COMPARATIVE LAW REVIEW

Comparative Law Review

VOL. 17 · N. 1 · 2026

SPECIAL ISSUE

European Law and Digital Technologies

ISSN
2038 – 8993

OPEN ACCESS JOURNAL

COMPARATIVE LAW REVIEW
The Comparative Law Review is a biannual journal published by the
I. A. C. L. under the auspices and the hosting of the University of Perugia Department of Law.

Office address and contact details:
Email: complawreview@gmail.com

Comparative Law Review is registered at the Courthouse of Monza (Italy) - Nr. 1988 - May, 10th 2010.

COMPARATIVE
LAW
REVIEW
VOL. 17/1 – 2026

SPECIAL ISSUE

European Law and Digital Technologies

Edited by Federica Giovanella

ESCAPING THE EU REGULATORY LASAGNA: HOW THE AI LIABILITY LEGISLATION MUST MOLT TO SURVIVE

Beatrice Marone

TABLE OF CONTENTS:

On February 11, 2025, the EU Commission declared that the Proposal for a directive on adapting non-contractual civil liability rules to artificial intelligence (AILD) was to be withdrawn, due to the fact that no agreement was foreseeable. Drawing lines from both the key features of the directive proposal and the inputs deriving from the EU efforts on the topic of AI regulation, this paper aims at providing a recollection of the core themes, along with the suggestions to go beyond the original scope in order to expand the applicability to non-AI software. Moreover, it will address the proposed change of skin from directive to regulation including an examination of the recent trends in the EU legislation about the so-called "directivization" of regulations.

Keywords: Artificial Intelligence – Liability – AILD – harmonization – directivization – regulation.

I. THE TURNING POINT

I.1 *The Commission's 2025 Work Programme and the reactions*

The most unexpected news coming from the EU Commission's 2025 Work Programme[1], published on February 11, 2025, was not in the thirteen pages of the text, but in its Annex IV[2]. Among the proposals for acts that the Commission intended to withdraw within six months from the publication of the Programme, precisely at page 26, row 32, of the table, it stood the Proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence (AI Liability). The legislative text, commonly addressed with the acronym "AILD", should have constituted one of the pillars of the EU regulatory framework for AI. The reasons explicitly stated as backbone of the Commission's choice were that no agreement was foreseeable and, thus, the Commission had to assess whether another proposal should be tabled, or another type of approach should be chosen.

---

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Commission Work Programme 2025 "*Moving forward together: A Bolder, Simpler, Faster Union*", February 11, 2025, available at https://commission.europa.eu/document/download/f80922dd-932d-4c4a-a18c-d800837fbb23_en?filename=COM_2025_45_1_EN.pdf (last visited Aug. 12, 2025).

[2] Annex IV: Withdrawals, February 11, 2025, available at https://commission.europa.eu/document/download/7617998c-86e6-4a74-b33c-249e8a7938cd_en?filename=COM_2025_45_1_annexes_EN.pdf (last visited Aug. 12, 2025).

Despite hidden in the depth of a Communication whose effects can be properly addressed only throughout a suitable amount of time, the Commission's radical decision was not taken lightly by the EU lawmakers. A vast gap has formed between two different currents of thought around the Commission's latest steps. In particular, soon after the publication of the Work Programme, the Internal Market and Consumer Protection Committee (IMCO) voted to maintain its agenda around liability rules for products including or making use of AI[3]. Subsequently, members of both the civil society and consumer groups penned a letter to the Commission, closing it with a powerful call to action: "If the Commission wants to improve EU consumers and citizens' trust in AI, its priority should be on new EU AI liability rules. A consistent and ambitious AI liability framework would also contribute to the social acceptance of this technology, which would have a positive spillover effect on the uptake of this technology and, in turn, on innovation and growth"[4].
At first glance, such position can seem rather simplistic, but the sentences actually echo the key points of the AI strategy envisioned at the EU level. Such strategy dates back even before the Proposal of the Commission dated April 2021 that ended up becoming Regulation (EU) 2024/1689 laying down harmonised rules on artificial intelligence. It goes back, first, to the Commission's Communication entitled "AI for Europe"[5] of April 2018 and, then, to the principles established by the High-Level Expert Group on AI in the "Ethics Guidelines for Trustworthy AI"[6] that followed one year later. The absolute need for AI to be trustworthy has been the recurring theme of the EU effort on the topic, as enshrined in the White Paper of February 2020, coherently entitled "A European Approach to Excellence and Trust"[7].
In order to understand the current dialogue on the contemporary state and perspectives of survival of the AILD, an exchange of ideas that, in some instances, devolves even into harsh confrontation, it has to be considered its place in the landscape of the EU past and recent struggle to reach and maintain a prominent role in the guidance for AI regulation. While the direction followed by the EU institutions has been rather consistent throughout the last decade, it has to be remembered that the Union is not an isolated entity. Its proposals, its policies and its solutions have to coexist with the approaches chosen by other national and international entities.

---

[3] C. Kroet, *Lawmakers reject Commission decision to scrap planned AI liability rules*, available at https://www.euronews.com/next/2025/02/18/lawmakers-reject-commission-decision-to-scrap-planned-ai-liability-rules (last visited Aug. 12, 2025).
[4] Open Letter to the European Commission on the announced withdrawal of the AI liability Directive, available at https://cdt.org/wp-content/uploads/2025/04/AILD-withdrawal-Joint-Open-Letter-.pdf (last visited Aug. 12, 2025).
[5] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, "*Artificial Intelligence for Europe*", April 25, 2018, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0237 (last visited Aug. 12, 2025).
[6] Ethics Guidelines for Trustworthy AI, April 8, 2019, available at https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai (last visited Aug. 12, 2025).
[7] White Paper On Artificial Intelligence - A European approach to excellence and trust, February 19, 2020, available at https://commission.europa.eu/document/download/d2ec4039-c5be-423a-81ef-b9e44e79825b_en?filename=commission-white-paper-artificial-intelligence-feb2020_en.pdf (last visited Aug. 12, 2025).

