The Intersection

Organisations are increasingly interested in the adoption of solutions based on artificial intelligence or machine-learning

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Companies planning to develop artificial intelligence (AI) tools, products or services need processes that begin early in the design phase to assess and address key risks and dependencies. These risks involve not just regulatory compliance, but also confirming the data set is appropriate for the application, third party liability, and risk to the reputation of the company, not to mention the need for aligning the company's ethics with the design and outcome of the tool. For example, a company needs to make sure that it will be able to provide a data-set that is both sufficiently 'clean' (bias-free and for which the organisation has sufficient rights) and large enough to be able to train the developed AI/machine-learning (ML) tool properly.

Organisations that are users or licensors of AI-based products or services developed by an external provider also need processes to ensure that their vendors comply with law, but also ensure that their products and services are consistent with the organisation's ethics, comply with law and provide transparency into what types of data they use and how their offerings analyze and make decisions – known as algorithmic accountability.

Whether a company is a developer or a user of AI (or both), establishing corporate policies to manage use of AI within organisations can help support both compliance with law and alignment with desired ethical standards.

Corporate Legal Departments

For corporate legal departments that are hard-pressed to do more with less, AI can be used to automate time-consuming activities, including due diligence review, litigation outcome prediction or forecasting, document automation and legal analytics. Many organisations' legal functions also have invested in e-billing and legal spend management through tools like Thomson Reuter's Legal Tracker and Brightflag.

Since the outbreak of the COVID-19 pandemic, in-house counsel have been faced with the daunting task of addressing critical near-term business continuity issues on top of their day jobs, such as ensuring that contracts mitigate risk and advising on matters affecting a remote workforce. Corporate counsel will now be turning their attention to entity realignment and strategic planning for organisations, which may involve business transformations and restructurings in order to survive the current market volatility. These tasks may often involve mass contract review, one place where AI tools could especially come in handy.

What many legal teams do not focus on, however, is use of AI across their companies' business units, whether those tools are developed by the organisation itself or not.

Within the Organisation

The use of AI across organisations is growing and is likely to significantly escalate in our 'new normal' environment. In a study conducted in 2019, 50% of workers across the globe were currently using some form of AI at work. Use spans across industries, from automotive vehicles to preventing fraud in payment

systems. However, many corporates in traditional industries are increasingly developing AI-based technology and embedding it in their businesses, often without thought to potential legal and ethical implications. In the new post-COVID-19 workplace, and as many countries are warily starting to reopen, we expect to see an increase in reliance on AI. We have included a few illustrative examples below.

Stakeholder Relationships

Relationship building with customers and suppliers across organisations will be heavily dependent on AI tools. Instead of jumping on a quick flight for an in-person meeting, customer outreach will be increasingly digitised through customer profiling, personalised advertising and targeted marketing. States are already taking notice. Effective 1 July 2019, the California 'Bolstering Online Transparency' law requires all online bots that attempt to incentivise a purchase or sale of goods or services in a commercial transaction to declare themselves as a bot and not a human. Similarly, in this new environment, organisations will increasingly rely on algorithms to profile suppliers and identify which providers are most likely to be a good fit in terms of reliability and quality.

Other Regulatory Developments

Most governments are keen to position their countries as leaders in AI and to encourage the development of AI technology as a driver of economic growth. In the US, at the federal level, in February 2019 the White House issued an executive order promoting the use of AI; and, in 2020, the Office of Management and Budget issued for public comment a Draft Memorandum for the Heads of Executive Departments and Agencies, 'Guidance for Regulation of Artificial Intelligence Applications', recommending a cautious approach to regulation of AI by federal government agencies. In Europe, in February 2020 the EU established the creation of a 'Europe fit for the digital age' as a key political goal and has published a series of documents intended to shape Europe's digital future – one of which is a white paper titled *On Artificial Intelligence – a European approach to excellence and trust.*

However, sitting alongside broad governmental endorsements are specific use limitations. Taking just one AI use case as an example, various jurisdictions in the US and elsewhere have banned the use of facial recognition technologies. Illustrating the problems of developing tools that comply with consistent international regulatory approaches, the position is different in the UK and EU. Facial recognition is neither banned nor currently governed by a specific legal framework in the UK (and, indeed, in March 2020 London's Met Police announced that it was pushing ahead with the use of live facial recognition technology). And, while an initial draft EU white paper on AI had floated the idea of a five-year moratorium on the use of facial recognition technology in public spaces, that was dropped in February 2020.

In May 2020, the UK Information Commissioner's Office (ICO) and the Alan Turing Institute (the UK's

national institute for data science and artificial intelligence) jointly issued guidance on AI to give organisations practical advice to help explain the processes, services and decisions delivered or assisted by AI, to the individuals affected by them. The guidance was issued in response to the commitment in the UK Government's AI Sector Deal. It is not a statutory code of practice under the UK Data Protection Act 2018, nor is it intended as comprehensive guidance on data protection compliance. But, for organisations based in the UK, it provides a useful reference framework – especially as it also includes a section aimed at senior management that focuses on the internal procedures for implementing compliant AI mechanisms and the corresponding documentation required in order to demonstrate compliance.

Ethical Standards

In the context of corporate use of AI, ethical standards also can operate alongside the law. Companies are not necessarily legally obliged to comply with such ethical standards but can adhere to them as a matter of choice.

