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The proposed EU legal framework surrounding AI Liability in the Supply Chain: A contribution to a cohesive system

JAEM01 Master Thesis

European Business Law

15 higher education credits

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Summary

The EU has a plan to develop itself as a leading force in the AI field, and for that, it created a whole plan to be better prepared for that and foster innovation and development of it in the Union. One of the steps in this plan is to create a cohesive framework around AI to increase trust to the European people, as said systems although very often beneficial, also brings many risks to fundamental rights. Because of those risks and consequences that it has, this plan also includes harmonisation around the non-contractual liability regime surrounding AI. This paper aim is to analyse the proposed legal text around such subject (the new Product Liability Directive and the AI Liability Directive), together with the AI Act, see how the creation of the EU legal framework around non-contractual liability of AI systems is happening. More than that, the aim is to see if said draft of a legal framework is cohesive and fills the necessary voids to provide legal certainty that it needs to achieve the objectives the proposed legislations set out to accomplish.

Preface

To my family, friend and my partner, without whom I would have not been able to juggle a full-time master's programme with a full-time job in a different time zone. No words will be able to thank you enough. I love you.

And to all my professional colleagues who instigated the curiosity to start thinking about liability and how it applies in the world of technology, until it reached to point that was decided to be discussed in this paper.

Abbreviations

AI	Artificial Intelligence
AILDP	Artificial Intelligence Liability Directive Proposal
CJEU	Court of Justice of the European Union
EU	European Union
GDPR	General Data Protection Regulation
ISO	International Organization for Standardization
PLD	Product Liability Directive
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union

1   Introduction

Imagine the following situation: you go out on a weekend to meet some friends and before leaving your house you tell your AI home system that it should turn off the heat in your place at 14 pm, as if it stays on for longer periods it can catch fire. When you go back, there is a fire truck there for a fire in your home caused by the heating that was not turned off as it was supposed to. Who is liable for this? The company that sold the AI home system? The developer? But how much liability do they have? Do they have it? How would you prove it?

According to a Deloitte report[1] 45% of the companies which responded to their surveys said that they would use generative AI to improve innovation. That means that in the next few years these types of AI systems will be more present in our daily lives. This will only increase from here on, as well as the kind of situation presented at the beginning.

Of course, AI can have positive uses like improving productivity, facilitating daily and miscellaneous task, even helping in the production of food[2] and decreasing waste production[3]. However, the use - or rather misuse - of AI can also lead to not as wanted outcomes: biassed automated decision on social services applications, denying people access to their rights; misinformation and disinformation, even wrong diagnosis in the medical field[4].

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[1] '*Now Decides next: Getting Real about Generative AI*' (Deloitte, 2024) <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/consulting/us-state-of-gen-ai-report-q2.pdf >accessed 19 May 2024

[2] "Significant developments are being enabled by drones, remote sensing and machine learning, helping us to save wine from bushfire smoke, measuring our unconscious responses to food and creating smart farms and vineyards" ('*Three Ways AI Is Transforming Agriculture and Food*' (University of Melbourne) <https://study.unimelb.edu.au/student-life/inside-melbourne/three-ways-ai-is-transforming-agriculture-and-food> accessed 19 May 2024)

[3] '*Earth Day: How Ai Can Solve Manufacturing's Waste Problem*' (World Economic Forum) <https://www.weforum.org/agenda/2021/04/how-ai-can-cut-waste-in-manufacturing/> accessed 19 May 2024

[4] Michael L. Littman, Ifeoma Ajunwa, Guy Berger, Craig Boutilier, and Others "*Gathering Strength, Gathering Storms: The One Hundred Year Study on Artificial Intelligence (AI100) 2021 Study Panel Report*". SQ10. Stanford University, Stanford, CA, September 2021. Doc: <http://ai100.stanford.edu/2021-report> accessed 19 May 2024.

That concern is very clearly stated in the 19th edition of The Global Risks Report, by the World Economic Forum, where misinformation and disinformation, as well as adverse outcomes of AI technologies show up among the most concerning risks of the world in the next ten years[5].

The EU however is in a special position to become a leading force in this field. But, for that to happen, there has to be trust from the people that are going to use the systems and also legal certainty for the business and developers to actively engage in the field and foster innovation. The potential the field has on an economical level is of the utmost importance for the EU, and having a coherent way of approaching the subject in the Union also helps in increasing competition on the market, which can be good for the consumers that will potentially have access to better and more robust systems for a lesser price, as more business are in the market[6].

In an attempt to improve trust and decrease the risks involved with AI use, based on article 114 TFEU (and 16), the European Union passed the first regulations on a developing AI legal framework in the Union: the AI Act[7]. One of the instruments chosen by the Commission as a way to harmonise the subject, and to make it a unified and coherent framework on the subject. The choice to harmonise follows the position of the CJEU in the Case *Poland v. Parliament and Council* (C-401/19), stating that the EU should regulate before every Member State decides to have their own regulation, to avoid fragmentation.

Said Regulation has very defined objectives, like ensuring "that AI systems placed on the Union market and used are safe and respect existing law on fundamental rights and Union values" and "enhance governance and effective enforcement of existing law on fundamental rights and safety re-

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[5] '*World Economic Forum Global Risks Report 2024*' (World Economic Forum, 2024) <https://www3.weforum.org/docs/WEF_The_Global_Risks_Report_2024.pdf> accessed 19 May 2024

[6] Whish R and Bailey D, '*Competition Law: 10th Edition*'. Oxford University Press. [2021]

[7] The final text of the AI Act was not yet published in the official journals by the time this paper was written

quirements applicable to AI systems", according to the Explanatory Memorandum on the original proposed text of the AI Act. However, with such goal, one would imagine that the legal text would bring ways to enforce the obligations and prohibitions stipulated in the Regulation, both in a public sphere (with the use of public agencies and oversight bodies), as well as in a private one to enforce said obligations and achieve the goal of protecting fundamental individual rights. Alas, that is not what happens.

As we will see, the final approved text actually does not bring rights to individuals affected by AI outputs, with the aim to guarantee their fundamental rights in the context of AI, as it happened with the GDPR for example. It brings rights and obligations to developers and deployers of AI systems, but not to the people who use AI and who suffered damage by AI outputs, that we will call "affected individual" from here on. So much so, that the final text of the AI Act doesn't even define what the term "User" is[8], or any other term that might define the people affected by the outputs of AI and that suffered damage.

Then, what if a private AI deployer doesn't follow all the requirements laid down in the AI Act and an Affected Individual suffers harm because of it? The only option this individual has is to report the company to a national agency? But even if the agency acts on their non-compliance to the requirements, that will not repair the damage suffered so what then?

The value chain of an AI system is very specific, with many variables until it reaches its end. We can have one developer, but its deployer is another person entirely, or the one using the system is actually using it to provide a service and it is not the final person who is going to use and be affected by the outputs of the system. We also have the ones that are not in the value chain directly, but indirectly: third parties that are affected by the output of the system used by someone else not related to them at all. All of those parties have to be protected and each one has to have liability rules to

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[8] *Artificial Intelligence Act - European parliament*. 2024. <https://www.europarl.europa.eu/doceo/document/TA-9-2024-0138_EN.pdf> accessed 14 May 2024

apply and to protect their own rights or make it possible to justify their methods and delivery. However, the AI Act doesn't bring ways for most of the parties in the value chain to actually enforce their rights in case someone doesn't comply with the regulation, being dependent entirely on public enforcement. At least when talking about non-contractual liability, which will be the focus of this paper.

Although the Parties in the value chain and the individuals that use AI systems have to have ways to be compensated in case of damage, figuring out liability in an AI context is not a simple task.

According to Béatrice Schütte, Lotta Majewski and Katri Havu, figuring out liability in situations that involves AI systems can be very tricky, as it very often depends on "[...] the degree of autonomy that an AI system has, or the number of stakeholders – such as producers, other service providers and operators – that are involved"[9], making it harder to identify the situations that lead to the damage, and even more so to identify the one person who can be held responsible for the results. In the AI White Paper, published previously to the AI Act text approval, the Commission already states the reasoning behind the need for legislation regarding liability:

> If the safety risk materializes, the lack of clear requirements and the characteristics of AI technologies [...] make it difficult to trace back potentially problematic decisions made with the involvement of AI systems. This in turn may make it difficult for persons having suffered harm to obtain compensation under the current EU and national liability legislation.[10]

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[9] Schütte B, Majewski L and Havu K, '*Damages Liability for Harm Caused by Artificial Intelligence – EU Law in Flux*' [2021] Helsinki Legal Studies Research Paper, no. 69, Page 2, University of Helsinki, Helsinki. https://doi.org/10.2139/ssrn.3897839

[10] European Commission. 2020. *White Paper on Artificial Intelligence : A European Approach to Excellence and Trust*. Brussels: European Commission. Page 12. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0065> accessed 14 May 2024.

Even if the one responsible is identified, what type of liability is applicable? If the Product Liability Directive is applied, we have a fault-based liability. However, that might not be the most appropriate system in the context of all AI systems. As also mentioned before, it is hard to trace where and what are the actions that were responsible for the damage, as well as the who behind it, be it one or more legal or natural persons, which are usually a necessary to this kind of system[11]. The tracking of all the answers to those questions might also make the whole process more expensive. Making the access to a right harder or impossible would go against fundamental rights and the objectives of the European Union, so a better solution might have to be used in this situation.[12]

Nonetheless, there are different liability systems available, being the contractual and non-contractual liability, where, in the last one there are also different approaches to it, like a "strict liability" legal framework, or a "fault" based one, which would have a great impact on the power to reach success on a claim against a powerful party, as the type of liability also affects the burden of proof, specially related to the causation of harm. So, which system should be applied?

