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“Comparing the GDPR and the AIA”

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Outline

1. On Legal Activism
2. Levels of Abstraction
3. Governing Risk
4. Models of Governance:
the AIA meets the GDPR
5. The EU Approach
6. Conclusion



AI

Part I – On Legal Activism

The state of the legal art

Against several acts, regulations, or case-law governing AI throughout the world, something new and relevant is happening in the EU legal system...



A Work in Progress

The list of legal sources aiming to discipline AI in EU law is already long (and much is still in progress):

- (a) The GDPR from 2016;
- (b) The Digital Services Act from 15 December 2020;
- (c) The Digital Markets Act from 15 December 2020;
- (d) The Data Governance Act from 25 November 2020;
- (e) The AIA from 21 April 2021;
- (f) Further initiatives such as the European Health Data Space legislative proposal; and,
- (g) Further sectors, e.g. the EU Cybersecurity Act entered into force on 27 July 2021.

Setting the Analysis



- In light of today's legal complexity, we must flesh out a sort of interface, through which to describe, examine, and argue about the current EU regulatory initiatives on AI;
- Although focus will mostly be on the GDPR and the AIA, further stances can be (and have been) proposed, and deserve our attention...

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Part II – Levels of Abstraction

Three popular overlapping stances

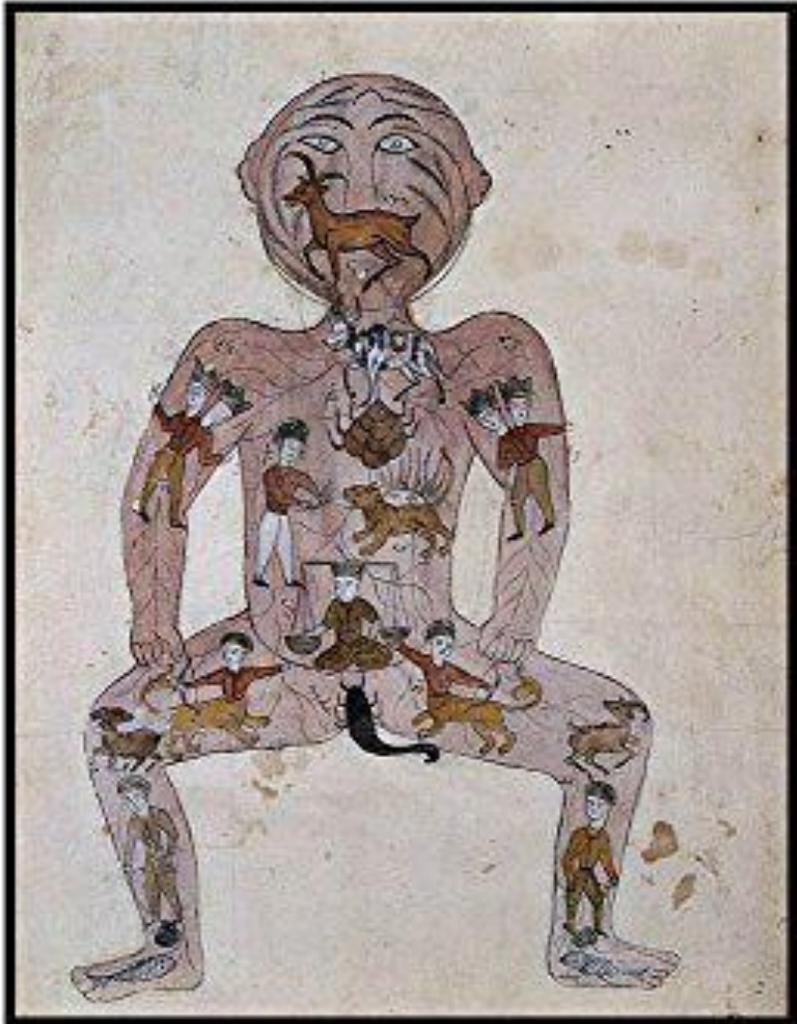
- Current EU law and initiatives have drawn the attention to (the limits of):
 - The quest of EU's 'digital sovereignty' (e.g. Floridi 2020 and 2021);
 - The Brussels effect (i.e. Bradford 2012 and 2020);
 - EU digital constitutionalism (e.g. de Gregorio 2021).
- Let me shortly explain why a 'risky approach' is more fruitful...



