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Artificial Intelligence in the EU – how to learn in Brazil from its impetus, but also its flaws

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Artificial Intelligence in Brazil and EU
I. Introduction

- HIV-Treatment with medication „cocktail“ according to mutations, DNA and individual behaviour – lege artis
- CERN physics large collider system according to simulation data on basis of app. 23.000 hits/minute
- Access to secondary education according to internet search and retrieval history of parents and godfather
- Presentation of personalized news and selected information according to own and friends‘ behaviour in virtual worlds (metaworld) and online games

- AI is not „good“ or „bad“: Depends on its use -> technology with side effects. Regulation of use = Regulation of purposes = Enforcement of Regulation

Artificial Intelligence in Brazil and EU
I. Introduction

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I. Introduction
II. Background of EU Regulation Proposal
III. Content and Assessment: What to watch out for, what to keep, what to develop
IV. Resumé and Outlook

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II. Background of EU AI-Regulation proposal

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II. Background

- Comprehensive EU strategy to regulate digitilisation
  - GDPR = Data, Decisions
  - Digital Services and Digital Market Act = Contracts, Platforms
  - Consumer Protection Law = Information, Transparency, Fairness and Third-Party Enforcement
  - Anti-Discrimination Law = Decisions, Contracts
  - [Data Act = Access to and Fair Use of Information]
  - [Competition/Anti-Trust Law = Business Cooperation]
  - AI-Reg-P: Decisions, Quality of Technology
- **Core interest: Regulation of power-asymmetry in digital services, markets, use and ressources of privates and state!**
- Trust in Data uses/IT (AI systems) legally operated

Artificial Intelligence in Brazil and EU
II. Background

- GDPR standard-setting in control of data processing/use. AI Regulation standard-setting in (special) automated decision making.
- Regulatory approach: Prevention (ex ante) <-> Control/Law-and-Order (ex post)
- Origin: Technology Law, i.e. Uncertainty/Risk; emergent technologies, fast development
- Gains: immediate, precise – Risks: future, diffuse
- Risk-based concept: „minimum“ – „unacceptable risk“ (four classifications)
- Technology neutral approach: Abstract regulation with examples and definitions of risk applications

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III. Content and Assessment

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III. Content and Assessment

- Why?
  - Goals: restriction of existing and developing power asymmetry (data – technology – services); new technology
  - prohibition and regulation of certain artificial intelligence practices (Art.1) -> technology guidance
  - rules on market monitoring and surveillance (Art. 1) -> dynamic standard

  - Effective enforcement / effectuating the rule of law state / foreseeability / innovation by new not large companies

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III. Content and Assessment

- Who? Adressees, Art. 3 Nr. 2, 3 AI-Reg-P
  - „provider“ = developer of AI systems for markets, but not: individual programmer/data analyst

    ≠ GDPR (beyond!)
  - „user“ = making use of AI systems
  - Private and public entities (later: no fines)
  - P: individual persons lacking on whom AI is used

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III. Content and Assessment

- Where? Art. 2 I AI-Reg-P
- Provider who (alternatively)
  - Place on market in EU
  - Use in EU
  - Use values/results in EU („output used in the EU“)
- User who (alternatively)
  - Are located in EU
  - Use values/results in EU
- Broad application („use of results“)
- Cf. „market principle“: offline and online goods/services regulated alike

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III. Content and Assessment

- What? „AI-system“, Art. 3 Nr. 1 AI-Reg-P
- Software listed in Annex I

plus

- Can
  - for a given set of human-defined objectives,
  - generate outputs such as content, predictions, recommendations, or decisions
  - influencing the environments they interact with
- Technology neutral regulation plus examples and positive enumeration (annex)

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III. Content and Assessment

- What? „AI-System“, Art. 3 Nr. 1 AI-Reg-P
- Problem: computer science ≠ AI
- Broad and unclear conception
- Legal uncertainty, but: Dynamics of annexes (!)

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III. Content and Assessment

- How? Art. 4 et. seq
- Risk-based approach – 4 classifications
  - 1. and 2. little/minimal risk -> no restrictions, recommendations only
  - 3. high risk -> high restrictions (procedure v. material standards)
  - 4. inacceptable risk -> typically forbidden
- Good: Risk-Orientation according to purpose
- P: Scenarios not regulated; 2 out of 4 categories empty
- P: procedure no counterbalance to clear material/substantive standards
- P: How to control purpose?

