



PROFILING AND THE AUTONOMOUS SUBJECT IN PRIVATE LAW

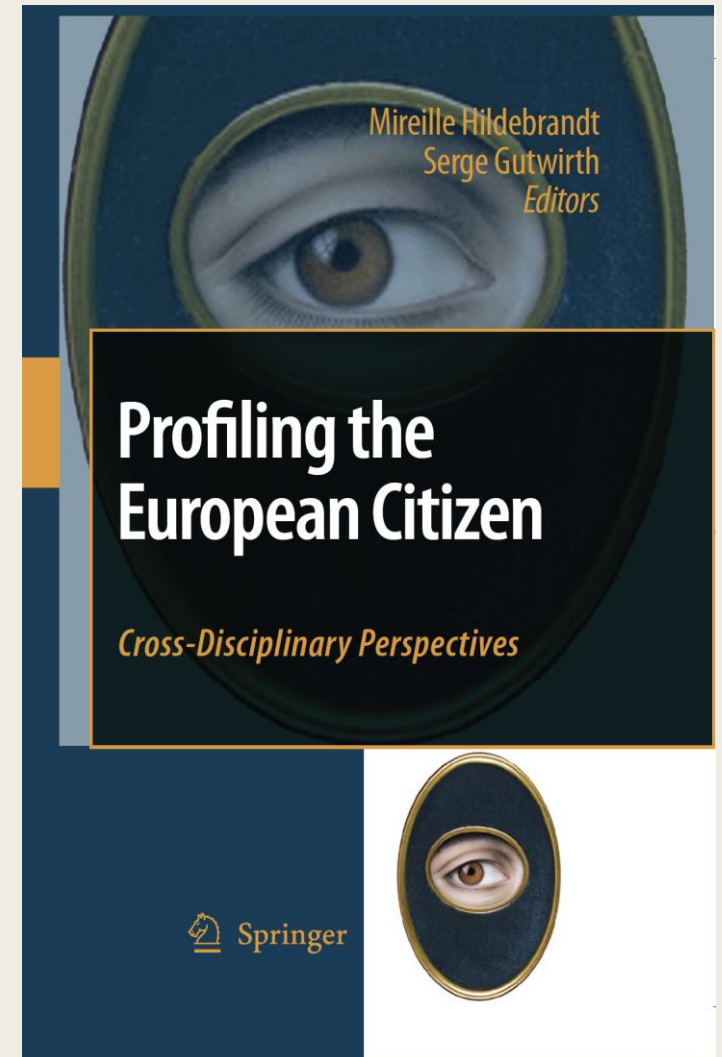
Mireille Hildebrandt, FBA

2008

- 2. What is profiling? KDD, algorithms, personalization, opacity, identity construction
- 6. Personalisation and its influence
- 13. *Cogitas ergo sum*. Art. 15 DPD (22 GDPR)

Co-authored by CS, LAW, SSH scholars

Dedicated Cross-Disciplinary format



JOURNAL OF CROSS-DISCIPLINARY RESEARCH IN COMPUTATIONAL LAW [CRCL]

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- Categories
- Computer science
- Legal theory
- Philosophy

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- ATOH 1.0
- RES 2.0
- RES 1.0

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About the Journal

The *Journal of Cross-disciplinary Research in Computational Law (CRCL)* invites excellence in law, computer science and other relevant disciplines with a focus on two types of 'legal technologies': (1) **data-driven** (e.g. predictive analytics, 'intelligent' search) and (2) **code-driven** (e.g. smart contracts, algorithmic decision-making (ADM), legal expert systems), and (3) their hybrids (e.g. **code-driven decision-making based on data-driven research**).

CRCL

- Main text (Law, CS, SSH)
- Reply ('other' discipline)
- Response author

■ CROSS-DISCIPLINARY

2018

Back to the future:

- Cogitas Ergo Sum
 - What Descartes didn't get:
the *autonomous* subject is a *relational* subject

BEING PROFILED: COGITAS ERGO SUM

what descartes did not get

What's next?