Classic Illustrated Edition

LEVIATHAN

THOMAS HOBBS



Digital Sovereignty

- A problem of this stance has to do with the troubles of EU law with the very notion of sovereignty, e.g. the Kompetenz-Kompetenz issue of EU constitutional law since the *van Gend en Loos* case from 1964.
- I'd better refer to these sets of issues in terms of digital subsidiarity, pursuant to Art. 5 of the Treaty of the Union.

The Brussels Effect

The power of EU law should always be taken with a pinch of salt. Coordination mechanisms (e.g. the adequacy decisions of the GDPR and the Commission) play of course a crucial role.





EU Digital Constitutionalism

- A limit of this stance concerns the limits of EU law, e.g. public order and relevant parts of criminal law under the jurisdiction of the Court of Strasbourg (rather than Luxembourg);
- Further instances related to the dynamic of legal transplants and receptions should be considered (e.g. the CCPA vis-à-vis the GDPR and the role of class actions).

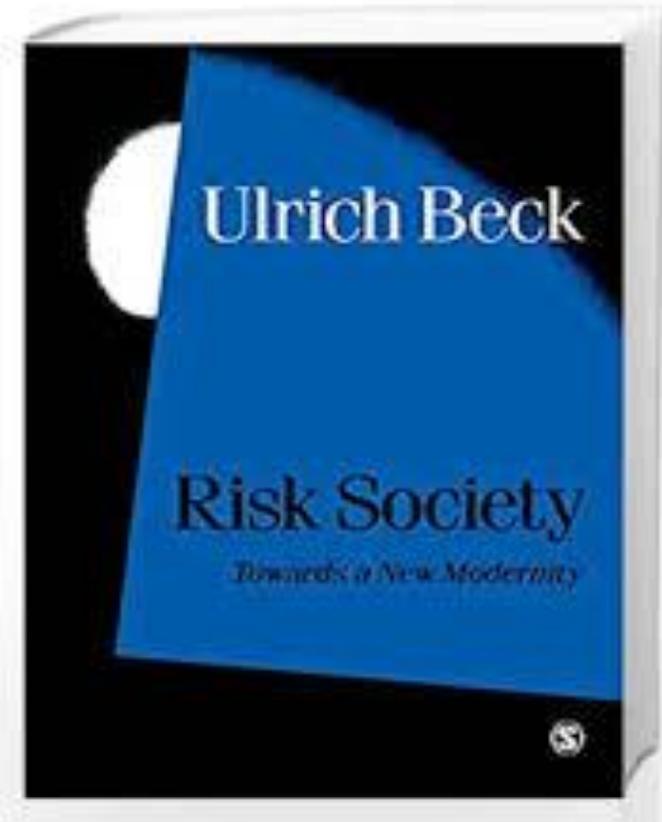
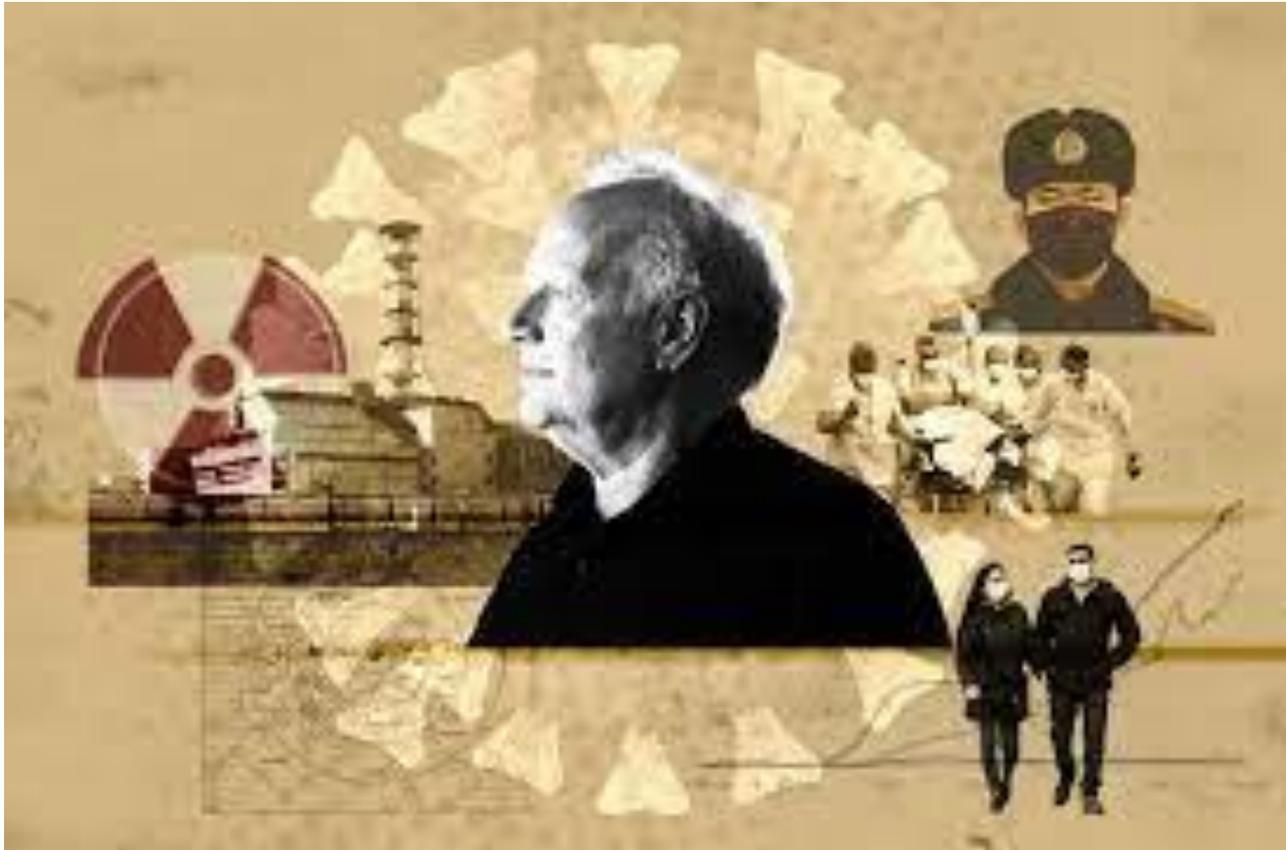
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Part III – Governing Risk

