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BSA RECOMMENDATIONS TO THE JURISTS' COMMITTEE ON AI FOR EFFECTIVE AI REGULATION IN BRAZIL

BSA | The Software Alliance (BSA)[1] welcomes the opportunity to provide comments to the Brazilian Senate Jurists Committee on AI regulation.

BSA is the leading advocate for the global software industry before governments and in the international marketplace. Our members are at the forefront of software-enabled innovation that is fuelling global economic growth, including cloud computing and AI products and services. As leaders in AI development, BSA members have unique insights into both the tremendous potential that AI holds to address a variety of social challenges and the governmental policies that can best support the responsible use of AI and ensure continued innovation.

We welcome the Brazilian Senate Jurists Committee's recognition of the opportunities presented by the development and deployment of AI. AI has the potential to generate substantial economic growth and enable governments to provide better and more responsive services, while addressing some of the most pressing societal challenges. However, a flexible policy framework is necessary to facilitate the responsible uptake of AI products and services. As the Jurists Committee considers the development of a policy framework to maximize the benefits AI, we outline below our key recommendations.

Summary of BSA's Recommendations

- AI regulations should be: (1) informed by existing law, (2) risk-based, and (3) context-specific;

- Account for the different roles and responsibilities of stakeholders;

- Promote interoperability of regulations and standards;

- Recommend tools and resources to help businesses mitigate risks of bias

- Maintain strong data innovation policies.

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[1] BSA's members include: Adobe, Alteryx, Altium, Amazon Web Services, Atlassian, Autodesk, Aveva, Bentley Systems, Box, Cisco, CNC/Mastercam, Dassault, DocuSign, Dropbox, IBM, Informatica, Intel, MathWorks, Microsoft, Nikon, Okta, Oracle, PTC, Rockwell, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Splunk, Trend Micro, Trimble Solutions Corporation, Twilio, Unity Technologies, Inc., Workday, Zendesk, and Zoom Video Communications, Inc.

Recommendation 1: AI Regulations Should be Informed by Existing Law, Risk-Based, and Context-Specific

As the Brazilian Government considers AI regulations, we encourage the adoption of an approach that is: (1) informed by existing law, (2) risk-based, and (3) context-specific.

1) Informed by Existing Law

The Brazil body of laws offers strong, technology-neutral protections that address multiple concerns pertaining to AI as set forth in the Marco Civil da Internet (MCI) and the Data Protection Law (LGPD

To minimise regulatory duplication policymakers should first evaluate the adequacy of the existing legal framework to determine whether new AI-specific regulations are needed. In evaluating the sufficiency of existing laws, policymakers should be guided by two considerations. First, to promote trust and confidence in AI, the public should be assured that the law will continue to afford the same level of protection irrespective of whether a decision is made by a person or an automated system. Second, to promote AI innovation and adoption, it is vital to ensure that there is sufficient clarity about how existing laws and regulations will apply to AI. **Based on the foregoing, we recommend that the Brazilian Government consider new AI regulations in circumstances where there is a demonstrated gap in the existing legal framework.** In addition, agencies and departments that oversee sector-specific regulations should examine existing legislation and guidelines — in consultation with the private sector — to determine whether the current rules are sufficient or require clarification regarding their application to AI.

2) Risk-Based

As a general principle, the scope of any regulatory obligations should be a function of the degree of risk and the potential scope and severity of harm. Many AI systems and the manner in which they are deployed pose extremely low, or even no, risk to individuals or society, and imposing onerous regulations on the entities developing and/or deploying such systems would only unduly hamper innovation. Regulations should therefore focus on high-risk application of AI, such as uses of AI that may have legally consequential impacts on a person's life (e.g., access to government services or credit) or that pose a significant risk of physical harm. To this end, it will be important to carefully assess scenarios that should be deemed as high-risk and hence be subject to legal requirements.

3) Context-Specific

The risks that AI poses and the appropriate mechanisms for mitigating those risks are largely context specific. **Rather than regulating AI as a technology, regulatory activity should instead focus on particular applications of AI that may involve specific risks**. Moreover, because the appropriate mechanisms for addressing risks will vary depending on the nature of the AI system and the setting in which it is being deployed, regulators should avoid prescriptive, one-size-fits-all technical requirements. Instead, BSA encourages regulatory approaches that provide incentives to adopt process-based accountability mechanisms, such as impact assessments, for particularly high-risk applications of AI.

