

# Automated vehicles, tort liability and Private international law

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## Abstract

Studies of, and research on, automated vehicles are currently underway, and their commercialisation will become a reality over the next years. Thus, the application of Artificial Intelligence (AI) to automated vehicles raises very important challenges from the regulatory point of view and, in particular, from the perspective of private international law rules. The introduction of automated vehicles will contribute to the gradual decrease in the liability of drivers involved in cross-border traffic accidents versus that of producers and operators of the AI systems installed in these vehicles. Consequently, there is a paradigm shift from the regime of the fault-based liability of the driver to that of the strict liability for damage caused by defective products. This shift will directly affect the application of the rules of private international law in order to determine the applicable law in cases of tort liability. This paper analyses the EU legislative initiatives on AI and civil liability and its compatibility with the rules of private international law applicable to tort liability arising from cross-border road traffic accidents involving automated vehicles. Methodology used: The object of my research is international by its very nature: the cross-border traffic accidents and the applicable rules of Private international law applying to determine the jurisdiction of national courts in the EU and the applicable law. Therefore, the methodology of my research work relies on interdisciplinary legal methodologies which will allow me to focus the legal problems from a conventional, institutional and domestic legal perspective – international conventions, European Union legislation and domestic rules – and to provide a comparative study of the matters analyzed.

## Keywords

Artificial Intelligence, Automated vehicles, Tort liability, Conflict of Law rules

## 1. Introduction

One of the most prominent examples of the positive effects that Artificial Intelligence (AI) systems can have on our lives is their application in the motor vehicle sector, which will turn vehicles into AI-controlled machines or robots designed to perform the function of driving in an automated way. The major car manufacturers – Audi, BMW, Ford, GM, Honda, Mercedes, Nissan, Tesla, Toyota, Volkswagen and Volvo – have been working on this project for some time now, along with leading software development companies such as Google and Apple.

Undoubtedly, the introduction of this type of vehicle, as a clear example of the so-called Internet of Things (IoT), will increase the safety, efficiency and mobility of people and will contribute in a very positive way to the reduction of traffic accidents and victims that these collisions generate every year.<sup>1</sup> On most occasions, these can be attributed to human failures, to errors caused by the driver's emotional or physical state, or to driver negligence, either due to distractions, the effects of drugs or alcohol, drowsiness, inappropriate speed, or the use of mobile phones.<sup>2</sup>

However, the introduction of new technologies into our society also poses enormous legal challenges, not only in terms of regulation but also of liability, privacy and intellectual property not to mention ethical and moral issues. Accordingly, in the field of non-contractual liability of drivers involved in a cross-border traffic accident, we can be faced with two very different scenarios.

In the first scenario AI and human action interact and operate simultaneously that is to say, the level of automation is not total. Then, the person is still responsible for supervising the vehicle and is obliged to take control of it when required by the software. It means that the driver will still be responsible.

The second scenario takes place when driving is fully autonomous and the occupant has no active role or control over the vehicle. It will then be

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According to a study by the consultancy KPMG, autonomous vehicle technology could reduce accidents by up to 80% by 2040. See, KPMG 'Marketplace of change: Automobile insurance in the era of Autonomous Vehicles' (White Paper 2015) <<https://assets.kpmg/content/dam/kpmg/pdf/2016/06/id-market-place-of-change-automobile-insurance-in-the-era-of-autonomous-vehicles.pdf>> accessed 31 March 2023.

2 According to data provided by the World Health Organization (WHO) in June 2021, approximately 1.3 million people die each year as a result of road accidents. In addition to the human tragedy that this represents, these accidents cost most countries 3% of their gross domestic product <<https://www.who.int/news-room/fact-sheets/detail/road-traffic-injuries>> accessed 31 March 2023.

questionable whether some responsibility can be attributed to the driver for a possible accident caused by the vehicle they are occupying; on the contrary, the driver would be exempt from responsibility as they would no longer be liable for any fault or negligence.

## 2. AI systems, automated vehicles and private international law

### 2.1. Jurisdiction: *The Brussels I-bis Regulation*

The jurisdiction of the EU courts will vary depending on the Member State where the offender is domiciled, where the accident takes place and where the vehicle is registered. So, it is necessary to analyse whether the currently applicable rules of private international law to non-contractual liability are appropriate to regulate situations arising from the involvement of autonomous vehicles in cross-border accidents.

Given that Regulation Brussels I-bis<sup>3</sup> does not contain specific rules to determine the jurisdiction in cases of cross-border traffic accidents, the same vacuum will continue to exist with regard to determining the jurisdiction in cases where automated vehicles are implied.

This means that the forum of the defendant's domicile,<sup>4</sup> where the defendant is located in the territory of the European Union, will be the competent court for claims brought against the driver, the owner, the manufacturer or the company that developed the software of the automated vehicle that caused the accident. For the purpose of determining the domicile of a natural person, the court shall apply its domestic law<sup>5</sup> whereas the domicile of a legal person shall be deemed to be established at the place where its statutory seat, central administration or principal place of business is located.<sup>6</sup>

Similarly, in certain circumstances, the courts of a Member State other than that of the defendant's domicile may also have jurisdiction. Thus, in the field of claims for damage caused by automated vehicles, the place where the harmful event occurred or may occur is of particular interest since, in such cases, the courts of that Member State may have jurisdiction.<sup>7</sup> Therefore, a double forum – *locus damni* and *locus actus* – would apply. In such cases, it will be possible to

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3 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L 351/1 and subsequent amendments.

4 Art. 4 Brussels I-bis Regulation.

5 *ibid* art 62.

6 *ibid* art 63.

7 *ibid* art 7((2).

sue before the courts of the Member State where the harmful event occurred or may occur, provided that direct damage is involved.<sup>8</sup> Where such a liability claim arises from an act giving rise to criminal proceedings, the court hearing such proceedings will also have jurisdiction.<sup>9</sup>

In addition, the special rules governing jurisdiction in matters relating to insurance should be taken into account because, as is currently the case, the obligation to insure all vehicles registered in the EU will have to be extended to automated vehicles. In consequence, a distinction must be made when the claim is brought by the insurance company against the policyholder, the insured or the beneficiary of the insurance. In such cases, the competent courts will be those of the defendant's domicile in the European Union.<sup>10</sup>

Nonetheless, where the claim is brought against the insurer (or co-insurer) domiciled in a Member State, the Brussels I-bis Regulation provides for different forums: firstly, the defendant's domicile;<sup>11</sup> secondly, the courts of the place where the harmful event occurred;<sup>12</sup> and thirdly, the courts of the Member State in which the policyholder, the insured or a beneficiary are domiciled (*forum actoris*),<sup>13</sup> as the Brussels I-bis Regulation provides for the possibility that the injured party can bring proceedings directly against the insurer, provided that such proceedings are possible.<sup>14</sup>

Finally, the Regulation also provides for the parties' freedom of choice and allows them to agree the jurisdiction of a Member State's court (*prorogatio fori*) within the limits and under the conditions laid down in the Regulation itself.<sup>15</sup>

## 2.2. Applicable law

Rome II Regulation<sup>16</sup> coexists with the application of two international conventions adopted at the Hague Conference: the 1971 Hague Convention on the Law Applicable to Road Traffic Accidents<sup>17</sup> and the 1973 Hague Convention on the Law Applicable to Product Liability.<sup>18</sup>

8 Case C-21/76 *Handelskwekerij Bier v Mines de Potasse d'Alsace* [1976] ECR 01735; and Case C-220/88 *Dumez France and Others v Hessische Landesbank and Others* [1990] ECR I-00049.

9 Art 7(3) Brussels I-bis Regulation.

10 *ibid* art 14(1).

11 *ibid* art 11(1)(a).

12 *ibid* art 12. This forum corresponds to that provided for in Brussels I-bis Regulation, art 7(2)

13 *ibid* art 11(1)(b).

14 *ibid* art 13(2) in relation to art 10, 11 and 12. As far as injured parties are concerned, Case C-463/06 *FBTO Schadeverzekeringen* [2007] ECR I-11321.

15 Brussels I-bis Regulation, arts 25-26.

16 Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L199/40.

17 Convention on the Law Applicable to Traffic Accidents (adopted 4 May 1971, entered into force 3 June 1975) (hereafter, 1971 Hague Convention).

18 Convention on the Law Applicable to Products Liability (adopted 2 October 1973, entered into force 1 October 1977) (hereafter, 1973 Hague Convention).

