Response of Clifford Chance LLP to the European Commission's artificial intelligence white paper consultation

Clifford Chance LLP welcomes the opportunity to respond to the European Commission's (the "**Commission**") white paper, "*On Artificial Intelligence – A European approach to excellence and trust*" (the "**AI White Paper**"). Our submissions are (i) made on our own behalf only, and (ii) based on our substantial experience as a global (including European Union) law firm, advising on issues relevant to the consultation for a diverse range of clients within and outside of the European Union. The comments below and our submissions do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

1.   **Overview**

1.1   Artificial intelligence ("**AI**") creates great societal opportunities for organisations within and outside of the EU, across all sectors. These opportunities can be better harnessed with controls and guidance, appropriately calibrated to AI-specific risks. The Commission's inclusive approach to this consultation is therefore important, and this submission reflects practical considerations that we view of relevance in further reviewing the AI White Paper.

1.2   We have observed that, despite the legal and ethical questions posed by AI, businesses are confident in their ability to understand and address these risks. In a recent survey of 200 board members from large businesses around the world conducted 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 AI use.[1] Notwithstanding this, our view is that more practical consideration – and application – of the law to this maturing understanding of AI risk and opportunity is needed across all types of organisations and society as a whole.

1.3   As the Commission is aware, there is a significant body of legislation and law that already regulates AI (including consumer protection, data protection, privacy, non-discrimination, cyber security, employment, product liability, human rights, national/strict liability rules, and more). Due to the breadth of potential legislative commentary, this submission focusses on practical considerations for the Commission's consideration in reviewing and designing an EU legal framework for AI. We have therefore not focussed, or provided comment on, any particular law.

2.   **International and industry cooperation**

2.1   **The international aspects of designing a new EU approach to AI must not be underestimated. AI is rarely used, or designed, in a EU-only context**. AI is bought, sold, developed and used across borders, within competing international regulatory frameworks. There is already a complex – and often conflicting – patchwork of 'hard' and 'soft' international and sector-specific rules regulating AI. This makes implementation of the varying requirements challenging for both EU and global players.

2.2   **There is a risk that an approach to understanding the EU's position is undermined by insufficiently accounting for global views**. Appropriate effort should therefore be placed on supporting, and identifying (i) areas of regulatory convergence internationally, and (ii) continued focus on cooperation and engagement with non-EU countries, global players and those with diverging views. In particular, we

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[1]   https://www.cliffordchance.com/content/dam/cliffordchance/hub/Risk/a-view-from-the-top-desktop.pdf

welcome the Commission's engagement on analysing international norms (such as human rights rules) in framing the EU approach to AI.

3.   **Legislative framework**

3.1   **The Commission's framework proposal for AI legislation is ambitious, seeking to cover all relevant economic operators providing AI-enabled products or services in the EU, regardless of whether they are established in the EU or not**. The framework proposal may help to bring together all economic operators providing relevant goods or services in the EU, increasing trust, harmonisation and possibly creating higher standards globally. In practice, however, we have also seen that broadly scoped legislation leads some organisations who would otherwise import their products and services into the EU ecosystem to re-examine their operational priorities and target markets (particularly, due to uncertainty as to how – and where – the relevant rules would apply). A carefully considered, pragmatic approach to balancing of the practical implications of where (and how) the AI framework would apply is encouraged.

3.2   **Unclear regulatory parameters on applicability may cause non-EU investors unfamiliar with the rules to invest in territories where they do have a better grasp on how the rules work**. Where this exclusionary effect is intended, this would further the Commission's policy aims of exporting European values to countries outside of the EU, and stripping the EU ecosystem of untrustworthy AI. Where the impact is unintended, this will stifle innovation and growth and create digital trade barriers. Careful examination of how any new AI rules would apply internationally is needed to avoid the unintended consequences.

3.3   **A clear definition of AI should be reflected in developing the AI White Paper proposals**. The definition of AI should be clearly scoped and not overly inclusive, mindful of AI uses that are appropriately covered by existing law. We, of course, recognise the challenges of introducing a definition that is sufficient to encourage legal certainty on the one hand, and that has the flexibility to accommodate technical progress on the other. To help with this, we encourage the Commission to also look to definitions made by public and private organisations in designing their own AI governance and risk management frameworks.