A Crucial Convergence

Both the GDPR and AIA regulations notably revolve around the notion of risk; either distinguishing between management, assessment, governance and prevention of risk (e.g. Art. 5(2), 24, 55 and 35 of the GDPR); or distinguishing between levels of risk: AIA's high, medium and low risk.





A well-established tradition

What's at stake with risk

- Risk is not only to be intended in terms of probabilities of events, consequences, and costs, so that, according to the level of risk, we can determine liability policies and accountability schemes. The notion refers also to the logic of risk production and how we intend to manage it proactively.
- What are then, the main differences between the GDPR and the AIA, as regards their approach to risk?



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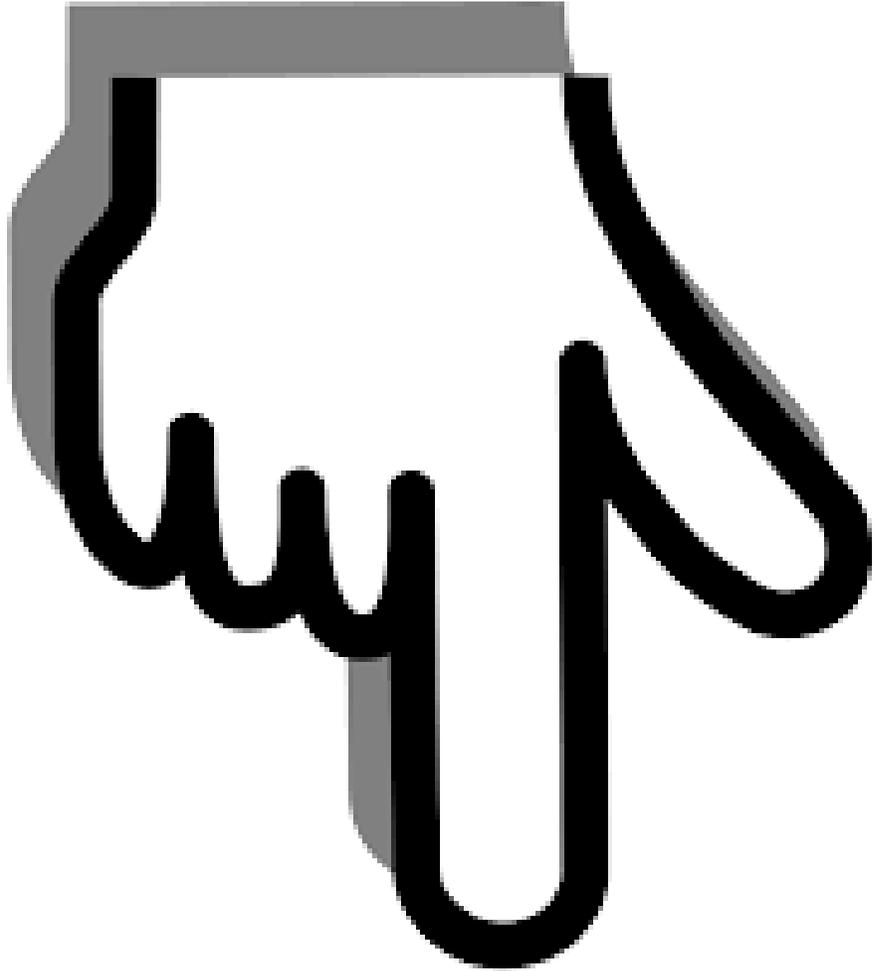
Part IV – Models of Governance