Recommendation 2: Account for the Different Roles and Responsibilities of Stakeholders

To the extent new AI regulation is contemplated, it should account for the unique roles and capabilities of the entities that may be involved in an AI system's supply chain. To that end, **regulatory obligations (and associated liabilities) should fall on the entity that is best**

positioned to both identify and efficiently mitigate the risk of harm that gave rise to the need for the regulation.

Reflecting the inherently dynamic nature of AI systems, AI regulations must account for the array of stakeholders that may play a role in various aspects of a system's design, development, and deployment. In general, there are at least two key stakeholders with varying degrees of responsibility for managing the risks associated with an AI system throughout its lifecycle:

- **AI Developers:** AI Developers are organisations responsible for the design and development of AI systems.

- **AI Deployers:** AI Deployers are the organisations that adopt and use AI systems. (If an entity develops its own system, it is both the AI Developer and the AI Deployer.).

It is critical that AI regulations account for the unique roles and responsibilities of *developers* of AI systems and the organisations that *deploy* such systems. The appropriate allocation of risk management responsibilities between such stakeholders will vary depending on the nature of the AI system being developed and which party determines the purposes and means by which the underlying model is trained.[2] In many instances — especially those involving general-purpose AI tools — developers will not be in a position to know the precise manner in which the technology is being deployed by an end-user. In such circumstances, the party best positioned to address potential risks will be the entity that deploys an AI system and determines the purposes and means by which it is used. Including such a conceptual distinction would be helpful to different stakeholders as they carry out risk assessments to determine the appropriate measures to adopt for AI development, deployment, and use.

Recommendation 3: Promote Interoperability of Regulations and Standards

Brazilian leadership in the development and use of AI will be possible only if Brazilian companies can access global markets. To ensure Brazilian innovation can thrive in foreign markets, **it will be vital to ensure that the Brazilian approach to AI regulation is interoperable with global partners**. The Organisation for Economic Cooperation and Development's (**OECD's**) Recommendation represents an important first step toward establishing global norms around the governance and regulation of AI. Those norms are predicated on a risk management-based approach for enhancing the benefits of AI and safeguarding against unintended harms. Future Brazilian regulation should seek to align with OECD's guiding principles. It is encouraging that Brazil's own AI Ethics Framework[3] was developed with reference to existing initiatives, including the OECD's Recommendation and the European Union's Ethics Guidelines for Trustworthy AI.[4] There are also various efforts underway to establish

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[2] The importance of such an approach to AI regulation is a key pillar of the Organisation for Economic Co-operation and Development's (**OECD's**) Recommendation of the Council on Artificial Intelligence, which recognises that effective AI policies must account for "stakeholders according to their role and the context" in which AI is being deployed. *See* Recommendation of the Council on Artificial Intelligence, May 2019, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449. Per the Recommendation, the AI stakeholder community "encompasses all organizations and individuals involved in, or affected by, AI systems, directly or indirectly."

[3] Artificial Intelligence Ethics Framework, November 2019, https://www.industry.gov.au/data-and-publications/australias-artificial-intelligence-ethics-framework

[4] Developing the AI Ethics Framework and principles, https://www.industry.gov.au/data-and-publications/australias-artificial-intelligence-ethics-framework

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internationally recognised standards for AI, including within the International Organisation for Standardization (**ISO**) and the Institute of Electrical and Electronics Engineers (**IEEE**).[5]

BSA urges that, in designing regulations and adopting standards for AI, the Government should continue to align them with global norms and strive to make them interoperable with other jurisdictions.

Recommendation 4: Recommend Tools and Resources to Help Businesses Mitigate Risks of Bias

BSA recently published *Confronting Bias: BSA's Framework to Build Trust in AI* (BSA Framework)*.*[6] The BSA Framework is a first-of-its-kind methodology that organisations can use to perform impact assessments to identify and mitigate risks of bias that may emerge throughout an AI system's lifecycle. The BSA Framework:

- Outlines a process for performing impact assessments to identify and mitigate potential risks of bias;

- Identifies existing best practices, technical tools, and resources for mitigating specific AI bias risks that can emerge throughout an AI system's lifecycle; and

- Sets out key corporate governance structures, processes, and safeguards that are needed to implement and support an effective AI risk management program.

