CLIFFORD CHANCE

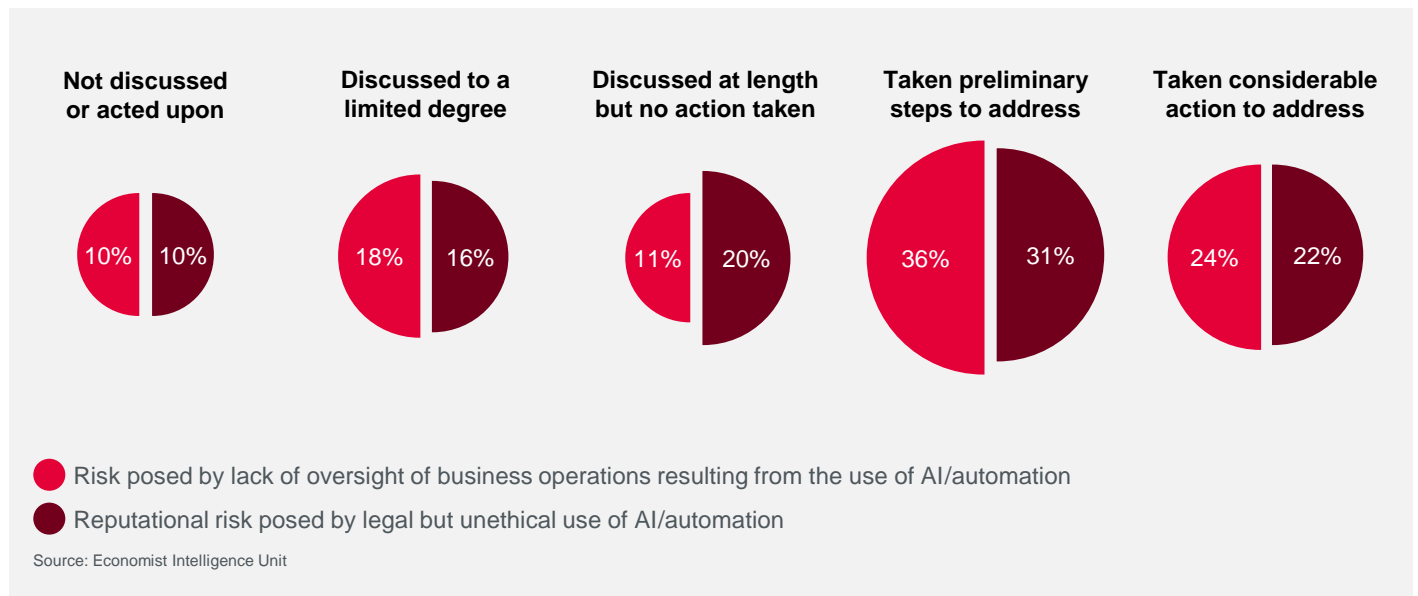## ARTIFICIAL INTELLIGENCE RISK:
WHAT DOES 2020 HOLD?

JANUARY 2020

Artificial intelligence (AI) creates huge opportunities for businesses globally across all sectors. However, the use of AI also brings the potential for significant legal, ethical and reputational exposure. Recently we have seen global regulators grappling with these risks, with the announcement of a vast number of legal developments, including the publication of legislation and ethical guidelines. Civil courts have been active too, with several recent judgments addressing liability for AI.

Despite the legal and ethical questions posted by AI, businesses are remarkably confident in their ability to understand and address the risks. In a recent survey of 200 board members from large businesses around the world carried out by the Economist Intelligence Unit on behalf of Clifford Chance, 88 per cent agreed (somewhat or strongly) that their board fully understands the legal, regulatory and ethical implications of their company's use of data and AI. However, given that the use of AI is nascent in most organisations, and given the ever-changing regulatory and legislative landscape, respondents' claims that they fully understand the risks could be overstated.

In this review we consider some of the emerging global themes and highlight recent international developments. We also explore what 2020 is likely to mean for the global regulatory outlook and the steps businesses should be taking now to minimise the risks arising from their use of AI.

Action on AI risks

To what extent has your board discussed and taken concrete steps to address the following risks over the last five years?