### 2.2.1 The Rome II Regulation

The Rome II Regulation lays down uniform rules to determine the law applicable to non-contractual obligations and therefore will apply to determine the law applicable to liability arising from cross-border traffic accidents and defective products. The Regulation ensures the proper functioning of the internal market and guarantees the conflict rules in force in the Member States to designate the same national law irrespective of the EU court before which the dispute is brought.<sup>19</sup>

The universal nature of this instrument ensures that the law designated by it is applicable even if it is not the law of a Member State.<sup>20</sup> Meanwhile, the exclusion of *renvoi* facilitates the predictability of the applicable law and makes it possible to mitigate the use of *forum shopping*.<sup>21</sup>

#### a) Liability arising from cross-border traffic accidents

In the field of cross-border traffic accidents, it will not be very common for the parties to agree on the law applicable, since they will not always be known to each other in advance. However, they may choose the law after the event that gives rise to the damage has occurred (that is to say, the accident);<sup>22</sup> or if the agreement has been freely negotiated before the event giving rise to the damage has occurred, when it is required that the parties will have previously carried out (or are carrying out) a commercial activity.<sup>23</sup> In both cases, the choice may be made expressly or be implied from the circumstances of the case.<sup>24</sup>

This solution provided for by the Rome II Regulation could be very useful for certain contracts relating to automated vehicles, because it would allow the parties in a contractual relationship to choose the applicable law even in cases of non-contractual liability arising from the contractual relationship, but not vis-à-vis third parties, such as the victims of the accident.

That said, it should be noted that party autonomy has two limitations: firstly, the observance of the provisions of the law (which cannot be derogated from by agreement) of the country in which the elements relevant to the situation at the time when the event giving rise to the damage occurred are located; and secondly, the provisions of Community law, as implemented in the Member State of the forum (which cannot be derogated from by agreement) where all the elements relevant to the situation at the time of the accident are located in one or more of the Member States.<sup>25</sup>

19 Recital n 6 Rome II Regulation.

20 *ibid* art 3.

21 *ibid* art 24, which excludes the *renvoi*.

22 *ibid* art 14(1)(a).

23 *ibid* art 14(1)(b).

24 *ibid* art 14(1), second para.

25 *ibid* art 14(2) and 14(3).

On the other hand, the Regulation does not provide for specific rules governing non-contractual liability. Hence, the general rule will apply, that is to say, the law of the country in which the damage occurs, ie the traffic accident, irrespective of the country in which the event giving rise to the damage has occurred, and irrespective of the country or countries in which the indirect consequences of that event occur.<sup>26</sup>

This rule will not apply where the person claiming to be liable and the injured party have a common habitual residence at the time when the damage occurs. In such cases, the law of the country of the common habitual residence applies.<sup>27</sup>

Likewise, the Regulation provides that, where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that in which the event giving rise to the damage occurred or in which the parties – the victim and the tortfeasor – are habitually resident, the law of that other country shall apply.<sup>28</sup>

Apart from this, the court that has jurisdiction could apply its own law (*lex fori*) and refuse the application of the law designated by the Rome II Regulation, but only if such an application is manifestly incompatible with the public policy of the forum.<sup>29</sup>

#### b) Liability arising from defective products

Once automated vehicles are put on the roads, particular attention should be paid to product liability issues that may affect these vehicles. It should be borne in mind that, until now, the cornerstone of liability in this type of accident has been the human factor – the driver's fault or negligence – whereas, with the introduction of automated vehicles, other objective aspects determined by the interaction of technology and AI will come into play.

In this sense, product liability is subject to special conflict rules in the Rome II Regulation.<sup>30</sup> Despite this, the Regulation does not include a definition of the term 'product'. It is therefore necessary to turn to the provisions of Directive 85/374/EEC on liability for defective products<sup>31</sup> and to consider limiting its

26 *ibid* art 4(1). With regard to the interpretation of the place where the damage occurs, we have to refer to the CJEU doctrine and the interpretation of art 7(2) of the Brussels I-bis Regulation, due to the coherence that must be guaranteed in the application of both instruments. See Rome II Regulation, recital n 7.

27 *ibid* art 4(2).

28 *ibid* art 4(3).

29 *ibid* art 26.

30 *ibid* art 5.

31 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 [1985] OJ L210/29 (Directive for Defective Products).

scope to movable property<sup>32</sup> or, in contrast, to advocate for a broader definition of the term, which would be desirable in order to include in its scope intangible products such as software, which will be an important element in the development of AI in automated driving.<sup>33</sup>

At the same time, it has to be mentioned that, despite the fact that Art 5 of the Rome II Regulation includes in its title the term ‘defective products’, its wording refers to non-contractual obligations arising out of damage caused by a product, without distinguishing in this case about its possible defectiveness. An extensive interpretation of the Regulation could lead to the argument that it includes both defective and dangerous products, in that sense defending the application of these conflict rules to technological products that are part of AI and automated driving because there is a potential risk involved, eg the damage caused by the software installed in an autonomous vehicle.<sup>34</sup>

In identifying the applicable law, the Rome II Regulation sets up a complex system of cascade connections: first, the law of the country of the common habitual residence of the person claimed to be liable and the injured party;<sup>35</sup> second, in the absence of a common habitual residence of the parties, the law of the country of the victim’s habitual residence at the time of the damage, if the product was marketed in that country (international stream of commerce rule);<sup>36</sup> third, the law of the country in which the product was acquired, if it was marketed there;<sup>37</sup> and failing that, fourth, the law of the country in which the damage occurred, if the product was marketed in that country.<sup>38</sup>

However, the law of the country in which the person claimed to be liable has his habitual residence shall apply if he could not reasonably foresee the marketing of the product, or a product of the same type, in one of the above-mentioned countries.<sup>39</sup>

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32 Peter Huber and Martin Illmer, ‘International Product Liability. A Commentary on Article 5 of The Rome II Regulation’, (2007) 9 Yb PrIL 31,37–38; and Peter Stone, ‘Product Liability under the Rome II Regulation’ in John Ahern and William Binchy (eds), *The Rome II Regulation on the law applicable to non-contractual obligations: a new international litigation regime* (Martinus Nijhoff Publishers 2009) 175, 181.

33 Richard Plender and Michael Wilderspin, *The European Private International Law of Obligations* (3rd edn, Sweet & Maxwell, Thomson Reuters 2009) 551; and Marek Swierczynski and Lukasz Żarnowicz, ‘Law applicable to liability for damages due to traffic accidents involving autonomous vehicles’, 14 Masaryk University Journal of Law and Technology [2020] 177, 186.

34 Andrew Dickinson, *The Rome II Regulation: The law applicable to non-contractual obligations* (OUPUP 2008), 370; and Martin Illmer, ‘The New European Private International Law of Product Liability—Steering Through Troubled Waters’, 73 RabelZ [2009] 269, 281–282.

35 Rome II Regulation, art 5.1 which refers to art. 4(2).

36 *ibid* art 5(1)(a).

37 *ibid* art 5(1)(b).

38 *ibid* art 5(1)(c).

39 *ibid* art 5(1), last para.

Finally, the Regulation provides for the principle of manifestly closer links to apply the law of the country which is manifestly more closely connected with all the circumstances of the case.<sup>40</sup>

### 2.2.2 *The Hague Convention of 1971 on the law applicable to road traffic accidents*

According to art 28 of the Rome II Regulation, the 1971 Hague Convention on the Law Applicable to Road Traffic Accidents prevails over the general rule provided for in art 4 of the Regulation, and will be applicable by the courts of the Member States which are parties to this Convention.<sup>41</sup> The Convention has a universal character, so it shall be applied even if the designated law is not that of a Contracting State, and its application will not depend on any requirement of reciprocity.<sup>42</sup>

Regarding the scope of application, the 1971 Hague Convention excludes ‘the liability of manufacturers, sellers or repairers of vehicles’.<sup>43</sup> Nevertheless, this does not mean that it cannot apply to manufacturers of components, such as software installed in the autonomous vehicles involved in cross-border traffic accidents.<sup>44</sup>

The Convention establishes as a basic principle the *lex loci delicti*, that is to say the application of the internal law of the State where the accident occurred.<sup>45</sup> However, it includes some exceptions to this principle depending on the number of vehicles involved in the accident and other circumstances.

Firstly, where only one vehicle is involved in the accident and it is registered in a State other than that where the accident occurred, the law of the State of registration of the vehicle shall apply for the purpose of determining liability in three cases: towards the driver, the keeper, the owner or any other person having a right in the vehicle, irrespective of their habitual residence;<sup>46</sup> towards the victims travelling as passengers, if they had their habitual residence in a State other than that in whose territory the accident occurred;<sup>47</sup> and towards the victims who were at the scene of the accident outside the vehicle, if they had their habitual residence in the State in which the vehicle was registered.<sup>48</sup>

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40 *ibid* art 5(2).

41 At the moment twenty-one States are part of the Convention; thirteen of them Member States of the EU: Austria, Belgium, Croatia, Czech Republic, France, Latvia, Lithuania, Luxembourg, Poland, Slovakia, Slovenia, Spain and The Netherlands.

42 1971 Hague Convention, art 11.

43 *ibid* art 2(1).

44 Some authors find it difficult to justify the distinction between vehicle manufacturers and component manufacturers. Marek Swierczynski and Lukasz Żarnowiec, ‘Law applicable to liability’ (n 33) 182.

45 1971 Hague Convention, art 3.

46 *ibid* art 4(a), first para.

47 *ibid* art 4(a), second para.

48 *ibid* art 4(a), third para.

