

# Automating decision-making in commercial transactions

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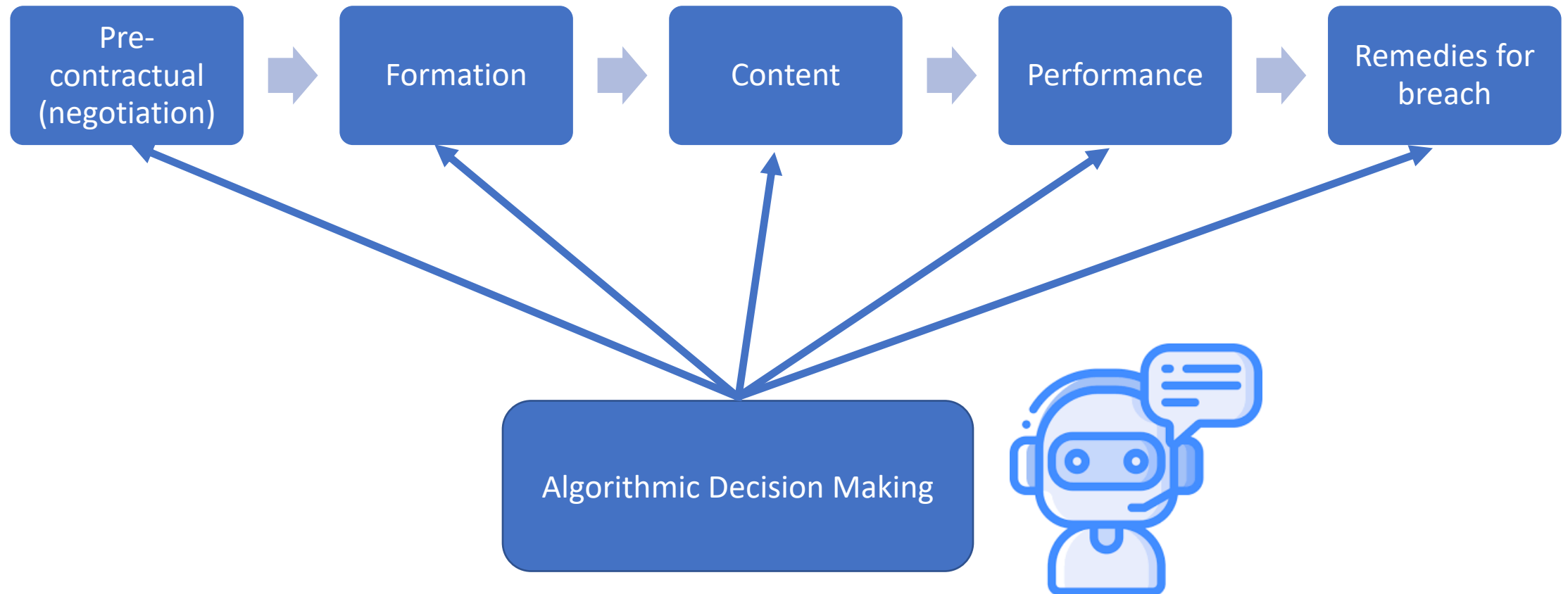
*BBVA Foundation Project on Responsible Algorithms: Developing an EU Legal Framework for Responsible ADM in commercial transactions*

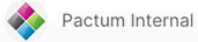
*Co-Reporter ELI Project on Algorithmic Contracts*

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# ADM in the Contract Life Cycle: AI Contracting





Hello and welcome to the Supplier Portal. We're glad to have you here. We would like to thank you for being a great partner to us and providing such a high level of service. We look forward to discussing our relationship with you as a representative of your company.

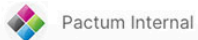
How are you today?

Great!



Through this portal, we will explore potential opportunities for your company's growth and how we could best support your business.

Thank you, understood



Before we begin, we'd like to provide a brief overview of the stages to the upcoming discussion. Please glance to the left-hand side of your screen. Here, you can follow your progress through the stages of the discussion.

**1. Introduction:** Review information regarding the portal and current contract terms

☒ **1. Introduction**

- ☐ 2. Exploring Interests
- ☐ 3. Contract Review
- ☐ 4. Summary and Signing
- ☐ 5. Feedback

## About Supplier Portal

We are reorganizing the supply base. There is an opportunity for you to transition from a Transactional Supplier to a **Preferred Supplier** status.

The discussion requires 30 minutes of your time. You can close the window and revisit the link at any time until the 15th of February, 2021.

The outcome of this discussion is Preferred Supplier Agreement document that will be sent to your email for reviewing and signing. If no agreement is reached, we will continue as a Transactional Supplier.

Translate Language

New Comment  
Delete  
Resolve  
Previous  
Next  
Show Comments

Track Changes  
All Markup  
Mark-up Options

Reviewing

Accept  
Reject

Compare

Block Authors

Protect Document

Always Open as Read-only

Hide Ink

party to this agreement nor shall it preclude or restrict any further exercise of that or any other right or remedy.

6.2 No single or partial exercise of any right or remedy provided under this agreement or by law shall preclude or restrict the further exercise of that or any other right or remedy by either party.

6.3 A party that waives a right or remedy provided under this agreement or by law in relation to another party, or takes or fails to take any action against that party, does not affect its rights in relation to any other party.

## 7. ASSIGNMENT

Except as otherwise provided in this agreement, no party may assign, sub-contract or deal in any way with, any of its rights or obligations under this agreement or any document referred to in it.

