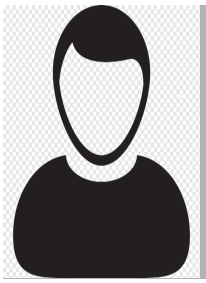
Civil Liability of Legal Tech Tools Developers face to End-users

The EU upcoming legal framework*

Susana Navas

From the upcoming legal framework on artificial intelligence perspective, in which, among other regulations, the Artificial Intelligence Act (AIA) and the Proposal for a regulation on civil liability for damages caused by AI systems (Proposal 2020) stand out, it is ostensible that Legal Tech tools at present are in legal limbo. Primarily, this paper will deal with and inspect the application of the AIA concerning these new technological tools in legal practice. Furthermore, it will address the issue of civil liability, highlighting some of the major dysfunctions that can be avoided to achieve a harmonized regulation of AI in the future on this matter.



Susana Navas is a Professor for Private Law and Head of the Faculty of Law at Autonomous University of Barcelona (Spain). She is member of the RAILS scientific committee.

I. Introduction

The legal practice is undergoing a great technological disruption[1]. The development of tools, mainly based on artificial intelligence (AI), built to reduce the manual paperwork for lawyers, as well as the creation of tools that can help end-users to prepare legal documents all by themselves, is one of the reasons for this disruption[2]. In addition to the automation of tasks that were previously carried out by the lawyers, the AI can be applied in other fields of the legal arena such as drafting judgments, predicting of recidivism of a criminal, expert evidence, or even setting up a robot judge in cases that have a low complexity level[3]. A third area, in which artificial intelligence can be applied relates to the analysis and drafting of legal texts[4]. In this work, we are going to focus on Legal Tech tools that are designed for end-users to provide them with access to online legal services. Consequently, they may have direct access to an AI application that can draft and review contracts of all types, prepare documents to claim small amounts of money (i.e. flight cancellation, bills, fines, etc.), provide legal information by using a chatbot, and reduce the need of asking legal advise from a human expert[5] which is often expensive for the consumers[6].

The application of AI in the legal field raises different controversial aspects. However, this work will focus on only two dimensions: First, it must be analyzed how the upcoming European regulation on artificial intelligence (*Artificial Intelligence Act* – hereinafter, AIA[7]) can affect the technological-legal tools. Second, if the artificial intelligence system (hereinafter, AI system), on which these tools are based, fails to act in a predictable way, where would the liability for compensation to third parties and end-users lay? In this respect, this paper will focus on the European Parliament Resolution of 20 October 2020, recommendations to the Commission on Civil Liability regime for Artificial Intelligence[8] (hereinafter, Proposal 2020), and the interactions with the AIA. Finally, it will draw some conclusions based on the findings of this analysis.

II. legal Tech Tools In The Light Of The Artificial Intelligence Act

How could AIA impact the automation of legal services and especially the Legal Tech tools that are based on AI? To answer this question, the distinction between high-risk and low-risk AI systems should be drawn. Moreover, the fact that the Proposal for a regulation on civil liability for damages caused by AI systems also uses this classification should also be taken into consideration. It can be done by exploring whether or not these systems are conceived in the same fashion as in the

* This paper is part of the R+D+i project: "Reframing of legal instruments for the business transition towards the data economy", PID2020-113506RB-I00.

1 * This paper is part of the R+D+i project: "Reframing of legal instruments for the business transition towards the data economy", PID2020-113506RB-I00.
Susskind/Susskind, *El futuro de las profesiones. Cómo la tecnología transformará el trabajo de los expertos humanos*, ed. Teell, translated by Ruiz Franco, Zaragoza, 2016, 65; Silver, "What We Know and Need to Know About Global Lawyer Regulation", *South Carolina Law Review*, vol. 67, 2016, 461.

2 Brescia et al., "Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice", *Albany Law Review*, vol. 78, nr. 2, 2014, 580; Solar Cayón, *La inteligencia artificial jurídica. El impacto de la innovación tecnológica en la práctica del Derecho y el mercado de servicios jurídicos*, Thomson Reuters, Arazadi, Cizur Menor, 2019, 60 ff.