All of these themes and questions are usually subjected to national law, even though there is often a cross-border element to the situation that would, in general, bring in the application of EU Law. However, the AI Act doesn't touch upon them, showing a clear gap around the subject in the EU framework, a lack of harmonisation. Because of this, new legislation and updates to already existing ones have been proposed by the European Commission.

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[11] A European Parliament Briefing from 2023 on the new PLD, this the fault-based liability system is "*[...] where an injured person can make a claim for damage caused by products and services based on a person's conduct by generally proving: (i) existence of damage, (ii) fault of the liable person, and (iii) causality between that fault and the damage.*" (European Parliament. 'Briefing New Product Liability Directive' [2023]. <https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739341/EPRS_BRI(2023)739341_EN.pdf> accessed 14 May 2024

[12] European Commission. 2020. *White Paper on Artificial Intelligence : A European Approach to Excellence and Trust*. Brussels: European Commission. Page 15. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0065> accessed 14 May 2024.

1.1   Research Questions

In face of the above-mentioned context, in this paper we aim to answer one main question: Does the proposed changes to the current legal framework surrounding AI contribute to a coherent system of liability to AI systems? At the same time, to get to that answer, we will also go through the following sub questions in section 2 and 3, respectively: a) How does the AI Act deals with its own enforcement through non-contractual liability?; and b) will the proposed directives be sufficient to complete the legal framework the EU is aiming to build?

1.2   Methodology

In regards to the methodology used to find the answers to the questions indicated in 1.1, we will mostly use a doctrinal methodology for this research. We will analyse the text of the proposed regulations, as well as the final approved text of the AI Act, to understand what the new legislations brings in relation to AI non-contractual liability to each of the actors in the supply chain.

We will also try the understand how these pieces of legislation will work together, how they are complementary, and if they are at all, with the help of legal doctrine, like books, but specially articles on the subject, as the theme is too new to have many updated books on it. Those materials will be mostly used to understand the concept used in the proposed and approved texts of the legal acts, as well as their connection points.

1.3   Structure of the Paper

As mentioned, in the body of this paper, we will try to get to the answer to that main question by first answering the following: How does the AI Act deals with its own enforcement through non-contractual liability?

For that, we will first analyse how the current legal framework on AI, composed right now of the AI Act, is applicable to each party in the value chain, and how non-contractual liability will appear for them.

We will then set out to understand and analyse the mechanisms the regulation brings to enforcing the obligations and rights it created. We will also try to understand the aims of said Regulation and if the lack of provisions on liability makes the text lacking to achieve the goals it set out for itself and to harmonise the AI related problems in the EU.

With all of that information in mind, we will go to the second sub-question, where we will focus on the proposed changes in this liability framework, looking specifically at the proposed revision to the Product Liability Directive and AI Liability Directive Proposal. In this moment we will analyse if said changes will bring more clarity to the application of liability and if they bring new mechanisms of enforcement to the parties in the value chain.

While at that, we will critically analyse if the proposed changes to the current framework will actually have a positive impact on the building of a coherent and harmonised legal framework on AI liability in the European Union and if the proposed chances make sense to what they aim to achieve.

Considering the length of this paper, we will not try to go over all of the changes and points that will be affected in relation to this type of liability, but focus on the main changes, that we believe will have bigger impact on the framework.

By the end, we are hoping to have an answer to that main question, and prove if our hypothesis is right: that the proposed legislations will not create the legal framework around AI non-contractual liability that the EU is hoping for.

2 Current legal framework and liability enforcement

As mentioned in the Introduction, the European Union has a very clear goal to create a harmonised and cohesive legal framework around AI with the aim to build trust and develop the field of AI in the Union, bringing investment and increasing innovation.

For that, it is necessary not only to harmonise the requirements for the development and deployment of AI systems, but the consequences of the definition of such requirements, besides the ones that come from a contract, but from the action or inaction themselves. That means that the utilisation of such AI systems might cause damage, and if such damage comes from the non-compliance of EU Regulation, there has to be indemnification for all the damaged parties, be it material or not, who have to have available mechanism of enforcement for their rights, in both private and public spheres.

Therefore, in this topic we aim to go through the current legislation around AI available in the EU and analyse if those provisions mention liability and how it is applied and to whom.

Afterwards, we will also analyse the topics around liability that are not mentioned, with specific focus on the enforcement mechanisms brought by the current legislation and the existing need to harmonise such topics.

2.1 The AI Act and Liability

Currently, the legal framework surrounding liability in AI use and development is moulded around existing regulations in other areas, like the Product Liability Directive, and with the specific general legislation on AI

known as AI Act, approved in March 13th, 2024[13]. However, to understand liability, we also have to understand the allocation of responsibility and the supply chain of an AI system, as well as how the outputs are produced.

According to Jennifer Cobbe, Michael Veale and Jatinder Singh in their article "Understanding accountability in algorithmic supply chains", this type of context is very interdependent. This means to say that there are multiple parties, with some responsible for the development, others deployment, some more for the operation, and all of them need the others to actually function[14]. This scenario, where there are multiple actors responsible for many different things in the supply chain, creates what they call the "*many hands problem*", where one can't be easily indicated as the responsible one for the simple fact that they were not responsible for it by themselves[15]. About this the authors also state:

> Responsibility for the workings and outcomes of supply chains is thus distributed among several actors who may not be straightforward to identify nor consistent across instances.[16]

[13] Yakimova Y and Ojamo J, '*Artificial Intelligence Act: MEPs Adopt Landmark Law: News: European Parliament*' (NEWS European Periliament, 2024) <https://www.europarl.europa.eu/news/en/press-room/20240308IPR19015/artificial-intelligence-act-meps-adopt-landmark-law> accessed 14 May 2024

[14] Cobbe J, Veale M and Singh J '*Understanding accountability in algorithmic supply chains*'. [2023]. Page 4. In Proceedings of the 2023 ACM Conference on Fairness, Accountability, and Transparency (FAccT '23). Association for Computing Machinery, New York, NY, USA, 1186–1197. https://doi.org/10.1145/3593013.3594073.

[15] Cobbe J, Veale M and Singh J '*Understanding accountability in algorithmic supply chains*'. [2023]. Page 2. In Proceedings of the 2023 ACM Conference on Fairness, Accountability, and Transparency (FAccT '23). Association for Computing Machinery, New York, NY, USA, 1186–1197. https://doi.org/10.1145/3593013.3594073.

[16] Cobbe J, Veale M and Singh J '*Understanding accountability in algorithmic supply chains*'. [2023]. Page 7. In Proceedings of the 2023 ACM Conference on Fairness, Accountability, and Transparency (FAccT '23). Association for Computing Machinery, New York, NY, USA, 1186–1197. https://doi.org/10.1145/3593013.3594073.

On this, Gerhard Wagner also mentions, in his paper "Liability for Artificial Intelligence: A Proposal of the European Parliament"[17], because it keeps getting harder and harder for humans to actually supervise and keep track of the decisions and outputs of the AI systems, the normal approach to liability might be void entirely, as not applicable to such situations.

Therefore, it is logical to assume that in such a case, if responsibility is distributed, liability is as well. Alas, academics have been trying to get clarifications to the points of liability and responsibility, according to Cobbe and others, through an "organisation-centric lens" attributing one functionality of the system to just one of the actors, and not through an interdependent lens, as it would make sense in this AI context.[18]

Another very specific problem for accounting liability for AI systems when it comes to their outputs is the so-called "black-box" very closely related with the problem of opacity and complexity of the decision process of an AI system[19]. The problem here is to identify the action that gave origin to the damage, what the AI actually did or took into account to produce and how it made the decisions that lead to the output that ended up damaging someone. This is the scenario where the developer or deployer doesn't have a way to understand the reasoning behind an output, as it can't know what data among millions it used to actually get there.[20] [21] And here we are imagining that providers are actually willing to disclose the information and follow the principle

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[17] Wagner G, '*Liability for Artificial Intelligence: A Proposal of the European Parliament*'. [2021] SSRN Electronic Journal. Page 14

[18] Cobbe J, Veale M and Singh J '*Understanding accountability in algorithmic supply chains*'. [2023]. Page 3. In Proceedings of the 2023 ACM Conference on Fairness, Accountability, and Transparency (FAccT '23). Association for Computing Machinery, New York, NY, USA, 1186–1197. https://doi.org/10.1145/3593013.3594073.

[19] Hacker P, '*The European Ai Liability Directives – Critique of a Half-Hearted Approach and Lessons for the Future*' [2023] Computer Law & Security Review, Volume 51, Page 4, 105871, ISSN 0267-3649, https://doi.org/10.1016/j.clsr.2023.105871.

[20] Bathaee Y, '*The Artificial Intelligence Black Box and the Failure of Intent and Causation*'. [2018] Harvard Journal of Law & Technology, 31, 889. <https://jolt.law.harvard.edu/assets/articlePDFs/v31/The-Artificial-Intelligence-Black-Box-and-the-Failure-of-Intent-and-Causation-Yavar-Bathaee.pdf> accessed 28 April 2024.

[21] This fact is better explained through the example given in the online article of the Michigan University, that compares deep learning of AI and how their decision-making reasoning starts to get very opaque with the more data it has access to. *"[...] think, for instance, of how children first learn to recognize letters of the alphabet or different animals. You simply have to*

of transparency to the letter, which is not necessarily what happens, as industrial and commercial secrecy also exist to protect competition[22].

Fact is that AI systems and supply chains have very specific problems that were not necessarily taken into account when the current legislation in the EU was passed. However, they are still applied in cases where such problems arise.

