

GLI GLOBAL
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INSIGHTS

**AI, Machine Learning
& Big Data**

2021

Third Edition

Contributing Editors: **Matt Berkowitz & Emma Maconick**

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Published by Global Legal Group

GLOBAL LEGAL INSIGHTS – AI, MACHINE LEARNING & BIG DATA
2021, THIRD EDITION

Contributing Editors
Matt Berkowitz & Emma Maconick, Shearman & Sterling LLP

Head of Production
Suzie Levy

Senior Editor
Sam Friend

Production Editor
Jane Simmons

Publisher
James Strobe

Chief Media Officer
Fraser Allan

*We are extremely grateful for all contributions to this edition.
Special thanks are reserved for Matt Berkowitz & Emma Maconick of Shearman & Sterling LLP for
all of their assistance.*

Published by Global Legal Group Ltd.
59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 207 367 0720 / URL: www.glgroup.co.uk

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ISBN 978-1-83918-116-0
ISSN 2632-7120

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Printed and bound by TJ Books Limited
Trecerus Industrial Estate, Padstow, Cornwall, PL28 8RW
May 2021

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Austria

Günther Leissler & Thomas Kulnigg
Schönherr Rechtsanwälte GmbH

Most recent development: Proposed regulation on AI

Artificial Intelligence (AI), Machine Learning and Big Data are still trending topics in Austria and all over the world. The ever-increasing market demand for AI products, however, has triggered a no less intensive call for regulation and uniform frameworks of AI.¹ These ambitions have now cumulated in what has long lastingly been expected: the European Commission has released a proposal for a regulation of AI.

What is it about?

On 21st April 2021, the European Commission proposed a regulation that lays down harmonised rules on AI.² It is intended to be the first ever legal framework on AI. The framework is still a proposal, meaning the European Parliament and the Member States will have to adopt the framework in order to make it effective. The year lasting discussions about the E-Privacy Regulation have shown that this process of adaption can become tedious. However, the proposed framework nevertheless shows a more comprehensive path of future regulations of AI than previous papers have done.

What is its legal nature?

The Commission has proposed a Regulation. It has identified a need for a uniform application of its proposed rules and by proposing a Regulation it resorts to an instrument that ensures direct applicability. It also has added another proposal which it references as the “Machinery Regulation”.³ This regulation shall establish safety standards for robotics and equivalent machinery. So, in essence, the proposed Machinery Regulation can be understood as the hardware related regulation and, with this, to some extent it counterparts the AI Regulation.

How is it structured?

The proposed AI regulation follows a concept of prevention. It understands AI as being inevitable but, at the same time, as being potentially harmful. This concept is not all too different to the spirit of the GDPR. While the GDPR understands any processing of data as being a necessary, yet potentially dangerous activity that therefore needs to be regulated, the proposed AI regulation follows the same thinking. Having said so, the proposed AI regulation divides AI into different threat scenarios. First, it determines AI that creates unacceptable risks. The proposal sees such unacceptable risks if AI serves the purpose of manipulation through subliminal techniques beyond peoples’ consciousness. Also, AI that exploits vulnerabilities of vulnerable groups, such as children or disabled persons, in order to distort their behaviour and potentially causing physical or psychological harm to them shall be deemed AI with unacceptable risks. Further, AI based social scoring through public authorities and real time biometric identification systems for law enforcement purposes in

public places are deemed to bear unacceptable risks. The use of such intrusive AI shall be generally forbidden.

Scaling down from that, the proposal identifies AI with high risks and AI with low or minimal risks. AI with high risks shall not generally be forbidden but its deployment shall be subject to rigid regulation. In particular, such systems must undergo an *ex ante* conformity assessment before their deployment. Similar to the GDPR, the proposed AI regulation also follows a purpose determined concept since the assessment of whether an AI shall be deemed as a high risk AI shall not only depend on its functionalities but also on the purpose for which the system is used. The proposal gives respective guidance through a separate Annex (Annex III) in which it lists high risk AI systems by referencing biometric identification systems, education training systems or employment and worker management systems (just to name a few). This Annex shall be reviewed and amended from time to time and as appropriate. Deploying high risk AI will require its provider to undergo quite a complex process in order to satisfy the regulation's governance and transparency requirements. Having said so, the system needs to satisfy robustness criteria, strong accuracy and security standards, and it will have to be bound to human oversight criteria and there will be notification obligations.