3 Engelnann/Brunotte/Lütkens, "Regulierung von Legal Tech durch KIVerordnung", *RDi*, 2021, 317; Nieva Fenoll, *Inteligencia artificial y proceso judicial*, Marcial Pons, Madrid, Barcelona, 2018, 20; Ben-Ari, et al., "Artificial Intelligence in the Practice of Law: An Analysis and Proof of Concept Experiment", *Richmond Journal of Law & Technology*, 2017, 23 (2), 35; Barona Vilar, *Algoritmización del Derecho y de la Justicia. De la inteligencia artificial a la Smart Justice*, Tirant Lo Blanch, Valencia, 2021, 344.

4 Navas Navarro (dir.), *Inteligencia artificial, tecnología, derecho*, Valencia, Tirant Lo Blanch, 2017, 24.

5 Wagner, *Legal Tech und Legal Robots. Der Wandel im Rechtsmarkt durch neue Technologien und künstliche Intelligenz*, Springer, Wiesbaden, 2018, 4.

6 Concerning the myriad of Legal Tech tools aimed at end-users I might forward to my article "The Provision of Legal Services to Consumers Using LawTech Tools: From "service" to "legal product"", *Open Journal of Social Science*, 2019, vol. 7, nr. 11, 79.

7 Proposal for a Regulation on Artificial Intelligence [COM(2021) 206 final]. The review of this Proposal has led to two compromise texts up to now: the first one was made public on 29. November 2021 and second on 13. January 2022 [Presidency compromise text. Interinstitutional File: 2021/0106(COD)]. Additionally, the Proposal has led to two Draft Opinions and one Draft Report that I will quote later.

8 P9_TA-PROV(2020)0276. A review of this Proposal was made public on 2 November 2021 [Axel Voss, Draft Report on artificial intelligence in a digital age, 2020/2266 (INI), Special Committee on artificial intelligence in a digital age] and approved by the EU Parliament in May 2022.

AIA. Similarly, it must be assessed whether or not the liability regime included in the Proposal 2020 can be applied to the events where AI-based Legal Tech tools cause damages.

1. Concept of AI system

The AIA compromise text which was made public on 29th November 2021 has considerably narrowed the definition of AI[9] compared to the original text of the AIA. Indeed, traditional software systems and programming are excluded[10]. Yet, according to the list of techniques and approaches mentioned in Annex I of the AIA, which have embraced the term "AI", a broad spectrum of Legal Tech applications would fall under it. Nevertheless, the draft opinion of both the Committee on Legal Affairs and the Committee on Industry, Research and Energy suggest that AIA must be applied to a limited scope upon those AI systems that use data; that is to say, the technique of machine learning and deep learning[11]. In this vein, both draft opinions embraced the AI definition expressed by the OECD by the virtue that "*an AI system is a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. AI systems are designed to operate with varying levels of autonomy*"[12]. The first Draft opinion mentioned that Annex I of the AIA will refer just to: "Machine learning *and optimization* approaches, including *but not limited to evolutionary computing as well as* supervised, unsupervised and reinforcement learning, using a wide variety of methods including deep learning"[13]. I would like to draw attention to the cruciality of highlighting the autonomy of the AI system. Evidently, for the upcoming civil liability regime regarding the damages incurred by AI systems is highly relevant the degree of autonomy. It is because the more autonomy an AI system possesses the greater risk of potential harm would exist for end-users.

In the upcoming sections, this paper will refer to (1.) prohibited practices (2.) high-risk Legal Tech tools (3.) low-risk Legal Tech tools (4.). First of all, I should remind that the AIA focuses particularly on the obligations and prerequisites that providers -or developers as suggested by the draft opinion of the Committee on legal affairs- distributors, and exporters must fulfill before placing on the market or putting into service or in use an AI system[14]. However, the AIA not only regulates the pre-marketing but also contemplates the post-marketing phases, establishing a range of measures and duties that make up the content of the monitoring obligation for those subjects.