The co-regulatory model of the GDPR

The principle of accountability enshrined in Art. 5, although not mentioned, is at work with Art. 24(1), 25(1), 32, etc. of the regulation. It is up to the decision-making of data controllers how to approach

- (i) the prevention of risk;
- (ii) pre-emptive measures by design, and by default; and,
- (iii) corporate organisational measures for the protection and security of personal data processing.



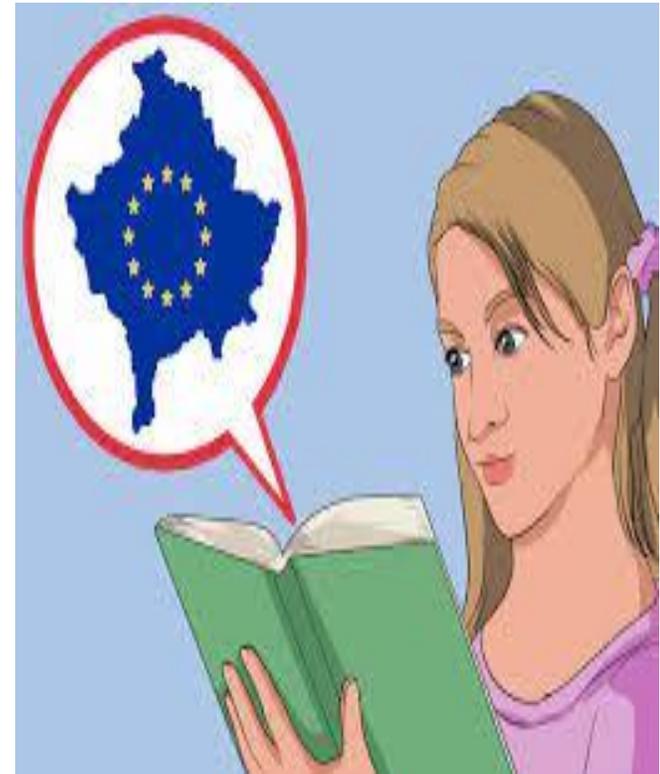


The top-down approach of AIA

- Art. 5 on prohibited AI practices, e.g. real-time bio-ID systems;
- Art. 8 ff. on requirements for high-risk AI systems, e.g. risk management system of Art. 9;
- Art. 16 ff. on obligations of providers;
- Art. 26 on obligations of importers;
- Art. 27 on obligations of distributors;
- Art. 29 ff. on obligations of users;
- Art. 44 on certificates;
- Art. 52 on transparency obligations;
- ...

The soft law tools of AIA

The troubles with technological innovation and how to govern it, e.g. from 2000/46/EC to 2009/110/EC, have recommended the European Commission to complement the proposal with the tools of soft law on e.g. codes of conduct for most AI systems (art. 69), and measures for small-size companies (Art. 55).





