Proposal for a legal act of the European Parliament and the Council laying down requirements for Artificial Intelligence – Clifford Chance LLP Response

Clifford Chance LLP welcomes the opportunity to respond to the European Commission's (the "**Commission**") inception impact assessment, on a "*Proposal for a legal act of the European Parliament and the Council laying down requirements for Artificial Intelligence*" (the "**AI Roadmap**"). 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.

We have considered and assessed the options to the baseline scenarios set out in the AI Roadmap, i.e.:

- **Baseline/Option 0**: no EU policy change.
- **Option 1**: EU "soft law" (non-legislative) approach to facilitate and spur industry-led intervention (no EU legislative instrument).
- **Option 2**: EU legislative instrument setting up a voluntary labelling scheme.
- **Option 3**: EU legislative instrument establishing mandatory requirements for all or certain types of AI applications.
- **Option 4**: combination of any of the options above taking into account the different levels of risk that could be generated by a particular AI application.

In our view, Option 4, i.e. a combination of any of the options taking into account the different levels of risk that could be generated by a particular AI application, is the most appropriate option to be considered by the Commission.

As set out in our response to the Commission's white paper titled 'Artificial Intelligence – A European approach to excellence and trust', an agile regulatory framework may help organisations and regulators respond to new risks (e.g. accelerated review procedures for (new) high risk activities).

Building on this approach, and in order to ensure that existing regulatory and industry efforts in relation to AI are adequately accounted for, an ideal approach would be one that combines high-level principles and obligations that are sector-agnostic (including a robust yet flexible definition and scope of what constitutes 'artificial intelligence') with industry-led norms, standards and codes of conduct developed in conjunction with close cooperation with EU regulators. This approach would also focus on the outcomes for individuals using (or impacted by the use of) AI in terms of their guaranteed rights and freedoms.

The principles-led approach would align any proposed AI regulation with existing law and guidance, such as the General Data Protection Regulation (GDPR), as well as Ethics Guidelines for Trustworthy Artificial Intelligence presented by the High-Level Expert Group on AI. This approach, in our view, would also ensure that a balance is struck between setting up requisite

guardrails for a critical technology and promoting innovation in the interests of industry and society, allowing AI developers in the EU to continue to innovate and remain competitive in the global market while adequately accounting for regulatory requirements.

Furthermore, when presented in conjunction with appropriate guidelines that can be kept up to date to account for changes in use cases as well as technological updates, this approach can help to ensure that regulations in relation to a fast-changing field do not become outdated. While the principles could apply to the development and deployment of AI as a whole, guidelines can be drafted for specific categories of AI applications which are either 'high risk', have otherwise significant impacts on the rights and freedoms of individuals, or both. We submit that in relation to identifying 'high risk' AI, a binary approach (whereby AI applications entailing a high risk are curtailed, while the others are deemed explicitly viable) would likely be over simplistic. Hence, we see a need that the mere statement of principle regarding "high risk" is supported by other factors. We support the Commission's suggestion that any mandatory requirements in relation to 'high risk' AI account for factors such as training data, human oversight, record keeping, transparency, robustness and accuracy.

We also agree that EU legislative instruments should account for enforcement mechanisms to ensure compliance with regulatory requirements. We support the Commission's proposal for carefully considered ex-ante mechanisms consisting of conformity/safety assessment procedures aligned with procedures that already exist in EU product safety legislation, and believe others could be developed with the aid of industry adopted standards and internal advisory and review boards. We also note that the Commission is currently in the process of considering (among others), the liability regime for AI and other emerging technologies. Whilst this may not be the object of this consultation, we agree that it is a key part of any meaningful regulatory framework for AI. Devising the right liability regime requires guiding and contextualising existing liability regimes, whilst carefully assessing the extent to which they may need to be adapted and complemented to account for the specificities of AI and other new technologies.

Drawing parallels with the GDPR where, while certification mechanisms are envisaged, in the two years since its implementation none have so far been approved. In order to address this for any proposed legislative framework relating AI, it is critical that mechanisms for close partnership between regulators and industry (e.g. IEEE, ISO and others) in the development and implementation of standards and guidelines are baked in from the beginning, potentially by specific inclusion in the mandate for any regulator(s) established under such a framework. Voluntary labelling schemes as envisaged in the Commission's white paper, while a conceptually viable option, in our view may not be the best way forward until the industry and regulators have achieved further maturity on the adoption of cohesive standards. Schemes of this nature introduced alongside a nascent regulatory regime, in our view, run the risk of having the unintended effect of diluting consumer trust and potentially opening the schemes up for misinterpretation (or in some cases, misuse). Quite the reverse of the objective sought. This is something that can be usefully assessed in due time, with the perspective and knowledge needed to be able to define the right use cases and appropriate safeguards and conditions. Only then will this actually help enhance user trust and promote the uptake of the technology, as contemplated by the Commission in its white paper.

In terms of ex-post enforcement, this should only be implemented in a manner that balances well against ex-ante approaches, once their efficacy has been established, and post a potential transition period for implementation, within which specific guidelines in relation to compliance and enforcement could also be made available. The legislative framework may also consider the need for a nodal regulator or supervisory authority at the EU and/or member state level. At this stage, it may be that such an authority should primarily play the role of helping to achieve a guided implementation of regulations, and coordinating the efforts of sectoral regulators, as opposed to taking an active position in enforcement of AI regulations, which may present complex challenges in terms of a lack of available expertise in adequately staffing such an authority, as well as overlaps with the mandate of other regulators.

In relation to specific guidelines that will be required alongside a principles-based regulatory framework, we believe that illustratively, these should include:

- Guidelines and standard on the broad, and context-specific definitions of AI.
- Guidelines on sectoral applications and 'high-risk/impact' AI.
- Guidelines on public-private partnerships in AI (including the development of standards).
- Guidelines on AI governance addressing the data lifecycle as it applies to the development of AI systems.
- Technical guidelines on approved/recommended methodologies for the prevention and mitigation of bias, discrimination and lack of transparency in how AI is deployed.
- Auditing and certification standards for sectoral/use-case specific AI.
- Guidelines contextualising the application of relevant existing EU laws for AI (such as those relating to consumer protection, product liability and public sector use of AIS).
- Guidelines on sustainable adoption of AI in the EU (contextualising, for instance the, UN Sustainable Development Goals).

Finally, and as a more general observation, we support the objective of seeking to streamline and harmonise legislation and other requirements at the European level and, beyond, on the international scene, where feasible and appropriate, whilst also taking account of industry specificities.