Not discussed or acted upon	Discussed to a limited degree	Discussed at length but no action taken	Taken preliminary steps to address	Taken considerable action to address
10% 10%	18% 16%	11% 20%	36% 31%	24% 22%

● Risk posed by lack of oversight of business operations resulting from the use of AI/automation

● Reputational risk posed by legal but unethical use of AI/automation

Source: Economist Intelligence Unit

"The opportunities that AI poses are clear, but too often the risks are oversimplified and underestimated.

As companies embrace innovation and use technologies to stay competitive, the ethical considerations, in addition to the legal requirements, need urgent consideration."

Dessislava Savova,
Partner, Paris

THE RISKS

Over 60 sets of guidelines, reports and recommendations were issued by governments and industry bodies around the globe last year alone. While some consistent themes emerge, a standard set of international principles is yet to be developed.

Businesses using or investing in AI must ensure that all applicable principles from this global patchwork of guidance are considered and reflected in new or existing policies, as applicable.

Many of the newly-published AI guidelines and ethical frameworks emphasise the importance of human oversight, governance and accountability. There is an emerging set of common themes centred on fairness, interpretability and robustness of AI. Businesses need to understand how their AI operates: how decisions are made and how to challenge its operation. Crucially, they must be able to explain this to employees, customers and regulators in an accessible and transparent way. The same standards apply whether AI is bought in or built in-house.

In the EU, there has been an increased antitrust enforcement focus on businesses that use AI and algorithms, including decisions against Google's advertising business and investigations into digital platforms. Businesses should consider the extent to which anti-competitive issues arise when using or investing in AI, including the risk of AI systems unintentionally learning anti-competitive behaviour as a way to achieve a seemingly "optimal" outcome.

Whether AI is used for autonomous vehicles, healthcare or financial services, the underlying data being used to develop and train the AI is key. Businesses must interrogate any datasets used in AI tools they develop, purchase or invest in. They must ensure data has been lawfully collected, is used appropriately and is not biased.

Intellectual property offices around the world have started to get to grips with the role played by AI in creating inventions. The trend to date has been to maintain the status quo that a human inventor is required; this may have a knock-on effect for the ability to protect AI-created inventions in the future.

Issues around liability for AI and algorithms, and in connection with human rights, are beginning to be explored by the civil courts. Businesses need to ensure that their contractual terms with customers and third-party suppliers of AI technologies remain fit for purpose and that they anticipate potential exposures. They should also assess the risk of adverse impacts on human rights arising from the use of AI.
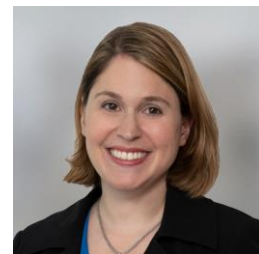
"Companies and governments are competing for dominance in AI – a technology with the potential to impact every area of life, from national security to healthcare to financial services.

In the 2020s, winners and losers will emerge. However, participants trying to advance too rapidly risk failing to properly evaluate and address social, ethical, and legal issues."

Megan Gordon,
Partner, Washington D.C.

OUR PREDICTIONS FOR 2020

1

Binding laws and regulatory frameworks

Globally, we will continue to see the evolution of legal and regulatory frameworks to address the use of AI across industries, with ongoing adaptation of existing law and regulation, alongside the implementation of new, stand-alone frameworks. Examples include:

- In the **EU**, we expect new AI-specific legislation, following the announcement by the European Commission's new President Ursula von der Leyen that rules will be drawn up during her first 100 days in office. The White Paper on the legislative framework is due in February. It is expected to include proposals for a temporary ban on the use of facial recognition technology in public spaces, while its impact is assessed; and for binding regulations regarding high-risk applications of AI in sectors such as health, transport and policing.

- In **France**, we expect developments relating to mobility, autonomous vehicles and healthcare. **Germany** will establish 12 regional digital research hubs to connect businesses with partners from science and start-ups, focusing on e-payment, mobility and health. The **UK**'s Law Commission is also consulting on the regulatory framework for automated vehicles.

- In the **US**, on 7 January 2020, the White House Office of Science and Technology Policy published, for comment, its 10 principles for government agencies developing AI regulations. The California Consumer Privacy Act, in effect since 1 January 2020, requires entities to provide detailed disclosures on how personal information is used with AI. Proposals for a federal privacy law have been tabled for discussion which, if effected, would impact the use of AI. Additionally, a new rule in effect from January 2020 limits the export of geospatial AI software outside the US, highlighting the importance of such technology to national security.