The pros and cons of EU law

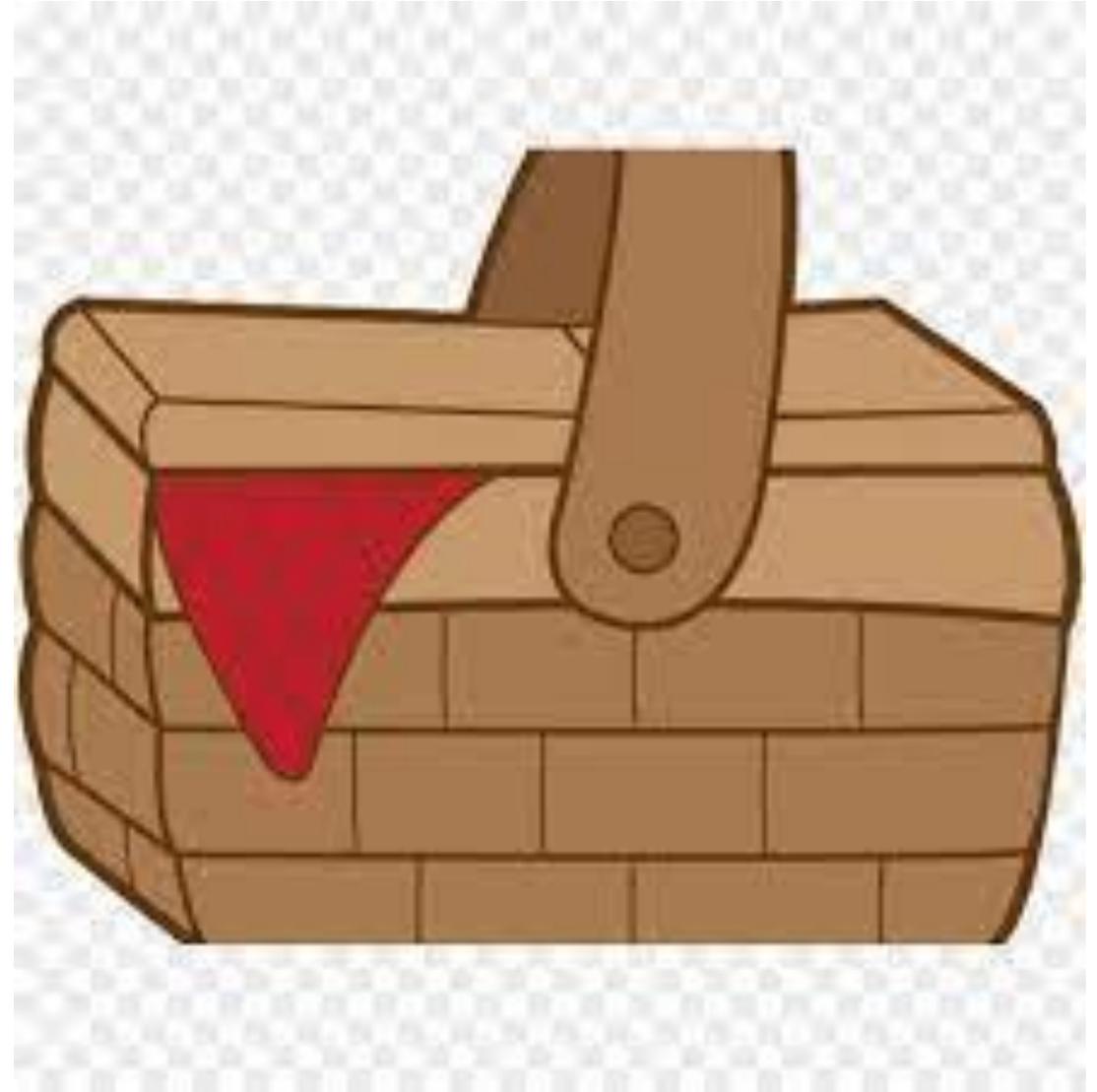
Scholars have extensively debated over the limits of e.g. the GDPR and from April 2021 onwards, on some drawbacks of AIA, e.g. certificates for machine learning systems. In more general terms, however, the question is, is there an overall coherent vision in the EU initiatives on how to govern current data-driven societies?