- The foundations of contract law re personalisation
- What is personalisation?
- The issue of proxies
- The EU Acquis, upcoming EU framework

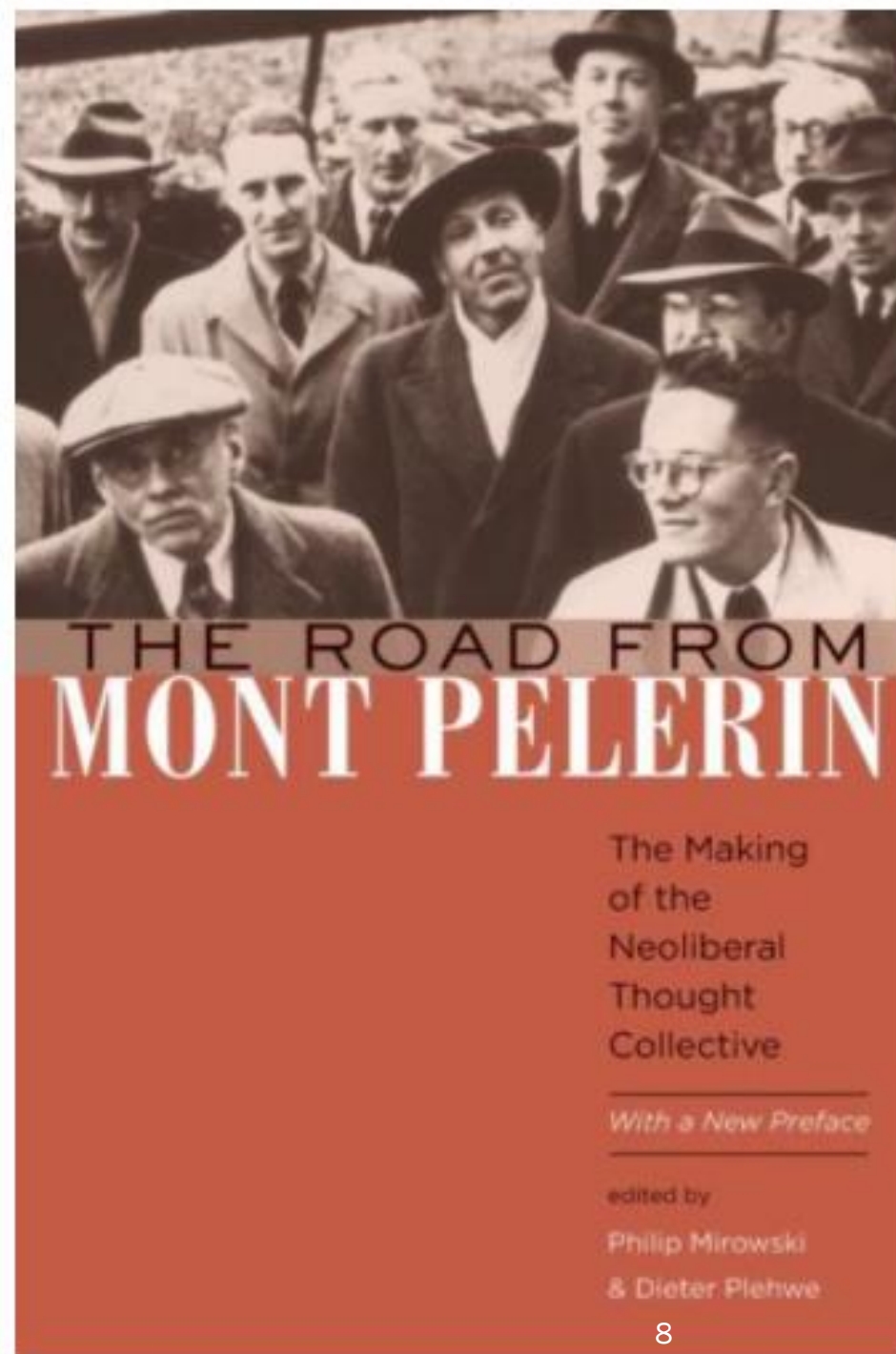
What's next?