Although AI with low or minimum risks will not have to meet such rigid legitimacy requirements, they will not remain completely unregulated. In particular, they must meet transparency obligations if they interact with humans and if they are used to detecting emotions or if they are generating or manipulating content.

When talking about AI: What is AI?

Given the fact that the proposed regulation is all about AI, an appropriate definition of AI is of key importance. In its proposal, the European Commission defines AI as a system that either forms a (safety) component to a product or that is a product on its own. The definition of AI shall be understood as a technology neutral and future proof definition. Having said so, the proposed regulation defines AI as software that can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations or decisions influencing the environment it interacts with. To fall under this definition, the software also has to be developed with one or more techniques of approaches as listed in a separate Annex (Annex I) although the said Annex refers to rather broad definitions, such as machine learned approaches, logic- and knowledge-based approaches or statistical approaches. With this, the Annex underlines what is also expressed by the regulation's definition itself, which is that the legislator wants to create a quite broad understanding and definition of AI. In essence, the proposed regulation seems to subsume every software under AI that, by following pre-defined objectives, creates an output which shall influence its addressees. To some extent this definition retypes advertising and marketing activities and, thus, puts AI in close connection particularly with the advertising industry. One might not need a crystal ball in order to predict that this broad definition of AI will face heavy discussions in the upcoming parliamentary proceedings.

Who will take care?

It is not that the proposed regulation leaves providers and users of AI on their own when making use of such tools. Rather, the proposal foresees certifications (including the CE certificate) and the option to establish Codes of Conduct. Further, the regulation asks the Member States to appoint regulatory bodies that shall give guidance but that shall also ensure enforcement. On the Union's level it seems that at least parts of the supervisory competencies shall be with the European Data Protection Supervisor and it would not come

with all too much surprise if Member States decided to mandate their local data protection regulators. Similarly to the European Data Protection Board in data protection affairs, the proposed AI regulation allows the establishment of a pan-European Board (the European Artificial Intelligence Board).

Will it come without fines?

No. Obviously, the GDPR has been an inspiration for the proposed regulation's concept of sanctions. So does the proposed regulation suggest a sanctioning scheme that follows the same "whatever is higher" approach as the GDPR does, with the particularity that the range of punishment under the proposed regulation is even higher than the one under the GDPR. Depending on the severity of the alleged infringement, the proposed regulation suggests staggered penalties of either up to EUR 10 million, EUR 20 million or EUR 30 million or, by following the "whatever is higher" concept, up to 2%, 4% or 6% of the offender's annual worldwide turnover.

Trends and the Austrian perspective

In Austria, the proposal of an AI regulation has so far only marginally been reflected in the media. Only platforms that are specifically devoted to AI, such as the Austrian Council on Robotics and Artificial Intelligence (ACRAI), have taken notice of the proposal but have, however, stayed at the level of reporting than explaining the proposal's potential impact.

Nonetheless the proposed regulation will have significant impact. First of all because it affects a lot of stakeholders. A study published by the ACRAI in May 2019 identified more than 600 companies in Austria that are active in the area of AI.⁴

- Most AI-related companies are software developers, who offer data processing solutions, often in combination with consulting services.
- Approximately a quarter of all identified companies are active in the area of consulting services (business or market consulting), developing their own software solutions to analyse company information, stock prices, etc. Production companies (such as mechanical engineering, plant construction, electrical equipment, pharmaceutical products, sensors, etc.) represented 28% of the identified companies.
- There are further several institutions active in AI, including specific institutions (such as the Austrian Research Institute for Artificial Intelligence of the Austrian Society for Cybernetic Studies⁵) and larger institutions, such as universities.
- Public subsidies, including Horizon 2020 projects, reached EUR 350 million.⁶
- R&D in AI is generally widely spread throughout Austria (with a focus on Vienna, Graz, Linz/Hagenberg and Klagenfurt).
- Start-ups further play an important factor in the AI industry in Austria; they are generally considered as a technology leader and competence centres, with AI-as-Service as a potential new business model for start-ups and other players.

