contrast to physical products, however, which are typically used for a specific and foreseeable range of purposes, software often can be deployed in an almost unlimited number of ways, across a wide range of products, and for many different purposes. In addition, software’s functioning, and in turn its ultimate deployment, is often heavily dependent on the user of the software and the context in which it is used—rendering it much more like a service than a product. The Directive recognizes these differences and imposes no-fault liability only on defective *products*. Where the software is embedded in a product before being put into circulation, the Directive provides a

often developed to the specifics of the customer needs (who is almost always will be deploying the AI), and therefore the responsibilities on how it is deployed are not exclusive to the developer.

means of redress for consumers. However, it does not extend liability to stand-alone software or to digital services (indeed, the Directive does not apply to any services).

We encourage the Commission to take this distinction into account and keep the focus of any reforms to the Directive on *products*. We note also that the Digital Content Directive already provides a means of redress for consumers with respect to digital content that may take the form of, include, or be delivered as software⁶. The Digital Content Directive entered into force in 2019, and Member States are not required to apply the Directive in national law until 1 January 2022 (see Article 24). As noted above, we urge the Commission to give these new rules the opportunity to work, and to clearly identify whether there is any evidence to suggest there are gaps in consumers' ability to seek redress for damage caused by digital content, *before* imposing additional rules.

2. Liability should be imposed against the party best able to provide redress to consumers

BSA strongly agrees that where redress for a defective product is due, consumers should have simple and straightforward ways to obtain it. A key goal of any reform to the civil liability regime should therefore be to ensure that liability falls on the entity best placed to provide redress. In contrast to products, however, AI systems (and software more generally) can often have multiple parties in the supply chain, operating in a wide range of different settings. For example, some parties create “enabling technologies” for AI — such as database hosting capabilities, template tools, datasets and AI models, and other components. Other parties may customize general purpose AI tools for specific use cases, or subsequently embed the AI into a product which is then sold to consumers. As there are often multiple parties involved in the creation of an AI-enabled product, the “manufacturer” of an AI system may not always be obvious — and often will not have a direct contractual relationship with the consumer, or even knowledge of how its AI is being deployed.

The current Directive provides a clear path for consumers to seek redress, and the cost of that liability is in turn addressed contractually between the parties that are upstream in the product supply chain. We urge the Commission to not up-end these longstanding consumer expectations by requiring consumers to seek redress from upstream parties. Doing so would place an unreasonable burden on consumers, who may have no knowledge of how to locate the developer of the AI (or of any other type of embedded software). For example, a party that supplies an AI-powered language recognition system to a vehicle manufacturer that then integrates the system into an automobile, or a party that develops an AI tool used by banks to score consumer loans, are often several steps removed from the actual user of the AI system or software (the vehicle manufacturer or the bank) and may not be readily identifiable by the consumer.

3. Any reforms to the civil liability regime should be technology neutral

The consultation proposes a number of reforms to the EU's civil liability regime that would target AI-enabled products, as well as AI services. The mere fact that a product or service incorporates AI is not a sufficient justification to impose additional or unique liability burdens on suppliers. Similarly, it is unclear that the types of harms for which consumers can claim compensation should be expanded, or that the ability to limit certain liability by contract should be narrowed, simply because the product involved integrates AI — yet the consultation suggests adopting both of these approaches. Imposing unique obligations on AI-enabled products will deter providers from offering those products in the market even where doing so may make the products, and ultimately

⁶ Articles 11-14 of the Digital Content Directive.

the end consumers, safer, out of fear that doing so could expose them to increased liability. The same holds true for services.

In addition, AI is rapidly being deployed in a virtually limitless set of products and services — from AI-enabled tangible products and fully autonomous systems, to AI software that merely assists or informs human action and decision-making, including systems that evolve through machine learning and/or can be personalized. Given the broad nature of “AI” as a category of technology, it is difficult to conceive of a coherent “one-size-fits-all” approach for AI liability. In effect, such a regime would create an illogical effect of imposing the same liability rules on, for example, both driverless cars and AI systems that retailers use to predict what color of paint a particular consumer might prefer. Instead, any reforms to the product liability regime should be technology neutral, at least until the need for AI-specific obligations is more clearly demonstrated.

4. Apply “strict liability” only to the *highest risk* AI

The consultation identifies a range of situations involving AI systems in which it might be appropriate to impose liability regardless of the producer’s fault or whether a product is defective—e.g., products that continuously learn and adapt, malfunctioning products, or scenarios where the producer failed to comply with its obligations under the AI Act. This sort of strict liability, however, is generally reserved only for circumstances involving dangerous activities that pose *substantial* risks to third parties having no contractual relationship to the supplier (e.g., pedestrians harmed by autonomous driving). In effect, the “condition” of allowing the substantial risk is that the party carrying out activities that may lead to substantial risks to others takes responsibility for harms that result from it, irrespective of any fault or product defect. Strict liability should only be imposed on AI-enabled products in similarly narrow circumstances. Given the burgeoning state of AI development and deployment in the EU, subjecting all AI systems that, for example, continuously learn and adapt, is unwarranted.

If the Commission chooses to proceed, it might, for example, limit the application of strict liability to those high-risk AI systems that pose inherent and unavoidable risks to the public (e.g., AI systems used in critical infrastructure). The need to consider which AI systems (if any) are sufficiently high-risk to merit strict liability is yet another reason to delay legislating for liability until the AI Act has been adopted and enters into force.

* * *

BSA would be happy to discuss these issues further with the European Commission or other interested parties.

For further information, please contact:
Thomas Boué, Director General, Policy – EMEA
thomasb@bsa.org or +32.2.274.13.15