- **The foundations of contract law re personalisation**
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Foundations of contract law re personalisation

- Hans Nieuwenhuis on contract law:
 - *Private law (civil law) is **civic morality***
 - ***19th century naturalisation of the civil code (Foque and 't Hart, Verstraete)***
 - Primacy of private law
 - Presenting private law as a **codification of positive – bourgeois - morality**
- If people 'buy into' personalisation that is their **choice**
 - *Connection with classical/neoclassical/neoliberal economic theory*
 - *Individuals seen as rational agents, focused on maximisation of self-interest*
 - *The key concept is **'preferences'** (proxy for utility; e.g. CTR proxy for preferences, etc.)*

- Hayek, Friedman, Buchanan usw.
- Aggressive promotion of the – largely unsubstantiated – theory, by visiting and teaching at law schools, to advocate a way of thinking that implies that:
 - *‘regulation has a cost’*
 - *policy must be understood in terms of CBA*
 - *markets will solve most problems, except in the case of market failure*
 - *transaction costs is often the real issue*
 - *legislation must be seen as ‘regulation’ = an attempt to influence behaviour*
- In other words: **denaturalization of the law**
- Based on behaviourist, utilitarian assumptions
- Methodological atomism (*Methodenstreit*), which underpins the game theoretical approaches of rational / public choice theory



FTC issues illuminating report on digital dark patterns

By: Lesley Fair

September 19, 2022



It's ironic that the only thing clear about digital dark patterns is the FTC's commitment to protect consumers from the injury they inflict. A new FTC Staff Report [sheds light on the ways that marketers can manipulate people](#) into buying merchandise or giving up personal information through the use of dark patterns – a phrase that describes a broad range of deceptive design elements. If your business is involved in web-based commerce, the Report discusses in detail a number of the practices that raise consumer protection concerns.

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Topics

[Advertising and Marketing](#) (4)

Nudge theory: assuming the **predictability** of irrational behaviour

- **Design elements that cause false beliefs.** An example of this tactic is when marketers use deceptive “masquer-ads” that look like independent editorial content, but really are advertising. **MH: advertorials**
- **Design elements that hide key information.** This category includes the practice of burying additional fees, mandatory charges, or “drip pricing” in hard-to-find or even harder-to-understand blocks of text, often late in the transaction. **MH: deceit**
- **Design elements that lead to unauthorized charges.** Marketers that take advantage of these dark patterns typically trick people into paying for goods or services they didn’t want and then bill them – often on a recurring basis – without their consent. **MH: fraud**
- **Design elements that trick customers into sharing personal data.** These dark patterns often appear to give consumers a choice about sharing data, but then intentionally steer them to the option that gives away the most personal information. **MH: swindle**

Nudge theory: assuming the **predictability** of irrational behaviour

- Does this actually work?
- No, because:
 - *Goodhart effect (if you use a measure as a target, it ceases to be a good measure)*
 - *Human behaviour is not predictable in the longer run (confusion between risk and uncertainty)*
- Does it cause harm at individual, societal level?
- Yes, because:
 - *Short term manipulative effects (e.g. pre-emption)*
 - *Goodhart effect (unpredictable effects)*
 - *It generates confusion and distrust*



RESEARCH ARTICLE | PSYCHOLOGICAL AND COGNITIVE SCIENCES |



The effectiveness of nudging: A meta-analysis of choice architecture interventions across behavioral domains

Stephanie Mertens , Mario Herberz , Ulf J. J. Hahnel , and Tobias Brosch [Authors Info & Affiliations](#)

Edited by Susan Fiske, Psychology Department, Princeton University, Princeton, NJ; received April 27, 2021; accepted November 24, 2021

December 30, 2021 | 119 (1) e2107346118 | <https://doi.org/10.1073/pnas.2107346118>

THIS ARTICLE HAS BEEN UPDATED

PNAS study

- Interventions that target choice architecture (decision structure) have a more significant effect
 - *Compared to*
 - information about alternatives (decision support)
 - Reinforcement of behavioural intentions (decision assistance)
 - *Moderate publication bias*
 - Positive (confirmatory) research results may be published more often than negative results