As Philipp Hacker states in his paper on "The European AI Liability Directives - Critique of a Half-Hearted Approach and Lessons for the Future":

> [...] all of these risks are potentially compounded, and aggravated, by the growing interconnection between devices, data sets and application, exacerbating difficulties of providing fault, defectiveness or causality.[23]

Therefore, considering such complexity of actors and difficulties in the liability field around AI, we then aim to evaluate the current legal

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show them enough examples of the letter B or a cat and before long, they can identify any instance of that letter or animal. The basic theory is that the brain is a trend-finding machine. When it's exposed to examples, it can identify qualities essential to cat-ness or B-ness, and these ultimately coalesce into decision protocols that give us the ability to categorize new experiences automatically and unconsciously. Doing this is easy. Explaining how we do this is essentially impossible. 'It's one of those weird things that you know, but you don't know how you know it or where you learned it', says Associate Professor of Electrical and Computer Engineering Samir Rawashdeh, who specializes in artificial intelligence. 'It's not that you forgot. It's that you've lost track of which inputs taught you what and all you're left with is the judgments.' [...]. [...] deep learning, one of the most ubiquitous modern forms of artificial intelligence, works much the same way [...]. But Rawashdeh says that, just like our human intelligence, we have no idea of how a deep learning system comes to its conclusions. It "lost track" of the inputs that informed its decision making a long time ago. Or, more accurately, it was never keeping track." (Blouin L, 'AI's Mysterious "black Box" Problem, Explained' (*NEWS - University of Michigan Dearborn*, 2023) <https://umdearborn.edu/news/ais-mysterious-black-box-problem-explained> accessed 28 April 2024)

[22] There are specific legislations that protect such information and those can't be completely overruled by a new regulation, but weighted with it in the specific situation and context as to balance the rights of the companies and the individuals, while keeping in mind the goals of the European Union and the internal market.

[23] Hacker P, '*The European Ai Liability Directives – Critique of a Half-Hearted Approach and Lessons for the Future*' [2023] Computer Law & Security Review, Volume 51, Page 5, 105871, ISSN 0267-3649, https://doi.org/10.1016/j.clsr.2023.105871.

framework and how it can be applied to AI liability problems, specifically the AI Act, for each of the parties in the AI supply chain.

To make this analysis easier, we will illustrate the chain by using a simplified flowchart of the supply chain in the production and use of AI system, indicating each party in the process, that used in the aforementioned article, "Understanding accountability in algorithmic supply chains", by Jennifer Cobbe, Michael Veale and Jatinder Singh[24].
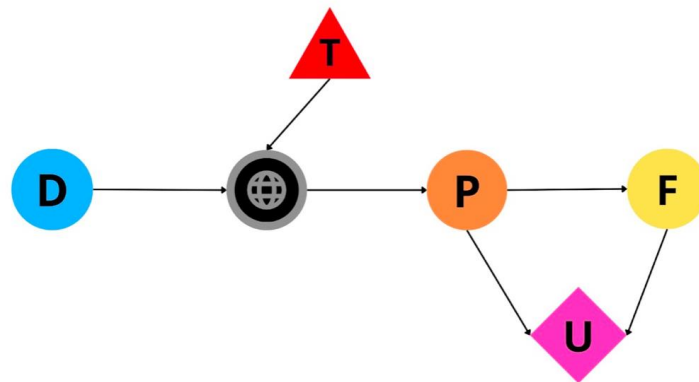

Figure 1 - AI Supply Chain flowchart

In this flowchart we have "D" as de developer, "T" as the Third Party, the grey icon the deployer, "P" the provider, "F" the professional user and "U" the Affected Individual of the AI system, who could be seen as the consumer of such service or a third individual who was not the consumer of such system, but that was affected by it. This can be understood as an already simplified supply chain of an average AI system

Now, when it comes to the AI Act, that was approved by the European Parliament in March 2024, but that has not yet been published in the

[24] Cobbe J, Veale M and Singh J '*Understanding accountability in algorithmic supply chains*'. [2023]. In Proceedings of the 2023 ACM Conference on Fairness, Accountability, and Transparency (FAccT '23). Association for Computing Machinery, New York, NY, USA, 1186–1197. https://doi.org/10.1145/3593013.3594073.

Official Journal by the time of this paper was written, it is good to have in mind that, according to the Coordinated Plan for AI in the EU that the Commission elaborated, this Regulation was always supposed to bring provisions on matters of AI risks and ways to mitigate them and create more safe and trustworthy systems. And, although not the path we would have used for it, it never meant to talk about liability, which was meant to be regulated by specific legislation from the beginning.

The AI Act, according to the explanatory memorandum in the approved text of the Regulation, brings "Predictable, proportionate and clear obligations [...] also placed on providers and users of those systems to ensure safety and respect of existing legislation protecting fundamental rights throughout the whole AI systems' lifecycle.", with very specific goals[25]:

1) ensure that the AI's that are available within the EU are safe to use and respect the principles and fundamental rights of the Union;

2) create legal certainty to increase investment and innovation in the field;

3) better the governance and enforcement systems of fundamental rights and AI requirements through the already existing laws; and

4) find ways to develop and facilitate the existing internal market as to avoid fragmentation

However, to actually achieve the objectives of ensuring respect to fundamental rights and ensuring legal certainty to facilitate investments, for us there is a need to approach the problem of liability in AI systems, and how to place responsibility.

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[25] European Commission. Proposal for a Regulation of the European Parliament and of the Council. Page 3 <https://eur-lex.europa.eu/resource.html?uri=cellar:e0649735-a372-11eb-9585-01aa75ed71a1.0001.02/DOC_1&format=PDF> accessed 14 May 2024

Although the approved text of the AI Act seems to do a good job in placing "Predictable, proportionate and clear obligations [...] also placed on providers and users of those systems"[26,] at least going by the topics approached by the legislator in the approved text. Therefore, it seems to have a good approach to responsibility, in most of the value chain, although the regulation final text fails to set out rights for these actors, including the Affected Individuals who use the systems.

Nonetheless, this is mostly only in regards to High Risk AI[27] systems, a fact that seems even a bit naive. In our opinion, although harder to happen, non-High-Risk systems can also give origin to damage and should have clear obligations and responsibilities as well, not only recommendation of what they "should" do as a good practice as it is in the AI Act.

The fact that the text didn't indicate any rights to individuals regarding the use of AI seems to have been an active choice of the legislators. A fact that goes against what was done with the GDPR (General Data Protection Regulation), where the provision brings clear rights to data subjects and how to enforce said rights, as well as obligations and rights for the companies that acted as data operators or controllers. The option here in the AI Act was to make a text with vertical provisions. That means, obligations for the main actors in the supply chain and how that is going to be supervised by public oversight agencies.

Analysing the approved text of the Regulation, there really are no provisions specifically regarding liability. The chapters mostly state the obligations for the Providers, who include product manufacturers, importers, distributors and third parties that use high risk AI systems. Even more, the final approved text, doesn't even have a definition for what a "user" is, in the sense of "Affected Individuals", not even being mentioned to have any kind of obligations or rights in front of the providers and deployers of such systems. In

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[26] Ibid

[27] The definition of what a high-risk AI system is and isn't appears specially in article 6 (1) and (3) of the approved text of the AI Act (Approved text of the AI Act. European Parliament <https://www.europarl.europa.eu/doceo/document/TA-9-2024-0138-FNL-COR01_EN.pdf> accessed 14 May 2024)

fact, the AI Act text, never had such actor included to its text, by choice of the legislator that preferred to approach the topics related to this actor in different pieces of legislation.

Therefore, the text brings responsibility to some of the actors in the supply chain. More specifically, following the chain indicated before, all but the natural person who is the Affected Individual of the system or product, like you and us when using, for example, ChatGPT for non-professional or economic reasons.

But, as stated before, although there are responsibilities for these actors, the AI Act barely creates rights to them[28], especially regarding how liability will be placed on them, the degree and in what situations they will be exempted from the liability or won't be liability at all. All points that could bring a lot of legal certainty to the field and increase the participation in this market, as possible expenses could be better determined as well as the risks involved. For us, if the legislation is creating obligations to those actors in the supply chain, it also has to make sure to precisely describe the limits of such obligations, at least.

Philip Hacker even affirms that specially in fields such as AI and high-tech in general, there is an intrinsic need to balance liability rules that will allow actual compensation of damages and not scare away people and companies from investing and deploying such technology[29].

The text then lacks on establishing rights and obligations to those who use AI systems in a non-professional manner, even if just to mitigate risks on the use of such systems, just like there are no provisions related

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[28] Take for example, the provider of AI systems, it has obligations like establish and implement quality management system in its organisation (art. 17), draw-up and keep up to date the technical documentation (art. 11) and logging information (record keeping - art. 13), and others. However, when it comes to their rights, there isn't much on it. It has, for example, rights that aim to serve as incentive for innovation, like the AI Regulatory Sandboxes (Article 57). However, it does not bring rights as to grant them ways to protect themselves, like the liability that will be applied to them and what are the limits for such liability, and if they can be exempted from said liability.

[29] Hacker P, '*The European Ai Liability Directives – Critique of a Half-Hearted Approach and Lessons for the Future*' [2023] Computer Law & Security Review, Volume 51, Page 3, 105871, ISSN 0267-3649, https://doi.org/10.1016/j.clsr.2023.105871.

to how individuals should enforce their rights under EU Law, when providers don't comply with their obligations under the AI Act and cause them harm. The last one was an active choice of the legislator on their plan for AI in the Union, however, the first one seems like a bit like an oversight to not mention Affected Individual in any capacity in a Regulation that aims to mitigate risks and protect exactly them.