- In **Singapore**, the Monetary Authority of Singapore has partnered with various financial institutions to create a framework, called Veritas, for the responsible adoption of AI and Data Analytics. Its report is expected in the second half of 2020.

2

Best practice guidance

We will continue to see the publication of detailed guidance by international regulators and industry-specific bodies that will expand "best practice" requirements for international firms. For example:

- The **Hong Kong** Monetary Authority will issue guidance on consumer protection principles.

- The **UK**'s data protection regulator, the Information Commissioner's Office (ICO), will publish an AI auditing framework; further guidance on explaining AI decisions; and a data protection accountability toolkit.

3

Focus on systems and controls

We can expect wider focus on how companies should comply with practical issues, such as governance of AI, explanations, testing and controls. Financial services firms are likely to be a test-ground, given the pronouncements by financial regulators in 2019 regarding the need for adequate systems and controls.

Crucial topics to consider include AI systems' fitness for purpose, accurate marketing, testing and accuracy, insurance, and increasing regulatory scrutiny on the use of AI in the financial services industry.

4

Focus on ethical use of AI

We will see the continued development of principles for ethical and responsible AI by regulatory and industry bodies around the world, addressing issues such as fairness and bias. Businesses will be expected to educate their employees and document their ongoing consideration of ethical issues when developing or using AI.

5

Increased enforcement activity

Reputational concerns will become increasingly important in the face of growing enforcement activity. Having laid out their principles, we anticipate that regulators will shift towards enforcement action, to demonstrate the cost of not complying with all existing AI law and regulation.

Big tech remains high on regulators' agendas. We expect increased enforcement action against large data-heavy organisations, as well as those in financial services and beyond that rely on, or work closely with, data-driven businesses. Antitrust, data and industry-specific or sectoral regulators (e.g. global financial or cybersecurity regulators) will all be bringing charges.

6

AI disputes in court

We will see more cases heard in local courts – this is critical in building out the limited existing body of case law. For example, in the UK, *Tyndaris v VWM* will go to trial in mid-2020. This will be the first time the English courts consider who is liable when an AI-powered investment system has allegedly caused substantial losses.

7

Protecting inventions created with AI

We expect that in 2020 patent registries will focus on whether inventions created by using AI can be sufficiently described for patent protection to be granted. This stems from the "black box" nature of AI; the more advanced systems become, the harder it is to explain how an invention is implemented, and this is a key requirement for patentability. Due to AI's increasing creativity, establishing the owner of intellectual output created by AI may also become increasingly difficult.

The debate concerning AI as an inventor for patent applications or as an author for copyright works will continue.

8

AI audits will be expected

The calls for more extensive auditing of AI (both internally within organisations and by external bodies) are likely to grow, given the matrix of technology (and third parties) involved in many AI systems.

We recommend that companies assess how and who will monitor their use of AI and escalate any issues to the Board on an ongoing basis.

HOW TO ASSESS YOUR AI RISKS
PRACTICAL ISSUES FOR GLOBAL BUSINESSES

AI is often used across different business lines, geographies, jurisdictions and technology teams and is not necessarily readily accessible or adequately explained to those with the usual control functions in institutions (such as legal, compliance and internal audit). This creates risk for institutions. That needs to change.

TOOLS FOR RESPONSIBLE AI MANAGEMENT

Governance and accountability	In our experience, the starting point for proper governance of AI is clear leadership, from companies' boards and a hybrid team of general counsels, senior data, compliance, risk and policy officers overseeing AI risk management and embedding a culture of transparent and ethical use of AI.
AI frameworks	For many businesses using AI, a stand-alone framework detailing their approach to AI and incorporating applicable global regulatory requirements and international norms (such as human rights responsibilities) will be crucial and should be a priority. This framework may be the first document requested by regulators, litigants and politicians, if any AI issues arise. It can also help to demonstrate a business's proper understanding of its AI use and its active management of AI risk.
AI boards	For businesses which are more extensive users of AI (or which may have more to lose reputationally from a particular use of AI), a dedicated AI and/or data board to ensure that consideration is given to legal, reputational and ethical AI risks and that suitable AI policies are adopted and adhered to internally may also be appropriate. AI boards should not just be used for PR purposes. A careful evaluation of how, whether and why an AI board is appropriate is a valuable first step.