3.4   **There is no AI without data, as noted in the AI White Paper. This, to us, suggests the need for continued examination of whether existing EU data regulation in the EU, in particular, is (i) sufficient, and (ii) effective (i.e. prior to any new, AI-specific legislation being introduced).** The AI White Paper confirms that legislative reviews are underway; however, we emphasise the importance of these reviews carefully examining existing *sector-specific* legislation – particularly where it relates to a 'high risk' sector identified in the AI White Paper (e.g. healthcare, financial services). If these rules are relevant and applicable to a 'high risk' sector or AI use case, any new rules should be very carefully designed to avoid legal and interpretative conflicts. This would also help with the Commission's objectives to encourage AI innovation.

3.5   **Where possible, the AI White Paper should more carefully consider whether it is appropriate to enhance or provide guidance on existing laws.** We have observed that organisations are generally better equipped to take effective action to uplift their existing compliance frameworks to account for specific regulatory requirements, and new laws may take some time to see meaningful changes to governance arrangements. Further detailed analysis of the existing strict liability and insurance rules explored in the AI White Paper is welcomed (i.e. to more appropriately consider how these regimes may already (and in the future) apply to AI).

3.6 **In our view, any future legislative framework should ensure that processes and mechanisms are built in to enable speed and reactivity to limit the gap between new AI technologies emerging and having appropriate regulations to manage them.** An agile regulatory framework may help to assist organisations to respond to new risks (e.g. accelerated review procedures for (new) high risk activities).

4. **Governance and risk management**

4.1 **In our experience, organisations understand that AI (if not used appropriately) is one of the greatest risks to individuals and societies.** With that in mind, they seek to address these risks through their existing governance and risk management frameworks (and, where the risk is heightened, through institutional mechanisms to govern AI, such as a dedicated AI governance policy framework and/or committee). In this respect, irrespective of whether any new legislative framework is implemented, we encourage the Commission's focus and guidance to centre on measurable, verifiable actions for AI use and implementation (for example, objective mechanisms to allow development, legal and other teams to remain accountable and demonstrate the trustworthiness of their AI tools).

4.2 **The proposed new legislative framework seeks to address (and define) 'high risk' AI, on a sector-specific basis. In our view (which we believe aligns with the Commission's), any new AI legislation should focus on systemically important risks, and controls that minimise the likelihood of those risks crystallising**. Like other EU regulation, any new rules should be principles-based and apply overarching principles to ensure accountability and proportionality in their implementation. Further, as the Commission will anticipate, 'high risk' sectors contemplated in the AI White Paper will likely be regulated by specific regulatory authorities, at an EU and national level. A foundational starting point should therefore be to engage with these regulators – in particular, to understand whether, in their view, a new regulatory framework would help further their objectives.

4.3 **In our view, requirements placed on 'high-risk' sectors should provide measurable, tangible guidance on what is expected in practice (in particular, referring to specific use-cases and any sector-specific requirements).** When considering whether an application is high-risk, we find that it is also important to consider that the same AI application may pose different risks depending on its different uses or purposes (i.e. the same AI application may be high-risk in one context but not in another). Further clarity in any follow up to the AI White Paper is welcomed.

4.4 **We welcome the AI White Paper's exploration of areas where it can help define AI use cases that are *not* high-risk, through a voluntary labelling scheme**. Identifying (and labelling) non-high-risk AI use cases may help to prioritise compliance and risk management resources, whilst achieving further AI transparency and trustworthiness. Further exploration of how a voluntary labelling scheme would work in practice is encouraged, (for example, responsibility for monitoring and audit of AI that is labelled as non-high-risk, and how the scheme would account for different or changing uses of the labelled AI).