## 8. LIABILITY

The Receiving Party shall indemnify and hold harmless the Disclosing Party from and against all losses, damages and claims incurred or suffered in relation to any breach of this Agreement.

## 9. NO PARTNERSHIP

Nothing in this agreement is intended to, or shall be deemed to, establish any partnership or joint venture between any of the parties, constitute any party the agent of another party, nor authorise any party to make or enter into any commitments for or on behalf of any other party.

## 10. THIRD PARTY RIGHTS

A person who is not a party to this agreement shall not have any rights under or in connection with it.

## 11. GOVERNING LAW

11.1 This Agreement and any non-contractual obligations arising out of or in connection with it shall be governed by the Laws of England and Wales.

Luminance-Corporate | Luminance

Ask Lumi

Ask Lumi any questions about your contract

AI Review

TAGS

MARKUP

Document Summary

Analysis

ON

OFF

Options

2 Unacceptable

3 Non-Standard

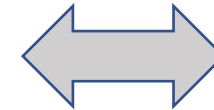
135 Acceptable

9 Missing

Select Traffic Light Analyzed text to view detailed analysis.



**Vendor /  
lessor**

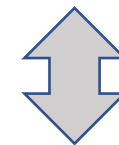


**Data  
Provider**

**Buyers – smart store**

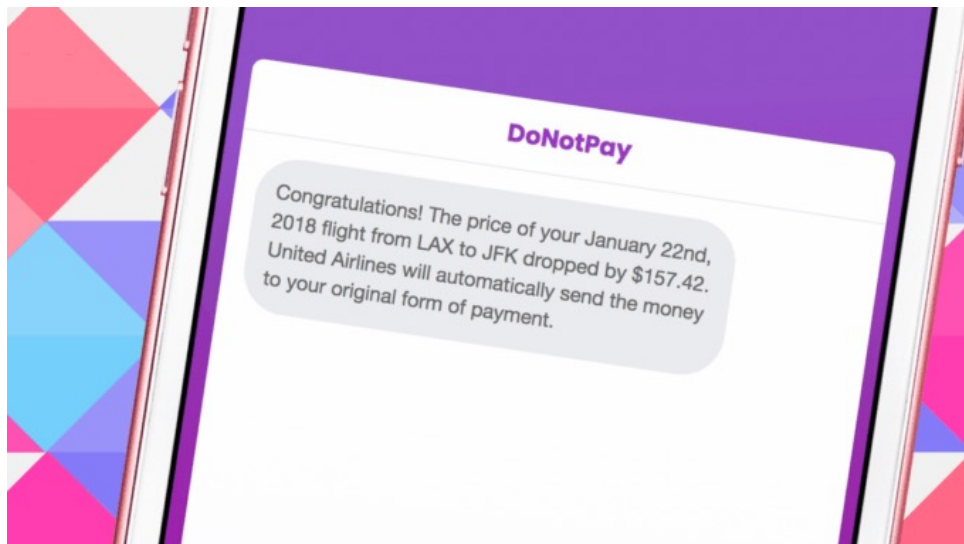


**Sellers – smart  
warehouse**



**Operator**





Are the decisions adopted by ADM or with the support of ADM valid and enforceable?

Can we simply apply the functional equivalence to declarations, agreements, performance actions, remedies, actions, settlements? Even if there is no human intervention in each and every action of the ADM?

...

Human-centric Contract Law and Liability rules (consent, capacity, intent, mistake, fault, meeting of minds)

To whom to **attribute** the legal effects

To whom to allocate **liability** for the damages caused

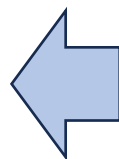
Are ADM-specific rules needed?

Legal/regulatory requirements: impact on private law

# ELI Guiding Principles on ADM in Europe



**United Nations**



**UNCITRAL WG IV on E-Commerce**  
*Use of AI in international trade*

- Guiding Principle 1: Law-compliant ADM.
- Guiding Principle 2: Non-discrimination against ADM.
- Guiding Principle 3: Attribution of decisions adopted by ADM
- Guiding Principle 4: Disclosure that the decision-making is automated.
- Guiding Principle 5: Traceable decisions.
- Guiding Principle 6: Reasoned decisions
- Guiding Principle 7: Allocation of risks to the operator
- Guiding Principle 8: No limitations to the exercise of rights and access to justice
- Guiding Principle 9: Human oversight/action
- Guiding principles 10: Human review of significant decisions
- Guiding Principle 11: Responsible ADM
- Guiding Principle 12: Risk-based approach for ADM



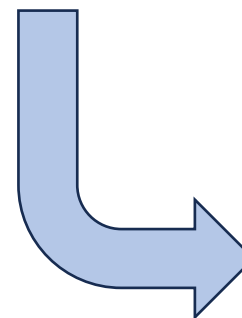
**UNIDROIT**  
International Institute for the Unification of Private Law  
Institut international pour l'unification du droit privé



**European Commission**

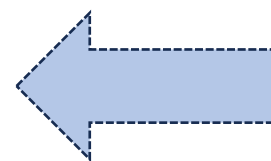
**EU Proposals**

*AI Liability Directive*  
*Revised Directive on Defective Product*  
*Pilot project on Novel forms of contracting*



**ELI**  
EUROPEAN  
LAW  
INSTITUTE

**ELI Algorithmic Project**  
*ADM-readiness test on B2C*



## INPUTS

*human-based inputs, machine-generated data, or interactions with the environment*