There is no "one-size-fits-all" solution for addressing AI risk. To assess which tools are appropriate and how they should be used, we recommend an AI risk audit.

1. Due diligence of AI usage	To minimise AI risk, businesses need to assess their use of AI from supply chain to clients, encompassing AI technology that has been bought (from suppliers or via M&A) or built in-house. This should include: • Data: Where does it come from and do you have the right to use it? Is any bias in the data inputs being addressed? • Transparency: How is data being used and decisions made? How is that communicated to stakeholders? • Explanations: Is there a written explanation of the AI's functionality? How and where is it documented and is it up to date? • Review: Are you monitoring and/or testing the AI's decision-making and its impact? To what extent is there human oversight? • Limits: Have boundaries been set regarding use of AI? Who could be harmed by its use? Are there uses that you will not countenance? Is there an off-switch? • Liability: What is the contractual framework for the use of AI? How is liability apportioned between the business and its suppliers and/or customers?
2. Consideration of existing policies/control frameworks	Businesses will typically have many existing policies that may contemplate or impact the use of AI; for example GDPR compliance, human rights policies, competition policies, codes of conduct and new product approvals. Where policies already contemplate AI use, are they consistent? If they are not, do they need amending?
3. Management responsibility	Businesses need to determine and document management responsibility for their use of AI, with a clear governance structure and a consistent approach. Senior managers need to understand the technological capabilities of AI and how to challenge its operation.

"Due diligence and regular audit – both of the AI's functionality and the apportionment of contractual and tortious liability between programmers, suppliers, the company and/or its clients in standard terms of business – should be a top priority. Organisations that fail to monitor and take action face regulatory sanction and unexpected civil exposures when the consequences of AI usage are tested in court."

Kate Scott,
Partner, London

RECENT GLOBAL AI HIGHLIGHTS

Global companies need a global approach. Each month of 2019 brought new AI developments, and we have highlighted some of the key events here. There will be many further developments in 2020.

JANUARY

French Senate's report on the *European Strategy for AI.* The report argues in favour of a co-ordinated approach in Europe and increased investment in AI in Europe.

First edition of Singapore's *Model AI Governance Framework.* The accountability-based framework, which is the first of its kind in Asia, sets out guiding principles on the use of AI and provides practical measures that can be implemented by organisations using AI.

The framework focuses on: (1) internal governance; (2) decision-making models; (3) operations management; and (4) customer relationship management.

German Association for the Digital Economy's *Guidelines for AI.* These address digital ethics, challenges for the labour market and the relationship between industry, politics and society.

FEBRUARY

Updated *Memorandum of Understanding* between the UK's Financial Conduct Authority (FCA) and Information Commissioner's Office (ICO). This includes new paragraphs on sharing confidential information (including personal data) and provides that the FCA and ICO can run investigations in parallel if necessary.

This means businesses could face enforcement action from both regulators. Both have significant sanctioning powers. Under the GDPR, the ICO can enforce a penalty of up to four per cent of global turnover and has already proposed to fine British Airways 1.5 per cent of its 2017 global turnover for GDPR breaches. The FCA can also rely on the broad principle of market efficiency to impose significant fines.

***Code of Conduct for AI and other data-driven technologies* for the UK's National Health Service.** This encourages developers to meet key principles and makes it easier for companies to work with the health service to develop new technologies.

MARCH

Singapore International Commercial Court judgment in *B2C2 Ltd v Quoine Ltd.* One of the first civil cases addressing contractual liability for an algorithm. When considering whether contracts entered into by computer systems pursuant to an algorithm were void for unilateral mistake, the court held that the mind in question was that of the programmer at the time the program was written (rather than at the point of contract).

Although the deterministic software in question was distinguished from AI, the court also considered whether AI could, in due course, be said to have a mind of its own. It appeared to leave the door open by acknowledging that the law here will continue to develop.

Germany's *AI Observatory* opens. It will analyse the effect of AI on labour and society and promote responsible and people-centred use of AI.