Secondly, where the accident involves two or more vehicles, an exception to the principle of *lex loci delicti* shall apply, and the law of the State of registration shall apply, provided that these vehicles were registered in the same State.<sup>49</sup>

Thirdly, where the accident involves one or more persons (either as perpetrators or victims) outside the vehicle or vehicles at the place of the accident, the derogation from the principle of *lex loci delicti* will apply only if all those persons are habitually resident in the State in which the vehicle or vehicles are registered.<sup>50</sup>

Fourthly and last, it should be borne in mind that, when vehicles not registered or registered in several States are involved in the accident, the conflict rule will not be the law of the State of registration, but the internal law of the State in which they are habitually stationed. The same rule applies in cases where neither the owner, nor the keeper, nor the driver of the vehicle had, at the time of the accident, his habitual residence in the State of registration of the vehicle.<sup>51</sup>

Although the 1971 Hague Convention does not provide for the possibility of the parties choosing the law applicable to the dispute, submission may also be made by the parties after the event giving rise to the damage has occurred, according to art 14 of the Rome II Regulation. If they do so, freedom of choice will prevail over the conflict rules of the 1971 Hague Convention, even if the doctrine is not unanimous regarding whether party autonomy will make it possible to exclude the application of the Convention in favour of the State law chosen by the parties.<sup>52</sup>

### 2.2.3 *The Hague Convention of 1973 on the law applicable to product liability*

In the same way, the application of the Convention prevails over the Rome II Regulation, in particular its art 5<sup>53</sup> (which identifies the law applicable to non-contractual obligations arising out of damage caused by defective products) and shall be applied on a preferential basis by the courts of the Member States which are contracting parties to this Convention.<sup>54</sup> This Convention also has a universal character, and its application will not depend on any requirement of reciprocity.<sup>55</sup>

As to the relationship between autonomous vehicles and non-contractual liability, the Convention is of great relevance for the following reasons: first,

49 *ibid* art 4(b).

50 *ibid* art 4(c).

51 *ibid* art 6.

52 Thomas Kadner Graziano, 'The Rome II Regulation and the Hague Conventions on Traffic Accidents and Product Liability—Interaction, conflicts and future perspectives' (2008) *Nederlands Internationaal Privaatrecht*, 425.

53 Rome II Regulation, art 28.

54 At the moment, eleven States are part of the Convention; seven of them Member States of the EU: Croatia, Finland, France, Luxembourg, Slovakia, Spain and The Netherlands.

55 1973 Hague Convention, art 11.

because the 1971 Hague Convention on the Law Applicable to Road Traffic Accidents excludes from its material scope the liability of manufacturers, sellers or repairers of vehicles that may be involved in cases of autonomous driving; second, because, at EU level, legislative harmonisation in the area of product liability has only been partially carried out through Directive 85/374/EEC, which is now in the process of being revised; and third, because it establishes a complex system of conflict rules on the basis of different connecting factors that do not correspond to those provided in art 5 of the Rome II Regulation where product liability is regulated.

Despite the fact that the Convention does not provide for party autonomy, the parties may also choose the law applicable to the dispute on the basis of art 14 of the Rome II Regulation, which would apply in these cases in the absence of regulation in the Convention.<sup>56</sup>

As far as the conflict rules are concerned, it establishes the habitual residence of the person directly suffering damage as connecting factor. Thus, the law of the State where the person directly harmed has his habitual residence will apply, provided that one of the following conditions is met: the State of the habitual residence is the principal place of business of the person claimed to be liable, or the place where the product was acquired by the person directly suffering damage.<sup>57</sup>

Where these requirements are not met, the *lex loci damni* principle shall apply consequently, the internal law of the State of the place of injury, if that State is also the place of the habitual residence of the person directly injured, or the principal place of business of the person claimed to be liable, or the place where the product was acquired by the person directly injured.<sup>58</sup>

In turn, where the conflict rules set out above do not apply, the applicable law shall be the law of the State where the principal place of business of the person claimed to be liable is located, although in this case the Convention allows the plaintiff to base his claim on the domestic law of the State in whose territory the damage occurred.<sup>59</sup>

Lastly, it should be noted that neither the *lex loci damni* principle nor the habitual residence connecting factor shall apply if the person claimed to be liable establishes that they could not reasonably have foreseen that the product,

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56 Thomas Kadner Graziano, 'Cross-border Traffic Accidents in the EU– the Potential Impact of Driverless Cars' (European Parliament – Directorate-General for Internal Policies of the Union, 2016) 27, <[https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571362/IPOL\\_STU\(2016\)571362\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571362/IPOL_STU(2016)571362_EN.pdf)> accessed 31 March 2023.

57 1973 Hague Convention, art 5.

58 *ibid* art 4.

59 *ibid* art 6.

or their own products of the same type, would be made available in that State through commercial channels.<sup>60</sup>

### 3. A European Union approach to Artificial Intelligence

#### 3.1. The European Parliament Resolution 2020, with recommendations to the Commission on a civil liability regime for AI

In its Resolution of 20 October 2020,<sup>61</sup> the European Parliament called on the Commission to submit a Proposal for a Regulation on civil liability for the operation of AI systems, in order to harmonise the laws of Member States and to prevent the misuse of AI systems and regulatory fragmentation in national laws (hereafter, European Parliament Resolution 2020).<sup>62</sup>

The idea of a uniform legal framework is based on the importance of civil liability,<sup>63</sup> as well as on the need to specifically review and adapt existing regimes to the new risks arising from using AI systems to ensure compensation for persons suffering personal injury or damage to property. AI systems, when they carry high inherent risks and act in an automated way, potentially endanger the general public and pose significant legal challenges to existing liability regimes. These challenges include proof of causation for the purpose of claiming compensation, as it will not always be easy to determine who controls the risk associated with the AI system; risks arising from connectivity between AI systems themselves; machine learning of AI systems; and cybersecurity breaches through hacking or hacking.<sup>64</sup>

Thus, the Resolution recognises the need to guarantee injured parties a level of protection similar to that which currently operates when an AI system is not involved. To achieve this objective, it refers to the insurance of these systems and the guarantee of effective access to the courts in the case of a dispute.<sup>65</sup> It also sets out rules for the civil liability claims of natural and legal persons

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<sup>60</sup> *ibid* art 7.

<sup>61</sup> European Parliament Resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL) (2021/C 404/05) [2021] OJ C 404.

<sup>62</sup> *ibid* points 2, 3 and 5.

<sup>63</sup> *ibid* para A, which provides: ‘whereas the concept of “liability” plays an important double role in our daily life: on the one hand, it ensures that a person who has suffered harm or damage is entitled to claim and receive compensation from the party proven to be liable for that harm or damage, and on the other hand, it provides the economic incentives for natural and legal persons to avoid causing harm or damage in the first place or price into their behaviour the risk of having to pay compensation’.

<sup>64</sup> *ibid* para H and I, and point 14.

<sup>65</sup> *ibid* para J.

against operators of AI systems,<sup>66</sup> that is to say, persons who have suffered damage or harm caused by a device or process governed by an AI system, as long as they are not its operators.<sup>67</sup>

Therefore, the Resolution's point of departure is an approach based on the generation or management of the risk caused by the use of these AI systems, despite the fact that it does not include rules for manufacturers but for operators who exercise control over the risks inherent in the use of AI systems. In this context, to adapt the regulatory legal framework of civil liability arising from AI systems, the Resolution defines some key concepts as 'automated decision-making',<sup>68</sup> or 'AI systems'.<sup>69</sup>

As a matter of private international law, the European Parliament Resolution 2020 includes a unilateral conflict rule stating that the Regulation applies:

On the territory of the Union where a physical or virtual activity, device or process driven by an AI-system has caused harm or damage to the life, health, physical integrity of a natural person, to the property of a natural or legal person or has caused significant immaterial harm resulting in a verifiable economic loss.<sup>70</sup>

In other words, the Regulation introduces the *lex loci damni* criterion.

### 3.2. The Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on AI

Considering the benefits of the use of AI and the risks posed by the use of this new technology, the European Commission submitted a Proposal for a Regulation laying down harmonised rules in the field of AI on 21 April 2021.<sup>71</sup> This was the first-ever legal framework for AI adopted by the European Commission, and it establishes a horizontal legal scheme and incorporates a set

<sup>66</sup> *ibid* text of the Proposal requested, art 1.

<sup>67</sup> *ibid* art 3(h) which reads as follows: "affected person" means any person who suffers harm or damage caused by a physical or virtual activity, device or process driven by an AI-system, and who is not its operator".

<sup>68</sup> *ibid* para G, which provides that: "automated decision-making" involves a user delegating initially a decision, partly or completely, to an entity by way of using software or a service; whereas that entity then in turn uses automatically executed decision-making models to perform an action on behalf of a user, or to inform the user's decisions in performing an action".

<sup>69</sup> *ibid* art 3(a) which defines AI system as 'a system that is either software-based or embedded in hardware devices, and that displays behaviour simulating intelligence by, *inter alia*, collecting and processing data, analysing and interpreting its environment, and by taking action, with some degree of autonomy, to achieve specific goals'. This definition contrast with that included in AI Act, art 3(1).

<sup>70</sup> *ibid* art 2(1).

<sup>71</sup> Commission, 'Proposal for Regulation of the European Parliament and of the Council of the EU laying down harmonised rules on artificial intelligence (Artificial Intelligence Act)', COM (2021) 206 final (Proposal for the AI Act).

of international norms and standards in order to ensure the safe and lawful use and application of new technologies in the EU market, as well as respect for EU fundamental rights and principles.