It has been highlighted by specialized observers that the EU Parliament's Committee on Legal Affairs (JURI) voted in December 2025 against the recommendation of suing the Commission over the decision to withdraw the AILD, despite concerns being raised over the timing of the decision, after encounters at the Paris AI Action Summit with US executives[8]. Everyone can notice how the US perspective on regulation had entered a rather dramatic inversion of trend after the latest presidential election. Such circumstance is even more evident simply reading the title of the executive order signed by President Biden in October 2023, i.e. "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence"[9], and of the executive order of President Trump dated January 2025, i.e. "Removing Barriers to American Leadership in Artificial Intelligence"[10]. The second, in substance, erased the previous one. Taken into consideration the above, it is not naïve to state that, before, the EU strategy, along with the so-called Brussels effect, could count on a powerful link not only to the other side of the ocean, but also to a State at the head of technological development. It is now, instead, realistic to accept that that era ended, maybe even before the coming back to the White House of the forty-seventh President. The common views of the Trump administration and of the CEOs of the tech giants have certainly expedited the process, giving rise to the so-called Washington effect for de-regulation. Nevertheless, the issue was already systemic and, even more dangerously, already embedded inside the same EU strategy on AI.

I.2 *The "regulatory lasagna" and its dangers*

The AILD path and its destiny are strictly linked to the need to urgently address the issue efficiently summarized by the same commentators with an easily understandable metaphor: the "regulatory lasagna". It was coined around the end of 2022 to address the challenges arisen in the medical sector from an increasing use of technology and, after the exponential growth registered in the AI subfield in 2023, has widened its reach (more among experts than within the general public) to encompass all the industries touched by the provisions included in the EU normative acts. Despite seeming trivial, the metaphor has the power to include in an image simple to grasp the feature of the EU approach on AI that has been subject to the harshest critiques: the inability to provide a coherent normative framework for a specific domain, due to the fact that it is regulated through an overlapping of different bodies of law, many times incapable of efficiently connect to each

[8] M. Henning, *Parliament won't take Commission to court for ditching AI liability law*, available at https://www.euractiv.com/news/parliament-wont-take-commission-to-court-for-ditching-ai-liability-law/ (last visited January 24, 2026).

[9] Executive order 14110 of October 30, 2023, available at https://www.federalregister.gov/documents/2023/11/01/2023-24283/safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence (last visited Aug. 12, 2025).

[10] Removing barriers to American Leadership in Artificial Intelligence, available at https://www.whitehouse.gov/presidential-actions/2025/01/removing-barriers-to-american-leadership-in-artificial-intelligence/ (last visited Aug. 12, 2025).

other. The result is a fragmented legislation, with many different layers leading to inconclusive outcomes and inefficient results.

The latest piece of legislation to fall victim of the issue it has been, unsurprisingly, the AI Act. While it should have become the master for a new age for the EU regulation, it has been, in reality, dispossessed piece by piece of its strongest features. This is due, on one side, to the need to approve it as a Regulation, hence as a legislative text immediately enforceable in all the twenty-seven Member States. On the other side, the willingness to provide an all-encompassing discipline led to an enormous text, with provisions that are seemingly heavy per se and also in contrast with each other.

This consequence represents only the latest and extreme extension of a trend already present in the General Data Protection Regulation[11]. Despite being data privacy, data security and data safeness relevant aspects to be incorporated into the AI strategy, the structure of the GDPR has proved not to be transferable to the AI domain without being subject to a proper rethinking. The key element manifesting why the same point of view is not suitable for data protection, on one side, and AI, on the other side, comes into the picture already at article 3 of the GDPR, when the territorial scope of the Regulation is described establishing three clear-cut criteria in the different paragraphs: establishment of controller or processor, targeting of the data subject and application by virtue of public international law[12]. It is way more difficult to specifically pinpoint the territorial scope of the AI Act, as evidenced by the fact that, first, no provision mirrors the article of the GDPR just mentioned and, secondly, article 2, entitled simply "Scope" includes in the only paragraph 1 seven different scenarios that actually may overlap with each other. This is because the AI features may experience different levels of embedding in the products used by the natural persons.

Besides, it has to be recalled that even the same definition of "AI system"[13] has been at the center of long discussions and brought a strong clash that even threatened to impede the conclusion of the works relating to the AI Act before the fast-approaching deadline laid out for its adoption. First, because such definition represents a wording born in the legal landscape to enshrine a technical concept; secondly, due to the fact that such technical concept has not remained the same, but it has, instead, undergone deep transformation even just considering the years between the proposal (2021) and the approval (2024) of the AI Act, with the most striking consequences due to the

[11] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679 (last visited Aug. 12, 2025).

[12] European Data Protection Board, *Guidelines 3/2018 on the territorial scope of the GDPR (Article 3)*, available at https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_3_2018_territorial_scope_after_public_consultation_en_1.pdf (last visited Jan. 24, 2026).

[13] Now included under article 3, letter a) of the AI Act as "*a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments*".

proliferation, in 2023, of large language models and of the so-called general purpose AI systems.

Thus, the EU tendency to overregulate might have been the tombstone of the past era, but the institutions seem to have become rather aware of the critics' words. This emerges from the title of the Commission Work Programme: "Moving forward together: A Bolder, Simpler, Faster Union". If this is the order of ideas, the words spoken by who defended and made official[14] the Commission's decision to scrap the AILD might be less drastic than they seem. Before diving into the foreseeable consequences deriving from a bold move, which may equally end up being the closure of the effort of an overall EU regulation on AI or the first brick of a luminous renaissance, an analysis of the features of the AILD and of the critiques raised against the same is in order. The reason for this choice is not connected to a simple theoretical analysis of the provisions, but rather to an examination of the wording of the text as a mean to convey the intentions of the authors. While the performance of literal interpretation of the legal texts has left space throughout the decades, shifting especially to courts the burden of filling the voids left by the legislators, only comparing the different versions of the proposals laid down on the path to a normative body it is possible to notice the changes in both the content itself and in the direction of action. Moreover, it is essential to test whether the provisions actually undergo significant amendments or simply shapeshift on the surface without deep changes.

II. AILD: FROM A STRONG IDEA TO A MESSY REALITY

II.1 *The 2022 Proposal and the landscape leading to it*

The Proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive)[15] was advanced on September 28, 2022. The reason calling for the enactment of a new piece of legislation has to be located exactly within the market.

