

September 10, 2020

Consumer Technology Association
Comments on
European Commission “Inception Impact Assessment” on Artificial Intelligence
Ref. Ares(2020)3896535

The Consumer Technology Association® (“CTA”)®¹ respectfully submits these comments in response to the European Commission (“Commission”) Inception Impact Assessment² (“the Impact Assessment”) analyzing the potential impact of adopting sweeping new legislation on artificial intelligence (“AI”), as outlined in the Commission’s White Paper.³ As explained in prior comments, CTA applauds the Commission’s thoughtful work on these issues, including release of the Impact Assessment, which raises important questions concerning the potential pecuniary impact of adopting new legislation in this area.

Respectfully, CTA urges the Commission to undertake additional review and analysis of the potential economic impact of formal Commission action. This is necessary to better understand and evaluate the potential economic costs, and benefits, of taking formal action that may lead to new rules and restrictions on the development, use and sale of AI. In order to meet the Commission’s own high standard for analyzing the impact of potential legislation, the Commission must (in its own words) “analyse in more detail the issue to be addressed, whether action should be taken at EU level and *the potential economic, social and environmental effects* of the different solutions outlined.”⁴

To meet this high bar the Commission must recognize the very significant potential economic costs of imposing burdensome new rules upon a still nascent and emerging technology. In recognition of this fact, the Commission should further develop its Impact Assessment to more fully consider the potential economic impact of adopting new legislation in this area. That further assessment should specifically analyze the potential impact on small to

¹ CTA® is the tech sector. Our members are the world’s leading innovators—from startups to global brands—helping support millions of jobs. CTA owns and produces CES®—the largest, most influential tech event on the planet.

² White Paper on Artificial Intelligence, A European Approach to Excellence and Trust; COM(2020) 65 Final, Brussels 2.19.2020 (“White Paper”).

³ European Commission Inception Impact Assessment on Artificial Intelligence, Ref. Ares(2020)3896535 23.07.2020 (“Impact Assessment”).

⁴ See European Commission, Planning and Proposing Law https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law_en#how-their-scope-is-defined (emphasis added).

medium sized businesses, the potential costs of adopting AI-specific liability schemes (such as a strict liability framework), and how to avoid creating potentially costly new requirements by leveraging consensus-based standards, voluntary governance and risk assessment processes in lieu of broad new AI legislation.

I. Certain Preliminary Findings in the Impact Assessment Will be Central to the Development of a More Fulsome Analysis by the Commission

The Commission's Impact Assessment correctly makes preliminary findings for several important issues, including the need to: 1) properly define the scope of any potential legislation; 2) avoid fragmentation amongst EU member states; and, 3) recognize that if legislation is overreaching and pervasive, the costs of compliance will outweigh the potential opportunities and create disincentives for developing this new technology. CTA agrees with these findings and offers the following additional considerations for these three points.

In the Impact Assessment the Commission recognizes that a "core question" relates to the scope of the initiative, i.e., "how should AI be defined (narrowly or broadly)."⁵ CTA submits that addressing this core question at the outset is critically important to completion of a probative and meaningful final impact assessment. How can the Commission assess the impact of potential additional compliance costs, if it has not yet determined how narrowly or broadly those costs may extend? Without addressing this threshold question the Commission's broad, general pronouncements in the White Paper are too vague to properly assess or calibrate (let alone implement). To address this issue the Commission should adopt a nuanced approach that recognizes that the breadth of AI use cases will require a focused response, which may differ by application.

To that end, the Commission should avoid using broad, ill-defined concepts in any future legislation. Use of untethered terms such as "automated decision making" conflicts with the thoughtful and focused risk-based constructs outlined in the White Paper. Similarly, the Commission must retain the risk/harm framework articulated in the White Paper and avoid adoption of new rules or requirements that do not distinguish between AI applications that may pose risk of injury or harm to individuals, and those applications that pose little, or no, risk. Retention of this risk-based framework is essential to maintaining proportionality in any new framework.