BSA encourages the Government to leverage the research and best practices in the BSA Framework to create relevant guiding materials for businesses around mitigating bias in AI development and deployment.

Recommendation 5: Maintain Strong Data Innovation Policies

AI systems are "trained" by ingesting enormous volumes of data. Their benefits are therefore dependent on the quantity and quality of data that is available for training. As a result, government policies affecting the ability to access and share data have a significant influence on the development of AI systems and the quality of their outputs. **To promote innovation and adoption of AI, Brazil should: 1) ensure that data may be transferred across borders; 2) support an open government data policy to make non-sensitive government data assets freely available and useable for the general public; and, 3) modernize the Copyright Act to provide flexibility for AI development.**

1) Ensure international data transfers are unimpeded
International data transfers are integral to every stage of the AI life cycle, from the development of predictive models to the deployment and use of AI systems. Data used in these systems often originate from many geographically dispersed sources. Many AI solutions used in Brazil are developed internationally and offered over cloud computing systems. Likewise, AI solutions developed in Brazil rely on international data transfers both for their development and deployment.

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[5] See: https://www.iso.org/committee/6794475.html and https://standards.ieee.org/initiatives/artificial-intelligence-systems/.

[6] Confronting Bias: BSA's Framework to Build Trust in AI, June 2021, https://ai.bsa.org/wp-content/uploads/2021/06/2021bsaaibias.pdf.

In this regard, we are encouraged that the Brazilian Senate Jurists Committee expressly acknowledges the importance of facilitating cross-border data transfers and prohibiting data localisation requirements.

2) Access to government data and public sector information

BSA supports an open data policy through which non-sensitive government data should be made open, available, and useable for the general public. Government-generated data is a resource that can serve as a powerful engine for creating new jobs and promoting economic growth. At both the local and national level, governments collect and generate vast quantities of non-sensitive data that can be harnessed in the development of AI systems. For instance, an AI system designed to improve supply chain efficiency can leverage government data about historical traffic flows, law enforcement event advisories, and weather patterns to recommend delivery routes that minimise congestion, reduce emissions, and improve public safety.

BSA encourages the Brazilian Government to facilitate access to and use of non-sensitive government data to support domestic innovation and development in AI.

5) Recognize a Copyright Exception for AI Development

The incredible advances in AI capabilities in recent years have been enabled by a particular subset of the technology referred to as "machine learning." At its most basic, machine learning involves the computational analysis of large amounts of data (i.e., "training data") to identify correlations, patterns and other metadata that can be used to develop a "model" capable of making predictions based on future data inputs. For instance, GitHub recently used machine learning to create CoPilot, an AI-powered software tool that enables programmers to write code more efficiently by providing source code recommendations for common software tasks.[1] Much like a smartphone or email "autocomplete" recommendation, CoPilot works by analyzing the code that a programmer is working on and suggesting options for completing the identified function. The model that powers GitHub Copilot was "trained" by analyzing patterns and correlations from a large repository of publicly available open source code. Tools such as CoPilot promise to democratize the software development process, empowering more people, more businesses, and more industries to benefit from the creation of customized software solutions.

As the foregoing example demonstrates, some forms of machine learning rely on training data that is derived through the computational analysis of items potentially subject to copyright protection. Although the reproductions created during the machine learning process are not visible or otherwise made available to the public, they may create uncertainty under copyright law. For that reason, many leading AI nations have sought to establish clear copyright exceptions to facilitate AI innovation. In the United States, for example, reproductions used for AI analysis or research are considered a fair use. But in legal systems that do not have a flexible fair use provision, which is the case of Brazil, there can be some uncertainty about the permissibility of such activity. There is an emerging international norm that reproductions created as part of the machine learning process should be subject to an explicit copyright exception. For instance, Japan recognizes a broad exception for "data analysis." Singapore recently passed a similar exception for "computational data analysis." And the European Union recognizes an exception for "text and data mining."

To ensure that that Brazilian business are well positioned to leverage innovation and drive economic growth, Brazil should likewise support the adoption of a copyright exception to provide clarity for organizations engaged in the development and adoption of AI technologies.

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[1] See https://copilot.github.com/

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Conclusion

We hope that our comments will assist the Government as it considers regulations for AI in Brazil. Please do not hesitate to contact me if you have any questions regarding this submission or if I can be of further assistance.

Sincerely,

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