AI

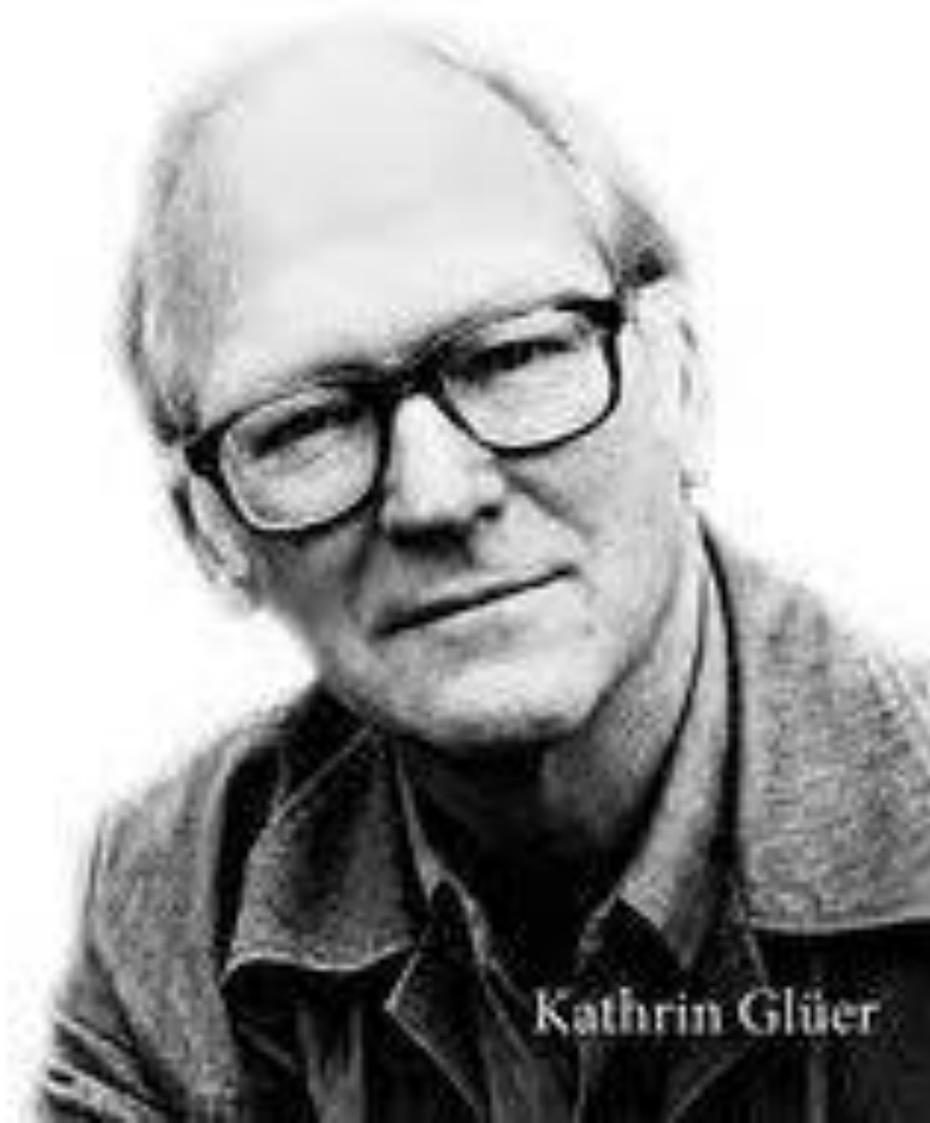
Part V – The EU Approach

A basket of legal goods

Bans, Top-down Regulations, Soft Law, Co-regulation (e.g., the GDPR), and variants of Self-regulation, such as through Codes of conduct.



