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The EU Approach to the Liability for AI systems. Key Policy Decisions, Milestones, and Future Expectations

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March 2018 Expert Group: New Technologies formation / PLD formation

November 2019 Expert Group Report – *Liability for AI and other emerging digital technologies*

February 2020

 White Paper on AI - *A European approach to excellence and trust*

 Commission Report *on safety and liability implications of AI, the Internet of Things and Robotics*

May 2020

 Draft Report *with recommendations to the Commission on a Civil liability regime for artificial intelligence*

 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL *on liability for the operation of Artificial Intelligence-systems*

 ...

1 -DISTINCTIVE FEATURES OF AI AND EMERGING DIGITAL TECHNOLOGIES: DISRUPTIVE POTENTIAL

INCREASING AUTONOMY

Unpredictability

DATA-DEPENDENCE

OPENNESS

VULNERABILITY

Cybersecurity

COMPLEXITY

Design and operation

Multiple actors (ECOSYSTEMS)

Plurality of parts and components

OPACITY

"Black Box" effect
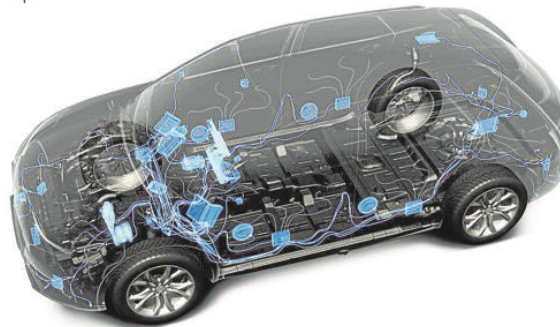
IMPACT ON LIABILITY RULES

DAMAGE	*Loss of data* *Economic losses* *Massive damages – virality*
CAUSATION	*1). Proof and evidence* *2). Plurality of causes* *3). Opacity* *4). Unpredictability for learning*
FAULT	*1). Non existence of models and standards of care* *2). Deviation due to learning*
VICARIOUS LIABILITY	*Equivalent to human assistant?*
DEFECTIVE PRODUCT	*Product? / Defect?/ Put into circulation? / Development risk?*
STRICT LIABILITY	*High risk: scale, severity, autonomy, likeliness, context, public space, etc*

2 –PERSPECTIVES ON LIABILITY FOR EMERGING DIGITAL TECHNOLOGIES

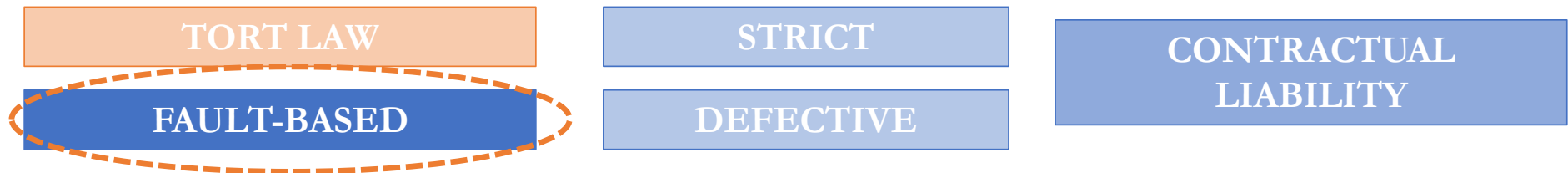| TORT LAW | STRICT | CONTRACTUAL LIABILITY |
| FAULT-BASED | DEFECTIVE | |

A). NO LEGAL PERSONALITY – at the moment…

TORT LAW

FAULT-BASED

STRICT

DEFECTIVE

CONTRACTUAL LIABILITY

B). FAULT LIABILITY AND DUTIES OF CARE

OPERATOR's duties of care

OPERATOR's defence

CHOOSING

+

MONITORING

+

MAINTAINING/ UPDATING

ACTIVATION WITHOUT KNOWLEDGE

+

Force majeure

Third party interference: untraceable or insolvent

NO defence

AUTONOMY

TORT LAW

FAULT-BASED

STRICT

DEFECTIVE

CONTRACTUAL LIABILITY

C). OPERATORS' STRICT LIABILITY

SCENARIOS

Non-private environments (public spaces)