## PRE-DEFINED OBJECTIVES

## TECHNIQUES

## OUTPUTS

*content moderation; rating, ranking, predictions or recommendations; online advertising; complaint handling and dispute resolution; tracing traders; algorithmic management in platforms; credit scoring; pricing, trading and investing, or compliance*

## PRODUCER

## DATA PROVIDER

## UPDATE PROVIDER

## DEPLOYER

ADM

1

INPUT for  
decision-making

FINAL DECISION

2

AFFECTED  
PERSON/s

Third parties

Third parties

Third parties

## *AI Act* DEFINITIONS

**‘artificial intelligence system’ (AI system)** is a machine-based system 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;

*Explicit or implicit objectives*

*Levels of autonomy*

*Adaptativeness*

*Influence the environment*

## Guiding Principle 1: Law-compliant ADM.

*An operator that decides to use ADM for a particular purpose shall ensure that the design and the operation of the ADM are compliant with the laws applicable to an equivalent non-automated decision-making system*

## Guiding Principle 2: Non-discrimination against ADM.

*As a general rule, ADM shall not be denied legal effect, validity or enforceability solely on the grounds that it is automated.*

## UNCITRAL – WG IV. A/CN.9/WG.IV/WP.182 –Draft Principle 2

A contract is not to be denied validity or enforceability on the sole ground that an automated system was used in its formation.

An action in connection with the formation of a contract is not to be denied validity or enforceability on the sole ground that it was carried out by an automated system.

An action in connection with the performance of a contract is not to be denied validity or enforceability on the sole ground that it was carried out by an automated system

### **Guiding Principle 3: Attribution of decisions adopted by ADM**

*The decision adopted by ADM shall be attributed to the operator. The operator shall not deny the attribution of a decision solely on the grounds that it has been adopted by automated means.*

### **Guiding Principle 7: Allocation of risks to the operator**

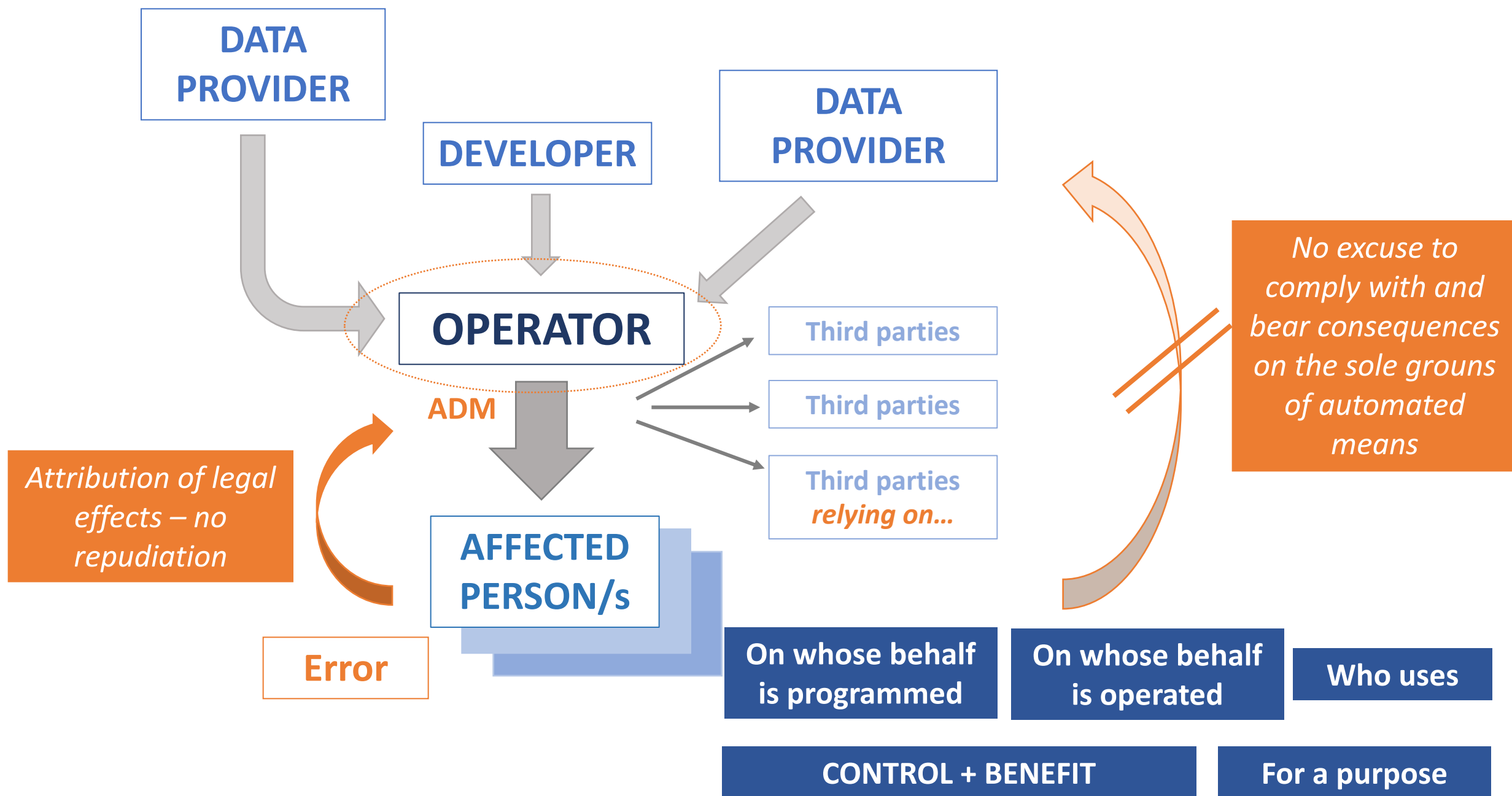
*The risks that the ADM may cause any harm or damage shall be allocated on the operator.*

## Guiding Principle 3: Attribution of decisions adopted by ADM

*The decision adopted by ADM shall be attributed to the operator. The operator shall not deny the attribution of a decision solely on the grounds that it has been adopted by automated means.*

**Illustration A.** An e-recruiting programme implemented by a service company ranks applicants, shortlists eligible candidates, and finally selects the chosen candidate who automatically receives an offer of employment. The recruitment decision is attributed to the company, as it is the operator.