2. Prohibited practices

Article 5 para 1 of the AIA gives a list of prohibited practices, which was amended by the compromise text of 29. November 2021. For the technological tools at stake, the following are particularly relevant:

- the placing on the market, putting into service or use of an AI system that deploys subliminal techniques beyond a person's consciousness with the objective to or the effect of materially distorting a person's behavior in a manner that causes or is reasonably likely to cause that person or another person physical or psychological harm (lit. a)
- the placing on the market, putting into service or use of an AI system that exploits any of the vulnerabilities of a specific group of persons due to their age, disability, or social or economic situation, with the objective to or the effect of materially distorting the behavior of a person pertaining to that group in a manner that causes or is reasonably likely to cause that person or another person physical or psychological harm (lit. b).
- the placing on the market, putting into service or use of AI systems for the evaluation or classification of natural persons over a certain period of time based on their social behavior or known or predicted personal or personality characteristics, with the social score leading to either or both of the following:
  - Detrimental or unfavorable treatment of certain natural persons or groups thereof in social contexts which are unrelated to the contexts in which the data was originally generated or collected
  - -Detrimental or unfavorable treatment of certain natural persons or groups thereof that is unjustified or disproportionate to their social behavior or its gravity (lit. c).

In this respect, the compromise text of the Proposal is expanding the scope of Article 5 of the AIA by adding private individuals to its original scope which was previously applied exclusively to the public authorities.

9 Art. 3 (1): 'artificial intelligence system' (AI system) means a system that:
(i) receives machine and/or human-based data and inputs,
(ii) infers how to achieve a given set of human-defined objectives using learning, reasoning or modelling implemented with the techniques and approaches listed in Annex I, and
(iii) generates outputs in the form of content (generative AI systems), predictions, recommendations or decisions, which influence the environments it interacts with.

10 Recital nr. 6 of the Compromise text of proposal for a regulation on artificial intelligence made public on 29 November 2021.

11 Draft opinion of the Committee on Legal Affairs for the Committee on the Internal Market and Consumer Protection and the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD). Rapporteur: Axel Voss, 2.3.2022; Draft opinion of the Committee on Industry, Research and Energy for the Committee on the Internal Market and Consumer Protection and the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD). Rapporteur: Eva Maydell, 3.3.2022.

12 OECD Legal instruments, *Recommendations of the Council of Artificial Intelligence*, adopted on 22.05.2019, C(2019)34 C/MIN(2019)3/FINAL, online: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449 . Date of consultation: June 2022.

13 This amendment justification lies on "*the justification for a lex specialis on AI by the Commission was based on the specific characteristics, such as autonomy and opacity, of (rather new) machine-learning and data-driven AI applications. It was argued that they are so far not adequately covered by existing laws. Their existence would therefore demand new laws. Symbolic AI (dominant from the 1950s-90s) is however already covered by numerous EU and national laws. Point (b) and (c) fall exactly in this category. It is therefore not justified to address them - again - within the AI Act. Their inclusion would be contradictory to the impact assessment as well as better regulation principles*" (Amendment nr. 285, Draft opinion of the Committee on Legal Affairs).

14 Amendment nr. 41.

Out of the variety of smart legal tools designed for the end-users, only those which involve profiling, ranking, or rating people by attributing a score should be regarded as prohibited practices if they breach fundamental rights or have the tendency to manipulate vulnerability.[15]. For instance, this could be true for online platforms on which lawyers offer services[16], websites that are offering users downloadable "do-it-yourself tools"[17] or in case of automated small claims services[18].

However, at present other rules such as the Regulation (EU), 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons regarding the processing of personal data and the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation – GDPR)[19] and the Unfair Commercial Practices Directive should also be applied.[20] On the other hand, the upcoming Digital Markets Act[21] will establish limitations and prohibitions concerning intermediaries' platforms that will curb the recombination of data from different sources, which indirectly will lead to the decreasing, or even elimination, of profiling, scoring, and online behavioral advertising. In this respect, better coordination between both the AIA and the DMA will be necessary.

3. High-risk Legal Tech tools

Can some of the technological tools designed for end-users be considered "high risk" (art. 6)? On one hand, the AIA contemplates AI systems that are safety components of other goods. On the other hand, it observes the AI systems themselves; also known as "*stand-alone AI systems*", that are products or systems as stated by the Draft Opinion of the Committee on the Industry, Research and Energy[22]. The Legal Tech tools this paper is dealing with is the latter, that is, the stand-alone AI system.

For a system to be considered a "high risk" AI system, the following three conditions must be met by it:

1) The system must be covered by the legislation that will be harmonized with the AIA ("*New Legislative Framework*", NLF), which is listed in Annex II. The so-called "New Legislative Framework" is composed of the following legal texts: Regulation (EC) Nr. 765/2008/EC of the European Parliament and of the Council of 9 July 2008, setting out the requirements for accreditation and market surveillance relating to the marketing of products[23]; Decision Nr. 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products[24] and Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and product conformity and amending Directive 2004/42/EC and Regulations (EC) Nr. 765/2008 and (EU) Nr. 305/2011[25].