Certain uses of AI might be perfectly legal, but inconsistent with a company's ethos or may cause concern among a company's key stakeholders – including employees and shareholders. There are many different possible ethical standards that companies could consider in formulating policies. The following list includes examples of such ethical principles, drawn from a variety of sources:

- seek to avoid creating or reinforcing unfair bias and unjust impacts
- seek to provide safe and secure systems
- the information used and logic behind decision-making of AI systems must be explainable
- the application of AI to personal data should not 'unreasonably curtail people's real or perceived liberty'
- apply an appropriate level of human direction and control in the development and use of AI systems
- maintain clear chains of accountability and avoid abdication of responsibility by individuals, corporations, governments or other entities for decisions automated through AI that otherwise would have required a human decision-maker to act
- respect and improve social and civic processes on which the health of society depends
- use AI in ways that encourage the sharing of a diversity of ideas and opinions and minimise the loss of cultural pluralism
- avoid placing individuals in siloes or 'filter bubbles' that limit their exposure to ideas or cultures different from their own
- avoid uses of AI that are likely to cause harm without carefully balancing the potential costs and benefits
- avoid use of AI in a manner or for a purpose that violates human rights, or for surveillance in violation of accepted norms or for purposes that are intended to cause direct physical injury to people (e.g., lethal weapons).

The Legal Function's Role

Earlier this year, Lex Mundi and Morrison & Foerster collaborated on the development of an *AI Readiness Checklist* which identifies steps for corporate legal functions to take in order to prepare for the development or use of AI tools within their companies.

Below are a few areas for corporate legal counsel to keep top-of-mind in formulating their role within the adoption of AI across their organisation.

Governance

Many of the steps set forth in the *AI Readiness Checklist* may need to be revised and tailored depending on the extent and stage of a company's particular development, implementation or usage of AI. In our experience, most organisations start with a limited proof-of-concept in a narrow application range in order to assess the use of AI tools and adjust their own organisational processes to reflect learnings received – before then going on to a wider roll-out.

Nevertheless, almost regardless of the degree of maturity of an organisation, legal leaders across industries invariably need to ensure that the right governance framework has been implemented at the C-suite, within relevant business units and within the legal/compliance teams. This may include the

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establishment of an internal governance committee and identification of individuals across departments with responsibility for overseeing AI use in their business units.

To guarantee a top-down approach, however, the board should have an explicit mandate (statutory or otherwise) to oversee ethics and governance across the company. In addition, it is important that the board is comprised of individuals with competence to understand the potential issues that arise with the use of AI across products, services operations and relationships with customers, suppliers, employees and other stakeholders.

Compliance

We would typically expect the legal function to be involved with developing and implementing AI corporate policies to ensure articulation of key principles, as well as improving compliance, increasing transparency across the organisation and consistency in approach to decision-making and compliance. In particular, the development of a corporate AI policy is often an important tool in facilitating compliance with applicable regulations, especially around privacy, bias and disparate impact, and addressing cross-border issues when necessary. An AI policy is also helpful in developing and implementing accountability

mechanisms, including project and algorithmic accountability.

Legal regulation of AI is relatively new and still evolving – as well as cross-border and multi-faceted (emanating from privacy laws, for example, as well as employment or anti-discrimination regimes, and taking account of various bases for liability assumption). Horizon scanning can help corporate legal departments stay abreast of key developments and regulatory challenges in jurisdictions where the organisation currently operates or is looking to expand. This is one of the key ways companies can proactively mitigate risk. Despite the current pandemic and market volatility which has dominated corporate legal functions, AI regulation continues to evolve quickly.

Product Design

Finally, for organisations that develop and implement their own AI tools, it is vital for the legal function to be involved in the early stages of AI project design to understand key risk areas and promote compliance-by-design. Where product design involves external vendors, the legal function should have oversight over relationships with AI vendors within the organisation, including responsibility for due diligence on suitability, contracting arrangements and ensuring vendor accountability for errors. Another area to note is ensuring that the project team only uses 'clean' data to train the AI solution and ensure that the project requirements encompass privacy-by-design and compliance-by-design.

The legal function should be involved in monitoring and ensuring progress through project stages, including proof of concept, build and test, and implementation.

From a practical perspective, bear in mind that an AI adoption project is still a form of IT/tech project. Corporate legal functions must not lose sight of the basic principles of good practice for implementing technology development and roll-outs, which may include maintaining a risk register, paying attention to delays, proactively managing external vendors, ensuring that customer obligations are fulfilled, being alert to cost overruns and addressing project issues early and quickly before they escalate.

Conclusion

In-house teams are increasingly under pressure to facilitate adoption of solutions based on AI or ML within their companies. Establishing cross-functional teams that involve senior leadership within the company helps ensure the organisation is aligned about when and how to use AI and, if applicable, develop AI tools, products or services.

Assessing key risks early and ensuring that key dependencies are addressed proactively can mitigate risks specific to AI applications, as can taking a horizon-scanning approach to key developments in jurisdictions in which the company does business. Establishing corporate policies to manage use of AI within organisations brings together all of these streams to support both an organisation's compliance with law and alignment of the company's AI-related activities with desired ethical standards. n