2.2 The lack of private enforcement mechanisms and need for Harmonization

The fact that AI systems can have negative outcomes and cause harm is a given, the "black-box" problem is a clear example. Added to that, there is the principle that where a person is harmed, it should be compensated as a way to "go back" to the state it was before the damage[30].

In parallel to this, the individual who caused harm may also face repercussions in a public sphere, going through administrative procedures or even legal ones, with the possibility of paying fines or having other types of penalties applied to them.

According to the electronic Oxford Dictionary of Law, harmonisation of law means the process of making a uniform Union legislation, by changing national law to follow what was indicated in EU Law, especially in areas of common interest of the Union, its Member State and individuals[31]. However, the subject of harmonising liability in the EU is a complex subject that academics have been discussing regarding much to the competence of the EU. That happens because it spills Union Law to private law and, in theory, EU competence should be restricted to public law. However, the need for

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[30] Katri Annikki Havu, in the paper "Damages Liability for Non-material Harm in EU Case Law", mentions what she calls the principle of full compensation, where damages that are not material also have to be compensated for. (Havu KA, 'Damages Liability for Non-Material Harm in EU Case Law' (University of Helsinki, 1 August 2020) <https://researchportal.helsinki.fi/en/publications/damages-liability-for-non-material-harm-in-eu-case-law> accessed 19 May 2024)

[31] Martin, E. A. *Dictionary of Law*. [Elektronisk Resurs], Oxford. 2015. <https://search-ebscohost-com.ludwig.lub.lu.se/login.aspx?direct=true&AuthType=ip,uid&db=cat07147a&AN=lub.5463248&site=eds-live&scope=site.> accessed 19 May 2024

the development of an internal market, according to Paula Giliker, that changed and much of the harmonisation needed is related to private law[32]. This is the case with the subject of liability in AI.

The public and private spheres are an integral part of the enforcement of legal rules in general. If a manager in a public office in your job fires you, just because they simply did not like you or felt threatened by you, not only he will probably go through an administrative investigation and have sanction applied to them, the individual harmed can also seek compensation for this action, as a way to go back to the state they were before the fact.

According to the *Simmenthal Case* (C-106/77), together with *Van Gend en Loos* (C-26/62), EU Law is a source of rights and obligations to individuals just as to Member States and public entities. EU Law then has direct effect and primacy (C-6/64 *Costa v. ENEL*) when invoked in National Courts as well, and, therefore, allows the private enforcement of EU law, especially when there is implementation of such EU laws into the national legal system, which is the Member States responsibility (C-201/04 *Molenbergnatie*).

In this scenario, when talking about provisions which do not have horizontal effect, there is still potential for a private party to be affected by said EU provision. Alas, according to Folkert Wilman (who wrote his book as a Member of the Legal Service of the European Commission, Belgium), because of the principle of private party liability, if the private party that was non-compliant to and EU Regulation causes damage to an individual, that individual has to be compensate for the damages caused[33].

More than that, the EU also has to offer effective means for the enforcement of such EU rules, according to article 19 (1) of the TEU, which also have impact on the effectiveness of the EU Law. Wilman also states that

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[32] Giliker P, 'Chapter 1', *Research handbook on EU Tort Law* (Edward Elgar Pub 2017) <https://www-elgaronline-com.ludwig.lub.lu.se/edcollchap/ed-coll/9781785365713/9781785365713.00008.xml?tab_body=pdf-copy1> accessed 14 May 2024.

[33] W Folkert, Chapter 1 "*Private Enforcement of EU Law Before National Courts - The EU Legislative Framework*", Elgar European Law and Practice series. [2015] <https://www.e-elgar.com/shop/gbp/private-enforcement-of-eu-law-before-national-courts-9781784718480.html> accessed 18 May 2024

mechanisms of private enforcement then not only serve to guarantee the application of EU Law across Member States, but also to guarantee its effectiveness. However, if left only to National systems to regulate on how private parties can hold other private parties liable for the consequences of their actions and inactions that are not compliant to EU regulation, it might cause the fragmentation that the Commission hopes so much to avoid.

So, why wouldn't there be ways to enforce non-contractual liability in a situation where AI is applied? Why not clarify that from the get go? Taking the example of the introduction of this paper, the person who had their home burned down by the malfunctioning of an AI system, should and has the right to compensation. However, who should be liable for that? The deployer? The developer? The third-party who was responsible for a specific part of the product that might have some kind of influence in the results? Where the obligations of providers and deployers finish? We do not see how the approach in a different legislation than the AI Regulation itself could be the best possible practice.

All these questions have to be clear to avoid the fragmentation of the internal market, as if there is no harmonisation to those points, in systems that often have a cross-border element inside the EU as well as outside of it, we will have a scenery of legal uncertainty that might scare of new investors and innovators in the field. The harmonisation would also stop the so-called "law shopping" by developers and deployers, who would most likely go to the Member States that had the most favourable legislations to them[34].

This would not help to develop the internal market or foster innovation and engage the AI field all around the Union. Also, as we stated before, "*facilitate the development of a single market for lawful, safe and trustworthy*

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[34] Lehalle DG, '*Civil Liability for AI: Welcomed but Perfectible Recommendations of the EP*' (AI-Regulation, 5 March 2021) <https://ai-regulation.com/civil-liability-regime-for-artificial-intelligence-welcomed-but-perfectible-recommendations-of-the-european-parliament/> accessed 14 May 2024

AI applications and prevent market fragmentation" and *"ensure legal certainty to facilitate investment and innovation in AI"* are some of the goals of the AI Act.

In regards to enforcement in the AI Act specifically, it follows a simple premise, which is well illustrated by the following exert:

> If we are to have confidence that technological protection mechanisms intended to ensure that human rights values are respected during the operation of digital processes, then we must have robust mechanisms of oversight that can investigate and verify that they do in fact so operate.[35]

When talking about AI, we are often talking about systems that have significant impact on fundamental rights of individuals, and this raises the question: is public enforcement through an oversight agency enough? The AI Act only brings public enforcement mechanisms for the obligations set out in the regulation[36]. But is this accountability enough or is it missing an important actor of the supply chain?

A way to enforce these obligations would be through the people that are impacted by it in their daily lives: the natural person who is a user without aim for profit, the Affected Individual. One could even say that mechanisms of private enforcement can be just as, if not more, efficient than public

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[35] Yeung K *"A study of the implications of advanced digital technologies (including AI systems) for the concept of responsibility within a human rights framework"* Council of Europe. <https://rm.coe.int/a-study-of-the-implications-of-advanced-digital-technologies-including/168096bdab> accessed 14 May 2024

[36] The non-existence of private enforcement mechanisms can be easily seen in the topic 5.2.6 of the Explanatory Memorandum on Governance and Implementation, where the enforcement is indicated with only public institutions, agencies and bodies, in both national and Union level. (European Commission *"Laying Down Harmonised Rules on Artificial Intelligence – Artificial Intelligence Act – and Amending Certain Union Legislative Acts"*. 2021. <https://eur-lex.europa.eu/resource.html?uri=cellar:e0649735-a372-11eb-9585-01aa75ed71a1.0001.02/DOC_1&format=PDF> accessed 19 Mary 2024)

ones[37] and are seen as an appropriate way to enforce and guarantee effective-ness of EU Law, as mentioned before in this topic. That is because public agencies, considering the number of cases and the distribution of them, often don't have enough reach and resources to monitor and investigate all provid-ers who don't comply with the regulation[38].

Take the Brazilian case for example. The national agency for data protection only did 6 administrative procedures since the publishing of their data protection regulation, in 2018. However, the regulation was mentioned in over 14.000 legal decisions since them, specifically from 2020 to 2023, according to news outlet Valor Economico[39]. The Agency, when it comes to fiscalization, in 2023 only had 4 employees available[40] for a country that in the same year had over 2.7 million new companies created[41] in an extension of over 8.5 million square kilometres.

Although a case from a different jurisdiction with different regu-lations, this example serves to show the power of horizontal enforcement of a regulation, through private means. Because, if depending only on the fiscal-ization and enforcement of the national agency, the law would most probably

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[37] Béatrice Schütte, in page 9 of the paper "*Damages Liability for Harm Caused by Artificial Intelligence – EU Law in Flux*", even mentions article 80 of the GDPR, that contributes to holding data agents responsible for breaches in their obligations. (*Schütte B, Majewski L and Havu K, 'Damages Liability for Harm Caused by Artificial Intelligence – EU Law in Flux' [2021] Helsinki Legal Studies Research Paper, no. 69, University of Helsinki, Helsinki. https://doi.org/10.2139/ssrn.3897839*)

[38] For example, the competition agencies. They have information of multiple incorporation that could potentially have an effect of competition in the internal market, and for such should be investigated and, in theory, stopped. However, because of how much those cost and the amount of available personnel to use, they have to choose the most important cases that have more immediate and serious consequences to the market. That does not mean that the other cases are not breaching EU competition law, but they might never be held accountable for it because the agency didn't have enough means to do so.

[39] Ignacio L, '*Levantamento Aponta Que LGPD É Citada Em Mais de 14 Mil Decisões Judiciais*'. Valor Econômico <https://valor.globo.com/legislacao/noticia/2024/02/16/levanta-mento-aponta-que-lgpd-e-citada-em-mais-de-14-mil-decisoes-judiciais.ghtml> accessed 14 May 2024

[40] Osvaldo Grossmann L, '*ANPD Só Tem Quatro Pessoas Para Fiscalizar Todo o Brasil*' (Convergencia Digital, 18 October 2023) <https://www.convergenciadigital.com.br/Go-verno/ANPD-so-tem-quatro-pessoas-para-fiscalizar-todo-o-Brasil-64507.html?UserActive-Template=mobile> accessed 19 May 2024

[41] '*Brasil Tem 2,7 Milhões de Novas Empresas Em 2023*' (Ministério do Desenvolvimento, Indústria, Comércio e Serviços, 26 September 2023) <https://www.gov.br/mdic/pt-br/assun-tos/noticias/2023/setembro/brasil-tem-2-7-milhoes-de-novas-empresas-em-2023> accessed 19 May 2024

have very little effect, but because private individuals have been enforcing it by invoking in legal procedures, the national data protection law has been very well applied.