Review of Behavioral Economics, 2018, 5: 303–336

The Bias Bias in Behavioral Economics

Gerd Gigerenzer*

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ABSTRACT

Behavioral economics began with the intention of eliminating the psychological blind spot in rational choice theory and ended up portraying psychology as the study of irrationality. In its portrayal, people have systematic cognitive biases that are not only as persistent as visual illusions but also costly in real life—meaning that

Foundations of contract law re personalisation

- Hans Nieuwenhuis on contract law:
 - *Autonomy* of the contracting parties
 - Can autonomy be assumed by the legislature and the courts?
 - *Anatole France: the law forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal loaves of bread (Sen's economic theory: liberty assumes equality)*
 - *Free services in exchange for sharing one's personal data*
 - *Free services in exchange for becoming the object of micro-targeting*
 - Must autonomy be enabled by the legislature and the courts?
 - *Consumer law, competition law, labour law, housing law, environmental law*
 - *E.g. new legislation on dark patterns (DSA, cp. FTC)*

OPINION: DATA-DRIVEN THINKING

What Goodhart's Law Can Teach You About Performance Data

By AdExchanger

Friday, April 4th, 2014 – 12:05 am

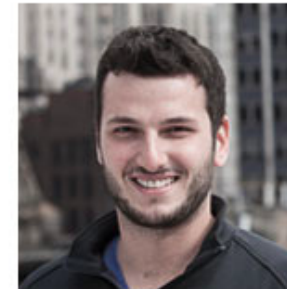
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"Data-Driven Thinking" is written by members of the media community and contains fresh ideas on the digital revolution in media.

Today's column is written by Roman Shraga, data scientist at [PlaceIQ](#).

Is there a metric you use to evaluate the effectiveness of something critical to your company's success? What about a metric used by your company to evaluate you?

If so, it is essential that you understand what could go wrong in the evaluation of performance data. Your job depends on it!



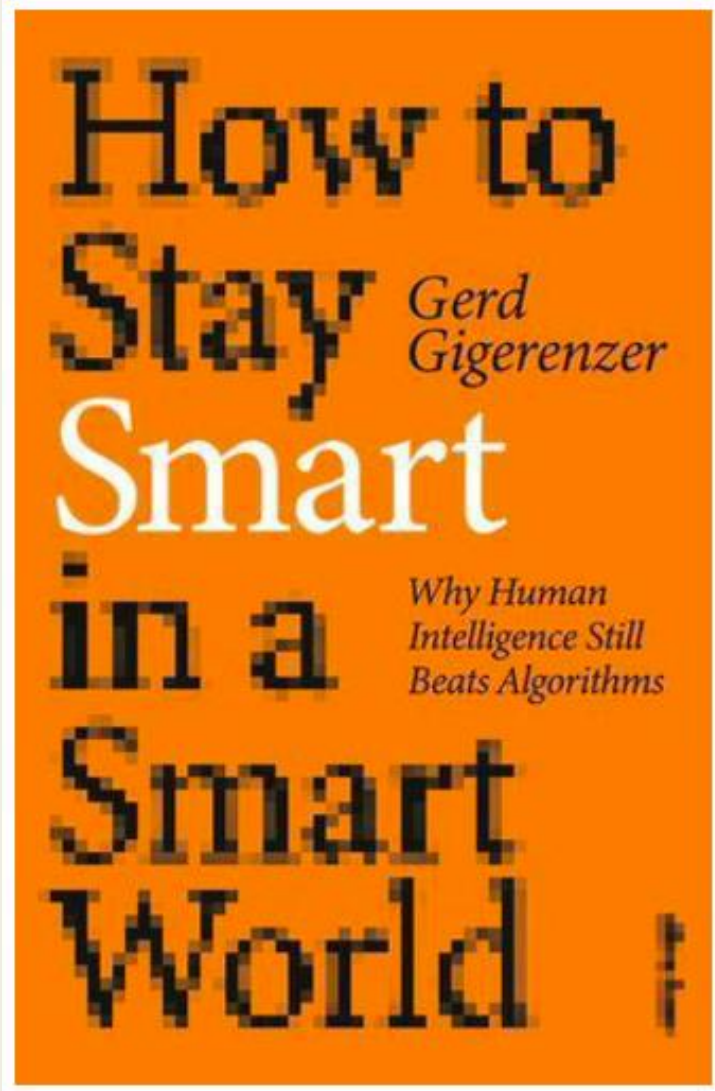
Roman Shraga,
Data Scientist
PlaceIQ

**Data-Driven
Thinker**

A critical insight into how to deal with performance data comes from Goodhart's Law: “When a measure becomes a target, it ceases to be a good measure.” In other words, when the measure being used by decision-makers to evaluate performance is the same as the target being optimized by those being measured, it is no longer a reliable measure of performance.