Donald Davidson
A SHORT INTRODUCTION



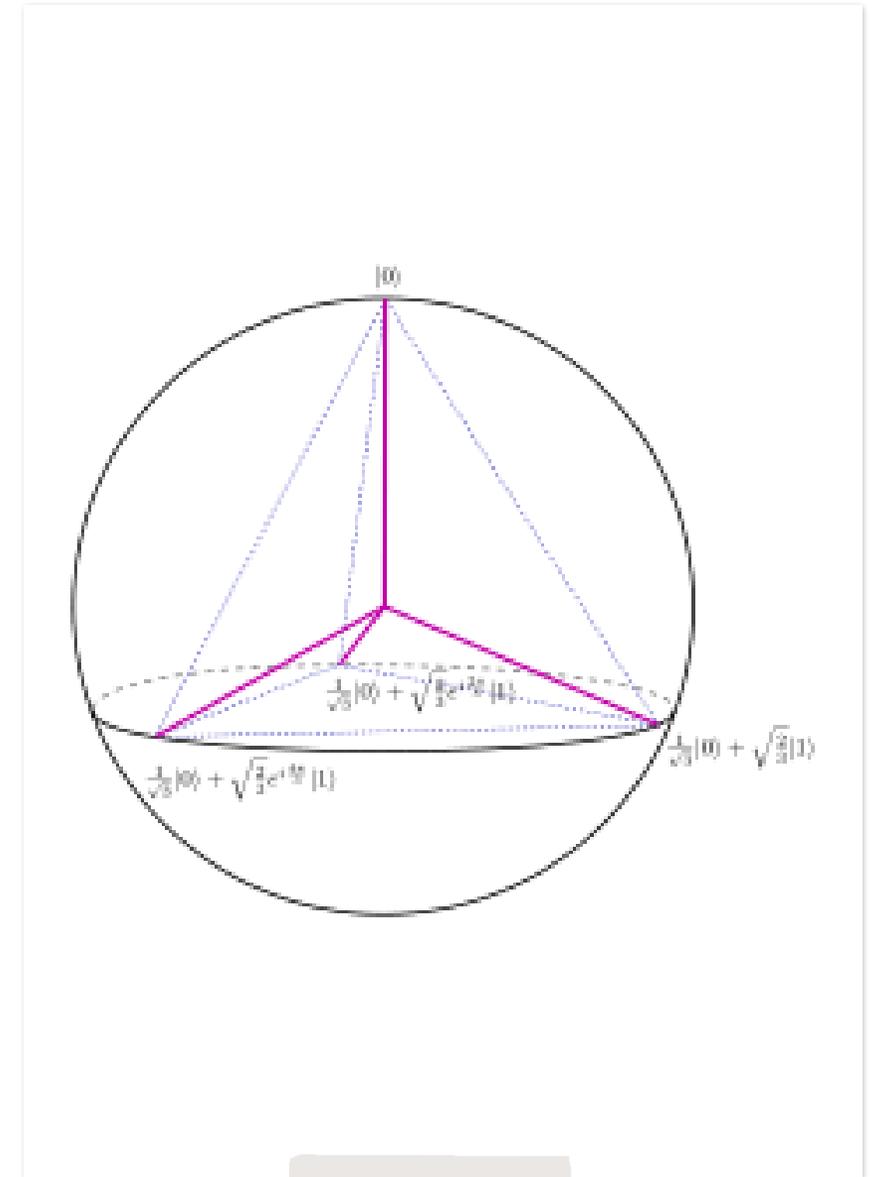
Kathrin Glüer

Is there any regulatory model in EU law?

Back to sovereignty, digital constitutionalism and the Brussels effect, according to the principle of charity

Open Problems

- How much will EU standards set the bar of legal regulation as a model for the world?
- How much should today's loopholes of constitutionalism be addressed vis-à-vis complex eco-digital systems?
- What balance will be struck between unilateralism and cooperation?
- Is there something as an EU model of legal governance for these problems?
- Or do current initiatives on data governance, AI regulation, cybersecurity and the digital market often lack coordination?