**Illustration B.** A health insurance app implemented by an insurer enables the user to fill out a health questionnaire and to put forward an insurance proposal. The app assesses the eligibility conditions, calculates the premium, and accepts or rejects the insurance request. The decision to refuse the proposal or to conclude the insurance contract is attributed to the insurer operating the app. The insurer is the operator of the ADM and becomes the contracting party vis-à-vis the insured upon the acceptance of the insurance proposal.



## Typology of risks

- 1). *Mistake*
- 2). *Errors and malfunction*
- 3). *Unexpected decision*

## Options to consider

Non-attribution

Defects of consent

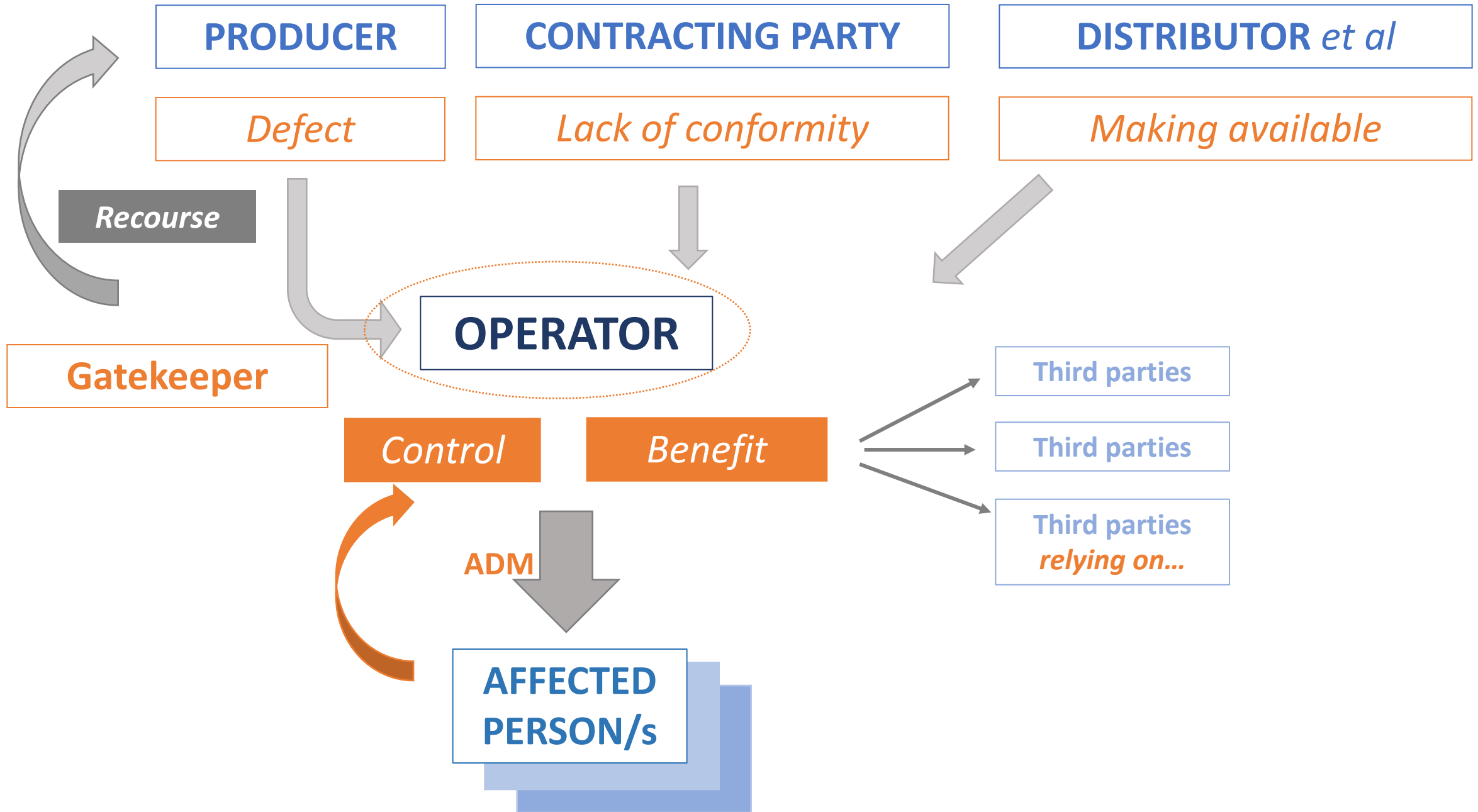
Liability

## Guiding Principle 7: Allocation of risks to the operator

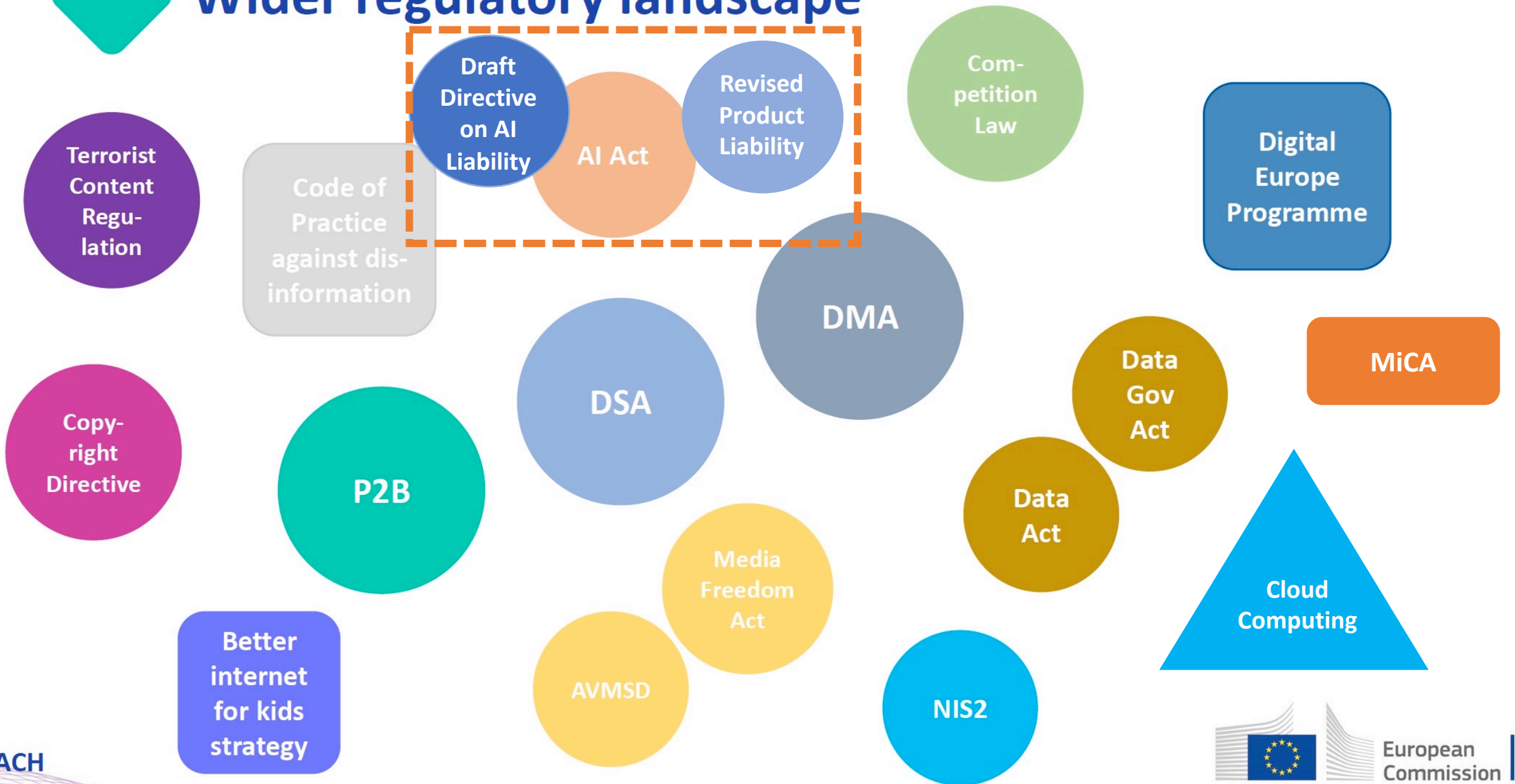
*The risks that the ADM may cause any harm or damage shall be allocated on the operator.*

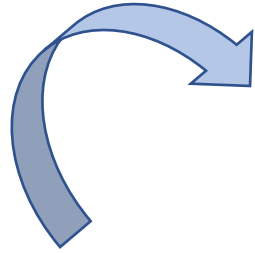
**Illustration A.** A basic smart home system is installed in a house to control the heating, the shutters, the sunshades, and the sprinklers in the garden. The operator – provider of the smart home system and producer of all interconnected devices – provides the ADM controlling the entire system pre-installed in the central smart home hub. The ADM is based on weather predictions and data relating to temperature, sun hours, light, and rain provided by the sensors connected to the smart home system. For unknown reasons, the ADM instructs the system to unfurl the sunshades, open the shutters, and activate the sprinkles at full power on a very rainy day. At the end of the day, the garden, the porch, and the garage are completely flooded, the sunshades collapse due to the weight of the water, and the water starts to seep through the windows of the living room and the hall.