But, according to Paul Craig de Burca, "The vigilance of individuals concerned to protect their rights amounts to an effective supervision addition [...]"[42] to the enforcement machine, and that in turn can make providers even more accountable for their non-compliance. News of such wrong action could have a negative impact on providers' image, which by consequence could lead to economic implications as well.

However, for that to happen, the regulation has to allow the enforcement of the regulation by private parties, and that can only happen if they have rights indicated by the regulation.

As it is now, individuals who use AI systems for non-professional reasons and that are damaged by the outputs of said technology and the non-compliance of the providers obligations, can't privately enforce the AI Act in National Courts, because the application seems to be only vertical. This means that if an Affected Individual is damaged by an output they can't go to the courts and apply the AI Act saying that the damage occurred because of non-compliance with this specific EU legislation and make providers accountable for their actions for which they are liable. More than that, they don't have any specific rights that they can enforce against the providers and make them liable for their action, according to this Regulation. So, it makes sense that it didn't bring any enforcement mechanisms for private parties.

As said before, this goes in the opposite direction the GDPR went, even if the reasoning behind it was to make a general regulation on a specific matter, just like it happened with the GDPR. The data protection legislation brought not only obligations to data agents, but also rights to them and data subjects, not forgetting to make provisions on how to enforce said rights in the public and private sphere and to approach liability for data agents.

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[42] Craig P and Búrca GD, '*EU Law: Text, Cases, and Materials*'. [2011] Oxford University Press 2011)

The reasoning behind the creation of the GDPR is very similar to the one behind the AI Act: the creation of a harmonized framework around data protection with enforcement mechanisms to develop the internal market, and the protection of the EU people by avoiding divergent legislations that might impede free movement in the internal market, creating legal certainty[43]

The AI Act was created to make a more coherent framework on artificial intelligence development and deployment, considering that it is an important to build trust and allow the EU to take point in this very rapidly developing market[44], to prevent divergences that might hinder the functioning of the internal market and provide legal certainty and transparency to all the actors in the supply chain. But this is where the AI Act stops, leaving the part of "a consistent level of protection for natural persons" that the GDPR mentions, behind.

According to Catherine Bernard, in her book "*The Substantive Law of the EU*", harmonisation "[...] would help the market to function properly while at the same time protecting vital public interests such as consumer protection and public health"[45]. To us, liability and accountability are subjects that require harmonisation, as if they are not harmonised, Member States will be forced to create their own regulations, because individuals will try to make providers liable and accountable for the damages they will eventually suffer.

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[43] General Data Protection Regulation. OJ L 119/. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679> accessed 14 May 2024.

[44] This is clear through the mention of the Commission White Paper on AI from 2020, in the explanatory memorandum of the approved text of the AI Act. Their objective was to be true to their promise of building "A European approach to excellence and trust" where the individuals in the European Union would be able to trust in this type of technology and be incentivised to invest and develop this market in the EU.

[45] Barnard C,'*The Substantive Law of the EU: The Four Freedoms'* [2022]. Oxford University Press. Page 556.

That hangs true as well in Hacker's paper, where he defends the existence of "only one harmonised European regime"[46] to liability and compensation relating to AI, where the application and creation of national regulations would happen subsidiary to that of the EU.

But as these systems are often in different Member States and even outside the EU, or have people involved from different Member States, there will be a problem of opposing legislations that will fracture internal law and cause legal uncertainty, which are two of the specific goals of the EU in the creation of the AI Act and the legal framework on AI, and that would hinder the proper functioning of the market.

So, to make sure the subject of AI is functionally harmonised in the EU, allowing the development of the internal market, the topic of liability and compensation for natural persons is necessary. The Commission always had a plan, when creating the Coordinated Plan on AI in the European Union to approach the risks of AI through the AI Act and mitigate them and talk about liability in a different moment, by filling the gaps that national laws presented[47]. Therefore, because this topic was not provisioned by the AI Act, the Commission made it so that other regulations were responsible to fill this void in the legal framework of AI in the EU regarding non-contractual liability and private enforcement.

We know that individuals are going to be affected by AI systems, and their rights have to be made clear, as well as how they should enforce their right to compensation for their damages, not forgetting the clarifications on liability for the other actors in the supply chain, who also need legal certainty to enter the market. The EU also knew that was necessary and that the subjects mentioned had to be harmonised. That is why they created a whole package of legal updates and new regulations on AI. But, for us, the way this

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[46] Hacker P, '*The European Ai Liability Directives – Critique of a Half-Hearted Approach and Lessons for the Future*' [2023] Computer Law & Security Review, Volume 51, Page 6, 105871, ISSN 0267-3649, https://doi.org/10.1016/j.clsr.2023.105871.

[47] European Commission. Communication from the Commission on Artificial Intelligence for Europe. 2018. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:237:FIN> accessed 19 May 2024.

was done was not enough to create a cohesive legal framework on AI that would lead to a fully harmonised system.

3   Effects of the Changes in the legal framework

As it was mentioned before, the main points that were not discussed in the AI Act were the rights of individuals who suffered damage by outputs of AI systems, and liability rules that have to be applied in case of noncompliance with the obligations set out in the Regulation.

The Commission, in an effort to fill those gaps, decided to include two different directives on this new legal framework on AI: the update to the Products Liability Directive (PLD) and the AI Liability Directive Proposal (AILDP). That by itself seems a weird choice. Why make two different legal texts instead of one? At first glance, it doesn't seem to be the logical, easiest or cheapest option. However, going opposite to what Philip Hacker states in his paper, we believe that the use of two directives can work and might even have some positive aspects to it.

Hacker is very critical with the choice of making two directives about liability instead of a unified legislation on the topic. He says that:

> Even fully harmonizing directives always create the risk of diverging transpositions. [...]. Hence, to prevent fragmentation and diverging transposition between the Member States in this highly sensitive area of innovation, AI liability should equally be spelled out in one comprehensive regulation, not two directives.[48]

The double legislation can really lead to more difficulties related to divergent and fragmented rules, but only if the texts are done inrush and without concern to making sure that all the points are integrated well and are not saying different things that go completely against what was stated in the

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other. It can even make it more difficult for individuals to know what legislation to invoke in time to protect their rights, as mentioned by Hacker as well[49]. Nonetheless, the choice of making use of existing regulations can possibly make the approval process easier, as there are fewer things being changed and introduced to the framework.

The choice for two directives also allows for a specific and more general text. That means that, if in the future, if an AI system doesn't exactly fall within the meanings and definition of the AILDP, for example, the general aspect of the PDL will still allow for the indemnification of the damages suffered by the individuals.

Therefore, the use of two instruments instead of one, on itself, doesn't mean the objectives are not going to be reached and that it will only make EU law more difficult to apply with more possibility for fragmentation. But only if the actual approved texts are done in a way where they are fluid with each other. This means to say that both directives take the other into account, as well as the existing AI Act, to make rules that are complementary and not opposing.

We aim then to analyse both these proposals, focusing on the matters that those two-legislation brought to the AI framework and how they interact, based especially in the topics raised by Philipp Hacker on his paper "The European AI Liability Directives - Critique of a Half-Hearted Approach and Lessons for the Future" to construct our opinions and critiques, as a way to narrow the topics to be approached.

Following the same direction of legislation applicability, we will start this analysis with the PLD, because of its "*lex generalis*" characteristics, being applicable to all systems and products put into the internal market, no matter if they are AI or not, and then the AI Liability Directive, as if it has more of a "*lex specialis*" characteristic to it, and that will apply to only AI

systems, having preference of application over the PLD. In no way we intend to exhaust all the points brought by the proposals. However, we will try to highlight the matter that to us seems to have more impact on the overall creation of a coherent legal framework on AI liability in the EU.

For that, we will analyse the following topics in both proposals: 1) legislative status; 2) objectives and need for harmonisation; and 3) scope, where we will analyse the a) type of liability applicable; b) origin of the claim; and c) burden of proof.

3.1 The New Product Liability Directive (PLD)

The Product Liability Directive in truth already exists. What has been proposed is an update to the existing legislation to include the digital economy in its scope of application. The later text was not updated for the necessities of an economy that relies so much in digital and online aspects and characteristics, in services and products provided to European citizens and Member States through the Internal Market. This proposal is now with the Parliament for first reading, which hopefully means that it will be voted soon.

The objective, according to the Explanatory Memorandum on the proposed text of the Commission, was to better the "[...] functioning of the internal market, free movement of goods, undistorted competition between market operators, and a high level of protection of consumers' health and property".

One important aspect of the new proposed PDL, regarding harmonisation is that in it we have a maximum harmonisation approach. According to art. 3 of the proposed text, the proposal is explicit in the prohibition to Member States, that can't keep or create any national legislations that are not in accordance with the Directive[50] and also approaches more subjects, like the

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[50] European Commission. Proposed text of the Product Liability Directive. 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0495> accessed 14 May 2024

right for compensation, the identification of liable actors, burden of proof, exemption of liability etc. This creates a more tied together legislation, that leaves fewer subject up to the National Courts to legislate and decide upon.