Finally, on 21 May 2024, the Council gave final green light to the first worldwide rules on AI (hereafter, AI Act), which is expected to apply two years after its entry into force, it is to say, in 2026.

The Proposal regulates the requirements to which manufacturers are subject before placing their products on the market. The Act follows a ‘risk-based’ approach, which means the higher the risk to cause harm to society, the stricter the rules. Furthermore, it establishes a legal framework for regulating high-risk AI systems, while those that do not meet the requirements to be considered as such will be regulated by codes of conduct. To this end, it classifies the risks that may result from AI uses as unacceptable risks or high, low or minimal risks.<sup>72</sup>

Thus, it refers to AI systems as:

‘AI system’ means 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.<sup>73</sup>

It also defines other important concepts related to AI, eg AI providers<sup>74</sup> or AI deployers,<sup>75</sup> and these definitions will serve as a reference for future legislative initiatives, such as the Proposal for AI Liability Directive.

As is the case for the European Parliament Resolution 2020, this Proposal includes a unilateral conflict rule, as it gives the Regulation an extraterritorial scope:

This Regulation applies to: (a) providers placing on the market or putting into service AI systems or placing on the market general-purpose AI models in the Union, irrespective of whether those providers are established or located within the Union or in a third country; (b) deployers of AI systems that have their place of establishment or are located within the Union; (c) providers and deployers of AI systems that have their place of establishment or are located in a third country,

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<sup>72</sup> AI Act, art 5 and 6 et seq.

<sup>73</sup> AI Act, art 3(1).

<sup>74</sup> *ibid.* art 3(3) “‘provider’ means a natural or legal person, public authority, agency or other body that develops an AI system or a general-purpose AI model or that has an AI system or a general-purpose AI model developed and places it on the market or puts the AI system into service under its own name or trademark, whether for payment or free of charge’.

<sup>75</sup> *ibid.* art 3 (4) “‘deployer’ 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’.

where the output produced by the AI system is used in the Union.<sup>76</sup>

This approach, which has already been used in other Regulations, eg in the General Data Protection Regulation (hereafter, GDPR),<sup>77</sup> may raise conflicting issues related to private international law, especially where service providers carry out their activity of providing services based on AI systems from a third state.

This is because, if the provider has foreseen that its services may be used in the EU market, the application of the Regulation will be justified; however, where a provider cannot be certain that its services will be used and may have an impact within the EU, the issue is more debatable, since the provider cannot control *ex ante* whether the AI system will be used by the user in that territory. In short, this issue is linked to the so-called International Stream of Commerce test and, where the provider has not directed the offer of its AI system services to users in the territory of the Union, the application of the Regulation to these providers will be more complex.<sup>78</sup>

Therefore, having into account that AI systems incorporated in automated vehicles qualify as high-risk AI systems under the Regulation, it seems obvious that this legislation will apply to automated vehicles, hence the importance of this legislation when it enters into force.<sup>79</sup>

### 3.3. The Proposal for a Directive on adapting non-contractual civil liability rules to AI

To complete the AI regulatory regime, the European Commission has recently launched two Proposals for a Directive directly related to the issue of AI and civil liability, the first of which is the Proposal for a Directive on adapting

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<sup>76</sup> *ibid* art 2(1).

<sup>77</sup> 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 (General Data Protection Regulation or GDPR) [2016] OJ L119/1, art 3(1), Territorial scope, states: ‘This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not’.

<sup>78</sup> Pedro De Miguel Asensio considers that in these cases the application of the Regulation to these AI system providers is excessive if the use of their results in the Union is unforeseeable for him. ‘Propuesta de Reglamento sobre inteligencia artificial’, 92 *La Ley Unión Europea* (2021) 5.

<sup>79</sup> AI Act, art 6(1) (a) ‘AI system shall be considered to be high-risk where both of the following conditions are fulfilled: the AI system is intended to be used as a safety component of a product, or the AI system is itself a product, covered by the Union harmonisation legislation listed in Annex I’.

non-contractual civil liability rules to AI (hereafter, AI Liability Act),<sup>80</sup> which harmonises certain national liability rules for AI and aims to facilitate fault-based tort claims, ie subjective liability and the recovery of compensation from victims of AI-related harm.

The Proposal complements the AI Act and, to ensure due consistency when referring to AI systems, AI providers and AI users, it invokes the definitions contained in that Act. In addition, the claims under the Directive are to be based on non-compliance with the specific obligations set out in the AI Act.

### *3.3.1 Objectives*

This Directive aims to improve the functioning of the internal market by laying down uniform requirements for certain aspects of non-contractual civil liability for damage caused by the involvement of AI systems, and to adapt private law to the needs of the transition to the digital economy. In this way, it follows from the European Parliament Resolution 2020, which proposed to consider reversing the rules governing the burden of proof for harm caused by emerging digital technologies in clearly defined cases and put forward a strict liability regime for AI-enabled technologies. In some aspects, however, the Directive departs from the content of the Resolution

The question remains whether, with this Proposal, the Commission considers its legislative initiative in this area to be complete or, on the contrary, whether it remains open to the possibility of presenting other initiatives in the future in the field of broader civil liability, including contractual liability as well as non-contractual liability.

The latter option might be thought to be feasible, if we consider that the Proposal has chosen a development in two phases as the most appropriate policy option. In the first phase, it provides three measures to alleviate and facilitate the burden of proof for victims trying to prove their liability claim. In the second phase, it foresees the introduction of a review mechanism to re-assess, in particular, the need to harmonise strict liability for cases of AI use with a specific risk profile, as well as the possibility of including compulsory insurance<sup>81</sup> – aspects that have already been included in the text of the European Parliament Resolution 2020.

The Directive then provides for a review five years after the end of the transposition period into national law. At that moment, the achievement of the

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80 Commission, '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) 496 final (Proposal for the AI Liability Directive).

81 AI Liability Directive, Explanatory memorandum, 9 where it says: 'the preferred policy option was developed and refined in light of feedback received from stakeholders throughout the impact assessment process to strike a balance between the needs expressed and concerns raised by all relevant stakeholder groups'.

objectives pursued will be examined, as well as the adequacy of no-fault liability rules for claims against the operators of certain AI systems insofar as they are not covered by other liability rules such as Directive 85/374/EEC. The need to establish compulsory insurance for the operation of specific AI systems will also be assessed, as suggested by European Parliament Resolution 2020.<sup>82</sup>

### 3.3.2 *Scope of application*

The Directive applies to non-contractual civil law claims for damage caused by an AI system under fault-based liability regimes, that is to say, for a specific act or omission that has caused damage. It aims to simplify the procedures for the victim of a tort/delict to justify and prove it was the fault of a person or company that caused the damage. To this end, the Directive focuses on harmonising national rules on two specific aspects.

The first concerns the right of access by victims to relevant evidence from the defendant – a person subject to the obligations of a provider:<sup>83</sup> that is, access to information (disclosure of evidence) in relation to claims for damages based on non-contractual fault caused by high-risk AI systems. The aim is to facilitate the obtaining of compensation by victims in the case of subjective liability regimes that provide for liability to repair the damage caused intentionally or by a negligent act or omission.

The second aspect is that, with regard to the burden of proof before national courts in tort claims arising from damage caused by an AI system, the Proposal includes a presumption of a causal link between the defendant's fault and the damage caused by the AI system – the output produced by the AI system or the failure of the AI system to produce an output.<sup>84</sup> Nonetheless, the defendant shall have the right to rebut that presumption.

On the other hand, the Directive does not apply to criminal liability, nor will it affect the existing rules governing the conditions of liability in the transport sector, the rights that an injured person may have under national rules applicable by the transposition of Directive 85/374/EEC, or the exemptions from liability and due diligence obligations set out in the Digital Services Act.<sup>85</sup> Nor does it affect national provisions determining the party on whom the burden of proof rests, the standard of proof or the definition of fault,<sup>86</sup> except as provided for in arts 3 and 4, whereby the Directive complements the above-mentioned national provisions. In other words, the different national laws will continue to

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82 *ibid* art 5.

83 *ibid* art 1(1)(a).

84 *ibid* art 1(1)(b).

85 *ibid* art 1(2), final para and 1(3)(a), (b) and (c). See, Proposal for a Regulation of the European Parliament and of the Council on a single market for digital services (Digital Services Act) and amending Directive 2000/31/EC - COM (2020) 825 final.

86 AI Liability Directive, art 1(3)(d).

apply on such relevant aspects as the strict liability regime or the reversal of the burden of proof.