In addition, there is a whole range of harmonized[26] technical standards that are published in the OJEU[27] and are added to those regulations. Based on this regulatory framework, a set of rules (Directives and Regulations) have been adapted and thus, have become part of the NLF. While others are either in the revision process or are likely to begin soon, i.e. those quoted by Annex II AIA which does not mention any regulation, whatsoever, that can be applied to Legal Tech tools. Accordingly, at the first glance, they would not be considered high-risk systems, or at least we can see that this first condition is not satisfied.

2) For harmonization, the system is required to conform to the legislation by a third party before being placed on the market. This second condition, which is directly linked to the first, does not apply to the discussion topic of this research.

3) Furthermore, art. 6 para. 3 AIA[28] warn that these high-risk systems must be applied to specific areas that are expressly mentioned in Annex III. It should keep in mind that in addition to the technological tools applied in legal practice, other tech tools also exist, which are intended to be used throughout the judicial process and that can be grouped under the term "e-justice" or "smart justice"[29].

Now coming to the last domain mentioned in Annex III, number 8, it concerns "*the administration of justice and the democratic process*" and includes "*AI systems intended to be used by a judicial authority or on their behalf for interpreting facts or the law for applying the law to a concrete set of facts*". Therefore, intelligent tools that are currently applied by legal practitioners would be left out. It does not seem that the area of "*the administration of justice and democratic processes"* could be interpreted so broadly as to encompass the automated "legal products" that are being discussed here[30]. Thus, they can not be considered "high risk" systems under the AIA.

However, as long as these systems involve machine learning or/and natural language processing, there is always a risk of

15 Engelmann, Brunotte,Lütkens, "Regulierung von Legal Tech durch die KI-Verordnung", RDi 2021, 317,321.

16 Council of Bars & Law Societies of Europe, *CCBE Guide on Lawyer's use of online legal platform, //www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_Guides_recommendations/EN_DEON_20180629_CCBE-Guide-on-lawyers-use-of-online-legal-platforms.pdf.* Date of consultation: June 2022; Some global platforms for lawyers are Rocket Lawyer, Anwalt.de, FlatLaw, Legalzoom, Avvo and Got.Law.

17 L. Gutiérrez/L. Domínguez, "La automatización de contratos" in B. Andrés (ed.), *Legal Tech. La transformación digital de la abogacía*, Wolters Kluwer, La Ley, Madrid, 2019, 234.

18 Bennett et al., *Current State of Automated Legal Advice Tools*, April 2018, Annex A.

19 OJEU L 119/1, 4.5.2016.

20 Consolidated text: Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) (Text with EEA relevance) Text with EEA relevance, 2005L0029 — EN —28.05.2022—001.001—1. Online: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02005L0029-20220528&from=EN. Date of consultation: June 2022.

21 COM(2020) 842 final. Hereinafter, DMA.

22 Amendment nr. 15.

23 OJEU L 2018/30, 13.08.2008.

24 OJEU L 218/82, 13.08.2008.

25 OJEU L 169, 25.06.2019.

26 More on this matter can be found at: https://ec.europa.eu/growth/single-market/european-standards/vademecum_en. Access date: June 2022.

27 Blue Guide publication, (nt 75) 4.1.2.2.

28 Axel Voss 2.3.2022.

29 Susskind, *Online Courts and the Future of Justice*, Oxford University Press, Oxford, 1st ed. 2019, 253; B. Vilar, *Algoritmización del Derecho*, 610.

30 Nonetheless, it should be expanded in order to include ODRs.

biases and lack of transparency[31]. Of course, if the system is not fed with quality data, it could, for example, display racial, ethnic, or cultural biases by denying access to justice to a certain group of the society or make "unfair decisions. The impact of such types of Legal Tech on the fundamental rights of due process, right to defense, right to trial, etc. assert that such tools should be classified as 'high risk" tools or even be categorized as prohibited practices.[32] Based on this observation, it is recommended that Annex III should include not only the tech tools intended for court use but also the tools that are used in the legal practice by lawyers and law firms or those made by the tech companies for consumers or end-users.