4.5 **Organisations want to ensure that their design and use of AI is legal but also aligns with the ethical norms, principles and expectations of those customers and consumers that they serve**. We consider that any change to the existing EU regulatory regime should be cognisant of this general desire of those who use and create AI, and from this starting point design any changes to law that focus on those specific high-risk aspects and applications. As part of the legislative review mentioned in the AI White Paper, it would – in our view – be useful to have sector-specific guidance reflecting the findings (especially for the high-risk sectors identified by the Commission). This would provide clarity for the relevant actors about what is expected immediately, and also allow them to plan for any future regulatory changes.

5.   **Digital and ethical skills**

5.1   **We welcome the Commission's work (and consultation with) organisations, individuals and bodies addressing the ethical issues regarding AI**. Organisations have sought to distil the various guidance and practical tools into their own risk policies and control frameworks, to address ethics issues from the design stage through to implementation. EU-approved guidance and tools to translate ethics into practice should continue to be an important reference point, particularly to help organisations (i) translate statements of intent into meaningful action, and (ii) realise and implement changes to address some of the most systemically important AI use cases (e.g. AI applications that create, or increase, the likelihood of unintended biases, or create/perpetuate non-diverse decisions or human rights issues).

5.2   **Building digital and ethical skills forms a significant part of the solution, but overemphasis should not be placed on training AI developers alone**. AI is not, in itself, untrustworthy. Many heightened risks of AI come from how it is used. The rationale for 'designing in' ethics and trustworthiness into AI at the development stage is well understood. In practice, however, non-developers need reliable resources to understand their role in actual AI use and implementation. Practical resources should also be made available to the public as a whole, to improve AI literacy and encourage greater understanding (rather than fear) of AI.

5.3   **In developing skills necessary to work in (and with) AI, a comprehensive curriculum including ethical guidelines reflecting European principles should also assist others who actually utilise AI**. Consensus on the EU expectation as to the role of different individuals within the ecosystem would be a valuable resource. Transformation of the existing assessment list produced in the revised coordinated plan on AI may also benefit from expanding beyond being used by AI developers only.

6.   **Public-private partnerships and AI investment**

6.1   **Public sector use of AI is important to society as a whole, and the Commission's intention to engage with public sector organisations is encouraged**. Guidance on how public sector organisations can utilise AI will encourage adoption and also soliciting views of the general public on the uses of AI that they find most concerning. Further consideration of how to empower public sector use of AI would help to encourage adoption of AI, without stifling innovation (e.g. through EU regulatory sandboxes, further guidance on algorithmic impact assessments, and training).

6.2   **The Commission may wish to further explore opportunities to co-invest in AI initiatives supported by private sector firms (for example, financial investors, funds and corporate joint ventures)**. Pooled equity resources may serve to bolster public funding and public-private initiatives explored in the AI White Paper.

Clifford Chance LLP

12 June 2020

Annex

Responses to consultation questionnaire

SECTION 1 – AN ECOSYSTEM OF EXCELLENCE

To build an ecosystem of excellence that can support the development and uptake of AI across the EU economy, the White Paper proposes a series of actions.

1.1 In your opinion, how important are the six actions proposed in section 4 of the White Paper on AI (1-5: 1 is not important at all, 5 is very important)?
[When commenting on the draft, please use 1-5 rather than ticking the boxes]

	1 - Not important at all	2 - Not important	3 - Neutral	4 - Important	5 - Very important	No opinion
Working with Member states	☐	☐	☐	☐	☒	☐
Focussing the efforts of the research and innovation community	☐	☐	☐	☐	☒	☐
Skills	☐	☐	☐	☐	☒	☐
Focus on SMEs	☐	☐	☐	☐	☒	☐
Partnership with the private sector	☐	☐	☐	☐	☒	☐
Promoting the adoption of AI by the public sector	☐	☐	☐	☐	☒	☐

1.2 Are there other actions that should be considered?
500 character(s) maximum

> AI is rarely used, or designed, in a EU-only context. AI is bought, sold, developed and used across borders, within competing international regulatory frameworks. We encourage further public engagement with non-EU and global players to maximise the potential of EU AI use, identify areas of regulatory convergence and build consensus on issues meriting global alignment.