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III. Content and Assessment

- 4. category, Art. 5 I AI-Reg-P
  - „subliminal techniques beyond a person's consciousness", to influence behaviour (lit. a) = „dark patterns"
  - Good: Power of influence acknowledged, direct and indirect
  - P: „Sublimal", „behaviour"
  - P: any influence?
  - P: influence as central purpose?
  - P: Ping-Pong between provider and user (communal liability/responsibility)

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III. Content and Assessment

- 4. category, Art. 5 I lit. b AI-Reg-P
  - Exploitation of vulnerabilities of persons due to age, physical/mental disability, in order to materially distort the behaviour of a person causing physical/psychological harm
  - Good: Acknowledgment of discrimination power
  - P: different characteristics (e.g. social/economic position)? Discriminiation individually or group-based? What is hard line between discrimination and differentiation?
  - Relevant effects in case of physical/psychological detriments -> measurement? Causality? Economic and other effects (e.g. access to schooling)?

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III. Content and Assessment

- 4. category, Art. 5 I AI-Reg-P lit. c) – „social score“:
- evaluation on social behaviour or personal characteristics
- through public authorities
- leading to : detrimental or unfavourable treatment of in unrelated social contexts or unjustified/disproportionate effects
- Good: Clear message on social scoring
- P: Adressee not platforms/private persons
- P: Enforcement - lack of change of burden-of-proof
- P: Lack of overall assessment: societal impact, chilling effects, mental setting, …

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III. Content and Assessment

- 3. category, Art. 6 I AI-Reg-P
- Part of high-risk products = Annex II

Or

- Problematic uses = Annex III + KOM, e.g.
  - Biometric identification
  - Access to schooling/higher education
  - Application/use for assessment in employment environment
  - Access to social services, credits, emergency assistance
  - Criminal procedure
  - Migration
  - Courts

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III. Content and Assessment

- 3. category, Art. 6 I AI-Reg-P
- Good: List of risk assessment by KOM, delegated acts = dynamics
- P: Undeterminacy/legal uncertainty: no standard for assessment
- Procedural means lacking (1:0 decisions)

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III. Content and Assessment

- 3. category: Procedural requirements, Art. 8 et. seq AI-Reg-P
  - Risk Management System (Art. 9 I AI-Reg-P) – dynamic standard
    - Good: awareness, no „internal black box“
    - P: SME; procedural standards further power of big companies -> start-up-clause
  - Training data regulation, Art. 10 II and III S. 1 AI-Reg-P)
    - Good: Attention to data as underlying problem.
    - P: not specific enough

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III. Content and Assessment

- 3. category: Procedural requirements, Art. 8 et. seq AI-Reg-P
  - Transparency of result interpretation for User (not: Person) (Art. 13 I 1 AI-Reg-P)
    - Good: Responsibility of the User
    - P: Burden-of Proof/enforcement regulation
  - Effective Supervision/verfication of results by natural persons, Art. 14 AI-Reg-P
    - Good: No „black box“; solution to technology
    - P: Burden of Proof; mass products/services?
  - P: Self-regulatory tools demand strict enforcement („shadow of the law“)

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III. Content and Assessment

- 3. category: Procedural requirements, Art. 8 et. seq AI-Reg-P
- User
  - Use for designated purpose (Art. 29 III AI-Reg-P)
  - Monitoring and information duties
  - Good: Purpose binding (cf. GDPR)
  - P: Enforcement
  - P: Burden of proof
- Special areas: Deep Fakes (Art. 52 III AI-Reg-P)
- P: Bots? Manipulation of elections? Regulation necessary!

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III. Content and Assessment

- Other Content:
  - GDPR etc. remains intact = part of overall regulation.
  - Art. 10 V AI-Reg-P: legitimation for data processing to correct biases
  - Regulatory sandboxes for experiments (Art. 53, 54 AI-Reg-P) P: uncertaint
  - High Fines parallel to GDPR (Art. 71 AI-Reg-P)
  - P: Enforcement mechanisms; burden of proof

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IV. Conclusion and Outlook

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IV. Conclusion and Outlook

- Important step towards regulation of (side) effects of digitalization.
- Power Asymmetry is a threat to any society (innovation, democracy, …)
- Fine-Tuning of definitions and of risks is vital.
- Enduser/“affected parties“ have to be integrated: rights towards processors and users, towards courts, by third-parties.
- Enforcement needs to be strengthened: Any law is only as good as its enforcement tools. And power asymmetry is also based on ressources asymmetry: Public enforcement, powerful authorities, procedural safeguards (burden-of-proof)

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IV. Conclusion and Outlook

- Liability must be strict: Technology law, emerging technology, dynamics of technology cannot be otherwise regulated.
- Third-party-rights need to be strengthened to cope with external effects
- Clear monitoring and supervision have to be installed.

- All in all: GDPR is a first big step, AI is the next big step to create level-playing fields (economically and human rights-wise).