APRIL

European Commission High-Level Expert Group's *Ethics Guidelines for Trustworthy AI.* Europe stakes its claim to driving the global debate on rules for achieving ethical AI. The guidelines emphasise human oversight and fundamental rights; technical robustness and safety; privacy and data governance; transparency; diversity and fairness; societal and environmental well-being; and accountability.

Singapore's Intellectual Property Office launches *Accelerated Initiative for AI.* The initiative aims to grant AI patents within six months of application.

MAY

OECD's *AI Guidelines.* The OECD's 36 members, along with non-members from South America and Romania, signed up to values-based principles endorsed by the US. The principles expressly mention the rule of law, human rights, democratic values, transparency and accountability.

Illinois passes the AI Video Interview Act and becomes the first US state to regulate the use of AI in job interviews. The law came into effect on 1 January 2020 and requires employers to gain consent from job applicants before using AI to evaluate candidates in video interviews.

Germany's Institute for Standardisation announces work on *AI Roadmap.* This will contain reliable norms and standards to further advance AI made in Germany and is expected in autumn 2020.

France adopts new rules on testing autonomous vehicles on public roads. This includes requirements regarding the ability to deactivate the technology or take control of the vehicle and questions of liability when the delegated driving functions are activated.

JUNE

European Commission High-Level Expert Group's *Policy and Investment Recommendations for Trustworthy AI.* These seek to guide AI towards sustainability, growth, competitiveness and inclusion.

Japan publishes *Comprehensive AI Strategy.* This sets out the Japanese government's top priorities for leveraging the use of AI and is based on the *Social Principles of Human-Centric AI* previously published by the Japanese government.

China's *New Generation of AI Governance Principles – Developing Responsible AI.* These lay down an AI governance framework and the corresponding action plan in China.
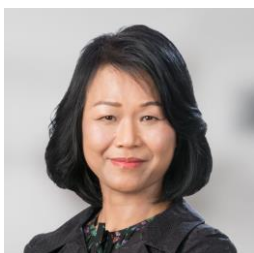
"One major issue with the wider adoption of AI is trust. To build trust, there must be proper human oversight and explainability when designing and using AI – this is a consistent theme in the principles for ethical and responsible use of AI published in different jurisdictions. It has been predicted that we will see the rise of AI to govern AI. It remains to be seen whether such an innovative approach can generate sufficient trust from both users and regulators."

Ling Ho,
Partner, Hong Kong

JULY

UK Competition and Markets Authority's *Digital Markets Strategy* launches. This includes consideration of new regulatory structures in digital markets. In particular, the CMA will continue to monitor the development of Machine Learning and AI to ensure it does not lead to anti-competitive behaviour or consumer detriment.

France adopts a new law on the organisation and transformation of its health system and provides for the creation of a platform for health data. This will gather, organise and share national health data. It aims to promote innovation in the use of health data, including uses linked to the development of AI. The platform, referred to as the 'Health Data Hub', was officially created in November / December 2019.

AUGUST

Poland's draft *AI Development Policy* for 2019-2027. The policy emphasises the need for a human-centric approach to AI and for education at all levels. AI development in Poland will be boosted through government-sponsored initiatives in the academic community and innovation platforms.

UK FCA publishes article on *AI in the Boardroom*. The advent of AI systems means that Boards and senior managers of regulated firms must take business responsibility for the major challenges and issues raised by AI.

SEPTEMBER

Saudi Arabia's *Royal Decree* to establish an AI Centre. This will enhance the drive towards innovation and digital transformation in Saudi Arabia and help develop efficiency through the use of AI and big data.

World Economic Forum paper on *Responsible Use of Technology*. This outlines a framework for organisations and governments to integrate ethics and human rights into technology development across three phases of the product life cycle: (1) design/development; (2) deployment/sale; (3) use and application.

UK High Court dismisses challenge to Automated Facial Recognition (AFR). An individual challenged the use of AFR by South Wales Police in public spaces on human rights grounds. The court ruled that the interference with the individual's right to respect for private and family life was lawful because AFR was used for a legitimate aim; it struck a fair balance between the rights of the individual and the community; and was not disproportionate.