Revising the Coordinated Plan on AI (Action 1)

The Commission, taking into account the results of the public consultation on the White Paper, will propose to Member States a revision of the Coordinated Plan to be adopted by end 2020.

1.3 In your opinion, how important is it in each of these areas to align policies and strengthen coordination as described in section 4.A of the White Paper (1-5: 1 is not important at all, 5 is very important)?

[When commenting on the draft, please use 1-5 rather than ticking the boxes]

	1 - Not important at all	2 - Not important	3 - Neutral	4 - Important	5 - Very important	No opinion
Strengthen excellence in research	☐	☐	☐	☐	☒	☐

	1 - Not important at all	2 - Not important	3 - Neutral	4 - Important	5 - Very important	No opinion
Establish world-reference testing facilities for AI	☐	☐	☐	☐	☒	☐
Promote the uptake of AI by business and the public sector	☐	☐	☐	☐	☒	☐
Increase the financing for start-ups innovating in AI	☐	☐	☐	☐	☒	☐
Develop skills for AI and adapt existing training programmes	☐	☐	☐	☐	☒	☐
Build up the European data space	☐	☐	☐	☐	☒	☐

1.4 Are there other areas that should be considered?

500 character(s) maximum

See accompanying submission.

A united and strengthened research and innovation community striving for excellence

Joining forces at all levels, from basic research to deployment, will be key to overcome fragmentation and create synergies between the existing networks of excellence.

1.5 In your opinion how important are the three actions proposed in sections 4.B, 4.C and 4.E of the White Paper on AI (1-5: 1 is not important at all, 5 is very important)?

[When commenting on the draft, please use 1-5 rather than ticking the boxes]

	1 - Not important at all	2 - Not important	3 - Neutral	4 - Important	5 - Very important	No opinion
Support the establishment of a lighthouse research centre that is world class and able to attract the best minds	☐	☐	☐	☒	☐	☐
Network of existing AI research excellence centres	☐	☐	☐	☐	☒	☐
Set up a public-private partnership for industrial research	☐	☐	☐	☐	☒	☐

1.6 Are there any other actions to strengthen the research and innovation community that should be given a priority?

500 character(s) maximum

Clarification is welcomed on (i) how the Commission intends to cooperate with existing research and innovation centres and institutes, (ii) what the role (and funding) of a 'lighthouse centre' for research, innovation and expertise would be. Further, a "curriculum" designed for all AI stakeholders would support

the Commission's objectives, particularly where the ethical guidelines reflecting European principles are also adapted to educate a non-developer audience (e.g. legal teams, senior executives, HR teams, marketing, sales, etc.).

Focusing on Small and Medium Enterprises (SMEs)

The Commission will work with Member States to ensure that at least one digital innovation hub per Member State has a high degree of specialisation on AI.

1.7 In your opinion, how important are each of these tasks of the specialised Digital Innovation Hubs mentioned in section 4.D of the White Paper in relation to SMEs (1-5: 1 is not important at all, 5 is very important)?

[When commenting on the draft, please use 1-5 rather than ticking the boxes]

	1 - Not important at all	2 - Not important	3 - Neutral	4 - Important	5 - Very important	No opinion
Help to raise SME's awareness about potential benefits of AI	☐	☐	☐	☐	☒	☐
Provide access to testing and reference facilities	☐	☐	☐	☐	☒	☐
Promote knowledge transfer and support the development of AI expertise for SMEs	☐	☐	☐	☐	☒	☐
Support partnerships between SMEs, larger enterprises and academia around AI projects	☐	☐	☐	☐	☒	☐
Provide information about equity financing for AI startups	☐	☐	☐	☐	☒	☐

1.8 Are there any other tasks that you consider important for specialised Digital Innovations Hubs?

500 character(s) maximum

See response in paragraph 1.6 to section 4E, regarding access to finance. Exploration of public-private co-investment opportunities in SMEs may assist with supporting partnerships between SMEs, larger enterprises and academic institutions around AI projects in particular. Information on equity financing for AI startups should also identify private sector investment opportunities and risks.

