Artificial Intelligence
Key Legal Issues for
Financial Institutions

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Regulatory/ethical compliance

There are now consistently strong messages from advisory bodies and regulators about the ethical use of AI, particularly in the financial services sector, around the transparency and explainability of AI.

Various regulators e.g. the UK FCA, the Singapore Monetary Authority and the Hong Kong Monetary Authority have emphasised that AI in the FS sector needs to be transparent, particularly when used for sensitive purposes e.g. consumer-facing transactions.

Given the highly regulated nature of the FS sector, we advise FIs to get ahead in this area by implementing robust AI governance.

Data protection

Data is an essential component of AI systems and data protection legislation is pervasive. Unbeknown to many companies, this legislation can apply specifically to personal data used in the context of automated decision-making (which includes AI).

For example, Articles 13 and 14 of the GDPR require organisations to provide "*meaningful information about the logic*" of an automated decision-making process which involves personal data. Other global data protection authorities have emphasised the need for high standards in the use of personal data in the context of AI. We expect data protection legislation in the future to address specifically the use of personal data in AI systems.

Employment

AI being used in recruitment or other HR/employment processes gives rise to a risk of bias and discrimination (including so-called "algorithmic bias").

Organisations using AI technology in this context will need to be able to demonstrate the integrity of their AI systems, including as to the input data being used and the reliability of the output.

Dispute resolution

Challenging questions arise when AI 'goes wrong' and causes physical or financial harm. For example, given that AI makes autonomous decisions, who is liable for the harm and was the harm foreseeable? In the context of product liability, is AI a 'service' or a 'product'?

Contracts will allow parties to allocate risk and responsibility between them where AI 'goes wrong'. However, this gives rise to challenges about who is responsible for any damage and how to allocate liability fairly in the contract.

There are also likely to be challenges in applying conventional tort law principles where there is no contractual framework.

Corporate/contractual

The uniqueness of AI will present challenges when drafting contracts. From substantive provisions to liability provisions (and even boilerplate provisions), AI will causes issues given the lack of understanding about how it works (leading to potential drafting uncertainties) and in the appropriate allocation of rights/obligations and liabilities.

This uniqueness will also apply in various other commercial contexts e.g. in M&A (in due diligence and in drafting warranties, for example), in licensing arrangements, funding/investment opportunities, and many other contexts.

Intellectual property

AI attracts novel IP challenges. For example, can IP rights apply to all or part of an AI system? Who owns the IP rights to an AI system's own creations?

Organisations developing or using AI should consider their IP rights at an early stage and ensure that they have sufficiently protected. This protection could range from ensuring that proprietary rights are appropriately retained in contracts to registering available IP rights e.g. patents, with the appropriate authorities.

Insurance

Insurance is increasingly available to cover the damage caused when AI goes wrong, whether under wider policies or specific AI policies.

For insurers, the autonomy of AI and the consequential difficulties in attributing liability to a human or legal entity give rise to coverage issues.

Legislation is likely to emerge in numerous jurisdictions relating to AI insurance, including compulsory insurance cover.

Tax

AI can be incorporated into business processes across the entire value chain. This could involve relocating people or shifting intercompany flows of data, as well as fundamental changes in economically significant risks for the business overall.

These changes could mean that existing tax structures are not sustainable in the future and should be re-evaluated as AI technology is harnessed.

Competition and antitrust

AI can generate competition and antitrust risks, with potentially significant repercussions.

For example, organisations using AI to improve pricing models or predict market trends could be at risk of engaging in tacit collusion or other anti-competitive conduct. AI's use of big data also raises similar information sharing risks.

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Our expertise

We have a dedicated Artificial Intelligence Group which spans numerous disciplines and has a wide range of specialist expertise.

Together with our sector-led approach and strong expertise in the financial services sector (including FinTech), we have advised a number of financial institutions on AI-related issues.

Our experience includes:

- **Advising a leading asset manager on a collaboration agreement involving the development of a machine learning investment platform**

- **Advising a leading software developer / provider to financial institutions on a digital sandbox tool to assist data synthesis in machine learning**

- **Advising a financial institution on a dispute arising out of the allocation of proprietary rights to an AI system**

- **Advising an app developer on data privacy issues, including undertaking a data protection impact assessment and liaising with the data protection regulator**

Please feel free to get in touch with us if we can assist you.