The Commission made abundantly clear already in the first line of the Explanatory Memorandum that the need for new rules with respect to liability, which is one of the most longstanding and, yet, most discussed, fields of law, originated directly from the stakeholders. It mentions, in fact, the results of a survey conducted two years prior among the companies willing to engage in their business in the EU[16]: liability was listed in the top three places regarding the barriers that such companies encountered in their path adjusting

[14] S. Brachmann, *EU Commission Confirms that SEP Regulation, AI Liability Directive are Officially Scrapped*, August 6, 2025, available at https://ipwatchdog.com/2025/08/03/eu-commission-confirms-sep-regulation-ai-liability-directive-officially-scrapped/id=190857/ (last visited Aug. 12, 2025).

[15] Available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0496 (last visited Aug. 13, 2025).

[16] European Commission: Directorate-General for Communications Networks, Content and Technology, iCite and IPSOS, *European enterprise survey on the use of technologies based on artificial intelligence – Final report*, Publications Office, 2020, available at https://data.europa.eu/doi/10.2759/759368 (last visited Aug. 13, 2025).

to the use of AI. According to 43% of the responders, it was even the most relevant external obstacle for companies that were planning to adopt AI, but had not done it yet. The legal framework on liability has been and still is mostly subject to the national rules of each single legal system of the twenty-seven Member States. The fact that a heavy burden of proof is placed on the plaintiff regarding the consequentiality between, on one side, the act or omission and, on the other side, the damage occurred, leads to a potential deterrence in even just initiating the legal proceedings. According to the Commission's perspective, the specific and unique features of AI led and lead to the rise of new and unforeseeable up-front costs, along with a relevant augmentation of the time needed to reach a decision.

The situation painted by the Commission was rather dark. Nevertheless, it had not even specifically addressed the issues that each single State was, and still are, facing dealing with the most traditional proceedings. Moreover, the features of AI interfering with the longstanding approach on liability, identified especially in complexity, autonomy and opacity, are even more serious in the current moment. The Commission was almost optimistic when it claimed that the situation would lead to legal uncertainty only in the future, while the legal practitioners, the scholars and even the private citizens are painfully aware that the legal uncertainty is a situation we were living in in 2022 and are sadly still experiencing today.

In October 2020, the EU Parliament issued a resolution on a civil liability regime for artificial intelligence[17] with a plan that was defined as both ambitious and radical. It proposed a high degree of harmonization at EU level for an AI-specific liability regime, thanks to the adoption of regulation based on two layers: on one side, strict liability for high-risk AI systems and, on the other side, fault-based liability for systems other than the high-risk ones[18]. Instead, the solution prospected by the Commission was centered around a multi-faceted approach, starting with the ex-ante assessment that lately found its core in the AI Act and ending with the ex-post evaluation of the damages not possible to prevent at an earlier stage. Following this road, the Commission felt the need, on the one side, to update the 2001 General Product Safety Directive[19] and, on the other side, to address the topic of liability though different actions. Such actions were supposed to be performed both on the existing directive on product liability (the so-called "PLD")[20] and through a

[17] Civil liability regime for artificial intelligence European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020IP0276 (last visited Aug. 13, 2025).

[18] T. Rodríguez de las Heras Ballell, *The revision of the product liability directive: a key piece in the artificial intelligence liability puzzle*, in *ERA Forum*, 249 (2023), available at https://doi.org/10.1007/s12027-023-00751-y (last visited Aug. 13, 2025).

[19] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on General Product Safety, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0095 (last visited Aug. 13, 2025).

[20] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31985L0374 (last visited Aug. 13, 2025).

new legislative text able to address the specific features of AI and the equally specific risks deriving by the same.

The legal instrument chosen for updating the rules of general safety for products shifted from directive to a regulation and, thus, the first goal set out above was reached in December 2024, with the entry into force of the General Product Safety Regulation[21] of May 2023. Instead, the direction of action regarding liability and, especially, AI liability, was the opposite: the Commission conceived a directive rather than a regulation. First, the Commission took into consideration the preliminary results of a public consultation run from October 2021 to January 2022[22]. Secondly, it addressed the cited high degree of interaction between national regimes of tort law, which differ greatly, reaching the conclusion that the only way to formulate a regulation able to derogate all of them only for the hyper-narrow field of harm caused by AI could lead to an unacceptable level of friction and inconsistency across the EU[23].

II.2 *The pillars of the Proposal*

The focus of the new piece of legislation was already very clear from article 1. It explicitly declares that the directive will lay down common rules dealing with two topics. On the one side, the disclosure of evidence on high-risk AI systems, in order to enable the claimant to substantiate a non-contractual fault-based civil law claim for damages. On the other side, the burden of proof, in case of non-contractual fault-based civil law claims brought before national courts for damages caused by an AI system. Moreover, it expressly excludes criminal liability, thus, clearly delimiting the borders of the theme to be addressed. Nevertheless, some elements in need of flexibility are already introduced through article 2, where all the definitions are linked to the ones provided in the AI Act. Such circumstance renders immediately clear that the AILD could not ever survive without the approval and entering into force of the AI Act itself and the close connection has confirmed from the beginning the fears that a long path for the AI Act also meant prolonging the timeframe needed for the introduction of the new instruments on AI liability. In fact, it comes with no surprise that all the works and discussions on the text of the AILD have been frozen until around July 2024. In the same way, it is not surprising at

[21] Regulation (EU) 2023/988 of the European Parliament and of the Council of 10 May 2023 on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council and Directive (EU) 2020/1828 of the European Parliament and the Council, and repealing Directive 2001/95/EC of the European Parliament and of the Council and Council Directive 87/357/EEC, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023R0988 (last visited Aug. 13, 2025).

[22] European Commission. *Civil liability – adapting liability rules to the digital age and artificial intelligence*, 2021, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12979-Civil-liability-adapting-liability-rules-to-the-digital%20age-and-artificial-intelligence_en (last visited Aug. 13, 2025).

[23] C. Wendehorst, *AI liability in Europe: anticipating the EU AI Liability Directive*, 4 (2022), available at https://www.adalovelaceinstitute.org/wp-content/uploads/2022/09/Ada-Lovelace-Institute-Expert-Explainer-AI-liability-in-Europe.pdf (last visited Aug. 13, 2025).

all that the Commission was ready to reopen such chapter, or, rather, bury it, only in its Work Programme for the year 2025.