SECTION 2 – AN ECOSYSTEM OF TRUST

Chapter 5 of the White Paper sets out options for a regulatory framework for AI.

2.1 In your opinion, how important are the following concerns about AI (1-5: 1 is not important at all, 5 is very important)?

[When commenting on the draft, please use 1-5 rather than ticking the boxes]

	1 - Not important at all	2 - Not important	3 - Neutral	4 - Important	5 - Very important	No opinion
AI may endanger safety	☐	☐	☐	☐	☒	☐
AI may breach fundamental rights (such as human dignity, privacy, data protection, freedom of expression, workers' rights etc.)	☐	☐	☐	☐	☒	☐
The use of AI may lead to discriminatory outcomes	☐	☐	☐	☐	☒	☐
AI may take actions for which the rationale cannot be explained	☐	☐	☐	☐	☒	☐
AI may make it more difficult for persons having suffered harm to obtain compensation	☐	☐	☐	☐	☒	☐
AI is not always accurate	☐	☐	☐	☐	☒	☐

2.2 Do you have any other concerns about AI that are not mentioned above? Please specify:

500 character(s) maximum

See accompanying submission.

2.3 Do you think that the concerns expressed above can be addressed by applicable EU legislation? If not, do you think that there should be specific new rules for AI systems?

☐ Current legislation is fully sufficient

☐ Current legislation may have some gaps

☐ There is a need for a new legislation

☒ Other

☐ No opinion

Other, please specify

500 character(s) maximum

See accompanying submission. Continued review of existing legislation is needed, prior to substantive exploration/implementation of new (prescriptive) AI rules. In carrying out this assessment, we would encourage the Commission to further engage with private and public organisations as to the effectiveness of existing rules to ascertain whether any remediation (or insertion) of legislation is needed (and, if so, where).

2.4 If you think that new rules are necessary for AI system, do you agree that the introduction of new compulsory requirements should be limited to high-risk applications (where the possible harm caused by the AI system is particularly high)?

☐ Yes

☐ No

☒ Other

☐ No opinion

Other, please specify

500 character(s) maximum

See response to question 2.3.

(If "yes") Do you agree with the approach to determine "high-risk" AI applications proposed in Section 5.B of the White Paper?

☐ Yes

☐ No

☒ Other

☐ No opinion

Other, please specify

500 character(s) maximum

See accompanying submission.

2.5 If you wish, please indicate the AI application or use that is most concerning ("high-risk") from your perspective:

500 character(s) maximum

See accompanying submission.

2.6 In your opinion, how important are the following mandatory requirements of a possible future regulatory framework for AI (as section 5.D of the White Paper) (1-5: 1 is not important at all, 5 is very important)?

[When commenting on the draft, please use 1-5 rather than ticking the boxes]

	1 - Not important at all	2 - Not important	3 - Neutral	4 - Important	5 - Very important	No opinion
The quality of training data sets	☐	☐	☒	☐	☐	☐

The keeping of records and data	☐	☐	☒	☐	☐	☐
Information on the purpose and the nature of AI systems	☐	☐	☒	☐	☐	☐
Robustness and accuracy of AI systems	☐	☐	☒	☐	☐	☐
Human oversight	☐	☐	☒	☐	☐	☐
Clear liability and safety rules	☐	☐	☒	☐	☐	☐

> See accompanying submission. Our responses relate to practical and legal considerations in reviewing and designing a possible future regulatory framework, and in producing guidance for organisations.

2.7 In addition to the existing EU legislation, in particular the data protection framework, including the General Data Protection Regulation and the Law Enforcement Directive, or, where relevant, the new possibly mandatory requirements foreseen above (see question above), do you think that the use of remote biometric identification systems (e.g. face recognition) and other technologies which may be used in public spaces need to be subject to further EU-level guidelines or regulation:

☐ No further guidelines or regulations are needed

☐ Biometric identification systems should be allowed in publicly accessible spaces only in certain cases or if certain conditions are fulfilled (please specify)

☐ Other special requirements in addition to those mentioned in the question above should be imposed (please specify)

☐ Use of Biometric identification systems in publicly accessible spaces, by way of exception to the current general prohibition, should not take place until a specific guideline or legislation at EU level is in place.