This happens all the time in the modern world. For example, when CTR is both a measure and a target, ad companies have a perverse incentive to optimize for clicks with absolutely no regard for whom is doing the clicking. An ad campaign for Ferrari with CTR of 15% sounds amazing — unless the majority of people who clicked the ads are teenagers looking at pictures of cool cars.

Similarly, when cases closed is both the measure of performance and target of customer service organizations, employees might choose to close cases without fully investigating and resolving them. When page views are both the measure and the target of news sites and blogs, editors have incentives to post shocking and controversial content to optimize for the target. In the long run, of course, this behavior degrades the quality of the site and the page views measure is no longer a useful indicator of the desired outcome of an engaged user base.



- Confusing risk with uncertainty
- Human interaction entails **foundational uncertainty**
 - *Mead, Parsons, Luhmann*
 - ***Double contingency***
 - *Ricoeur: oneself as another*

Foundations of contract law re personalisation

- Hans Nieuwenhuis on contract law:
 - *Expectations generated must be protected based on the principle of **trust***
 - What is the role of terms of service, privacy policies, consent management systems?
 - What is the role of reliance on appearance?

- What is the **meaning of trust in case of major power asymmetries?**
 - *Economic (VLOPs) who define global ICT infrastructure (DSA)*
 - *Public administration deploying personalisation for fraud detection (Pol)*

Foundations of contract law re personalisation

- Hans Nieuwenhuis on contract law:
 - *The legal effects on both sides are related as **causa***
 - How would this play out in the case of personalised recommendations and advertising: quid quo pro (consideration in common law)?
- What is the causa in the case of ‘free’ services?
 - *Art. 7.4 GDPR*
 - *Directive (EU) 2019/770*
 - *Art. 6.1(b): ‘objective necessity for provision of service’ (Rantos Meta Opinion C-252-21)*

Foundations of contract law re personalisation

- Hans Nieuwenhuis on contract law:
 - *Contracts must be understood as **actions** made possible by contract law*
 - To what extent can use of a service be qualified as an action?
 - How should we understand autonomy, consent and agreement in case of personalisation?
 - *Nudge theory combined with machine learning*
 - *Behavioural advertising, micro targeting*
 - *Manipulation, opacity, dark patterns*
 - *CJEU pending cases, e.g. C-252/21 (is using a free service entering a contract?)*

What's next?

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- **What is personalisation?**
- The issue of proxies
- The EU Acquis, upcoming EU framework

What is personalisation?

- Personalisation is the wrong term:
 - *This is not about addressing one as an **in-dividual person***
 - *This is about turning individuals into **'dividuals', deployed as 'predictors' (ML)***
 - *Personalisation = creating the preferences you mine*
 - This relates to **the issue of proxies**

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REVIEW article

Front. Artif. Intell., 28 April 2022
Sec. AI for Human Learning and Behavior
Change
<https://doi.org/10.3389/frai.2022.789076>

This article is part of the Research Topic
Improving Human-Machine Feedback Loops in Social Networks
[View all Articles >](#)

The Issue of Proxies and Choice Architectures. Why EU Law Matters for Recommender Systems

 Mireille Hildebrandt^{1,2*}

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² Research Group Law Science Technology & Society (LSTS), Faculty of Law and Criminology, Vrije Universiteit Brussel, Brussels, Belgium