To us, because AI systems have a great risk of breaching individual and fundamental rights, a more rigid approach sounds more certain to the protection of such rights, as a way to really avoid any kind of fragmentation and increase the trust and development of the subject in the Union. Especially here in the PLD, where damages are the ones related to property, death or personal injury and data loss (art. 4(6) of the proposal[51]), the application of a maximum harmonisation approach is the ideal one.

The scope of said Directive then is obviously much broader. This is because it doesn't apply only to situations where AI systems are involved, but to all situations where damage was done because of a defective product available in the market. With this new text, products also include software systems, where AI systems are also supposed to fall, at least according to the Questions and Answers published online by the EU Commission. There, the Commission states what follows:

> The revised PLD makes clear that all these mandatory safety requirements, including those set out in the AI Act, should be taken into account when a court assesses if a product is defective. The revised PLD crucially also makes clear that software, including AI systems, is a product.[52]

In our opinion, the proposed revision has to be updated to make this point clearer in the text. The way it was proposed, the text doesn't bring the definition of product as including AI systems and, more importantly, doesn't make reference to the AI Act, indicating that defects derive from the

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[51] Ibid

[52] European Commission. '*Questions and Answers on the Revision of the Product Liability Directive*' (Questions and Answers, 28 September 2022) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_5791> accessed 19 May 2024

noncompliance with the mandatory requirements set out in the Regulation. The proposal only brings the definition of online platform, which goes according with the definition set out in the Digital Services Act[53]. If this update is not done, then the answer indicated by the Commission will not actually ring true.

When we say that the PLD has a broader scope of application, this also includes the fact that it imposes rights related to damages originated from non-high risk AI systems as well, which as we will see are not really mentioned in the AI Liability Directive Proposal. Because it doesn't follow the same structure and nomenclature as the AI Act, the PLD is applicable to all defective products, and that includes both high risk and non-high risk AI systems. This is interesting when thinking about the whole of the AI liability framework.

Also, as we will see in the next topic, the AI Act doesn't bring much obligations to non-high-risk systems, only making recommendations and indication of good practices to providers and deployers. Also, as w the AILDP mostly applies to high-risk applications, following the AI Act. Now, with this Directive we finally have legislation that also fully applies to non-high-risk AI. To that, Hacker says:

> The PLD therefore finally expands its material scope
> of applicability to generally include non-high-risk AI
> systems (as per the AI Act), and any type of software

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[53] This definition also doesn't explicitly mention AI systems, algorithmic platforms or applications. According to art. 3(i) of the Digital Services Act: "'*online platform' means a hosting service that, at the request of a recipient of the service, stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation*". (Digital Services Act. *OJ L 277, 27.10.2022, p. 1–102)*

beyond AI. It reaches much further, in this sense, than the AILD Proposal and the AI Act itself.[54]

Now, in relation to the liability system it brings, the PLD has a stricter liability system, that is not the usual default regime. According to the Electronic Oxford Dictionary of Law, this regime of liability is where the one making the claim does not have the defendant's fault, as it simply does not matter here. In this system it is not enough that the actor that caused the damage applied reasonable methods of protection to provide a safe product or system to consumer, but that it went beyond that and applied other various methods to prevent any damage from being caused[55].

This system means that in the lack of mention by the specific legislation, AI systems would fall under a strict liability regime, that could in one hand create more security for the Affected Individuals and facilitate the compensation of suffered harms, and in the other prevent deployers and providers from entering the market because the liability regime is too harsh, and brings them to much risk to bear when entering a new market.

With that change in the system of liability, we have as a consequence also a change in the origin of said liability. In the case of the PLD, the trigger is the product's defect itself. That, when applied to AI systems however, might become a problem. That is simply because AI systems don't function or behave as other products and systems, having decision making paths that lead to outputs that cause harm but that don't necessarily originate from a "bug" in the system or a mistake in the algorithm.

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[54] Hacker P, '*The European Ai Liability Directives – Critique of a Half-Hearted Approach and Lessons for the Future*' [2023] Computer Law & Security Review, Volume 51, Page 16, 105871, ISSN 0267-3649, https://doi.org/10.1016/j.clsr.2023.105871.

[55] Martin, E. A. *Dictionary of Law*. [Elektronisk Resurs], Oxford. 2015. <https://search-eb-scohost-com.ludwig.lub.lu.se/login.aspx?direct=true&AuthType=ip,uid&db=cat07147a&AN=lub.5463248&site=eds-live&scope=site.> accessed 19 May 2024

In the PLD, according to Hacker, there are 3 different types of defects: construction, design and instruction. When it comes to the first one and the last one, it follows the normal approach as to almost all other products. There is a defect if the system deviates from what it was meant to actually do (construction) or if the instructions to use or install it had mistakes that lead to damage. No problem here. However, the problem shows up in the Design type of defect, where to Hacker most AI problems will come from[56].

Considering Hacker's paper, when it comes to design defects, literature understands it exists where a human in its normal faculties would not make said mistake, but that would not work when it comes to AI, because it does not think as a human, if you can even say AI "thinks" in the first place. Therefore, to identify the more technical standards necessary to see if the AI system first deployed had a defect or not, the PLD could be tied up with the AI Regulation, according to Hacks[57]. However, we do not think it would be enough, as the AI Act mention more governance standards than technical ones, that could come from international security certificates, for example, like the ISO's (International Standards Organization). Those could be verified with the governance documentation to than identify the defects in the AI design.

In the last topic for analysis in the theme of scope, we also have the question of the burden of proof. As mentioned before in this topic, the liability system applied in the PLD does not require to prove fault. However, it does have to prove the existence of a defect, which according to the legislation is the obligation of the individual making such claim. The new PLD proposal tough, bring the indication that where the claimant has too much difficulty to prove the defect because of technical or scientific, which is clear that was introduced to fill the gap that AI systems would cause in this point.

[56] Hacker P, 'The European Ai Liability Directives – Critique of a Half-Hearted Approach and Lessons for the Future' [2023] Computer Law & Security Review, Volume 51, 105871, ISSN 0267-3649, https://doi.org/10.1016/j.clsr.2023.105871.
[57] Hacker P, 'The European Ai Liability Directives – Critique of a Half-Hearted Approach and Lessons for the Future' [2023] Computer Law & Security Review, Volume 51, 105871, ISSN 0267-3649, https://doi.org/10.1016/j.clsr.2023.105871.

This, as we well see, goes in the same lines with the presumptions created by the AILDP.

3.2 The Artificial Intelligence Liability Proposal (AILDP)

In regards to the AILDP, this proposal was presented in 2022 and is now in discussion with the Council of the European Union, with no estimate date for it to be evaluated by the Parliament. However, the text, which is integral in its necessity for the AI plan that the EU constructed to function, so we expect that with the publishing of the AI Act, the legislative procedure around this proposal starts to pick up.

Its goal, according to the explanatory memorandum of the proposed text "[...] is to improve the functioning of the internal market by laying down uniform requirements for certain aspects of non-contractual civil liability for damage caused with the involvement of AI systems"[58] , making it clear that the topic of non-contractual liability is essential for the functioning of the internal market and the development of AI in the European Union, requiring harmonization in the topics mentioned in 2.2. The fact that the AI Act will have repercussions on other actors of the supply chain, besides the deployer and provided actually mentioned in the approved text, there is a necessity to establish how the liability systems of the Union should approach this kind of subject, to not have too divergent legislation on the subject that might lead to an obstacle to the free movement in the internal market. For that, the text brings rights to the following supply chain actors: Affected Individuals, Deployers and Providers of the systems.

The Commission opted for a very conservative approach in terms of the subjects related to non-contractual liability it was going to harmonize, leaving space for an evaluation and target review of the effectiveness of the

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[58] European Commission. AI Liability Directive Proposal. 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A0496%3AFIN> accessed 19 May 2024.

directive after it enters into force, to see if additional measures would have to be included in the scope.

In 2020, the Parliament presented a full text for an AI Liability Regulation, instead of a Directive. It mentioned rules on type of liability applicable depending on the risk of the AI system, differentiating the regimes between high-risk applications and non-high-risk ones, as well as the varying of liability by actors (even if not all of them), ways of compensation and limitation period for claims, and apportionment of this liability, considering the participation of each actor in the chain [59].

However, the Commission opted for the adoption of a Directive instead of a Regulation, considering the fact that Member States have different liability regimes, so a Directive that could be more flexible and "[...] enable Member States to embed the harmonised measures without friction into their national liability regimes.". The option was a minimum invasive approach (art. 1(4) of the proposed text[60]) to enable national autonomy to the Member States, and although a valid point, to us the approach goes against the main reason for the creation of harmonising legislation on the topic. Philipp Hacker agrees with our position, even mentioning is his text that such approach could leave space for the fragmentation that they aimed to avoid in the first place when they decided to implement harmonisation methods[61].

The point of harmonisation, as mentioned before in the topic 2.2 of this paper, is exactly to make it so all Member States and the Union have a unified legislation along themes of common interest, which can't be

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[59] Wagner G, '*Liability for Artificial Intelligence: A Proposal of the European Parliament*' [2021] SSRN Electronic Journal

[60] "Art. 1(4) - Member States may adopt or maintain national rules that are more favourable for claimants to substantiate a non-contractual civil law claim for damages caused by an AI system, provided such rules are compatible with Union law." (European Commission. Proposed AI Liability Directive. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0496> accessed 14 May 2024)

[61] Hacker P, '*The European Ai Liability Directives – Critique of a Half-Hearted Approach and Lessons for the Future*' [2023] Computer Law & Security Review, Volume 51, Page 9, 105871, ISSN 0267-3649, https://doi.org/10.1016/j.clsr.2023.105871.

achieved so effectively when keeping all the different legal frameworks existing in each Member State. If the matter had lesser consequences and implications on individual and fundamental rights of EU citizens, then the option might have been more interesting. Nonetheless, that is not the situation we are presented with here.