Article 3 and article 4 make even more evident that the whole impact envisioned for the AILD has roots strongly held in procedural law. In fact, it establishes two relevant presumptions, albeit rebuttable. First, the presumption of non-compliance when, after the plaintiff has presented facts and evidence sufficient to support the plausibility of the claim for damages, the defendant does not disclose the relevant evidence at its disposal about the specific high-risk AI system that is suspected of having caused such damage. Secondly, the presumption of a causal link in the case of fault when the three following conditions exist at the same time: i) either demonstration by the plaintiff or presumption by the court, on the basis of the previous article, that the fault of the defendant, or of a person for whose behavior the defendant is responsible, consists in the non-compliance with a duty of care directly intended to protect against the damage occurred; ii) reasonably likely consideration, based on the circumstances of the case, that the fault has influenced the output produced by the AI system (or the failure of the AI system to produce an output); iii) demonstration by the plaintiff that the output produced by the AI system or the failure of the AI system to produce an output gave rise to the damage.

The requirements needed to verify the existence of the first condition are provided in a more detailed manner for the high-risk AI systems. Thus, such condition is deemed reached when the plaintiff has demonstrated that either the provider or the person subject to the provider's obligations failed to design and develop the AI system in compliance with the following requirements, laid down in the AI Act: i) quality criteria for training, validation and testing data sets; ii) transparency; iii) effective oversight by natural persons during the use of the system; iv) appropriate level of accuracy, robustness and cybersecurity; v) not immediate application of the necessary corrective actions to either bring the AI system in conformity with the obligations, to withdraw or to recall the system.

As stated by the commentators, both the initial aim and the expected effect of the AILD are modest, pragmatic and realistic from a lawmaking perspective[24].The Commission was clearly aware that, at the time of the issue of the proposal, the regimes available to the plaintiffs to claim compensation for damages, due to both overlapping and juxtaposition between the single national laws and the PLD, were, essentially, three: i) fault-based liability claim, requiring the proof of damage, fault and causality; ii) strict liability claim, independent from fault; and iii) claim against the producer of a defective product, requiring both the proof that the product was defective and the causal link between that defect and the damage[25]. Through the revised PLD directive[26] adopted in October 2024,

[24] T. Rodríguez de las Heras Ballell, *The revision of the product liability directive: a key piece in the artificial intelligence liability puzzle*, cit., 250.

[25] T. Madiega, *Briefing. EU Legislation in progress. Artificial Intelligence Liability Directive*, 2022, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739342/EPRS_BRI(2023)739342_EN.pdf (last visited Aug. 13, 2025).

[26] Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202402853 (last visited Aug. 13, 2025).

the Commission achieved its scope to adapt the producers' strict liability regime for defective products to allow for compensation for damages without the need to prove a fault. Instead, the whole point of the AILD has always been another one: taking into account the impossibility to reform the substantial provisions belonging to fault-based liability regimes due to their nature of national legislation, the aim has been to harmonize specific procedural aspects of the regime applicable to claims for fault influencing the AI system that caused the damage, in order to alleviate the burden of proof weighty on the plaintiffs' shoulder, being them either natural or legal persons.

The proposed horizon of action refers to two gaps correctly identified in the current landscape of the EU legal framework on liability. The first one, just addressed in the previous paragraph, refers to the so-called liability gap: in the present moment, it is not simple to ascribe responsibility for the harms caused by the AI system and, in particular, to allocate such responsibility among the different persons concurring in the development and in the deployment of the same, i.e. designers, developers, deployers and users. The second one, instead, regards the so-called information gap: the persons damaged by the use of the AI system, or of a system incorporating AI features, may not be aware that such use exists and affects their own rights[27]. While it seems that the provisions of the AILD, as it is in its latest form, cooperate in the first of the two directions of action, it is more disputed whether the same are suitable to face the challenges posed by the second.

II.3 *The rejection of the harmonization horizon*

Despite the best efforts of its authors and of the people working on the same, the most invasive wound in the AILD is laid down explicitly in the contrast among the texts included in the recitals. In recital number 26, the AILD confirms that a full harmonization of the requirements for AI systems and, especially, the specific requirements for high-risk AI systems, is a task reserved for the AI Act. In the same sense, recital number 12 refers to the fact that the Digital Services Act fully harmonizes the rules applicable to providers of intermediary services in the internal market, thus covering the societal risks stemming from the services offered by those providers, including the AI systems they use.

The provisions of the AILD are not designed to touch either of the regulations just cited. What the Commission itself designs as a holistic approach is further enhanced by the text keen in making the borders of the effort towards harmonization crystal clear and, not, instead, underlining what the directive is trying to harmonize. This is evident under recitals number 7 and number 9, specifically referring to the need to harmonize certain national non-contractual fault-based liability rules and to pinpoint in a targeted manner specific aspects of such fault-based liability rules. Recital 10 manifests the limits that the text imposes on itself: in order to ensure proportionality, it is appropriate to harmonize in the cited targeted way only those fault-based liability rules that govern the burden of proof for

[27] M. Ziosi, J. Mökander, C. Novelli, F. Casolari, M. Taddeo, L. Floridi, *The EU AI Liability Directive (AILD): Bridging Information Gaps*, in *European Journal for Law and Technology*, 3 (14, 2023).

persons claiming compensation for damage caused by AI systems. It is highlighted with different wordings and in various sentences that the AILD should not harmonize general aspects of civil liability. These aspects are exemplified in the definition of fault or causality, the different types of damage that give rise to claims for compensation, the distribution of liability over multiple tortfeasors, the contributory conduct, the calculation of damages, the limitation periods. Each of them is regulated in a different way by national civil liability rules. Not only this should not change, but it also cannot change, according to the perspective adopted at the time by the Commission.

Tort Law and Contract Law are the domains that, notwithstanding the general trends in integration of legal systems and globalization as a whole, still resist within the limits of the States. The systems of extra-contractual liability of the single EU Member States share a common background on the classical human interests in life, bodily integrity, health and property, listing them as the core of the protective scope of causes of action based on tort, but diversity is behind the corner, especially dividing the road after having dealt with the same fundamental principles. One area where the European systems of tort or delict diverge concerns the status of statutory norms regulating behaviors through prescriptions or prohibitions[28]. Choosing not to address the juridical concepts underlying the features of the single regime and not even trying to establish principles relating to the substantial topics is certainly an interesting approach, especially since it has not been explained in detail by the Commission which ones have been the core reasons in leading it to believe that such approach to the topic could actually work. It is fascinating to consider that a very specific part of the civil liability regime, i.e. the procedural rules regarding the disclosure of information and the exact proportion of the burden of proof on the parties, could function without the building blocks of the domain defined in a harmonized way.