Further, the Commission should differentiate types of harm and carefully calibrate the responses to such harm. Indeed, as CTA explained in its prior comments to the Commission, the Commission's approach should begin with a narrow focus by identifying challenges that are *unique* to AI and not already covered by existing regulation.⁶ To begin with, the Commission should adopt a definition of AI that narrowly focuses on those unique aspects of the technology (i.e., systems that are capable of learning on their own), but which avoids capturing general concepts or constructs used in computer science (i.e., algorithms) that do not, on their own, constitute AI. The Commission can do so by utilizing the definition set forth in its April 2018

⁵ Impact Assessment at 5.

⁶ CTA Consumer Technology Association Comments on European Commission White Paper on Artificial Intelligence – A European Approach (filed June 12, 2020) ("CTA AI Comments").

Communication on AI.⁷ A more nuanced approach would embrace an application-specific framework for consideration of any new mandates, which would also ensure that AI policy does not duplicate existing policy frameworks in those fields in which AI technologies are already in use today (such as healthcare, financial services or energy).

CTA also agrees with the Commission's finding that it must avoid fragmentation amongst EU member states that may consider differing rules as one potential benefit of this process.⁸ While sovereignty must be respected, the potential emergence of varied regulatory or legislative proposals within the EU would create an unworkable environment for many technology providers, who would be forced to operate and comply with numerous different rules and regulations. The operational costs and burdens of doing so are well documented. Indeed, as the Commission itself noted: "... increasing fragmentation can hamper the confidence of European businesses to innovate and the development of beneficial AI solutions, and jeopardize the goals of a single digital market."⁹ Narrow, focused Commission action supported by a detailed, and evidence-based assessment will reduce the potential for fragmentation among member states.

Finally, CTA applauds the Commission for recognizing that if compliance costs outweigh the benefits, some desirable AI systems may not be developed at all. Specifically, the Commission finds that new legislation may impose additional compliance costs because AI systems may have to adhere to "new requirements and processes."¹⁰ Indeed, this finding is followed by an acknowledgement that "[i]f compliance costs outweigh the benefits, it may even be the case that some desirable AI systems may not be developed at all." This principle should be the touchstone of any truly accurate and meaningful impact assessment: over-regulation will lead to under-investment and loss of innovation. Thus, the Commission must be mindful of the potential for taking action that has the effect of simply discontinuing further development of this technology in the EU.

II. Additional Analysis Is Necessary to Fully Assess the Impact on Nascent and Developing Technology

A. Further Development of the Cost-Benefit Analysis Is Necessary to Ensure Commission Action Does Not Undermine Investment and Innovation

Although the Impact Assessment acknowledges the potentially deleterious impact on investment and innovation, it does not give sufficient consideration to the potential economic impact of adopting over-reaching new rules. The Commission's analysis of the potential economic impact of new rules¹¹ is insufficient and must be more fully developed. The assessment does not give necessary, or sufficient, consideration to the significant potential costs of "new requirements and processes," and specifically any new requirements that may include *ex*

⁷ "Artificial intelligence (AI) refers to systems that display intelligent behaviour by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals. AI-based systems can be purely software-based, acting in the virtual world (e.g. voice assistants, image analysis software, search engines, speech and face recognition systems) or AI can be embedded in hardware devices (e.g. advanced robots, autonomous cars, drones or Internet of Things applications)." COM(2018) 237 Final, p. 1.

⁸ Impact Assessment at 4.

⁹ *Id.* at 3.

¹⁰ *Id.* at 5.

¹¹ *Id.* at 5-6.

ante regulation. If *ex ante* rules are adopted, many companies developing this technology will likely face costly and burdensome obligations that would deter innovation and discourage investment.