To partially avoid situations where it is uncertain whether an AI system would affect a specific area and- thereby make it a "high risk" system, the Draft Opinion of the Committee on Industry, Research and Energy suggested the introduction of a new rule: "*In case there is uncertainty over the AI system's classification, the provider shall deem the AI system high-risk if its use or application poses a risk of harm to the health and safety or a risk of adverse impact on fundamental rights of users, as outlined in Article 7(2)*"[33]. Accordingly, some Legal Tech tools could be considered "high risk" despite their absence in Annex III.

A specific purpose "high risk" AI system must fulfill the following requirements, i.e. (1) a risk management system (art. 9); (2) and if the system uses machine learning, data sets must meet a range of quality requirements (art. 10), to be considered as "high quality". This can significantly reduce the number of errors and discriminatory biases; (3) technical specifications must be documented (art. 11), (4) a mechanism to record the system motions must be implemented (art. 12), (5) transparent information for users (art. 13), who are not consumers but those who own and/or control the system (art. 3 para. 4), (6) human supervision (art. 14), and (7) accuracy, robustness, and cyber security (art. 15).

4. Low-risk Legal Tech tools

Low-risk AI systems are defined as "limited risk" in the AIA. While analyzing them we should consider the following two aspects. First, art. 52 AIA states a duty of transparency about "certain" AI systems when they are interacting with end-users. In such cases, the end-users should be informed by the service provider that they are interacting with an AI system and not a person unless it is an obvious circumstance (i.e. virtual assistant or a roboadvisor).

Second, art. 69 AIA deals with the AI systems that present "minimal or residual risk" and seeks to promote the development of codes of conduct with the clear intention that providers voluntarily comply with the requirements that are set out in Title III, Chapter 2 AIA and they have been referred earlier in this article.

Obviously, some of the intelligent legal tools (e.g. chatbot) are based on decision trees (e. g. answers and questions), therefore it is safe to assume that they pose a low risk for the consumers.

Nonetheless, some of the Legal Tech tools embrace different functionalities that can qualify them as "high risk" while others are "low risk"[34]. Such hybrid AI systems are not brought under the umbrella of AIA. Therefore, there is uncertainty about the set of rules applicable to such AI systems. This gap should be bridged through the parliamentary drafting process.

In addition, the purpose of an AI-system must also be taken into account. Indeed, there is a difference between a "general purpose" AI system and a "specific purpose" (intended purpose) AI system. The first comprises AI systems that are capable of executing general functions established in Recital nr. 70a added by the compromise text of 29 November 2021, such as voice or image recognition, pattern detection, video generation, translations, questions, and answers, etc On the contrary, the second refers to the AI systems that have an intended use. It is specified by the provider or by whoever introduces or puts it into use or service in the market and determines its terms and circumstances of use and creates instructions. This distinction is relevant to the extent that if the AI system is of a general-purpose system, it should not meet the requirements given in the AIA. Whereas, they will be mandatory for intended purpose AI systems (new art. 52a). From this discussion, it can be deduced that only AI systems with minimal and residual risk are taken into consideration. It seems unlikely that a high-risk general-purpose AI system should not be complying with the requirements of the AIA just because it is a "general" purpose AI system. In short, the relationship between the classification of the type of an AI system based on the degree of risk it poses and its purpose is not as clear as it is desired to be.

III. The Proposal For A Regulation On Civil Liability Regime For Artificial Intelligence And legal Tech Tools

In the previous section, the questions that arise when the AIA is related to the Legal Tech tools were highlighted and explored. Now, we will dwell on the proposed regulation on a civil liability regime (Proposal 2020) in the event of damage caused using AI systems. Two dimensions will be discussed here. First, I will present the most relevant aspects of the Proposal 2020

31 The absolute absence of errors is not possible. Therefore, art. 10 para. 3 AIA has been amended by the compromise text, made public on 13. January 2022, in order to make clear this concern. The proposed text considers that "Training, validation and testing data sets shall be relevant, representative, *and to the best extent possible*, free of errors and complete" [Interinstitutional File: 2021/0106(COD)]. Emphasis added.

32 Engelmann, Brunotte, Lütkens, "Regulierung von Legal Tech durch die KI-Verordnung", RDi 2021, 317, 318 ff; Nieva Fenoll, *Inteligencia artificial*, 127 ff.