II.4 *The longstanding issue of definition*

As already briefly anticipated under paragraph 1, it is safe to say that the defining problem has proved, time and time again, to be the main obstacle in, at least, the latest decade of legislation efforts around technology at the national level as well as in the EU. This is due to the fact that, once again, the subjects operating in the legal field have not reached yet an adequate level of confidence towards the key concepts for the technological tools. Such feature is absolutely needed to draft consistent and coherent sets of rules in order to deal with the same. Notwithstanding the above, this is not even the major reason for the stalling situation that the lawmakers are dealing with right now. Indeed, liability comes way before technology. It comes from the ancient times, from the rules of eye for eye and of the vengeance. It comes from the system of dueling to reach a solution around compensation and from the ancient belief that it would be up to the gods to decide where liability laid and what was the exact amount of compensation to be granted to the victim. Even nowadays, different treatments, different lengths of proceedings and even different

[28] G. Wagner, *Liability Rules for the Digital Age*, in *Journal of European Tort Law*, 232 (13, 3, 2023).

outcomes are still expected by victims in the same use case, depending on the legal system they initiate their disputes. This is, with all due probability, the defining obstacle not only of this century, but probably of the whole history of law.

Nevertheless, the only way to achieve legal certainty is the adoption of common rules. It was rather difficult in the past, but it has become unconceivable in the present to still have to manage the different treatments provided for the same circumstances under different national laws. This is why the choice of law and the choice of jurisdiction are still one of the most discussed themes not only among scholars, but within the drafting phase of a contract. This is because both parties do not wish to be put into an uncomfortable position if and when any obligation may be left incomplete or not fully performed. The legal uncertainty in the present globalized word is not bearable, especially taken into consideration the wide transnational implications of technology.

At the beginning of the newest era of the shared journey between technology and law, the latest has been subject to the longstanding Collingridge dilemma, torn between the option of regulating fast and in an insufficient way with regard to the actual outreach of the norms and the option of regulating after building a strong awareness, confidence and coherence, but with the unavoidable consequence of being too late. For a certain timeframe, soft law instruments have been deemed as the first line of action to try to bridge the gap between the fast pace of the changing reality and the inherent slowness of the lawmakers. Instruments of soft law have risen already in the years prior to the adoption of the EU White Paper, between 2018 and 2019: education and institutional entities, but also expert groups set up in the committees of the UN agencies and groups collecting categories of professionals with the same background have proposed decalogues of principles that present many features in common. However, it does not seem that in the current situation of clash between legal orders that have become very polarized thinking only in a soft law perspective is a viable solution. Soft law might be a lifeline to lead the way, but proper enforceable regulation is needed.

II.5 *A divided field*

Notwithstanding the above, the concerns of the same Commissioners defending the choice to scrap the AILD with the features described are, at least, shareable. Indeed, the same Commissioner for Tech Sovereignty, Security and Democracy Henna Virkkunen has not subtly hinted at the fact that what has been seen as a (negatively) groundbreaking decision may not be full of such dreadful consequences in the long-term period. Virkkunen declared that the main reason for the withdrawal of the AILD was that the legal instrument of the directive enables the Member States to implement the rules in different ways, while the new approach to the topic might be more towards more regulations, with the aim of reaching the goal of one single market[29].

[29] C. Kroet, *EU Tech Commissioner defends scrapping of AI Liability rules*, available at https://www.euronews.com/next/2025/04/09/eu-tech-commissioner-defends-scrapping-of-ai-liability-rules (last visited Aug. 14, 2025).

In its Draft Opinion[30] of January 2025, the Committee on the Internal Market and Consumer Protection (IMCO) stated loud and clear that the adoption of an AILD at this stage is "premature and unnecessary". The reasons behind this strong message reside in both a physiological and a pathological condition of the EU legal landscape. The first one is that much time actually passes between the adoption of a legal act and its effective entry into force. The opinion recalls that, while the AI Act officially entered into force in August 2024, the different rules dealing with low-risk or high-risk AI will be applicable, partly in August 2026 and partly in August 2027. Besides, even the revised PLD will need to be transposed only within the timeframe closing at the end of 2026. It has to be remembered, in the same sense, that the AI Act itself was aware of the issue and, thus, tried to provide a mechanism including the automatic need for revision six months prior to the effectiveness of each set of provisions included in the same. Notwithstanding the above, it is clear that such circumstance, already present for any new body of law, has exacerbated consequences in the field of AI. Thus, the cautionary approach taken in the Draft Opinion about the content of the AILD, especially due to the tight connection with the AI Act already subject to analysis in the present paper, is, once again, completely shareable.

While the opinion on the prematureness can be easily understandable and even agreed upon, the part about the unnecessariness might be faulted. Indeed, the Draft Opinion cites reports and data relating to cost-benefit analysis, informing that the EU's run on AI is significantly slower than forecasted and also declaring that the impact assessment provided by the Commission in 2022 with reference to the AILD proposal relied on hypothetical scenarios rather than concrete data. The input is that an excessive liability or rather procedural law framework risks to deter innovation and increase compliance burdens, particularly for SMEs (that are, indeed, a major part of the market for many EU Member States, Italy included). Moreover, according to the rapporteur, the fact that the AILD proposal envisions changes in the procedural rules could disrupt national civil law systems, which have functioned effectively for decades, including in the digital era. The opinion also mentions the claim that the Commission's perspective in proposing the AILD has more theoretical and academic roots, rather than being based on a balanced assessment grounded in the reality and backed by a comprehensive consideration of relevant data. Despite not assessing in deep whether such conclusions may be regarded as wrong or, at least, sleeting on a fragile ground, it is rather interesting that such perspective is backed by inputs, the content of which is undisclosed, from a variety of entities, including Apple Inc. and OpenAI OpCo, LLC.