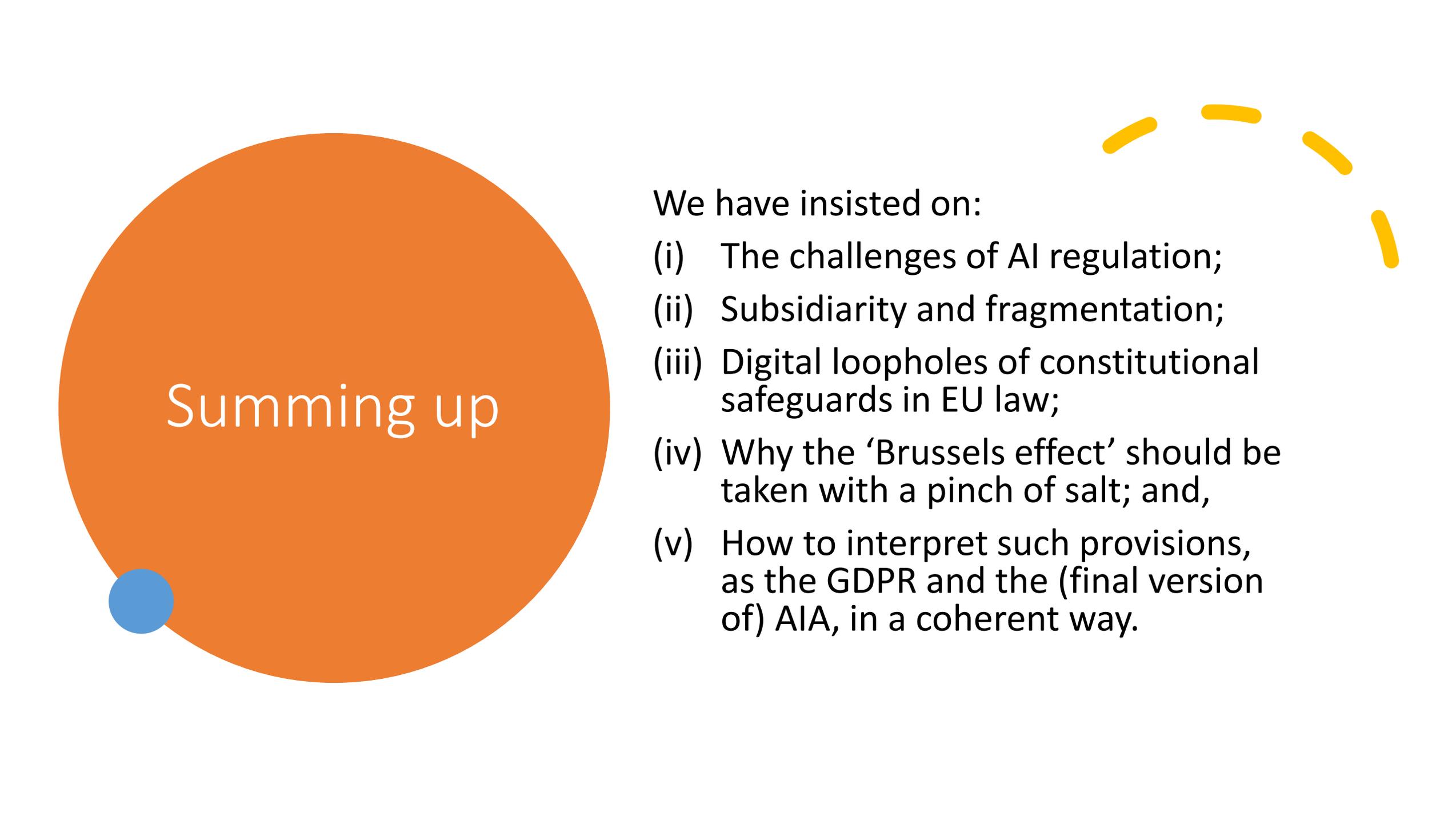
A Case Study



- The lack of environmental concerns in the AIA (see the European Parliament's AIDA Report from 2021).
- In more general terms, a human-centric approach to the challenges of AI vis-à-vis the ontocentric stance of environmental law

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Part VI – Conclusions



Summing up

We have insisted on:

- (i) The challenges of AI regulation;
- (ii) Subsidiarity and fragmentation;
- (iii) Digital loopholes of constitutional safeguards in EU law;
- (iv) Why the 'Brussels effect' should be taken with a pinch of salt; and,
- (v) How to interpret such provisions, as the GDPR and the (final version of) AIA, in a coherent way.

The Gist

On the one hand, the Groups of Experts set up by the European Commission did a good job in paving the way for the new generation of top-down regulations and acts for AI. As previously mentioned, further regulations should be expected at both regional and international levels.

On the other hand, top-down regulations are a necessary but insufficient ingredient of the analysis on the legal challenges of AI and its governance: attention should be drawn to further normative options, such as co-regulation, or variants of self-regulation, at work with further EU initiatives, e.g. the Data Governance Act and codes of conduct.

The Gist 2.0

We do not pretend models, Aristotle docet, but lawmakers should be attentive to the harmonization of multiple acts and initiatives, e.g. the environmental impact of AI technologies in the AIA and the role of AI in the European Climate Law from April 2021.

For example, a more intensive integration of the fields through a new generation of AI eco-impact assessments, complementing the human-centric approach of recent EU legislative initiatives with the traditional onto-centric stance of environmental law.

Thank you!

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