33 Amendment nr. 33.

34 "Identification and assessment of existing and draft EU legislation in the digital field", study requested by the AIDA special committee, January 2022. Online: https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)703345. Date of consultation: June 2022.

and, secondly, these will be linked to both the Legal Tech tools and the AIA.

1. Overview

This Proposal 2020 distinguishes a dual liability regime which depends on whether the damage is caused by a high-risk or low-risk system[35]. Art. 3 lit. c AIA describes high-risk AI systems as autonomously operating systems that can potentially cause significant harm to one or more people ("collective damage") at random and in excess of what can reasonably be expected from the operation of that system. To determine the possibility to cause damage, the relationship between the degree of severity of the potential damage, autonomy status in the decision-making process, probability of risk materialization, and the context in which the system is used must be taken into account[36]. Therefore, the core elements of a high-risk system are two. One is the degree of autonomy of the system (art. 3 lit. b) which comes under the umbrella definition of an AI system mentioned in both of the abovermentioned Draft opinions. Second, is the control exercised by the operator on the AI system (art. 3 lit. g).

An annex to the Proposal will list the high-risk systems and the critical sectors in which they could be used (art. 4 para. 2). The White Paper on AI[37] has already mentioned the sectors that are considered critical such as transport or assistance. The recent Draft Report prepared by Axel Voss which was made public on 2. November 2021, addresses six cases that affect critical sectors, and it may be an excellent starting point for preparing the list referred to in the Proposal. These critical sectors are the following: health, green deal, foreign policy and security, democratic process, competitiveness, and labor market[38]. It should be addressed that the definition of an AI system given by the Committee of Legal Affairs based on the autonomy level comes close to that provided in the Proposal at stake. This closeness is essential and it is welcomed for the sake of the future European legal harmonization regarding AI.

The damages caused by high-risk AI systems must be compensated by the means of a strict liability regime. Whereas, the damages caused by low-risk AI systems will be compensated based on negligence. This new regulatory framework takes a "risk-based approach" so that the person (the "operator"), who is in the best position to control and minimize the risk, holds the liability for any potential damages that the technology may cause. This new liable subject (the "operator" of the AI system) is added to other liable subjects such as the manufacturer of the AI system, the owner, the holder, and the user thereof, and all of these roles may potentially concur in the same person.

In this respect, the Proposal 2020 contemplates two operators: the front-end operator and the back-end operator. Both operators would be considered jointly and severally liable. Pertaining to the "operator", the Proposal 2020 follows the *Report of the Expert Group on Liability and New Technologies*[39] which considers the existence of two or more AI system operators, that are, the front-end and the back-end operator[40]. Hence, the tools by the tech companies they introduce in the market i.e. those which the clients of a law firm are allowed to use throughout its webpage can be included within the scope of this proposal. In this case, the company is the back-end operator that has produced the tool and the law firm is the front-end operator. There are also two operators when the public authority gets the assistance of a technological tool that is to be used by citizens. Here, the public authority would be the front-end operator.

Although the Proposal 2020 is based on the assumption that high-risk AI systems usually have more than one operator, it does not rule out the possibility that there could be only one operator who may also be the manufacturer of the system.

The damages for which the operator may be held responsible have more characteristics of the analog reality than that of the digital one. Indeed, the operator might also be held liable for corporeal injuries to the victim, resulting in serious harm or even death. Also, the verifiable financial losses which occur due to such corporeal losses, as well as the (art. 6) material damages to goods that are of the property of the victim and, finally the non-pecuniary damage financial losses, must also be added to the liability of the operator (art. 5). However, the non-pecuniary damages, financial losses, or any other damages that occurred to the digital assets of the victim are not compensated[41].

2. Legal Tech tools concerning both the Proposal 2020 and the AIA

The application of the liability regimes that are set out in the Proposal 2020 to end-users of Legal Tech tools may potentially raise the following issues. In the first place, we may consider if, when critical sectors, in which damages can potentially occur, be drawn up in the Annex of the Proposal 2020, the administration of justice and the automated legal services will be included. This is essential to ensure that no high-risk AI sys-

35 The Proposal defines "damage or harm", in art. 3 lit i, as such: "*adverse impact affecting the life, health, physical integrity of a natural person, the property of a natural or legal person or causing significant immaterial harm that results in a verifiable economic loss*". The concept of "significant harm", a legal expression used by the American Law of manufacturer's civil liability for defective products (Geistfeld, *Principles of Products Liability*, New York, Foundation Press, 2011, 115 ff), raises questions due to its excessive ambiguity (Bertolini, "Artificial Intelligence and Civil Liability", Study requested by the JURI Committee, European Parliament, July 2020, 77).