The need for a fuller impact assessment of the potential economic costs of regulations is most clearly framed by the Commission’s consideration of a restrictive and complex “Option 3” regulatory approach, as described in the Impact Assessment.¹² As outlined in numerous comments before the Commission, new recordkeeping and disclosure obligations could greatly increase the operational and compliance costs of AI developers, including many small emerging companies in this market. Indeed, the Impact Assessment significantly underestimates the potential administrative burdens of operating under a new regulatory regime for AI, as reflected in the finding that “binding requirements could create *some* administrative burden that is not totally compensated by additional benefits.”¹³ This finding ignores the likely *significant* administrative burden if recordkeeping, reporting, training and oversight obligations are imposed.

More significantly, the Impact Assessment does not fully analyze the potential impact of adopting limits on the use of certain training data, which may impact the accuracy and robustness of these systems; and the impact of imposing new obligations to utilize human oversight of systems that may be unnecessary or redundant.¹⁴ Nor does the analysis give sufficient consideration to the numerous societal, economic and other benefits provided by emerging AI systems and technologies, such as the numerous new AI-powered technology solutions being deployed to respond to COVID-19.¹⁵ Accordingly, the Commission should further develop its assessment to ensure that it considers the impact of policies that may deter the continued development and deployment of AI products and services which enhance the lives, safety and interests of European consumers.

The analysis also fails to fully evaluate the potential impact of providers that may need to operate under a regime which creates duplicative or overlapping obligations, and the legal and administrative costs of operating in that environment. As CTA demonstrated in its comments, the potential for conflicting or duplicative laws in certain markets such as autonomous vehicles, which may already have existing duties and obligations, is particularly problematic.¹⁶ For example, the creation of conformity assessment procedures for high-risk AI applications, if applied to autonomous vehicles, could be duplicative of other existing requirements applicable to autonomous vehicles. To mitigate this potential overlap the Commission should identify those areas, such as autonomous vehicles, which may already have existing duties and obligations and carve out such areas that are subject to other regulatory requirements.

¹² *Id.* at 4-5.

¹³ *Id.* at 7 (emphasis added).

¹⁴ See *CTA Comments* at 11-12 (noting that imposing an obligation of human oversight may be appropriate in certain circumstances, but is fundamentally at odds with the objective of developing and deploying fully automated vehicles intended to operate free from human intervention).

¹⁵ As previously noted, during the global COVID-19 pandemic AI is driving important research and testing necessary to defeat the virus. For example, French AI company Iktos has partnered with SRI International, based in Menlo Park, to discover and develop new anti-viral therapies using deep-learning models. *Id.* at 1-2.

¹⁶ *Id.* at 11.

B. Cost-benefit Analysis Should Specifically Consider the Impact on Small and Medium Sized Business

In discussing potential compliance costs for potentially affected entities,¹⁷ the Commission focuses primarily on the aggregate costs on the industry (i.e., the greater the potential costs of compliance, the higher the costs that industry must assume). But the Impact Assessment fails to sufficiently account for the disproportionate impact of significant compliance costs on small to mid-sized entities that do not have the margin or operational budget to assume significantly greater compliance costs. For that reason the final Impact Assessment must specifically consider how such compliance costs would impact small to medium-sized businesses.

While some AI developers are large concerns with significant resources, this is an area with many new entrants (small and medium sized enterprises) that may not have the same resources to devote to respond to new compliance, paperwork or reporting obligations. The potential impact on overreaching compliance costs must consider the proportional impact on such small and medium sized businesses.

C. Final Impact Assessment Must Recognize that AI Specific Liability Schemes Could Create a Competitive Disadvantage for AI Technologies

The Impact Assessment fails to explore the potential impact of adopting AI-specific liability rules, including a strict liability scheme for AI. CTA believes that adoption of AI-specific liability rules could lead to a competitive disadvantage for AI technologies competing against traditional technologies that may create similar risks. For example, many studies have recognized that implementation of autonomous vehicle systems is likely to increase road safety in the years ahead, but if such systems are subjected to new or greater liability duties than that which applies to existing systems, that could create a significant disincentive for further investment in autonomous vehicle systems. In this way, an AI-specific-liability scheme that creates an uneven playing field may hinder the development and deployment of many different types of AI technologies in the EU.