In any case, if we disregard the whole choice of instrument, the Commission proposal only approaches the matter of burden of proof and presumption of fault in relation to damages claims related to AI systems brought forth by natural individuals in fault-based liability regimes[62]. Regarding the scope, the explanatory memorandum of the proposal even says:

> In this respect, this Directive eases the burden of proof in a very targeted and proportionate manner through the use of disclosure and rebuttable presumptions. It establishes for those seeking compensation for damage a possibility to obtain information on high-risk AI systems to be recorded/documented pursuant to the AI Act. In addition to this, the rebuttable presumptions will give those seeking compensation for damage caused by AI systems a more reasonable burden of proof and a chance to succeed with justified liability claims.[63]

However, for now, the scope of application is very limited, defining rules mostly only in relation to burden of proof in claims involving AI,

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[62] According to the Electronic Oxford Dictionary of Law, the term "fault" when applied to liability, is actually the opposite of "strict liability", where the injured person doesn't have the obligation to prove that the action or inaction of the defendant is because of negligence or intentional. (Martin, E. A. *Dictionary of Law*. [Elektronisk Resurs], Oxford. 2015. <https://search-ebscohost-com.ludwig.lub.lu.se/login.aspx?direct=true&AuthType=ip,uid&db=cat07147a&AN=lub.5463248&site=eds-live&scope=site.> accessed 19 May 2024)

[63] European Commission. Explanatory Memorandum of the Proposed AI Liability Directive, Topic 1. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0496> accessed 14 May 2024

specifically against manufacturers, professional users and consumers. The text presented by the Commission is very different from the one proposed by the EU Parliament, that although had some problems itself, in our opinion had a more interesting scope of application to fill in the gaps left by the AI Act and European legislation as a whole relating to liability.

We are not disagreeing with the fact that establishing rules to the production of proof and indication of fault being important, if not fundamental, points in the liability department. But they are not the only ones. As mentioned before, questions like applicable liability system, compensation and apportionment mentioned in the Parliament recommended text are also of optimal importance to a coherent legal framework on AI liability around the Union.

Nonetheless, fact is that the choice to just legislate on this topic in this first moment was made. By consequence to this choice, we can take away that the liability system chosen to the AI systems included in the proposal's scope (which are especially the high-risk AI systems defined by the AI Act), is the "fault liability". This type of liability system requires, according to the electronic Oxford Dictionary of Law, creates on the individual making the claim the obligation to prove that the action or inaction of the defendant is because of negligence or that it was intentional. With the proposed AILDP, this burden would be alleviated, but would not change the type of system it is included in.

With the indication of the fault-based system, one interesting aspect (to good or bad) about the proposal is the fact that it harmonises the rules regarding the procedural aspect of damages claim on this type of systems, to make it fall under Member State Law. On one hand, the fact that it is related to Member State law, means that most probably than not, it will have a broader scope of application, covering infringements on fundamental rights or economic damages and allowing the change in the burden of proof rules. On the other hand, if there is a Member State with a different system that is not fault based, it remains the question on how the Directive will apply, like with strict liability regimes. With the current Member States that would not

be a problem, but considering the existing applications for new Members, there might be a jurisdiction with a different approach to liability than the one currently existing within the Members of the Union.

According to this proposal, the trigger for liability is the fault of the deployer or manufacturer in regards to non-compliance, at least to high-risk AI, with the obligations established by the AI Act, which, because of the problems indicated before, is not easy to prove. So, to make the exercise of rights by Affected Individuals something possible, there has to be some kind of easing in the burden to generate proof and establish the causal link necessary for the liability claim.

Not only that, but, as briefly mentioned before in this topic, the rules established on presumption and part of the alleviation to the burden of proof, are only applicable to high-risk systems, following the definitions set out in the AI Act. The proposal indicates that there will be a possibility that when Affected Persons make a claim, they won't need to prove the fault or the causality with the damage, which will be presumed to facilitate access to rights, as like we mentioned in chapter 2, identifying those aspects in an AI supply chain is not an easy task.

Therefore, other systems that don't fall into that category, remain mostly without harmonised rules regarding liability, even if they still present risk to individuals. On that, Philipp Hacker says:

> [...] this excludes certain AI applications, such as AVs, emotion recognition systems or insurance pricing models (the latter are currently covered regarding life and health insurance). Importantly, these excluded models are just as much prone to significantly damage affected persons materially or immaterially as those considered high-risk under the AI Act.[64]

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[64] It is valid to note that this excerpt in not updated to the most recent approved text of the AI Act in what it refers to "emotion recognition systems" that are now considered High Risk

This restriction in its application signifies that these points, because not harmonized by the "*lex specialis*" text, will fall under the PLD. That means that the non-high-risk systems that are not within the scope of this directive, will go through a "*strict liability*" system. In this scenario, the more dangerous systems will actually have a more "relaxed" liability system, than the ones that are going to fall under the PLD.

If the intention of the proposal is to create a harmonised coherent framework that covers liability and protects the rights of individuals that use AI, it seems logical that it has to approach all kinds of systems that can give right to damage claims by an individual. If they wanted to continue to apply the same definitions as the AI Act, this would be made possible by creating provisions to both high risk and non-high-risk systems, just like it was indicated in the Parliament text.

Another important and very relevant point regarding the proposal is that it mostly relies on the definitions made by the AI Act, including on what "AI" is, what "high risk" systems are to be considered and what an "User" is. However, until the moment this paper was written, the latest version of the approved text of the AI Act available in the Parliament website[65] doesn't have a definition for "User" or any other definition for what this proposal needs, that is more towards Affected Individuals. To us it is actually a good thing, as the definition originally brought was kind of misleading, because it actually meant a deployer, more than an Affected Individual. In any case, as it is, the proposed text for the AILD doesn't have a definition to "users" or any other definition that define Affected Individuals of AI systems, and, because of that, we don't know to whom this Directive Proposal will actually end up applying to besides providers and deployers.

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systems. (Hacker P, '*The European Ai Liability Directives – Critique of a Half-Hearted Approach and Lessons for the Future*' [2023] Computer Law & Security Review, Volume 51, Page 13, 105871, ISSN 0267-3649, https://doi.org/10.1016/j.clsr.2023.105871.)

[65] Approved text of the AI Act

As mentioned, before, "user" was an actor who had to have knowledge and ways to maintain a log catalogue for the use of the AI system, as well as monitor the activity of the system and its outputs to then report it in case there is something that seems wrong with it. The initial text brought the definition of "User" in Article 3(4):

> 'User' means any natural or legal person, public authority, agency or other body using an AI system under its authority, except where the AI system is used in the course of a personal non-professional activity.[66]

The fact that such definition was actually taken out gives space for a better definition that actually includes the natural people who occasionally use AI systems in their daily lives and that don't have the means and knowledge to keep up with those obligation (the Affected Individuals), with the possibility of being applicable to more people who suffered damage by the outputs of AI systems.

Also, because of the fact that the proposal clearly states the possibility of claim in cases where those actors are non-compliant with EU Regulation is very important, as the AI Act doesn't give rights to Affected Individuals to make liability claims invoking the AI Act itself, as it has a vertical application only, and not a horizontal one. Making this an indirect way of invoking the AI Regulation and filling this void left by it.

Nonetheless, the directive is at least consistent with its structure. Because it is applied to fault-based regimes, no matter if the systems are high risk or not, there has to be provisions on how to acquire proof and facilitate the establishment of such fault and causal link between the fault and damage in a field where we have the "black box" and "many hands" problem mentioned in the last section.

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[66] Proposed text for the AI Act.

3.3   The PLD and AILDP Interactions and Commentaries

Considering all that was mentioned in the last 2 topics, now we can see where and how those two proposals interact with each other and, where applicable, with the AI Act that was discussed in chapter 2.

We can see that we currently have a legal framework that to us is pretty much divided between high risk and non-high-risk. Where a system falls within the definition of high-risk AI, the AI Act and the AILDP will definitely apply, and when falling outside of said definition, it will most probably fall under the PLD. There, we will have a liability regime that is applicable to all economical operators of the supply chain. This is actually an interesting and a bit of an ironic point, because the only legislation proposed that considers all actors in the AI supply chain, is the one which is not specific to AI systems.

Alas, if this division was intended and thought out, and the division between the applicability for non-high-risk and high-risk systems, this framework could function very well. However, that is not the case for what we can see. There are topics that can overlap, some provisions brought by the AILD that also apply to non-high-risk AI. In this case, if a claim was brought forth by a Affected Individual of a non-high-risk AI system, the AI Act, the AILD and the PLD might be applicable.

To us, this many applicable legislations to one situation might indeed cause confusion to the Affected Individual to know what legislation to invoke, as mentioned in the introduction to this topic 3. Therefore, it won't help with the objective of developing and engaging society in the field, fostering innovation in the EU, as legal certainty is an important point for companies, for example, to decide to enter or not a market, as the uncertainty increases the risks involved in the endeavour.

Still on the overlapping scope, we also have the question of burden of proof, for which it also eases the burden of the individual to prove the

existence of a defect and causal link between the defect and the damage when fulfilling some requirements[67], which considering the problems that AI systems impose, is of clear importance.

Now, in regards to the liability trigger, we have the biggest difference from the AILDP. Where fault was the trigger, here the trigger is the defect itself, where fault in theory doesn't matter. Therefore, we have here a strict liability regime relating to consumer protection. This goes completely against the proposed text of the AILDP. So, which one is correct?