Both are closely monitored from a variety of viewpoints relating to the EU regulation of different aspects of digital technologies. Besides, especially the latter is now famously involved in a variety of proceedings relating, in particular, to the training of its systems on

[30] Draft Opinion of the Committee on the Internal Market and Consumer Protection for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive) (COM(2022)0496 – C9-0320/2022 – 2022/0303(COD)), January 19, 2025, available at https://www.europarl.europa.eu/doceo/document/IMCO-PA-768056_EN.pdf (last visited Aug. 14, 2025).

copyrighted works. While all of them are currently ongoing and the majority of which has been filed before courts in the US, something is moving also on the European side of the Atlantic[31], showing that the level of attention is raising in the EU Member States as well. Morevoer, one of the first judgements dealing with the same claims[32], despite recognizing fair use of the copyrighted works by the defendant, has been referred to as "salomonic", since it leaves the door open for a jury trial on the theme of piracy that involves more than billions of dollars in damages. Thus, it is rather interesting to see how the internal interest of the mentioned companies not to be ordered to pay damages on the grounds of their past behavior developing AI systems is linked to voicing their concerns about the disruption of a fragmented system around liability, in contrast with an effort towards an all-encompassing solution, at least partially on the substantial contents. This is not, of course, to say that they may have had any undue interference on the reasoning path of the IMCO, but rather that the current circumstances call, as never before, for the approach suggested by Commissioner Virkkunen. Indeed, the rapporteur of the AILD proposal, MEP Axel Voss, has declared that liability rules are a need in the horizon of creation of a single market, even within a simplification trend. The shared feeling, among both the MEPs supporting the Commission's decision on the withdrawal of the AILD proposal and the MEPs opposing the same, is that the AILD must undergo substantial changes, whether in its form or in its content, but that its own existence cannot be put at stake.

III. THINGS WE LOST IN THE FIRE AND WHAT CAN BE SAVED

III.1 *The need for a new beginning*

Multiple concerns have arisen with reference to various features of the AILD and it is needed to address some of them in order to understand the grounds underlying the present text about what can be learned from a failed proposal and where to go after the striking of the same without abandoning the principles that guided its birth.

With purposes of order and clarity, the first one to be addressed will be the one concerning the piece of legislation as a whole and, especially, the compliance of the same with the goal that its authors had in mind when drafting the proposal: the need for harmonization. Such circumstance corresponds to sort of a close road that has posed and will continue to create deep issues. Both the conditions for disclosure of evidence for high-risk AI systems and the ones relating to the presumption of a causal link in fault-based cases are not based on harmonized concepts. Thus, they will leave an unbearable amount of space not only to the national legislators, as in the intentions of the AILD itself, but also to the courts called to implement such provisions.

---

31 M. Tsimitakis, *OpenAI faces landmark copyright lawsuit from GEMA*, available at https://creativesunite.eu/article/openai-faces-landmark-copyright-lawsuit-from-gema (last visited Aug. 14, 2025).

32 Available at https://admin.bakerlaw.com/wp-content/uploads/2025/07/ECF-231-Order-on-Fair-Use.pdf (last visited Aug. 14, 2025).

EU Law relies deeply on the decisions of the Court of Justice in order to be properly addressed, interpreted and updated, especially dealing with bodies of legislation adopted decades ago. It creates almost a unicum in the legal order of Europe, made mostly by codified law systems. However, it is not acceptable to enact new legislation with already such a deep wound in itself, even before being implemented by the national Parliaments. With reference, in particular, to the request to disclosure of evidence, the conditions differ in case the plaintiff advances such request to the defendant or to third parties and, in both these scenarios, first, a great deal of discretion will be undoubtedly provided to the national courts called to evaluate the requests and, even before that, it will be the turn of the Court of Justice to clarify the requirements, namely in relation to the concepts of necessity, proportionality and the balancing of the interests of the parties[33].

It is very much understandable the reason why the EU institutions have reached the choice of a laxer approach to regulation. The nomination of a specific Commissioner for Implementation and Simplification in September 2024, in order to ensure that EU rules and policies in place to support business and protect people are issued in the simplest, fastest and most practical way[34], was only the formalization of an effort pursued since the 1990s under the umbrella goal of "better regulation". It is rather surprising that the international organization that has mostly been accused of its over-regulatory approach is, indeed, the one that has been striving for almost thirty years to strike a balance between the needs for protection of the individual's fundamental rights and of competitiveness of the companies based in its territory. In this sense, the attention has to be drawn back to the roots of the EU system: in the absence of a common political vision (and of any chance to reach the same), the first seed of a uniting effort had to be located in an economic-centric approach and, only later, in the need to guarantee the respect of fundamental rights. It is not completely out of scope that the von der Leyen's Commission has recovered the first goal, despite not being completely aligned with the policy efforts of the previous Presidents of the Commission. The regulatory strategy now centers around the building blocks of competitiveness and cost-reduction for businesses, with an eye specifically on SMEs, while it has been witnessed a rather slow, but steady, shift of the attention away from societal benefits and, especially, from the analysis of the cost of inaction[35]. In this sense, it is interesting to note that the same push towards a double path for liability, through the revision of the PLD and a brand new AILD, might be considered as an exception in this strategy, since it poses the individual again at the center of the picture, with regard to harms caused by the AI-embedded products or services. Nevertheless, the

[33] S. Li, B. Schütte, *The Proposed EU Artificial Intelligence Liability Directive Does/Will Its Content Reflect Its Ambition?*, in *Technology and Regulation*, 147, (2024) available at https://doi.org/10.71265/82fwbw94 (last visited Aug. 23, 2025).

[34] Mission Letter of Ursula Von der Leyen to Valdis Dombrovskis, September 17, 2024, available at https://commission.europa.eu/document/download/71c3190f-0886-4202-846e-5750f188f116_en?filename=Mission%20letter%20-%20DOMBROVSKIS.pdf%22%20%EF%B7%9FHYPERLINK%20%22https://eur01.safelinks.protection.outlook.com/GetUrlReputation (last visited Aug. 23, 2025).

[35] B. Pircher, *Rebalancing EU Regulation: Progressive responses to the deregulation push*, 2025, available at https://library.fes.de/pdf-files/bueros/bruessel/22096-20250604.pdf (last visited Aug. 23, 2025).

approach has been defined as "half-hearted"[36] and this strikes as both the most complete and efficient way to provide a full picture. In order to fully comply with the scope of such piece of legislation, the form of regulation would be preferable, being it the only one able to provide full harmonization in view of the efforts made through the AI Act.

