

THINKING OUTSIDE THE BOX?

REGULATORY SANDBOXES AS A TOOL FOR AI REGULATION

Ruscheimer, Hannah

FernUniversität in Hagen

Hagen, Germany

hannah.ruscheimer@fernuni-hagen.de

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The dynamics of the digital transformation conflict with the reactive concept of legal regulation: Law can often only react to current developments in retrospect. Digital technology develops rapidly; law, on the other hand, is slow because democratic law-making demands compromises and constitutionally compliant procedures. In addition to the characteristic of irreversibility, certain digital technologies are characterised by a qualitative leap; they have no analogue equivalence in the physical world. The quantitative data analyses of algorithm-based decision-making systems are among them: without corresponding digital tools, the quantity of information would be unmanageable by humans. In addition, the phenomenon of exponential growth of computational power occurs.

Regarding how law as a regulatory tool can react to the challenges described above, it intrudes on seeking new legal instruments. The relevant questions are no longer just about regulating technology but about the technology of regulation. Finding the right path is complex: abandoning regulation through law is not an option under the rule of law; changing entire codifications in anticipatory obedience is also not fecund. This situation calls for a flexible but effective experimental regulation.

I address the question of how the law should be designed as a regulatory instrument to respond to the challenges of digital transformation. The reference area is the concept of experimental regulation, which was already popularly discussed in various contexts and forms several decades ago, e.g. in the field of education, and is now again shifting into focus due to the demand for the regulation of new technologies.

The starting thesis is the public-law perspective that experimental regulation can offer instruments to strengthen administration, the legislature and the rule of law by using it to gain knowledge and insights within state institutions and to improve legal regulations. Experimental regulation as an umbrella term combines empirical findings with legal requirements in a targeted manner to promote innovation on the one hand and to generate expert knowledge on the state side about new technologies on the other. The European Commission's proposal for a regulation of Artificial Intelligence requires member states to set up regulatory sandboxes to test AI technologies under administrative supervision. The specific implementation needs to be clarified. Numerous legal questions arise that intertwine different levels. First, the projects must be embedded in national constitutional and administrative law. Questions of national competencies and procedural law arise concerning the requirements of EU law. In addition to the competent authorities, which must fit into the national order of competencies, the content of substantial law has to provide freedom for experimental clauses. On the other hand, this law must always meet the constitutional requirements of legal certainty and must not, by definition, become contourless to create room for experimentation. At the supranational level, the relationships between different findings of member state regulatory sandboxes must be clarified – is there perhaps a need for a European AI regulatory sandbox?