The AILDP, as we already stated, mostly relates to damages claims involving high risk AI systems, while the PLD one is applicable to all economical actors in the supply chain, no matter the level of risk involved. Therefore, we have legislation that gives more attention to high-risk AI with fault-based liability regime, while the non-risk ones that are falling under the PLD have a strict liability regime. That is, to say the least, very contradictory. How does the AI that imposes more risks to individuals have a more "relaxed" liability regime than the systems with lesser risk to individuals?

This is so contradictory that when we look at the Parliament proposal to the AILDP, mentioned in 3.a, the liability regime for high risk and non-high risk were exactly the opposite to the ones we are currently seeming to have: a strict liability approach to high risk, as it failed to provide a safe system, and a fault based on non-high risk, as it can have its risks mitigated more easily and they are not as "serious"[68]. To us, considering the points shown by Gerhard Wagner, this division is much more logical and with consequential defence of rights, while also not creating a hostile environment to all types of AI systems for innovation and deployment.

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[67] European Parliament. 'Briefing New Product Liability Directive' [2023]. <https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739341/EPRS_BRI(2023)739341_EN.pdf> accessed 14 May 2024. Page 6

[68] The difference is approached by Gerhard Wagner's paper, "Liability for Artificial Intelligence: A Proposal of the European Parliament", where he explains the choice of the Parliament to indicate different systems depending on the risk of the AI systems, although the is very critical of said division and does not agree with it. (Wagner G, '*Liability for Artificial Intelligence: A Proposal of the European Parliament*' [2021] SSRN Electronic Journal)

One topic that the proposed revision doesn't bring, and that Philipp Hacker highlights in his paper, is the definition of defect when applied to AI systems. Considering the specific context that AI products have, usual definitions and applications of the defect types explained in the Directive, might not work in the same way.

According to Hacker, defects related to designs are the ones that would most likely happen the most in the scenarios where AI systems were involved, and that would entail a necessary clarification on the approach that should be taken when analysing such a situation. To that we are in agreement that the best approach would be the one that considers a defect the one that appears in a systemic level[69].

To us, if the questions of opacity and the black box issue, and the deep learning aspect of some systems, an AI might "evolve" or make decisions in face of very specific situations, that lead to a wrong output, but that is not sourced from something wrong in the decision processes, algorithm or deployment system. Therefore, it is not actually a defect of the product.

To us, this type of situation could even fall under the possibilities of exemption of liability. Another topic mentioned by the Directive, but that didn't bring any specific provisions to the special situations that AI requires.

Because they are not mentioned, it might even lead to a need for clarification on the applicability and interpretation of national rules that regulate such subjects in light of the Directive, which will then lead to more cases brought to the European Court of Justice, and negative harmonisation[70] of the

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[69] Hacker P, '*The European Ai Liability Directives – Critique of a Half-Hearted Approach and Lessons for the Future*' [2023] Computer Law & Security Review, Volume 51, Page 23, 105871, ISSN 0267-3649, https://doi.org/10.1016/j.clsr.2023.105871.

[70] Indirect Harmonisation is the one done through jurisprudence. The Court clarifies and interprets Union Law and National Law in light of EU law (European parliament. Briefing The EU as a community of law Overview of the role of law in the Union. <https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599364/EPRS_BRI(2017)599364_EN.pdf> accessed 14 May 2024.)

points through case law. That is not ideal, as the idealised framework on liability for AI should be clear and not rely on a decision by the ECJ to harmonise the topic.

4   Conclusion

In face of all the facts mentioned before, we now try to answer the main question of this paper: Does the proposed changes to the current legal framework surrounding AI contribute to a coherent system of liability to AI systems? And the answer to that is that yes, it does. However, in our opinion, they are not enough to complete the necessary egal framework around liability of AI systems.

As we saw in 2.1, AI systems can bring diverse and positive consequences to society, helping solve current and urgent problems. However, they also bring risks that are specially related to very specific situations, unique to an AI context, like opacity and the black box issue, and the "many hands" problem, that make the establishment and identification of liability in such cases very difficult.

Because of said difficulty and the necessary advancement of AI in the EU for economic reasons, there was an urgency in the regulation of AI in the Union. For that, the AI Act was very recently approved, and is awaiting publication in the official journal. However, the Regulation opted to not mention rights and obligations for the individuals who use said systems.

When looking at the AI supply chain, discussed in 2.2, the AI Act only brought provision to the participating actor up to the deployment of the system, not mentioning the actors that came afterwards. Most importantly, it didn't bring any provision related to liability for the actor that they did mention in the text. The legislative choice in the regulation was to not mention liability at all and leave such subject to a different legal text.

The Commission knew that the subject of liability required harmonisation and that leaving such a topic unregulated by the EU, would possibly lead to the fragmentation and disruption of the internal market. That is why, from the beginning they decided to build a whole new legal framework regarding liability in AI systems, utilising the AI Act as a possible base as well to develop such a framework.

That framework included the new PLD and the AILDP analysed in topic 3 of this paper. However, as we saw, although they brought some interesting and necessary topics in regards to what is needed for a liability legal framework, they still lack some topics. That is specially in regards to their own interconnection to make sure there is a fluid application with no divergences between them.

In the perfect world, we do believe the best possible approach to this would be to have only one regulation approaching all the necessary themes for a comprehensive and cohesive system regarding AI, like Philipp Hacker said before. In this ideal scenario, we believe that the AI Regulation should have been used to regulate all of the matters. It should have regulated obligations to developers, deployers, third parties, users for economic reasons and natural individuals, Affected Individuals who don't have economical goals, and be comprehensive in to all the necessary actors in the AI supply chain indicated in topic 2.

With all the obligations to the actors, the Regulations also should have approached the liability issue on it as well, to guarantee that all provisions would be aligned and using the same definitions, avoiding overlapping and divergent issues, like what happened in the actual situation. In this perfect case, liability rules would have been laid out to specify the applicable liability regime to high risk and non-high-risk AI systems, the easing of the burden of proof on the cases where fault was necessary, how compensation should be done, time-limit for liability claims and apportionment of liability, considering participation of each actor of the supply chain. It would also have been ideal to have a mention to the possibilities of exemption of liability, like what exists even in the current text of the PLD.

Although we defend the idea of a unified regulation, we do believe that the revision of the PLD would have been necessary in any case. It is fact that an update to product liability rules was urgent considering the market that exists with technological, digital and online products, that also have to be embraced by the EU legislation relation Product Liability.

Nonetheless, this perfect scenario is not reality, but we do not agree with the view that a comprehensive and cohesive legal framework to liability in AI systems could only be achieved through this unified regulation. We do believe that the proposed framework could work as well.

The problem here is that it is difficult to make it work well. This requires a great amount of synchronisation between all the texts, making sure they are interconnected in the right ways and topics, and filling the void the other left out. Not regulation again in the same matter to the same actors, creating overlapping legislations that might confuse individuals when they need to invoke their rights.

This was, unfortunately, the problem we face with the current texts proposed. The proposals happened before the final text of the AI Act being approved, and therefore, some points mentioned in the proposal of the AILDP, for example, are not connected in the right way. We hope that the final revised texts of the proposals pay attention to these alterations, add the necessary definitions and points to fill the voids left by the approved version of the AI Act.

We hope that the final version of both proposals also become clearer on the overlapping issues and applicability of each directive. The PLD for instance, like we mentioned in topic 3, has some overlapping issues with the AILD proposed text, that might lead to confusion and the application of liability regimes that are not ideal to the systems utilised in the analysed situation.

On this topic, we understand that the AILD should be made more comprehensive, applicable to all types of AI systems, making sure that the PLD only applies where specific legislation regarding AI does not regulate. That would mean that if new more innovative AI systems arise, and that don't fall under the AILDP's scope, we would be able to apply a more general legislation, like the PLD, to cover those voids. The LPD should then have a more residual application than what it seems to have today, where the text indicates that it would most probably then not, apply to almost all situations relating to

non-high-risk AI systems. Therefore, currently, we have a specific legislation to AI that would not be applied to a great part of the AI systems, that instead would apply a general legislation to it, that doesn't bring any specific provision that takes into consideration the unique specificities of AI systems. To us, that makes very little sense.

However, to make it a fair assessment, the topics regulated by the proposed directives are also of great importance, and would most definitely still be reproduced in the perfect scenario that we mentioned above. The difference would be more on the fact that it should approach other subjects as well. If not, at least have a final approved version that takes into consideration the changes approved to the AI Act and the discussions happening with the other Directive. Ideally both directives would not be approved at the same time, so it can take into consideration all the alterations and they are fluid with each other, with no divergent provisions. We believe this is what is going to happen as both Directives are in different moments in the legislative process.

At the end of the day, the proposed regulations do contribute to a cohesive and comprehensive legal framework on AI liability. They start a comprehensive discussion on a harmonised liability system in the EU, specific to the topic of AI. But the proposed texts without revisions would not be enough and would not fulfil the aims behind the creation of such a framework, of harmonising the topic in the EU. That is because in the end, there would still be many issues regarding liability that would require regulation, and that would fall to national law to do, causing the fragmentation that the Commission so much wanted to avoid. Because, as Béatrice Shütte, Lotta Majewsky and Katri Havy, the Member State's legislator will find a solution for this type of harm themselves[71].

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[71] Schütte B, Majewski L and Havu K, '*Damages Liability for Harm Caused by Artificial Intelligence – EU Law in Flux*' [2021] Helsinki Legal Studies Research Paper, no. 69. Page 3, University of Helsinki, Helsinki. https://doi.org/10.2139/ssrn.3897839

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