### 3.3.3 *Victims' right of access to evidence and intervention by national courts*

#### a) Application by the injured party to their national courts

The Proposal for a Directive provides claimants of compensation caused by a high-risk AI system with the means of identifying the persons potentially liable for the harm and of excluding those who might appear to be falsely liable.<sup>87</sup> To this end, the Proposal foresees that potential claimants may go before national courts and request them to order providers, persons subject to the obligations of a provider or a deployer of an AI system<sup>88</sup> to disclose information available to them regarding the high-risk AI system suspected of having caused the harm. However, this must be a justified request. To ensure this, the Proposal adds that potential claimants must present sufficient facts and evidence to support such a claim and the admissibility of a claim for damages.<sup>89</sup> This implies that the supplier is required to retain this information as part of its obligations under the AI Act.<sup>90</sup>

It is debatable whether, under certain circumstances, this obligation may be contradictory due to the high complexity that some AI systems may present, and because the party who has suffered the damage will not always have access to such facts or evidence. Consequently, these facts or evidence should be limited to the damage and negative effects suffered by the potential plaintiff. Otherwise, it will not be easy to prove this causal link if proof or evidence that are in the hands of the providers or users of the AI system, are lacking. It would be desirable, therefore, for courts to apply this provision flexibly; if they do not, it could lead to the refusal of the request for evidence from the potential tortfeasor.

In contrast, the court may only be asked to disclose evidence from providers and users of AI systems when the plaintiff has unsuccessfully tried to obtain such evidence directly from the defendant.<sup>91</sup> However, if the persons mentioned above – the provider, the person subject to the provider's obligations or the user – refuse to comply with an order for disclosure of the evidence requested by the potential plaintiff, prior to their application to the court, this

<sup>87</sup> *ibid* Explanatory memorandum, 12.

<sup>88</sup> Pursuant to arts 16 et seq. of the AI Act.

<sup>89</sup> *ibid* art 3(1). The AI Act requires the providers to keep the documentation at the disposal of the national competent authorities for a period of ten years since the AI system has been introduced on the market or put into service. See art 50.

<sup>90</sup> AI Liability Directive, art 3 where it provides that 'national courts, upon the request of a claimant, are empowered to order specific measures to preserve the evidence mentioned in paragraph 1'.

<sup>91</sup> *ibid* art 3(2).

should not justify the presumption of a breach of non-compliance with relevant duties of care on the part of these persons.<sup>92</sup>

Furthermore, the request for disclosure of such evidence by the national courts shall be limited to that which is necessary and proportionate to substantiate the claim for damages.<sup>93</sup> This rule ensures proportionality in the disclosure of evidence and its limitation to the minimum amount required in order to prevent and avoid general requests.<sup>94</sup> In determining whether an order for disclosure or preservation of evidence is proportionate, national courts shall consider the legitimate interests of all parties, including interested third parties, in particular the protection of trade secrets and confidential information, e.g., relating to public or national security. They may also, at the request of the interested party, take necessary measures to protect the confidentiality of evidence used in legal proceedings.<sup>95</sup> These conditions make it possible to strike a balance between the rights of the complainant and the guarantees of the legitimate interests of other parties to the proceedings.

Finally, national courts must ensure that the person ordered to disclose or preserve the evidence mentioned above has access to appropriate procedural remedies in response to such orders.<sup>96</sup>

b) Refusal of the requested party to comply with the national court's disclosure order

In the absence of compliance by the requested party with the order issued by a national court to disclose or preserve the evidence at its disposal by the conditions set out above, the national court shall presume that the defendant has not complied with a relevant duty of care respecting the evidence requested, which was intended to prove for the purposes of the claim for damages. Of course, this presumption may in any event be rebutted by the plaintiff.<sup>97</sup>

### *3.3.4 Presumption of a causal link between fault and harm caused by AI systems*

The Proposal for a Directive lays down a causality presumption in cases where a causal link between the harm and the activity carried out by the AI system can be considered reasonably likely from the circumstances in which the damage occurred.<sup>98</sup> However, as in the case of disclosure of evidence, the defendant shall have the option to rebut this presumption when they considers that the conditions giving rise to it are not met, in short, by proving that their

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92 *ibid* recital n 17.

93 *ibid* art 3(4).

94 *ibid* Explanatory memorandum, 12.

95 *ibid* art 3(4), second and third paras, and recital n 20.

96 *ibid* art 3(4), fourth para.

97 *ibid* art 3(1) and (5).

98 *ibid* art 4(1).

fault could not have caused the damage.<sup>99</sup> In order to deal with the presumption of causal link, the Proposal distinguishes between high-risk AI systems, non-high-risk AI systems and the use of AI systems for non-professional activity.

a) Claims for damage caused by a high-risk AI system

In these cases, national courts shall consider the existence of a presumption of causation between the fault or omission of the defendant and the harmful result produced by the AI system, subject to the fulfilment of certain conditions.<sup>100</sup> At this point, it might be asked: when is the fault of the AI service provider or person subject to the provider's obligations considered to exist?

The Proposal for a Directive states that claims can be brought against a provider of a high-risk AI system, a person subject to the provider's obligations or a user of a high-risk AI system. The claimant must also prove the defendant's fault in accordance with the applicable EU or national rules.

So far as claims against the provider of a high-risk AI system or person subject to the provider's obligations under the AI Act are concerned, the defendant shall be deemed not to have complied with the duty of care laid down in Union law or national law where the claimant proves that they have failed to comply with any of the obligations laid down in Section 3, obligations of providers and deployers of high-risk AI systems and other parts, of the AI Act.<sup>101</sup>

By contrast, in the case of complaints against users of a high-risk AI system, those users shall be deemed not to have complied with the duty of care laid

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<sup>99</sup> *ibid* art 4(7).

<sup>100</sup> *ibid* art 4(1). According to that provision, it will happen where all of the following conditions are met: (a) the claimant has demonstrated or the court has presumed pursuant to Article 3(5), the fault of the defendant, or of a person for whose behaviour the defendant is responsible, consisting in the non-compliance with a duty of care laid down in Union or national law directly intended to protect against the damage that occurred; (b) it can be considered reasonably likely, 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; (c) the claimant has demonstrated that the output produced by the AI system or the failure of the AI system to produce an output gave rise to the damage'.

<sup>101</sup> *ibid* art 4(2). According to that provision, these requirements are: '(a) the AI system is a system which makes use of techniques involving the training of models with data and which was not developed on the basis of training, validation and testing data sets that meet the quality criteria referred to in [art 10(2) to (4) of the AI Act]; (b) the AI system was not designed and developed in a way that meets the transparency requirements laid down in [art 13 of the AI Act]; (c) the AI system was not designed and developed in a way that allows for an effective oversight by natural persons during the period in which the AI system is in use pursuant to [art 14 of the AI Act]; (d) the AI system was not designed and developed so as to achieve, in the light of its intended purpose, an appropriate level of accuracy, robustness and cybersecurity pursuant to [art 15 and art 16, point (a), of the AI Act]; or (e) the necessary corrective actions were not immediately taken to bring the AI system in conformity with the obligations laid down in [Title III, Chapter 2 of the AI Act] or to withdraw or recall the system, as appropriate, pursuant to [art 16, point (g), and art 21 of the AI Act]'.

down in Union or national law where the complainant proves that the user<sup>102</sup> has failed to comply with their obligations to use and monitor the AI system in accordance with the instructions for use that accompanied it or; where applicable, failed to suspend or discontinue its use according to the AI Act;<sup>103</sup> or exposed the AI system to input data under its control that is not relevant in view of the system's intended purpose pursuant to the AI Act.<sup>104</sup>

In addition, where the defendant demonstrates the existence of sufficient and reasonably accessible evidence for the claimant to prove the causal link between the defendant's fault or omission and the harmful result produced by the AI system, the national court will not apply the causal link presumption.<sup>105</sup> This is an exception to the causation principle; it is up to the defendant who has breached the rules to prove that this breach has not caused harm because there are other explanations for it.

b) Claims for damage caused by non-high-risk AI systems

Respecting claims for damage caused by non-high-risk AI systems, the presumption of causation shall only apply if the national court considers it excessively difficult for the claimant to prove the causal link between the fault and the output produced by the AI system, or the failure of the AI system to produce an output.<sup>106</sup>

c) Claims for damage caused by AI systems used in the course of a personal, non-professional activity

Where the AI system was used for personal, non-professional use, the presumption of causation will apply only where the defendant has materially interfered with the operating conditions of the AI system, or if they might have been required to (and could have) determined the operating conditions of the AI system, but failed to do so.<sup>107</sup> This distinction seeks to strike a balance between the interests of injured persons' and non-professional users' by not applying the presumption of causation when non-professional users do not add risks through their behaviour.<sup>108</sup>

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102 *ibid* art 4(3)

103 *ibid* art 4(3)(a). See AI Act, art 26.

104 *ibid* art 4(3)(b). See AI Act, art 26.

105 *ibid* art 4(4).

106 *ibid* art 4(5).

107 *ibid* art 4(6).

108 *ibid* Explanatory memorandum, 14.