36 Wagner, "Haftung für Künstliche Intelligenz – Eine Gesetzinitiative des Europäischen Parlaments", *ZEuP* 2021, 554.

37 White paper on Artificial Intelligence – A European approach to excellent and trust", COM(2020) 65 final, 19.2.2020.

38 Axel Voss, *Draft Report on artificial intelligence in a digital age*, 2020/2266 (INI), Special Committee on artificial intelligence in a digital age, 2.11.2021, 53. See: AIDA_Compromise_Amendments_1647964752.pdf. Accessed: June 2022.

39 Expert Group on Liability and New Technologies (NTF), "*Liability for Artificial Intelligence and other emerging technologies*", of 28 November 2019, online: LiabilityforAIandotheremergingtechnologies.pdf. Date of consultation: June 2022.

40 Art. 3 lit. e states that 'frontend operator' means "any natural or legal person who exercises a degree of control over a risk connected with the operation and functioning of the AI-system and benefits from its operation" and lit. f. refers as back-end operator "any natural or legal person who, on a continuous basis, defines the features of the technology and provides data and an essential backend support service and therefore also exercises a degree of control over the risk connected with the operation and functioning of the AI-system".

41 Wagner, "Haftung für Künstliche Intelligenz– Eine Gesetzinitiative des Europäischen Parlaments", *ZEuP* 2021, 554, 567.

tem according to the AIA ends up falling under the category definition of low-risk AI system under the Proposal 2020. It is known that the AIA will be applied mainly in a phase before it is allowed to circulate in the market, put into service, or use an AI system whereas the Proposal 2020 is applicable to AI systems when they are already put into circulation. However, if a Legal Tech tool makes a decision that randomly classifies consumers, i.e. introduces clauses that could damage them, if they are automatically included or not deleted in the drafting of a contract, then such an AI system would not be considered as high-risk based on the Proposal 2020, but likely it would be so by the AIA. According to the Proposal 2020, they would be low-risk AI systems and the consumer protection would be lower as compared to the high-risk AI system because the liability of the operator would be strict in such a case. Some degree of coordination between the AIA and the Proposal 2020 seems advisable in the critical areas where the malfunction of an AI system has the potential to cause damage to more than one person. In this respect, perhaps a rule similar to the one proposed in relation to the AIA could be introduced regarding the uncertainty of whether a system can be applied in a specific sector if the developer/provider has remarked a possibility of its negative impact on the fundamental rights of the user than it should be considered as high-risk. Following the draft opinions' recommendations, some high-risk Legal Tech tools could be covered under the Proposal 2020 as well.

A controversial issue may arise from the language of art. 62 para. 1 AIA that established the duty of AI system providers (or developers), once their system starts circulating in the market, to notify the market surveillance authorities of any failure or malfunction they might encounter which may constitute a breach of the obligations under the EU fundamental rights laws. The question arises whether such a notification would amount to the admission of the breach by the provider? In doing so, would the provider be implicitly recognising the causal link with the damage caused to the victim? Even if there are no damages, such a notification would indefinitely impact the field of civil liability since it is going to predetermine the possibility of certain harmful behavior. The rule may discourage reporting on the AI systems that are malfunctioning to avoid the potential liability for damages[42].

Neither the AIA nor this Proposal 2020 includes a rule that contemplates and encompasses mixed-risk AI systems that have the functionalities of both a high-risk and a low-risk systems[43]. What requirements must AI systems meet in such a cases? Those of the high-risk AI systems? These issues are not only important for the pre-marketing and post-marketing obligations of the system but are also especially relevant to the matters of civil liability since the users would find it difficult to determine whether a system is high-risk or low-risk. In the case of mixed purposes AI systems (general and specific), there is a solution since the new art. 52a section 3 AIA compromise text of 29.11.2021 considers that the AI system will be subject to the AIA. It remains to be seen whether the final text of the Proposal 2020 will take this aspect into account. It is important to take into consideration that in the future many of the Legal Tech tools on the market would include more functionalities, a hybrid mix of both high and low-risk systems. So it will be essential to know exactly what standards are going to be applied in such cases.