This would also be the road mostly aligned with the close link established between the AI Act and the AILD by the same authors of the latter text. Throughout the years of discussions, confrontations and, oftentimes, quarrels among the various streams of the various EU institutions, such link allowed a prospective widening of the material application of the AILD, once approved and entered into force. As it was explicitly stated under the third recital of the General Prodcut Safety Regulation, "A regulation is the appropriate legal instrument as it imposes clear and detailed rules which leave no scope for divergent transposition by Member States. The choice of a regulation instead of a directive also allows for better delivery of the objective of ensuring coherence with the market surveillance legislative framework for products falling within the scope of Union harmonisation legislation, […]". Also building on the road full of obstacles that the AI Act encountered in the portion of its path preceding the publication of the AILD proposal, between April 2021 and October 2022, it has been clear from the very beginning that the ambitious formal vest of a regulation was a complex horizon to consider for the normative effort around liability. Indeed, bearing in mind the simplification goal and the better regulation framework, it seems that, instead, the AI Act became the unique exception. An unavoidable exception, as it was, before, the GDPR. It is questionable, however, how proposing directives which are actually devoid of any significance without the supporting regulation is the correct direction of action when facing pressing issues such as the regulation of AI.

The more and more evident "directivization" direction of the EU legislative approach is understandable. It follows an enlargement that, on one side, cannot be deemed as completed and, on the other side, led the whole structure to undergo a growing level of fragmentation. The opt-out clauses in the legislative acts have been the key to obtain the consent of some States to become and to keep being part of the Union, while the free circulation of people under Schengen and the Euro-Area is only the most prominent example of the model of differentiated integration. The directivization trend is only the last consequence of it. That reflects, of course, on the true impact that the EU can have on each of the legal systems belonging to the areas of the world outside of it, when it cannot even provide the same level of protection for the rights of its citizens and of the companies based in the Member States.

[36] P. Hacker, *The European AI liability directives – Critique of a half-hearted approach and lessons for the future*, in *Computer Law & Security Review*, 40 (51, 2023), available at https://www.sciencedirect.com/science/article/pii/S026736492300081X (last visited Aug. 23, 2025).

III.2 *Beyond the directivization trend*

The directivization of the normative framework might also be deemed as the most prominent obstacle to harmonization, but the issue goes beyond that. First, the Parliaments of the Member States are called to implement the legislative acts of the Union, with, in some cases, significant delays with respect to the timeframe provided. Moreover, the Member States have the right to challenge the content of the directives before the Court of Justice, meaning that the same is called to provide its guidance on the concepts at the core of the norms being adopted. Despite the concerns about delays and the deep issue posed by such mechanism, again, for the compatibility between the solutions proposed and the high-speed of the changes in the reality, it may be argued that such road is actually the safest choice, since there is a unitary interpretation, provided centrally by the Court of Justice, which both the Parliaments and the national courts have to comply with and, eventually, build upon. Instead, the major concerns arise when the implementation through national bodies of law runs smoothly and the citizens to whom such provisions have to be applied in judiciary proceedings have no other option that hope that the judge activates the process of preliminary ruling according to article 267 TFEU.
The need to strike a balance between the legislative power of the Member States and that of the EU itself has been at the core of the same existence of the EU, with the specific definition (and limitation) of competences, along with the principle of proportionality remaining throughout the decades probably the most sacred provision. Especially in the tumultuous years after the withdrawal of the United Kingdom from the EU, Member States have asked for and have been awarded more and more shreds of sovereignty.
The simplification at the core of the von der Leyen Commission's efforts shall not be translated into less regulation and more self-regulation through codes of conduct developed and applied internally by the various category of stakeholders. Rather, it should lead to a complete re-thinking of the instrument of regulation. The most viable effort could be the production of regulations that do not share the all-encompassing features of the GDPR or of the AI Act, but rather follow the steps already laid out, as a way of example, by the Digital Services Package, with the Digital Services Act and the Digital Markets Act, or by the Data Package, with Data Act and Data Governance Act. The AILD shall, hence, be effectively transformed into an AILR, with the specific changes to its features that will be further highlighted, building on the critiques and suggestions of the experts and of the scholars. The choice of framing such piece of legislation as directive was understandable four years ago, but it can and has to be challenged now. By redefining its premises, it may be possible to envision an instrument able to go not only beyond the obstacles posed by its inner structure, but also beyond its original scope.
The specific content of the proposal also needs to molt in order for the AILR to be a resourceful source of law, able not only to bring the EU into the technological revolution 4.0, but also to provide both the EU enterprises and the EU citizens with the most suitable tools to face the challenges of the reality (which, it will never be stressed enough, is) constantly changing at high-speed pace. The idea of a double system regarding liability is, in substance, correct. The sole revision of the PLD is not currently and will not be able,

in the future, to address the specific concerns deriving not only from AI systems, but especially from the implementation of AI components into the products offered on the market. While, in theory, it is clear that the system will have a manufacturing defect if it is trained with a learning algorithm or with training data that deviate from the manufacturer's intended specifications, the design defects are even more difficult to be identified for a variety of reasons, among which the impossibility for humans to retrace the learning process followed by the system[37]. On one side, such landscape poses to the courts the same issues already highlighted in the context of the AILD, that also the PLD tries, in parallel, to overcome through procedural rules regarding the burden of proof. Despite this perspective not being a complete failure in itself, imagining to see in place only the PLD and, thus, the inclusion of the AI-driven or AI-powered systems under the sole PLD is far from providing the legal subjects with at least a minimum level of protection for their rights. The ex-ante assessment around safety requirements for the AI system and the discussion about the features of liability of the same and of the individuals involved in its development and deployment cannot and should not overlap. In fact, the goal is to consider the different nature of the two approaches, from both a technical and a legal point of view, with the aim of allowing them to converge to create a system suitable both for the enhancement of the market value of the systems itself and for the protection of the fundamental rights of the people.

On the other side, the theme of human oversight (which is the title of article 14 of the AI Act), or lack thereof, with reference to both the process and the outcome of the path of AI system is a further issue in itself. With reference to the current content of the AILD proposal, paradoxically, in the case of technically opaque or complex systems, victims seeking to prove fault may find such task easier when the system is high-risk. Instead, revising the whole framework, courts should be empowered to order the defendant to disclose relevant evidence at its disposal in any case, upon request of an injured person claiming compensation and when the claimant has presented facts and evidence sufficient to support the plausibility of the claim[38].