### 3.4. The Proposal for a Directive liability for defective products

#### 3.4.1 Objectives

Alongside the AI Liability Directive, the European Commission has also presented a Proposal for a Directive on liability for defective products (hereafter, Product Liability Directive).<sup>109</sup> This Proposal aims to provide an EU legal framework for compensating people who suffer physical injury or damage to property due to defective products. It adapts the text of Directive 85/374/EEC (which has been applied in the European Union for more than 35 years) to the digital age and that Directive will therefore be repealed when the new one enters into force. In order to fulfil its aims, the Proposal lays down ‘common rules on the liability of economic operators for damage suffered by natural persons caused by defective products’<sup>110</sup> and provides for uniform harmonisation of civil liability law in Member States. To ensure a similar level of protection in all Member States, it does not allow for the adoption of more or less stringent standards.<sup>111</sup>

Similar to the AI liability Directive, the Proposal for a Product Liability Directive seeks to alleviate the burden of proof of the claimant in complex cases, for instance involving AI systems, and also when it came to products that fail to comply with safety requirements.<sup>112</sup>

Thus, the Proposal is consistent with existing instruments concerning liability and, at the same time, complements the Proposal for an AI Liability Directive, so there is no overlap with claims that may be brought under both Directives.<sup>113</sup>

In the light of this Proposal, it is obvious that businesses must improve the safety of their products and services linked to digital technologies, including those related to AI; otherwise, they may cause damage and, in such cases, the right of injured parties to obtain compensation must be guaranteed.

#### 3.4.2 AI systems and the notion of ‘product’

Among the most relevant aspects introduced by the Proposal is that AI systems and AI-enabled goods are considered as ‘products’. This means that they fall within the scope of the Product Liability Directive, and the damage caused by defective AI systems may be the subject of a claim by the injured person

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109 Commission ‘Proposal for a Directive of the European Parliament and of the Council on liability for defective products’ COM (2022) 495 final.

110 Directive for Defective Products, art 1.

111 *ibid* art 3.

112 In order to ensure the adaptation of liability rules to AI, these provisions of the Proposal for a Directive follow to a large extent the provisions included in the European Parliament Resolution 2020, and the Proposal for a Regulation included therein. Explanatory memorandum, para 1.3.

113 Directive for Defective Products, Explanatory memorandum, paras 1.2 and 1.3.

without it being necessary to prove the tortfeasor's fault.<sup>114</sup> Therefore, in order to adapt the content of the current Directive on defective products to the reality of products in the digital age – which can be tangible or intangible – the Proposal includes 'digital manufacturing files and software' within the definition of 'product'.<sup>115</sup> It also defines when a related service is to be treated as a component of a product.<sup>116</sup>

### *3.4.3 Defectiveness of a product and the right to compensation*

As far as the product's defectiveness is concerned, the Proposal refers to products that do not provide the safety that a user is entitled to expect, including safety-relevant cybersecurity requirements.<sup>117</sup> To determine defectiveness, an objective analysis should be carried out, taking into account the intended purpose and the objective characteristics and properties of the product, as well as the expectations and requirements of the users for whom the product is intended.<sup>118</sup>

Nonetheless, there is an exclusion and a product shall not be considered to be defective 'for the sole reason that a better product, including updates or upgrades to a product, is already or subsequently placed on the market or put into service'.<sup>119</sup>

The Member States shall also ensure the right of any natural person who suffers damage (material losses) caused by a defective product to obtain adequate (full and proper) compensation. Furthermore, this right shall extend to persons subrogate to the right of the injured person or acting on behalf thereof,<sup>120</sup> even

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114 *ibid* Explanatory memorandum, para 1.3.

115 *ibid* art 4(1) and (2) which defines "digital manufacturing file" as a digital version or a digital template of a movable'. As referred to in recital n 12 of the Directive 'Software, such as operating systems, firmware, computer programs, applications or AI systems, is increasingly common on the market and plays an increasingly important role for product safety'; and in recital n 14 'Digital manufacturing files, which contain the functional information necessary to produce a tangible item by enabling the automated control of machinery or tools, such as drills, lathes, mills and 3D printers, should be considered as products, in order to ensure consumer protection in cases where such files are defective'.

116 According to Directive for Defective Products "component" means any item, whether tangible or intangible, or any related service, that is integrated into, or inter-connected with, a product by the manufacturer of that product or within that manufacturer's control; meanwhile "related service" means a digital service that is integrated into, or inter-connected with, a product in such a way that its absence would prevent the product from performing one or more of its functions'. See arts 4(3) and (4) respectively.

117 *ibid* art 6(1)(f).

118 *ibid* recital n 22.

119 *ibid* art 6(2).

120 *ibid* art 5.

though rules on calculating compensation should be laid down by Member States.<sup>121</sup>

#### 3.4.4 *Liability for defective products*

Concerning the persons who may be held liable for damage, the Proposal includes hardware manufacturers, software providers and providers of digital services that affect how the product works, eg (in the field of autonomous driving) the navigation software development service that is installed in these vehicles. Moreover, the Proposal ensures that manufacturers can be held liable for changes they make to products already on the market, even if those changes are due to software updates or machine learning.<sup>122</sup>

Regarding product liability, the Proposal distinguishes between the type of operator involved in each case. First, it determines when the manufacturer of the defective product shall be liable. In this regard, it considers that any natural or legal person who modifies a product that has already been placed on the market or put into service in the course of a commercial activity shall be regarded as a manufacturer. However, such a modification must be considered substantial under the relevant Union or national product safety rules and carried out outside the control of the original manufacturer. Likewise, the manufacturer of a defective component that has caused the product to be defective will be held liable.<sup>123</sup>

Second, the Proposal regulates the liability of manufacturers established outside the EU. In these cases, the following distinction must be made. If the importer of the defective product and the manufacturer's authorised representative are established in the territory of the Union, they can be held liable for damage caused by the defective product. However, if neither of them is established in the EU, the fulfilment service provider may be held responsible for the damage.<sup>124</sup>

Third, where the above-mentioned operators – manufacturer, importer, authorised representative of the manufacturer or fulfilment service provider – cannot be identified, the Proposal states that Member States shall ensure that each distributor of the product can be held liable provided that certain conditions are met.<sup>125</sup>

121 According to recital n 18 of the Proposal, material losses includes those 'resulting from death, or personal injury, or damage to or destruction of property and data loss or corruption'. But the Directive should not affect national rules relating to non-material damage.

122 *ibid* Explanatory memorandum, para 1.3.

123 *ibid* arts 7(1) and 7(4).

124 *ibid* arts 7(2) and 7(3).

125 *ibid* art 7(5), where the following conditions are set out: '(a) the claimant requests that distributor to identify the economic operator or the person who supplied the distributor with the product; and (b) the distributor fails to identify the economic operator or the person who supplied the distributor with the product within 1 month of receiving the request'.

Fourth, the Proposal also refers to online contracting and sets up the responsibility of providers of an online platform that is not a manufacturer, importer or distributor and which enables consumers to conclude distance contracts with traders, provided that the conditions of the Digital Services Act are met.<sup>126</sup>

Fifth and finally, it provides for the joint and several liability of those (multiple) economic operators which, in accordance with the provisions of the Directive, may be held liable for the same damage.<sup>127</sup>

### 3.4.5 Proceedings for claiming

#### a) Disclosure of evidence

In order to claim compensation from the operator responsible for the defective product that caused the damage, injured parties who have presented facts and evidence to support the plausibility of such a claim may request and obtain relevant evidence. In this respect, the Proposal provides that Member States should ensure that national courts have the power to order the defendant to disclose the relevant evidence at its disposal.<sup>128</sup>

However, Member States should ensure that national courts limit the disclosure of evidence to what is necessary and proportionate. In doing so, they shall take into account the legitimate interests of all parties, including the third parties concerned, in particular in relation to the protection of confidential information and business secrets within the meaning of art 2(1) of Directive (EU) 2016/943.<sup>129</sup> Member States shall also take specific measures necessary to preserve the confidentiality of such information when it is used or referred to in the course of judicial proceedings.<sup>130</sup>

#### b) Limitation periods to initiate proceedings for claiming

The Proposal sets up different limitation periods. First of all, there will be a limitation period of three years applicable to initiating proceedings for claiming compensation for damage caused by defective products according to the

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126 *ibid* art 7(6).

127 *ibid* art 11.

128 *ibid* art 8(1).

129 Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L157/1, art 2(1) sets up: “‘trade secret’ means information which meets all of the following requirements: (a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) it has commercial value because it is secret; (c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret’.

130 Directive for Defective Products, art 8 paras 2-4.

Directive. However, issues relating to the suspension and interruption of limitation periods will continue to be governed by national law.

To determine the start of this three-year period, the Proposal provides that it will run from the day on which the injured person became aware, or should reasonably have become aware, of all of the following: the damage; the defectiveness of the product; and the identity of the economic operator that can be held liable.<sup>131</sup> According to the Proposal's wording, it should therefore be understood that these elements must be fulfilled cumulatively, and that the time limit will not start to run until the injured party has become aware of all three. The problem will arise in cases where it is possible to identify the damage and the tortfeasor, but not the defect that has caused it when, for example, AI systems are involved.

Second, the Directive provides for the extinction of the rights conferred on the injured person under the Directive after the expiry of a limitation period of 10 years. This period will begin to run from the date on which the defective product which caused the damage was placed on the market, put into service or substantially modified, unless in the meantime the claimant has initiated proceedings before a national court against the economic operator who may be held liable.<sup>132</sup> This limitation period may exceptionally be extended up to 15 years when the injured person has not been able to initiate proceedings within 10 years due to the latency of a personal injury.<sup>133</sup>

#### *3.4.6 Burden of proof*

As a general principle, the Proposal for a Directive sets up the obligation of the claimant to prove the defectiveness of the product, the damage suffered and the causal link between the defectiveness and the damage, that is to say, the burden of proof is on the injured person.<sup>134</sup> In this sense, to ease this burden, the defectiveness of the product shall be presumed where some conditions are met, eg non-compliance with mandatory safety requirements or the obvious malfunction of the product.<sup>135</sup>

It will be presumed that there is a causal link between the defectiveness of the product and the damage, where it has been found that the product is

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<sup>131</sup> *ibid* art 14(1).