On the other hand, as noted above, pure non-pecuniary damages are not compensated, so the damage caused as a result of invisible discrimination or the damages to fundamental rights ("social damages") should be compensated according to the national laws on civil liability. This exclusion of non-pecuniary damage is not unusual to the communitarian law, since the regulation on civil liability for damages caused by defective products is aligned through this rule. However, the verifiable financial losses derived from such non-pecuniary damages are compensated by the Proposal 2020. This compels the aggrieved to file claims based on rules with different levels of protection. In fact, as Prof. Wendehorst points out, the regulation concerning social risk (also called "fundamental right risks") presents many gaps because they are addressed in different rules (e.g. personal data protection, antidiscrimination Law) and not quite well suited to tackle the challenges that AI poses[44]. It is true that art. 2 para. 3 of the Proposal 2020 settles that this Regulation is applicable without prejudice to any additional liability claims resulting from contractual relationships[45], as well as from regulations on product liability, consumer protection, anti-discrimination, labour and environmental protection between the operator and the natural or legal person who suffered harm or damages because of the AI system and that may be brought against the operator under Union or national law. Nevertheless, this exactly is the issue. Social risks are addressed in different norms leading more than likely to disparate outcomes for the aggrieved victim when each of them is applied. In my view, an AI system that harms fundamental rights should be considered as high-risk under this Proposal 2020.

In addition, damages caused to other digital assets of the victim are not explicitly addressed. Thus, for example, when the consumer downloads digital content that is generated by the Legal Tech tool, it may affect other contents or data as well. In such case, if these damages are not incurred due to the lack of conformity of the digital content (art. 7 lit. a Directive 2019/770) of the European Parliament and the Council of 20 May 2019 on certain aspects of the contracts for the supply of digital content and digital services[46]), the contractual rules must be applied[47]. They may be compensated under the rules of the Proposal 2020, as soon as the wording "*items of property owned by the affected person*" (art. 5 para. 2 lit. c) were interpreted as consisting of both tangible and intangible assets. Otherwise, the consumer should seek protection under other regula-

42 European Parliament, AIDA special committee, "Identification and assessment of the of existing and draft EU legislation in the digital field", 60.

43 European Parliament, AIDA special committee, "Identification and assessment of the of existing and draft EU legislation in the digital field", p. 58.

44 Wendehorst, *Safety and Liability Related Aspects of Software*, EU Commission, 2021, 45.

45 Ebers, Breunig, SWK Legal Tech, *Haftung des Legal Tech-Unternehmens ggü. Kunden*, 2023, forthcoming.

46 OJEU L 136/1, 22.5.2019.

47 When the affected person also files a contractual liability claim against the operator, no compensation shall be paid under the Proposal, if the total amount of the damage to property or the significant immaterial harm is of a value that falls below 500 euros (art. 6 para. 2 Proposal 2020).

tions: one which is related to the responsibility of the manufacturer of the Legal Tech tool or under the general rules of civil liability.

Finally, for many of the Legal Tech tools that exist in the market for consumers, the operator is also the manufacturer. In this case, the Proposal in art. 11 prescribes that the Proposal's liability regime will prevail over that of the manufacturer's liability as stated by the Products Liability Directive (hereinafter, PLD[48]). Which, referring to low-risk systems, means reducing the level of consumer protection. Indeed, a strict liability regime would cease to apply in favor of one based on fault.

IV. Conclusion

In conclusion, there is a pressing need for coordination between different proposals for regulations related to AI to ensure effectiveness in the protection of various stakeholders, especially the end-users. Throughout this study, some dysfunctions were addressed when relating the AIA to the Proposal 2020. The latest draft opinions with their amended suggestions have brought both standards closer. It remains to be seen whether the same level of coordination will be achieved when the PLD amendments are made public and how the liability of the AI system manufacturer will be stressed. As for now, it is safe to say that in the case of the future legal framework for AI in Europe, Legal Tech tools used in law firms, that is, *in-house*, and those designed for end-users are in a kind of legal limbo and the risk of a decrease in protection is high.

48 OJEU L 210, 7.8.1985, 29-33.