Besides, with reference to the claim that the AILD is superfluous in the framework of liability established by the PLD, it necessary to remember that, in case no further piece of legislation dealing with the theme of liability in the landscape of AI is enacted, all of the following causes of damage will not be covered, with catastrophic results for the protection of the fundamental rights: discrimination, when AI systems lead to outcomes impacting individuals or groups unfairly; personality rights, among which privacy, dignity and potentially family-related rights, violated as a way of example by the share of toxic, non-consensual intimate or harmful content; intellectual property rights; pure economic

[37] A.-K. Mayrhofer, *Product liability in the age of AI — Proposal for a "two track" solution*, in *Revista Electronica de Direito*, 112 (2024), available at https://cij.up.pt/en/red/previous-editions/2024-no-1/product-liability-in-the-age-of-ai-mdash-proposal-for-a-ldquotwo-trackrdquo-solution/ (last visited Aug. 26, 2025).

[38] B. Botero Arcila, *AI liability in Europe: How does it complement risk regulation and deal with the problem of human oversight?*, in *Computer Law & Security Review*, 10 (54, 2024), available at https://www.sciencedirect.com/science/article/pii/S0267364924000797 (last visited Aug. 26, 2025).

loss from damages not associated with physical harm or property damage, but with direct financial losses; sustainability, in relation to the environmental and climate impact of AI systems[39]. In particular, it has become obvious that the fight around IP rights and, specifically, to the fairness of the use of copyrighted works in the training of systems might be the most prominent issue actually involving AI in the everyday life of people in the current age. This happens because, of course, no specific legislation is currently in force in order to regulate such impending matter. Instead, in an unprecedented expression of unity of intents, creatives have joined to make a common front against the unfair exploitation of their works by the developers of AI systems.

As previously mentioned, the US courts in particular have been flooded by complaints submitted by creatives belonging to a variety of fields, from journalist to screenwriters, from narrators to actors. Such issues may seem trivial in the big scheme of things, with the specter of General Purpose AI at the horizon, but, instead, they cannot pass under silence. Such matters are important for the protection not only of the rights of economic exploitation of the copyrighted works, but also for the protection of the fundamental rights of the authors, especially as they have been considered as untransferable in the systems leaning on codified law. But even more, they present a perfect test bench for the topic of liability and for the push towards a regulation of the same that is not only acceptable, but also satisfactory. If AI-generated outputs that reproduce third-party copyrighted works and/or protected subject-matter are deemed to be infringing, the next step to be considered is the allocation of liability resulting from the same. Specifically in the context of generative AI, the traditional bridge between primary/direct and secondary/indirect liability inevitably shatters, leaving ground necessarily open with reference to the need for a rewriting of the terms of service issued by the providers of AI models[40].

IV. FINAL THOUGHTS

Since many of the most ferocious critiques, as recalled above, have been addressed to the features of the impact assessments produced by the relevant EU institutions with reference to the AILD, it is worth to mention the lines drawn by the same EU Parliament in the latest Complementary Impact Assessment, dated September 2024. It has, first, to be borne in mind that such publication was issued some months ahead of the decision of the Commission to scrap the AILD and it already provides answers to many of the concerns that led to the very much discussed outcome. From such text, it is clear that two

[39] S. Wachter, *Limitations and Loopholes in the EU AI Act and AI Liability Directives: What This Means for the European Union, the United States, and Beyond*, in *Yale Journal of Law and Technology*, 671, (26, 2024), available at https://yjolt.org/sites/default/files/wachter_26yalejltech671.pdf (last visited Aug. 28, 2025).

[40] E. Rosati, *Infringing AI: Liability for AI-Generated Outputs under International, EU, and UK Copyright Law*, in *European Journal of Risk Regulation*, 619 (16, 2025) available at https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/infringing-ai-liability-for-aigenerated-outputs-under-international-eu-and-uk-copyright-law/C568C6B717E9CFC45FB52E58E54B6BEC (last visited Aug. 29, 2025).

main tendencies are, right now, confronting one another in the same EU scenario. On the one side, the cautious willingness of the Commission to defend the steps reached until now, derived from the awareness that the approval of the AI Act is not the last word on the topic, but the start of a new season of discussion and, in many cases, fights on the application and implementation of the same by the national legislators and by the relevant stakeholders. On the other side, the drive of the EU Parliament not to close the door of the topic, but to push the need for regulation forward. The desire (and the plan) of the Parliament is that the AILD is expanded into a more encompassing software liability instrument, able to cover not only AI, but also all other types of software, to ensure that the evidence disclosure mechanisms and the principles of rebuttable presumptions apply universally to all software applications[41]. As highlighted throughout this whole opinion, the different political seasons will have on the subject a heavy weight, due to the fact that the topic concerned is closely tied to any aspect of the everyday life of individuals.

At the present moment, it seems that the attention of the EU legislator is pointed more on looking for a coherence in the different bodies regulating the AI-adjacent fields then on addressing the still existent gaps in the regulatory framework. Such trend seems to be confirmed by the latest normative proposal, the so-called "Digital Omnibus" Regulation[42], issued in November 2025. It is interesting to see how not once the theme of liability is included in the one hundred and fifty-five pages of the document shared by the Commission. Nevertheless, from a lawmaking perspective, it is relevant to note that the nature of the instrument chosen is the Regulation, whose features and impact have been addressed before in the present text.

Lines of thought have been suggested and inputs for discussion have been provided, showing that the only walkable road is in the direction of changing what is already in place to find the most reasonable, yet efficient, mean for regulating a topic that desperately need to be addressed from a realistic point of view. The route is the furthest away possible from being clear, but the only way forward is through the uncertainty, certainly not avoiding it.

[41] P. Hacker, *Proposal for a directive on adapting non-contractual civil liability rules to artificial intelligence. Complementary impact assessment*, 25 (2024), available at https://www.europarl.europa.eu/RegData/etudes/STUD/2024/762861/EPRS_STU(2024)762861_EN.pdf (last visited Aug. 28, 2025).

[42] Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2016/679, (EU) 2018/1724, (EU) 2018/1725, (EU) 2023/2854 and Directives 2002/58/EC, (EU) 2022/2555 and (EU) 2022/2557 as regards the simplification of the digital legislative framework, and repealing Regulations (EU) 2018/1807, (EU) 2019/1150, (EU) 2022/868, and Directive (EU) 2019/1024 (Digital Omnibus), available at https://eur-lex.europa.eu/resource.html?uri=cellar:ebf17714-c56e-11f0-8da2-01aa75ed71a1.0001.02/DOC_1&format=PDF (last visited Jan. 12, 2025).