<sup>132</sup> *ibid* art 14(2).

<sup>133</sup> *ibid* art 14(3).

<sup>134</sup> *ibid* art 9(1).

<sup>135</sup> *ibid* art 9(2) According to that provision, any of the following conditions should met: '(a) the defendant has failed to comply with an obligation to disclose relevant evidence at its disposal pursuant to Article 8(1); (b) the claimant establishes that the product does not comply with mandatory safety requirements laid down in Union law or national law that are intended to protect against the risk of the damage that has occurred; or (c) the claimant establishes that the damage was caused by an obvious malfunction of the product during normal use or under ordinary circumstances?'

defective and the damage caused is of a kind typically consistent with the defect in question.<sup>136</sup>

It is now necessary to examine what will happen if the claimant cannot prove the defectiveness of the product or the causal link between the defectiveness and the damage caused. In such cases, where national courts consider that the claimant faces excessive difficulties for the burden of proof due to technical or scientific issues, there will be a presumption of defectiveness and a causal link where the claimant has demonstrated that: '(a) the product contributed to the damage, and (b) it is likely that the product was defective or that its defectiveness is a likely cause of the damage, or both'.<sup>137</sup>

In any event, the Proposal provides that the defendant shall have the right to contest the existence of excessive difficulties in proving the defectiveness of the product or the causal link between defect and damage, as well as the right to rebut any of the presumptions set out above.<sup>138</sup>

#### *3.4.7 Exemption, reduction, exclusion or limitation of liability*

Economic operators – manufacturers, importers or distributors – might be excluded from liability for damage caused by defective products, provided they can prove the existence of any of the circumstances foreseen in the Proposal.<sup>139</sup> Nevertheless, where the defectiveness that caused the damage did not exist when the product was placed on the market, put into service or (respecting a distributor) made available on the market, or where this defectiveness came into being after that moment, the economic operator's exemption from liability shall not apply where the defectiveness of the product is due to a related service; to software, including software updates; or to failure to update the software as

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<sup>136</sup> *ibid* art 9(3).

<sup>137</sup> *ibid* art 9(4) last para.

<sup>138</sup> *ibid* art 9(4) and 9(5).

<sup>139</sup> *ibid* art 10(1) which sets the following circumstances: '(a) in the case of a manufacturer or importer, that it did not place the product on the market or put it into service; (b) in the case of a distributor, that it did not make the product available on the market; (c) that it is probable that the defectiveness that caused the damage did not exist when the product was placed on the market, put into service or, in respect of a distributor, made available on the market, or that this defectiveness came into being after that moment; (d) that the defectiveness is due to compliance of the product with mandatory regulations issued by public authorities; (e) in the case of a manufacturer, that the objective state of scientific and technical knowledge at the time when the product was placed on the market, put into service or in the period in which the product was within the manufacturer's control was not such that the defectiveness could be discovered; (f) in the case of a manufacturer of a defective component referred to in Article 7(1), second subparagraph, that the defectiveness of the product is attributable to the design of the product in which the component has been integrated or to the instructions given by the manufacturer of that product to the manufacturer of the component; or (g) in the case of a person that modifies a product as referred to in Article 7(4), that the defectiveness that caused the damage is related to a part of the product not affected by the modification'.

necessary to ensure its security, provided that this is within the manufacturer's control.<sup>140</sup>

The Proposal provides for the reduction of liability when the damage is caused by both the defectiveness of the product and the fault of the injured party, or of a third party for whom the injured party is responsible.<sup>141</sup> However, this compels Member States not to reduce the liability of economic operators when the damage is caused by both the defectiveness of the product and by an act or omission of a third party, without distinguishing whether that third party has any connection with the operator.<sup>142</sup>

Lastly, the Proposal obliges Member States to ensure that the liability of an economic operator under this Directive is not limited or excluded, in relation to the injured party, by a contractual provision or by national law.<sup>143</sup>

## 4. Compatibility of the AI liability regime with the rules of private international law

### 4.1. Territorial scope of the Commission Proposals for a Regulation

Neither the Proposal for a Regulation included in the European Parliament Resolution 2020, nor the Proposal for a Regulation (AI Act), expressly refers to the introduction of private international law rules. As illustrated, both Proposals include unilateral conflict rules characterised by their extraterritorial scope, which may have an impact on the system of private international law currently in force. In this context, it is now necessary to examine some relevant questions.

The first relates to the interpretative doubts raised by art 2(1) of the Proposal for a Regulation included in the European Parliament Resolution 2020. Thus, when referring to damage caused in the territory of the Union, is it considered that the person affected must also be permanently present in that territory, ie habitually resident there? In contrast, would a temporary presence in that territory be sufficient if the person were in the territory of the Union on holiday or on a business trip?

Since the Proposal does not distinguish between these situations, the AI Act<sup>144</sup> – which also establishes a unilateral conflict rule with regard to its scope

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140 *ibid* art 10(2) in connection with provisions of 10(c).

141 *ibid* art 12(2).

142 *ibid* art 12(1).

143 *ibid* art 13.

144 AI Act, art. 2(1) states: '1. This Regulation applies to: (a) providers placing on the market or putting into service AI systems or placing on the market general-purpose AI models in the Union, irrespective of whether those providers are established or located within the Union or in a third country; (b) deployers of AI systems that have their place of establishment or are

– could apply by analogy in order to clarify this question. Accordingly, one must admit that it will suffice that the user of AI systems should be in the territory of the Union at the time of the damage; or even that the user should be in a third country, provided that the consequences of the use of AI systems occur within the territory of the Union, eg because the user of the AI systems provides services to companies located in the European Union.

On the other hand, in order to assess whether the AI system that caused the damage was developed in the territory of the European Union, would it be sufficient for the result of the damage to occur in the European Union, or is it also necessary that the system should be established in that territory?<sup>145</sup> Again, the extensive interpretation of art 2(1) of the AI Act may be helpful in answering this question. The Act states that providers may be established in the EU or in a third country. More particularly with regard to AI systems, it states that the information generated by the system must be used in the EU. Consequently, the damage must occur in the territory of the Union, irrespective of where the operator is located.

In addition, it should be borne in mind that, in some cases, damage may materialise virtually, ergo, that the principle of *lex loci damni* may be burdensome for certain companies when they are established outside the European Union and cannot foresee that damage may occur within the territory of the Union. In such case, this rule could be considered exorbitant.

All this being said, it should not be forgotten that the unilateral conflict rule seeks to protect the interests of citizens within the European Union. However, the internal market of the EU is of great interest to companies operating in the field of AI, which may compensate for the fact that they are subject to EU rules in such a matter.

The second question relating to territorial scope of the Commission Proposals for a Regulation, would be what will happen in cases where the AI system causes damage outside the Union? In principle, the application of the referred Regulations should be excluded, according to their current wording.<sup>146</sup> In such cases, it seems reasonable to resort to the general system of sources of

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located within the Union; (c) providers and deployers of AI systems that have their place of establishment or are located in a third country, where the output produced by the AI system is used in the Union; (d) importers and distributors of AI systems; (e) product manufacturers placing on the market or putting into service an AI system together with their product and under their own name or trademark; (f) authorised representatives of providers, which are not established in the Union; (g) affected persons that are located in the Union’.

145 Alexia Pato, ‘The EU’s upcoming regulatory framework on Artificial Intelligence and its impact on PIL’ (EAPIL, 12 July 2021) <<https://eapil.org/2021/07/12/the-eus-upcoming-regulatory-framework-on-artificial-intelligence-and-its-impact-on-pil/>> accessed 31 March 2023.

146 European Parliament Resolution 2020, art 2 Text of the Proposal for a Regulation requested, and AI Act, art 2.

private international law to determine the law applicable to the non-contractual liability arising from the damage caused by AI systems.

The third question arises with respect to the condition established in the Proposal for a Regulation included in the European Parliament Resolution 2020. It will apply

Where a physical or virtual activity, device or process driven by an AI-system has caused harm or damage to the life, health, physical integrity of a natural person, to the property of a natural or legal person or has caused significant immaterial harm resulting in a verifiable economic loss.<sup>147</sup>

This wording also raises interpretative difficulties regarding the delimitation of the concept of ‘significant’ and, in the absence of an autonomous and uniform definition or interpretation, we will have to refer to national rules and case law.

The fourth and final question, concerns the possibility of applying a foreign law. Taking into account the unilateral nature of these rules, neither the AI Act nor the Proposal for a Regulation included in the European Parliament Resolution 2020 responds to this question. It is therefore not clear when a foreign law may be applicable in cases of non-contractual liability arising from the use of AI systems; nor do these texts suggest the possibility of incorporating a specific conflict rule in other existing instruments for claims arising out of the use of AI. It would, therefore, be necessary to resort to the rules of private international law that are generally applicable in this area, whether the Rome II Regulation or The Hague Conventions of 1971 or 1973.