Similarly, the Impact Assessment fails to explore the potential impact of adopting a strict liability scheme for AI. To address that shortcoming the Commission should acknowledge that a strict liability scheme would, if adopted, likely increase economic and societal costs across the board, which would require a very different cost-benefit framework and analysis. In exploring some of the issues surrounding the adoption of a strict liability scheme, the Impact Assessment fails to recognize that there are numerous economic actors involved in the lifecycle of an AI system including entities: *developing* the technology, those *deploying* the technology and potentially *others*, such as distributors, resellers, service providers and individuals who use the technology in an integrated platform or solution. Under this framework numerous private economic actors play a role in the development and delivery chain and will be impacted by the adoption of an overly broad, ill-conceived strict liability system. This shortcoming may stem from the fact that neither the White Paper nor the accompanying Report on the Safety and Liability Implications of Artificial Intelligence, the Internet of Things and Robotics,¹⁸ properly evaluates the potential ramifications of adopting a strict liability framework for all AI systems.

¹⁷ Impact Assessment at 5.

¹⁸ COM(2020)64, Report on the Safety and Liability Implications Of Artificial Intelligence, The Internet of Things and Robotics (rel. 19 Feb. 2020).

Such a decision would have wide-ranging implications that could seriously undermine the development and expansion of important AI systems, and must be considered in any further Impact Assessment.

D. Final Impact Assessment Should Rely Upon Evidence from Companies Leading in the Development and Deployment of this Technology

Although the Impact Assessment states that there is “not a lot of currently valid evidence [] available at this stage” this belies the very robust record already developed by the Commission itself in this proceeding. There is significant evidence already in the record in the form of public comments made in response to the White Paper. Many leading developers of AI systems and technology, such as Google, Microsoft and others have filed comments with the Commission which provide significant factual record to address the many important questions raised in the White Paper. To fail to account for, and rely upon, such evidence would be a mistake.

E. Final Impact Assessment Should Further Analyze Value of Industry Consensus and Voluntary Standards in Lieu of New Rules

While the Impact Assessment acknowledges the potential value of adopting a “soft law” approach (“Option 1”), the analysis does not fully consider the potential value of leveraging voluntary standards and industry consensus in lieu of more formal rules. This approach should be used whenever possible to leverage existing voluntary standards and ethical frameworks adopted by many actors. As CTA has explained, voluntary consensus-based standards can reduce the burden of complying with ill-formed regulation, eliminate the administrative costs of developing state-mandated standards, and decrease the overall cost of goods procured and the burden of complying with agency regulation. This is precisely why CTA and its members have taken a leadership position in AI standard-setting, both in North America¹⁹ and internationally.²⁰ Consensus-based standards, like those being developed by CTA and its member companies, often have broad support from industry, are more likely to reflect the most current technological developments, and reflect the most practical solutions available to the marketplace.

III. Conclusion

CTA and its members have a significant interest in ensuring that European consumers benefit from AI-powered products and services. The Commission should further develop its assessment of the economic impact of over-reaching and burdensome new legislation in this area. Instead, the Commission should proceed carefully to ensure that its policies promote continued development and deployment of AI products and services that enhance the lives, safety and interests of European consumers. CTA stands ready to continue its central role in the

¹⁹ For example, CTA is developing standards focused on AI in healthcare. *See* The Use of Artificial Intelligence in Health Care: Trustworthiness; or Definitions and Characteristics of Artificial Intelligence; *and*, Riya Anandwala and Danielle Cassagnol, CTA, Press Release, CTA Launches First-Ever Industry-Led Standard for AI in Health Care (rel. Feb. 25, 2020), available at <https://www.cta.tech/Resources/Newsroom/Media-Releases/2020/February/CTA-Launches-First-Ever-Industry-Led-Standard>.

²⁰ For example, CTA has been actively participating in ISO/IEC JTC 1/SC 42, the international standards committee responsible for standardization in the area of Artificial Intelligence.

development of consensus-based standards that advance these goals and promote continued dynamic growth and innovation throughout the consumer technology industry.

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