**Illustration B.** A university has implemented an algorithm-driven system for the delivery of mail and parcels on campus by a fleet of drones. The central system automatically classifies the received mail, assigns deliveries, and remotely activates and operates the drones up to destination. Should damage or personal injuries be caused by an accident, a collision with buildings or windows, or by a drone crashing in a garden, the university, as the operator, bears the risk, without prejudice to the liability of the producer, if damage is caused by a defect of the product



# Wider regulatory landscape



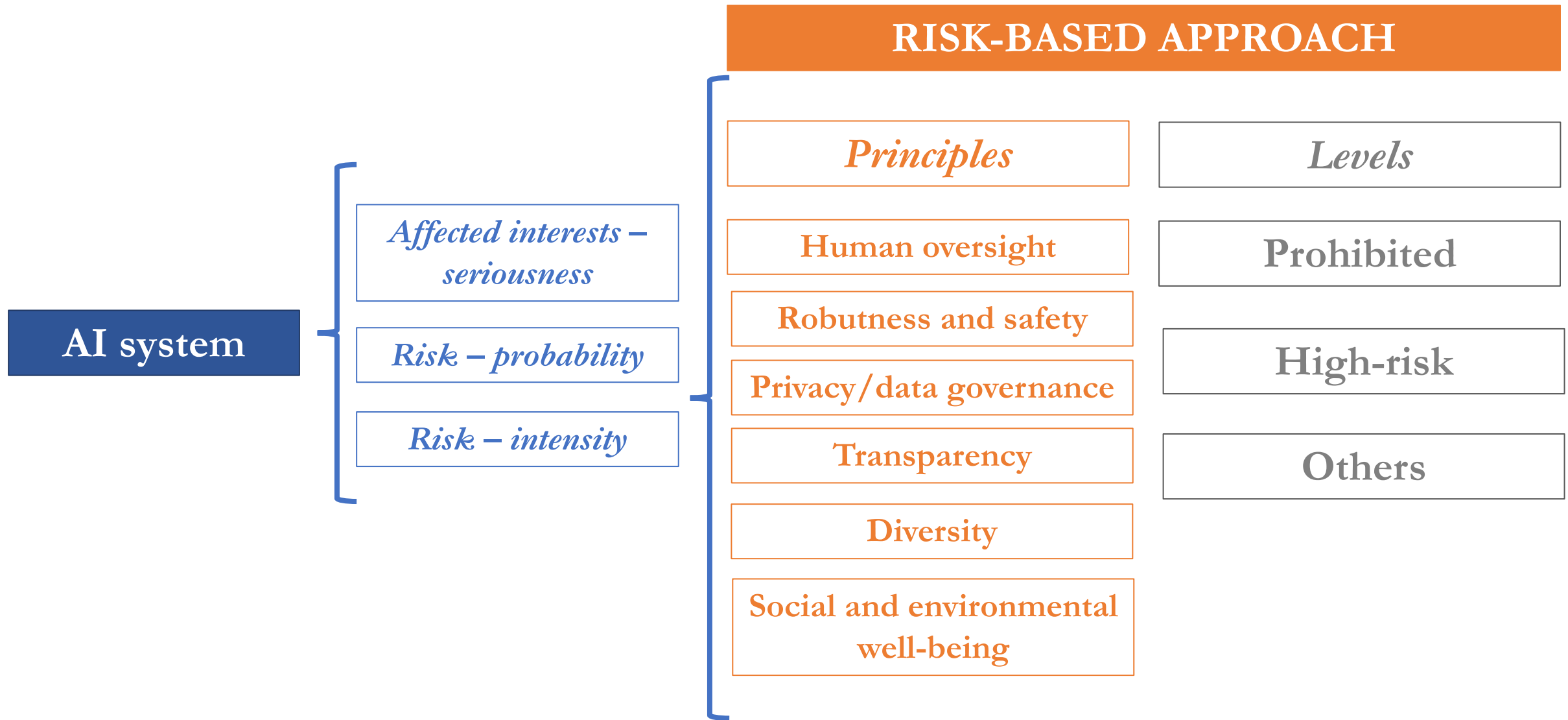


*AI Act*

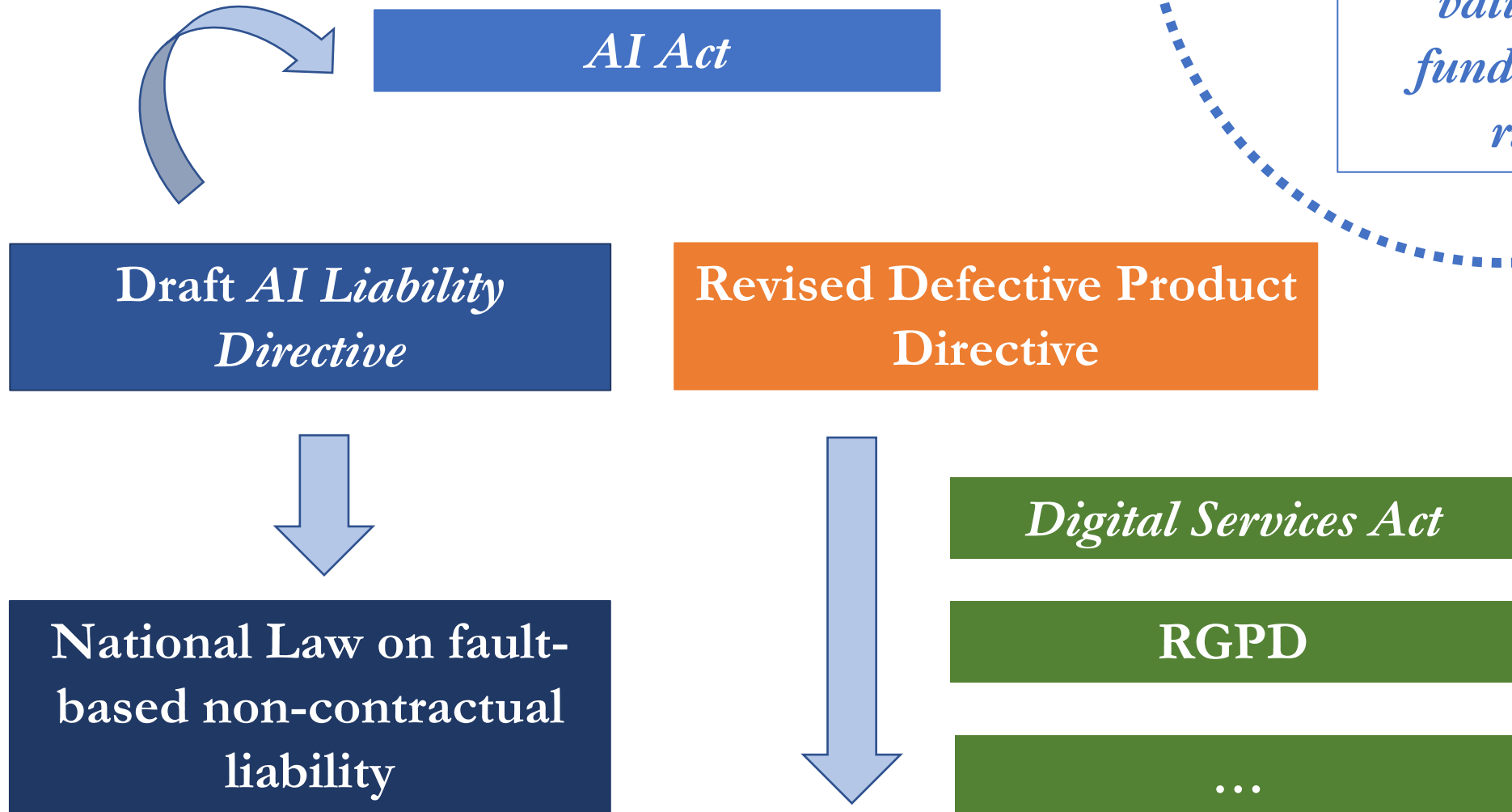
*Redress gap*

Draft *AI Liability*  