#### **4.2. Interaction with the Brussels I-bis Regulation, the Rome II Regulation and the Hague Conventions**

Where the damage occurs in the territory of the Union, the two rules included in the scope of the above-mentioned Proposals for a Regulation establish a direct link with one of the 27 Member States and, consequently, with their courts, which may have jurisdiction based on the place where the harmful event occurred.<sup>148</sup> The question will be whether these rules prevail over the application of the provisions laid down in the Brussels I-bis Regulation.<sup>149</sup> In principle, it should be noted that these rules are not incompatible, as they are delimiting the

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<sup>147</sup> *ibid* art 2(1) and recital n 16. AI Act, recital n 4 also refers to immaterial harm when states that: ‘depending on the circumstances regarding its specific application and use, artificial intelligence may generate risks and cause harm to public interests and rights that are protected by Union law. Such harm might be material or immaterial’.

<sup>148</sup> Brussels I-bis Regulation, art 7(2).

<sup>149</sup> *ibid* art 67, which provides: ‘This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in instruments of the Union or in national legislation harmonised

place where the damage occurred within the territory of the European Union; nor do they prevent the application of the rule of general jurisdiction (the forum of the defendant's domicile) provided for in the Brussels I-bis Regulation where the injured party wishes to sue before that court.<sup>150</sup>

As far as the applicable law is concerned, the mentioned unilateral conflict rules will prevail over the Rome II Regulation, as they are provisions of Community law applicable to liability arising out of non-contractual obligations.<sup>151</sup> In this context, it seems necessary to examine the interplay of these rules with conflict rules provided in other international instruments of private international law.

Furthermore, the Proposal for a Regulation included in the European Parliament Resolution 2020 limits party autonomy by considering any agreement to be void between an operator of an AI system and an injured party – natural or legal person – which circumvents or limits the rights and obligations set out in the Regulation.<sup>152</sup> In short, the Regulation would allow the parties to choose the applicable law as long as this respects the rights and obligations contained in the Regulation. In a way, this provision has some parallels with the party autonomy principle foreseen in the Roma II Regulation, which allows the parties to agree to submit non-contractual obligations to the law of their choice, albeit with certain limits.<sup>153</sup>

It is now necessary to refer to liability arising from defective products and cross-border traffic accidents, since both situations are subject to special conflict rules.

As far as defective products are concerned, the Rome II Regulation provides for the habitual residence of the injured party as the connecting factor, which is given preference over the *lex loci damni* conflict rule foreseen in both Proposals for a Regulation mentioned above.<sup>154</sup> This is despite the fact that, in such cases, the 1973 Hague Convention on the Law Applicable to Product Liability is to be applied in preference to the Rome II Regulation by the courts of Member States which are contracting parties to this Convention. As is the case with the

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pursuant to such instruments'. See Benedetta Cappiello, *AI-systems and non-contractual liability. A european private international law analysis* (Giappichelli Editore 2022) 36.

150 *ibid* art 4.

151 Rome II Regulation, art 27 states: 'This Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations'.

152 European Parliament Resolution 2020, art 2(2): 'Any agreement between an operator of an AI-system and a natural or legal person who suffers harm or damage because of the AI-system, which circumvents or limits the rights and obligations set out in this Regulation, concluded before or after the harm or damage occurred, shall be deemed null and void as regards the rights and obligations laid down in this Regulation'.

153 Rome II Regulation, art. 14(2) and (3) in relation to art. 16 (overriding mandatory provisions) and art 26 (public policy of the forum).

154 *ibid* art 5.

Rome II Regulation, the Convention also lays down conflict rules where the connecting factor of the habitual residence of the injured party prevails over the *lex loci damni* criterion.<sup>155</sup>

In matters relating to liability arising from cross-border traffic accidents, the Rome II Regulation does not provide for a specific rule and, therefore, the general rule will apply.<sup>156</sup> However, the 1971 Hague Convention on the Law Applicable to Road Traffic Accidents prevails over the general rule of the Rome II Regulation and, although the Convention establishes the *lex loci delicti* as the general criterion, it is important to note that this principle is subject to certain exceptions.<sup>157</sup>

Finally, given that neither the 1971 nor the 1973 Hague Conventions incorporate party autonomy, the parties may resort to the Rome II Regulation, which foresees such an option 'by an agreement entered into after the event giving rise to the damage occurred; or where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred'.<sup>158</sup>

In this context, should the Proposals for a Regulation be adopted as currently drafted, the main consequence will be that the unilateral conflict rules included therein may create problems in the area of tort liability arising from the use of AI systems in automated driving. On the one hand, this is because the existing instruments will remain applicable to cases where the damage caused by an AI system does not occur within the territory of the European Union; on the other hand, it is because, where the damage occurs within the territory of the Union, the aforementioned unilateral conflict rules will make the predictability of applicable law more complex due to the coexistence of different regulatory instruments of application in this area.

## 5. Conclusion

The recent package of legislative measures launched by the European Commission in the field of AI and non-contractual civil liability constitutes a legal framework adapted to the robotisation and automation of our society, and makes it possible to harmonise national legislation in these matters. These Proposals allow us to reflect on the need to reform and harmonise the regulatory framework in force, particularly in the field of private international law, and especially to ensure its adaptation to aspects related to AI and automated

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155 1973 Hague Convention, arts 4-7.

156 Rome II Regulation, art 4.

157 1971 Hague Convention, arts 4-6.

158 Rome II Regulation, art 14.

driving, and to provide an adequate response to the challenges and risks that may arise in future in this sector.

As explained earlier, the unilateral conflict rules included in the Proposals for a Regulation limits party autonomy and states the *lex loci damni* as the only connecting point. In consequence, they do not foresee other connections that may be more favourable to the injured party, such as habitual residence or the more closely connected principle. This circumstance will be particularly important in claims arising from automated driving and damages suffered in the territory of the European Union by persons who do not have their habitual residence in one Member State, since extraterritoriality of the Community rules will apply and the parties will not be able to choose the applicable law.

Moreover, it is debatable whether the *lex loci damni* rule would be appropriate for cases of damage caused through the internet, where the physical location of the damage is complex or where different places may concur.<sup>159</sup> Bearing in mind that the damage could occur in any country of the European Union, this would also be relevant, considering the lack of harmonisation of Member States' legislation in terms of such relevant aspects as, for example, those relating to the scope of compensation and limitation periods.

Furthermore, the unilateral conflict rule foreseen in the Proposal for a Regulation included in the European Parliament Resolution 2020 would only affect the 'operator' – initial and/or final – of an AI system. This means that claims against producers of defective AI systems, or against third parties who interfere by using the AI system to cause harm (as long as they have no control over the AI systems), will continue to be governed by the system envisaged in the Rome II Regulation and the 1973 Hague Convention.

Finally, both Proposals consider that AI may cause material or immaterial harms, and, when referring to immaterial harm, they require that it has to be significant immaterial harm resulting in a verifiable economic loss. Otherwise, it must be understood that the immaterial harm falls outside its application and, accordingly, the civil liability derived from these damages will also be subject to the Rome II Regulation.

In turn, the two recent Proposals for a Directive (on AI liability and liability for defective products) are both to be welcomed, since they present positive and innovative aspects for adapting non-contractual civil liability rules to AI, particularly the liability arising from using defective products based on AI systems. It is obvious that both norms will allow for a proper coordination and harmonisation of the civil liability regimes applicable to AI systems in the EU, eliminating the risk of fragmentation of national rules in this matter and the consequent negative effect of this on the proper functioning of the internal

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159 Eva Lein, *Study on the Rome II Regulation (EC) 864/2007 on the law applicable to non-contractual obligations* (British Institute of International and Comparative Law 2021), 73.

market. At the same time, they will ensure the unification of the applicable law irrespective of the law designated by the conflict rule, where the law of a Member State is involved.

In this way, the risk-based regulatory approach aimed at ensuring that high-risk AI systems comply with safety and fundamental rights requirements can be considered appropriate, also allowing for the alleged infringer to rebut the presumption of defectiveness of the product. Hence, such an approach would ensure a fair balance between manufacturers and consumers and contribute to creating a safe and reliable environment for developing AI systems within the European Union.

Another important question is whether the provisions contained in the two Proposals for a Directive could be considered as overriding mandatory provisions. If yes, the main consequence will be that they will be applicable by the courts of the EU Member States, irrespective of the law designated by the conflict rule.

To conclude, one must admit that the private international law provisions currently in force should be sufficient to provide an adequate answer to the questions of non-contractual liability arising from the use of AI systems in automated vehicles. Nevertheless, better coordination of these instruments will be necessary, either by considering the denunciation of the Hague Conventions of 1971 and 1973 or by introducing some modifications to the Rome II Regulation to bring it into line with the Conventions. In the absence of this, it would be desirable for new legislative initiatives, such as those analysed in this paper, to include conflict rules that follow the same criteria established by the above-mentioned instruments, in order to avoid this legislative dispersion making the already complex application of these rules more difficult.