The court pointed to the transparent use of AFR, the fact it was used for a limited time on each occasion, and that images were not stored if they did not match individuals on the police watch-list. The claimant is appealing to the Court of Appeal. In the meantime, companies considering using AFR should ensure they undertake a legal impact assessment as the considerations to be balanced will differ in each case.

OCTOBER

Close of UK ICO consultation period for *Framework for Auditing AI.* A draft framework will follow in January 2020. It will include governance and accountability considerations and specific risk areas including fairness, accuracy and trade-offs.

The ICO has emphasised that firms should not underestimate the investment and effort it will expect from them.

Singapore establishes *National AI Office.* The office will set the national agenda for AI and catalyse efforts to work on national AI priorities.

French Patent Office updates guidelines. The update includes additional guidance on AI, including a list of AI or machine-learning technologies that can be patented (e.g. speech recognition, robotics and control/command processes, predictive analysis). This demonstrates that AI can now be protected under French patent law.

UK Intellectual Property Office updates patents *Formalities Manual.* The amendments confirm that AI tools will not be accepted as the "inventor" for the purposes of a patent application. Failure to name a person as an inventor will result in the patent application being refused.

NOVEMBER

European Commission *Report on Liability for AI and other emerging digital technologies.* The report clarifies that certain characteristics of new technologies may make it difficult to claim compensation and allocate liability fairly. The recommendations include strict liability for digital technologies operating in a public space, and important developments regarding who that liability should lie with; joint and several liability when multiple organisations create a product; new duties of care for operators of technology; and mandatory insurance for certain technology. We expect more activity from the EC in this area in 2020.

Singapore rolls out *National AI Strategy.* The strategy takes a human-centric approach. Its objectives are to: (1) position Singapore as a global hub for AI; (2) use AI to generate economic value and improve lives; and (3) improve society's understanding of the benefits, limitations and risks of AI and equip the workforce with necessary AI competencies. AI technologies will be used in transport and logistics, municipal services, healthcare, education and border clearance.

Hong Kong Monetary Authority's *Guidance for the Banking Industry on using AI.* The principles include the following: boards and senior management are accountable for AI-related outcomes; banks should ensure explainability and ongoing monitoring of AI applications; and banks using AI must ensure they produce ethical and fair outcomes and safeguard customers' personal data.

Chinese Patent Office's draft amendments to the *Patent Examination Guidelines.* Chinese companies have emerged as top developers of AI-based inventions. The amendments should further promote innovation by providing guidance on claim drafting, disclosure and assessing inventiveness.

DECEMBER

World Intellectual Property Organization (WIPO) begins public consultation on AI and intellectual property policy. Comment is invited on WIPO's draft issues paper, which will be used to form the basis of future discussions as to how intellectual property policy makers should approach the use of AI. The consultation closes on 14 February 2020.

UK ICO's draft *Guidance on Explaining Decisions made with AI.* The guidance is detailed, and recognises that context is key, as there is no single approach to fit all scenarios. It also recognises that a balance needs to be struck; there are risks in both failing to provide an explanation and providing too much information. The consultation closes on 24 January 2020.

France adopts a new law with rules on autonomous vehicles. This empowers the French Government to adapt existing rules to autonomous vehicles, including in relation to the applicable liability regime. Measures must be taken within 24 months of the promulgation of the law. The law also addresses access to data from connected vehicles.

France establishes *Pilot Ethics Committee for the Digital Age.* The committee's first recommendations will deal with chatbots, autonomous cars and medical diagnosis in the era of AI.

"We know that AI is going to be an increasingly powerful tool. We also know that governments, legislators and regulators will intervene. We can say with almost complete certainty that some companies will make big mistakes and suffer reputational damage, but that many will have put in place structures to minimise risk as far as possible whilst taking advantage of the huge opportunities. Being in that second group will not be easy, but should be at the very top of the corporate agenda in the 2020s."

Phillip Souta,
Head of UK Public Policy, London

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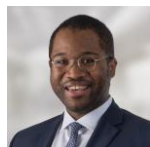
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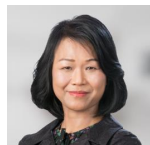**T** +33 1 4405 5483
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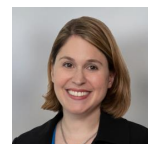**E** arun.visweswaran
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