*Directive*

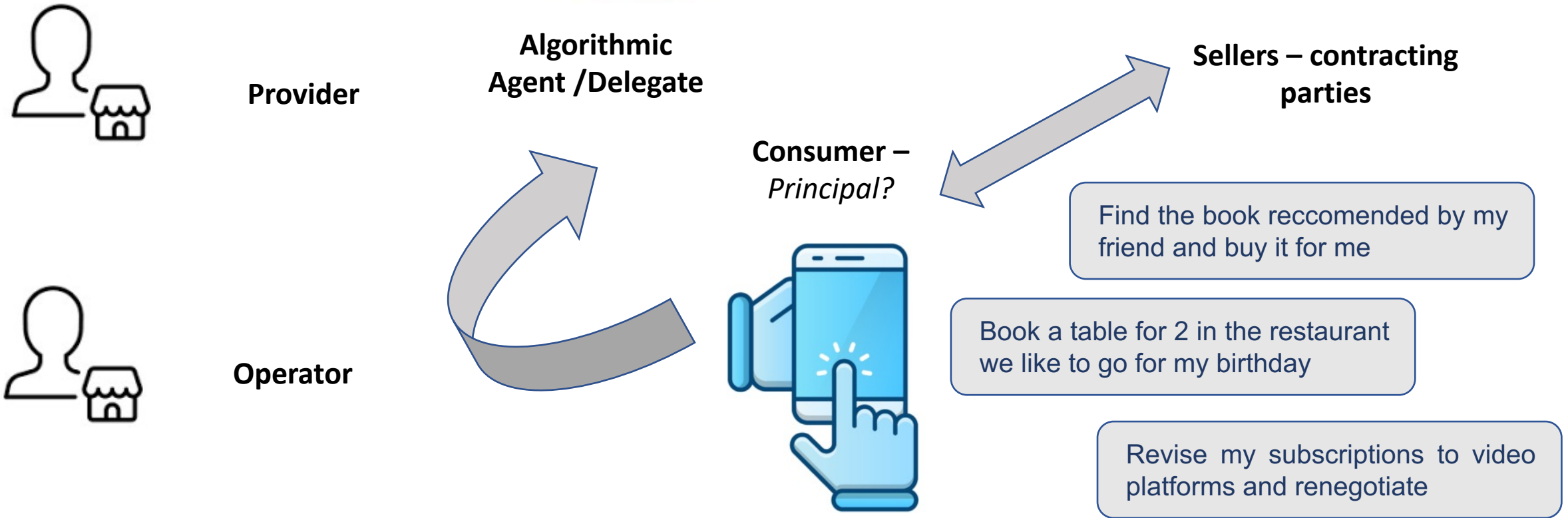
Revised Defective Product  
Directive



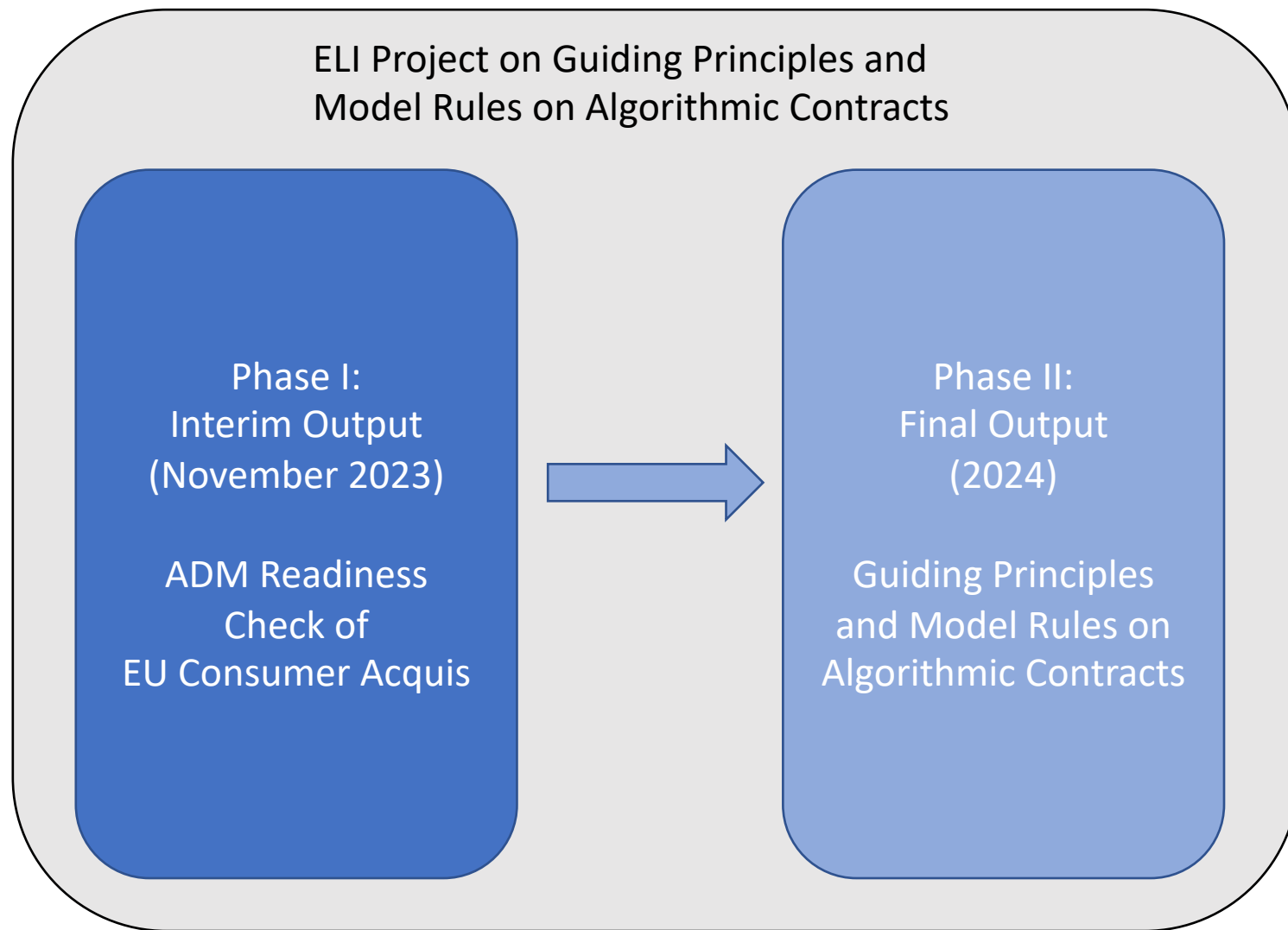
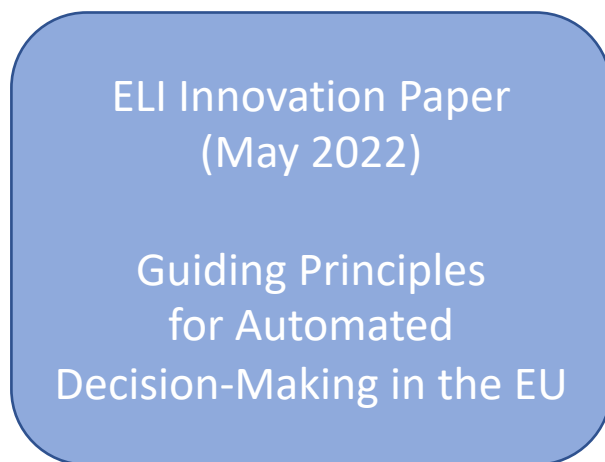
Sectoral legislation



*EU interests,  
values and  
fundamental  
rights*



# ELI Project on Algorithmic Contracts



# Principles for ADM Readiness of EU Consumer Law

Principle 1: Attribution of digital assistant's actions to consumer combined with design requirements for digital assistants so consumer retains ultimate control

Principle 2: Application of Consumer Law to algorithmic contracts

Principle 4: Non-discrimination/ no barrier principles

Principle 3: Pre-contractual information duties continue to apply

Principle 5: Disclosure of use of digital assistant

Principle 6: Protection of digital assistant from manipulation

Principle 7: Ability to determine parameters/disclosure of pre-set parameters

Principle 8: Digital Assistants and Conflicts of Interest

# ADM-readiness test of Consumer Protection Legislation



ELI  
EUROPEAN  
LAW  
INSTITUTE

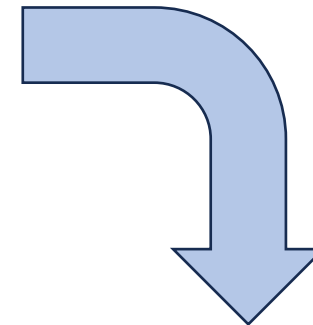
Agency Law

Conflict of interests

Informed decisions?  
*Dark patterns*

Rationale of information  
duties

New/more/less  
vulnerabilities



## Future work and key issues ahead

- 1). Model rules for International B2B transactions with AI
- 2). Issues raised by Generative AI, AGI and frontier models
- 3). Adaptation of consumer legislation to novel forms

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