Others exposed to risk

Significant harm: potential frequency and severity of harm

OPERATOR

CONTROL

+

BENEFIT

BACKEND OPERATOR

More control over the risks

FRONTEND OPERATOR

2 – PERSPECTIVES ON LIABILITY FOR EMERGING DIGITAL TECHNOLOGIES
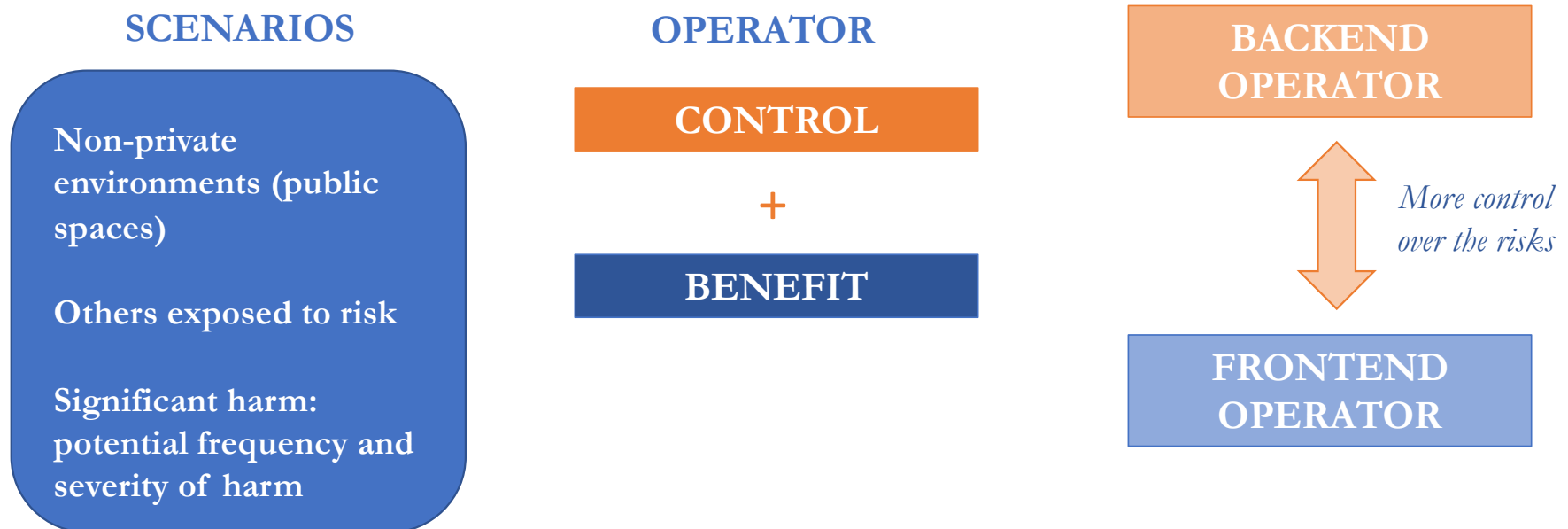
TORT LAW	STRICT	CONTRACTUAL LIABILITY
FAULT-BASED	DEFECTIVE	

D). PRODUCER' STRICT LIABILITY

SCENARIOS

Defective digital products

Updates

Digital services provided on a continuos basis

PRODUCER

After the product is placed on the market

AFTER-PLACING DEFECTIVE PROVISION

+

NO UPDATE OR PROVISION (under-expected safety)

BURDEN OF PROOF

i.- Reversed: proving defect

ii.- Alleviation: causal relationship defect-damage

iii.- Supplemented by fault-based liability on monitoring

SAFETY RULES

2 – PERSPECTIVES ON LIABILITY FOR EMERGING DIGITAL TECHNOLOGIES

TORT LAW

FAULT-BASED

STRICT

DEFECTIVE

CONTRACTUAL LIABILITY

E). VICARIOUS LIABILITY FOR AUTONOMOUS SYSTEMS

Functional equivalence

Outperforms

Comparable technology

+

Duty of care in choosing

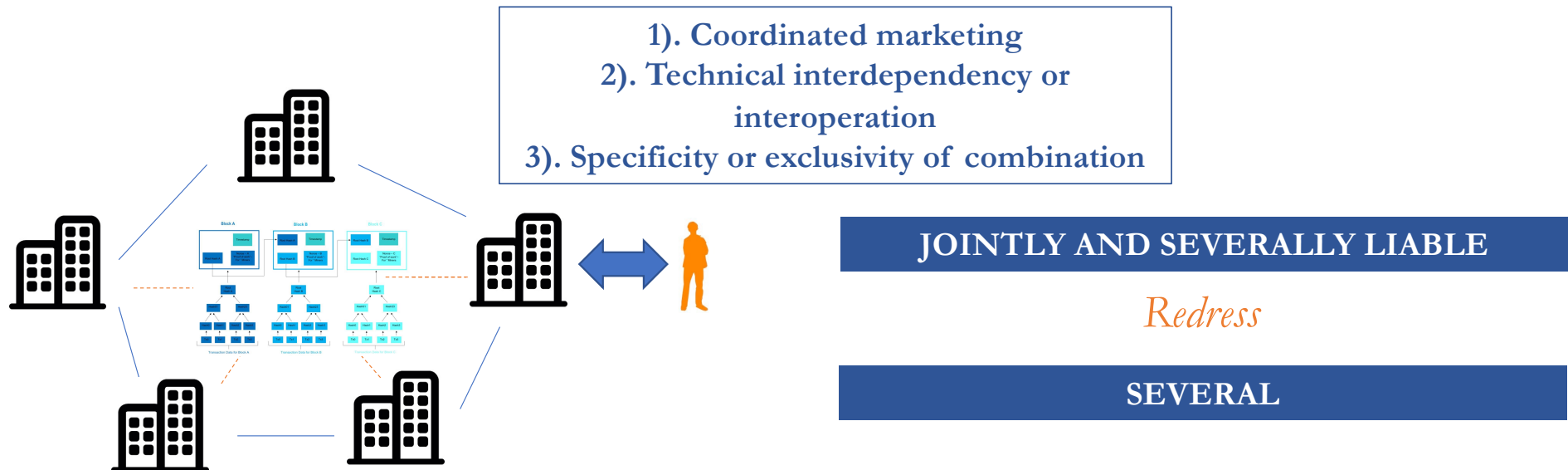## 2 –PERSPECTIVES ON LIABILITY FOR EMERGING DIGITAL TECHNOLOGIES

TORT LAW	STRICT	CONTRACTUAL LIABILITY
FAULT-BASED	DEFECTIVE	

F). COMMERCIAL AND TECHNOLOGICAL UNITS

1). Coordinated marketing
2). Technical interdependency or interoperation
3). Specificity or exclusivity of combination

JOINTLY AND SEVERALLY LIABLE

Redress

SEVERAL

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