Recommendations are meant to increase sales or ad revenue, as these are the first priority of those who pay for them. As recommender systems match their recommendations with inferred preferences, we should not be surprised if the algorithm optimizes for lucrative preferences and thus co-produces the preferences they mine. This relates to the well-known problems of feedback loops, filter bubbles, and echo chambers. In this article, I discuss the implications of the fact that computing systems necessarily work with proxies when inferring recommendations and raise a number of questions about whether recommender systems actually do what they are claimed to do, while also analysing the often-perverse economic incentive structures that have a major impact on relevant design decisions. Finally, I will explain how the choice architectures for data controllers and providers of AI systems as foreseen in the EU's General Data Protection Regulation (GDPR), the proposed EU Digital Services Act (DSA) and the proposed EU AI Act will help to break through various vicious circles, by constraining how people may be targeted (GDPR, DSA) and by requiring documented evidence of the robustness, resilience, reliability, and the responsible design and deployment of high-risk recommender systems (AI Act).

The issue of proxies

Personalisation or **creating the preferences you mine**

- **a critique** of the hidden behaviourism and assumed utilitarianism that underpins personalised recommender systems and search engines
- **a discussion** of the perverse incentives generated by the political economy that builds on a utilitarian way of framing human interaction
- **a first analysis** of how EU legislation may counter and channel such incentives, (allowing us to have our cake and eat it too?)

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THE AI ACT AND EMERGING EU DIGITAL *ACQUIS*

Overlaps, gaps and inconsistencies

Artur Bogucki, Alex Engler, Clément Perarnaud, Andrea Renda

September, 2022 - 02

The EU Acquis and upcoming framework: overlaps, gaps and foundations

- ‘implicit intent to leave out most of the solutions developed by large digital platforms in their consumer-facing AI deployment, ranging from content moderation to search engines and recommendation systems’.
 - *E.g. third-party systemic risk assessment by very large online platforms (VLOPs) in the DSA without reference to the conformity assessment procedures envisaged in the AI Act*

C-300/21

Österreichische Post AG
Opinion AG expected 6/10/22

- Does the award of compensation under Article 82 of the GDPR also require, in addition to infringement of provisions of the GDPR, that an applicant must have suffered **harm**, or **is the infringement of provisions of the GDPR in itself sufficient for the award of compensation?**
- Does the assessment of the compensation depend on further EU-law requirements in addition to the principles of effectiveness and equivalence?
- Is it compatible with EU law to take the view that **the award of compensation for non-material damage presupposes the existence of a consequence of the infringement** of at least some weight that goes beyond the upset caused by that infringement?

Tech Brief: AI liability presumption, digitalising energy, Google's record fine confirmed

By Luca Bertuzzi and Molly Killeen | EURACTIV.com

📅 16 Sep 2022

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“These measures will help persons seeking compensation for damage caused by AI systems to handle their burden of proof so that justified liability claims can be successful.”

-A leaked draft of the AI Liability Directive

The EU Acquis and upcoming framework: overlaps, gaps and foundations

- **Domain of application:** non-contractual civil law claims for damages caused by an AI system in fault-based liability regimes
- Alleviations of the burden of proof through
 - *the use of disclosure*
- Legal ground for tort action based on non-compliance AI Act
 - *rebuttable presumption of causation*
- The directive would not affect the national rules related to the burden of proof, the degree of certainty required for the standard of proof or fault definition (apart from the above)

The EU Acquis and upcoming framework: overlaps, gaps and foundations

Alleviations of the burden of proof through

■ the use of disclosure

- A potential claimant may request the providers of a high-risk system to disclose the information the provider will have to keep as part of its obligations under the AI Act
- The information requested would entail the datasets used to develop the AI system, technical documentation, logs, the quality management system and any corrective actions
- The addressees might refuse the request, which then can be raised again via a lawsuit where it will be assessed by a judge wherever it is justified and necessary to sustain a claim in case of accidents where AI was involved

The EU Acquis and upcoming framework: overlaps, gaps and foundations

Legal ground for tort action based on non-compliance AI Act

■ rebuttable presumption of causation

- Insofar as a causal link between non-compliance and damage can only be established by explaining the AI's inner workings, the approach is that **the causal link is assumed** under certain circumstances.
- In other words, it would be **up to the AI provider that has violated the rules that its non-compliance did not cause the damage** by demonstrating that there are more plausible explanations for the damage.



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