☐ Biometric identification systems should never be allowed in publicly accessible spaces

☒ No opinion

Please specify your answer:

> See accompanying submission.

2.8 Do you believe that a voluntary labelling system (Section 5.G of the White Paper) would be useful for AI systems that are not considered high-risk in addition to existing legislation?

☒ Very much

☐ Much

☐ Rather not

☐ Not at all

☐ No opinion

2.9 Do you have any further suggestion on a voluntary labelling system?

500 character(s) maximum

See accompanying submission.

2.10 What is the best way to ensure that AI is trustworthy, secure and in respect of European values and rules?

☐ Compliance of high-risk applications with the identified requirements should be self-assessed ex-ante (prior to putting the system on the market)

☐ Compliance of high-risk applications should be assessed ex-ante by means of an external conformity assessment procedure

☐ Ex-post market surveillance after the AI-enabled high-risk product or service has been put on the market and, where needed, enforcement by relevant competent authorities

☒ A combination of ex-ante compliance and ex-post enforcement mechanisms

☐ Other enforcement system

☐ No opinion

Please specify any other enforcement system:

500 character(s) maximum

To the extent new procedures are to be introduced, a combined ex-ante compliance/ex-post enforcement mechanism would align with existing regulatory frameworks (and, therefore, be more familiar to those who would be regulated). Proportionality and appropriate autonomy would need to be implemented to avoid conflicting with sector-specific rules applicable to AI.

2.11 Do you have any further suggestion on the assessment of compliance?

500 character(s) maximum

See accompanying submission.

SECTION 3 – SAFETY AND LIABILITY IMPLICATIONS OF AI, IOT AND ROBOTICS

The overall objective of the safety and liability legal frameworks is to ensure that all products and services, including those integrating emerging digital technologies, operate safely, reliably and consistently and that damage having occurred is remedied efficiently.

3.1 The current product safety legislation already supports an extended concept of safety protecting against all kind of risks arising from the product according to its use. However, which particular risks stemming from the use of artificial intelligence do you think should be further spelled out to provide more legal certainty?

☐ Cyber risks

☐ Personal security risks

☐ Risks related to the loss of connectivity

☐ Mental health risks

3.2 In your opinion, are there any further risks to be expanded on to provide more legal certainty?

500 character(s) maximum

See accompanying submission.

3.3 Do you think that the safety legislative framework should consider new risk assessment procedures for products subject to important changes during their lifetime?

☐ Yes

☐ No

☒ No opinion

3.4 Do you have any further considerations regarding risk assessment procedures?

500 character(s) maximum

Organisations and individuals will require further clarification on what the 'risk assessment procedures' and 'important' changes referred to are, for a meaningful response as to whether further considerations are required.

3.5 Do you think that the current EU legislative framework for liability (Product Liability Directive) should be amended to better cover the risks engendered by certain AI applications?

☐ Yes

☐ No

☒ No opinion

3.6 Do you have any further considerations regarding the question above?

500 character(s) maximum

The Product Liability Directive should be assessed from the view of its technology neutrality. Non-EU countries have, in similar contexts, addressed this risk by publishing product-specific legislation where required (and the Commission, as appropriate, should confirm its position on whether this is also an appropriate mechanism for EU regulation).

3.7 Do you think that the current national liability rules should be adapted for the operation of AI to better ensure proper compensation for damage and a fair allocation of liability?

☐ Yes, for all AI applications

☐ Yes, for specific AI applications

☐ No

☒ No opinion

Please specify the AI applications:

See accompanying submission.

3.8 Do you have any further considerations regarding the question above?

500 character(s) maximum

See accompanying submission.

Thank you for your contribution to this questionnaire. In case you want to share further ideas on these topics, you can upload a document below.

Contact: CNECT-AI-CONSULT@ec.europa.eu

Online link to the consultation: https://ec.europa.eu/eusurvey/runner/AIConsult2020