



**10 January 2022**

**Comments of the Software & Information Industry Association (SIIA) on the Public Consultation regarding Adapting liability rules to the digital age and Artificial Intelligence**

The Software & Information Industry Association (SIIA) appreciates the opportunity to provide feedback on the European Commission's public consultation regarding adapting liability rules to the digital age and artificial intelligence (AI).

SIIA is the principal trade association for the software and digital information industries worldwide. Our members include over 450 companies reflecting the broad and diverse landscape of digital content providers and users in academic publishing, education technology, and financial information, along with creators of software and platforms used by millions worldwide, and companies specializing in data analytics and information services. As the only association representing a diverse array of technology companies, SIIA believes in consumer privacy protections.

We appreciate the EC's focus on developing guidance and regulations to govern a changing technological landscape. Our comments in this submission address, in brief, the proposed policy options set forth in the Inception Impact Assessment (IIA).

The Product Liability Directive provides a harmonised framework for liability claims against the producer of covered products for damages caused to a consumer due to product defects. SIIA believes that extending the strict liability rules in the Product Liability Directive to software and other intangible, digital products is ill-advised, and will lead to numerous negative consequences for innovators and consumers alike. The rationale underlying the Product Liability Directive, that producers should be held liable for defective products that cause damage to persons or property, regardless of intent, cannot apply to software and other intangible digital products due to their unique characteristics.

Software is by its nature in a regular state of development. Even after software is introduced to the marketplace, it is regularly updated to make improvements (often to respond to consumer demands), patch cybersecurity vulnerabilities (which typically are not known at the time of development), and for other reasons. Moreover, not all software is sold directly to consumers, and it is common for software created by one company to be combined with software

products created by another company. In other words, the very factors that lead the EC to consider software to be “intangible” make the translation of product liability rules designed for “tangible” products inappropriate for these digital products or services. The movement of much software to the cloud has further widened this gap.

AI, a subspecies of software, raises additional questions. While it is not reasonable to view any form of software as completely free of errors, uncertainty is part of what make AI and machine learning technologies unique and powerful. Many of these engines are trained to improve themselves on a constant basis: they digest information and refine their operations.

Imposition of a strict liability regime on software will harm innovation, development, and consumer welfare. The mere specter of liability for product defects will lead many developers to hold on releasing products to the public. Rather than creating certainty, the possibility of legal liability for “imperfect” or “defective” products will generate significant uncertainty.

In addition, significant amounts of commercially critical software are developed on an open-source basis using distributed networks. That development occurs both through employees of companies who operate as contractors for particular clients and through changes made by independent contractors or volunteers. No one “owns” the source code: under the copyright statutes of both the EU and the U.S., each of these improvements is owned by its author, which becomes part of the code base, and is disclosed so others can improve on them.

Application of the Directive’s product liability standards creates a risk of destroying those networks, which developed on the assumption that software would be treated as an intangible. Application of product liability rules in that circumstance would have a devastating effect on open-source innovation, as these programs do not necessarily have a corporate “owner” as liability would necessarily fall on the individual or company that coded a specific change to the code. Problems of proof aside, the result will be a chilling effect on open-source innovation.

From the consumer safety perspective, application of product liability to software would create perverse incentives. The notion that a software update could itself be grounds for liability could lead developers to withhold critical updates to fix bugs and cyber vulnerabilities and chill innovation. The effect is likely to be felt disproportionately by European companies although it will have ramifications for all companies that provide products or services to European consumers and European businesses. Competing in the software market will become more difficult and expensive, resulting in fewer entrants and heightened

power in dominant players. Ultimately, it is the consumer that is likely to bear the costs and inconveniences that a strict liability regime will generate.

In light of the foregoing, SIIA therefore makes the following recommendations:

- As an initial matter, we would recommend the EC to provide clarity on the scope of “intangible products.” Not all software or digital content is the same, and, indeed, much software (and digital content) is closer in kind to a “service” than to a “product” as that term is used in the Product Liability Directive.
- We respectfully recommend that the EC hold in abeyance any decision on liability rules for AI systems until some version of the proposed AI Act becomes law. We believe it is inappropriate to advance liability rules for their development and use while the European Parliament is debating that legislation. For similar reasons, we believe the evaluation of burdens of proof is premature. These questions will depend in part on the framework that emerges in the final AI Act, including any disclosure obligations that the Act may impose on developers of software.

Thank you for the opportunity to provide input on this consultation. We would be pleased to provide any further information that you may request.