However, the AI regulation certainly enfold impact on companies and stakeholders beyond the abovementioned group since it might be applicable to companies that are not even aware of being part of the AI regulatory environment. This is a direct consequence of the proposed regulation's broad definition of AI. Although some companies might not have the intention to employ AI, they might nevertheless operate software that performs predictions or that makes decisions in order to generate an output that shall guide individuals, that shall motivate individuals to take certain actions or that shall provide options to individuals which they had not been aware of before the software having taken action. In terms of the suggested AI definition, it does influence its environment. Such tools are quite commonly

in use, such as telematic software in cars, or e-learning tools in work environments or self-creating content, as we all have become used to it through our private cloud solutions, such as Google Photo, or equivalent. Not to talk about the advertisement industry which, by the nature of its business, performs actions which the proposed AI regulation understands to be influencing. So, the key takeaway at this stage should be that more companies currently acting on the business playfield are providers or users of AI and, thus, subject to the proposed AI regulation as they might be aware of.

Another upcoming trend, or at least a very substantial expectation, is a strong merge of AI regulation and data protection regulation. AI means software and software means the processing of data. It is therefore no coincidence that the proposed AI regulation reflects so much that has already been enacted through the GDPR. While currently the processing of biometric data essentially asks a company to satisfy the GDPR's requirements under Art 9, its data protection impact assessment obligations and, depending on the details of the service, additional legal aspects (such as the GDPR's limitation on profiling), the limitations and prohibitions under the AI regulation will additionally have to be considered if the biometric data processing comes along a software that qualifies as AI. This is just one example of numerous interplays between data protection regulations and the proposed AI regulation and it will be more than likely that the Austrian legislator might take the decision to combine both regulatory playfields under the competencies of the Austrian data protection regulator.

The GDPR aims at regulating the company that is processing personal data (might it be a controller, might it be a data processor) in order to award adequate protection to the data subject. The proposed AI regulation follows a similar thinking by regulating the providers of AI as well as its users, which means that it regulates those stakeholders that want to take benefit from the operation of the AI. Again, with a view of protecting those individuals that might be impacted by the deployed AI.

As mentioned above, it is still a proposal, and the outcome of the parliamentary discussions will have to be seen. Still, the train is on track. And, maybe of most importance, the suggested definition of AI provides the biggest benefit at this stage. This is because until now, when discussing AI and its legal impacts, a certain number of people had twice as many interpretations of what AI is. Now the draft regulation, although this is not more than a proposal at this stage, forms some consensus on what has to be understood as AI. This will certainly help structuring legal discussions about the regulation of AI, independent of whether and to which extent the definition by itself might experience adaptations in the course of the parliamentary adoption of the proposal.

* * *

Endnotes

1. Compare: European Commission, White Paper on Artificial Intelligence – A European approach to excellence and trust, COM(2020) 65 final, 2020.
2. <https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-laying-down-harmonised-rules-artificial-intelligence-artificial-intelligence>.
3. <https://ec.europa.eu/docsroom/documents/45508>.
4. https://www.bmvit.gv.at/dam/jcr:abf0cdc3-bd4c-4335-ae9-8e5b0a33c119/ai_potenzial_oesterreich.pdf.
5. <http://www.ofai.at/index.html>.
6. Between 2012 and 2017.

**Günther Leissler****Tel: +43 1 534 37 50276 / Email: g.leissler@schoenherr.eu**

Günther Leissler is a partner with Schönherr, where he specialises in data protection, telecommunications and life science regulation. Günther heads the Data Protection Group of Schönherr.

**Thomas Kulnigg****Tel: +43 1 534 37 50757 / Email: t.kulnigg@schoenherr.eu**

Thomas Kulnigg is a partner with Schönherr, where he specialises in technology M&A and venture capital transactions, start-ups and digitalisation matters. Thomas heads the Technology & Digitalization Group of Schönherr.

Schönherr Rechtsanwälte GmbH

Schottenring 19, 1010 Vienna, Austria
Tel: +43 1 534 37 0 / URL: www.schoenherr.eu

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