Legal issues in AI implementations

*So you're thinking about integrating **'artificial intelligence'** into your business?*

In which case, there are a number of aspects that you'll need to consider to give your project the best chance of succeeding. By way of example, here are a few of the areas that we focus on when helping our clients to make the most of these powerful new technologies.

Project Success

The market for AI solutions is growing rapidly but, as at the time of writing, it remains relatively immature. More and more, we're seeing organisations without previous experience with AI investing in pilot projects, frequently as part of a portfolio approach. Whilst these small-scale pilots are often inexpensive to begin with, what is typically viewed as a cheap option for assessing new technologies is fraught with danger if the issues are not properly considered and addressed up front.

The usual impact of incomplete planning in technology implementations is wasted time and money, though there can also be potentially serious compliance issues.

A lack of good quality information at the outset of a project can mean that complexities are uncovered only after the project has begun. This is a major cause of delays, or even failure. With emerging technologies such as AI, it is normal for customers not to have a full understanding of how the solution will work within their particular situation. This makes it critical for communication to happen between the right stakeholders as early as possible.

"Successfully deploying a technology solution will often be as much about having the right talent in place, as about the technology."

Unless an organisation is lucky enough to have the right blend of skills in house already, it will need more than merely configuration support from the vendor. Consider how much you will be relying on your vendor, and how much they actually understand your business context, then take this into account when it comes to project planning and agreeing terms.

Analysing and understanding the cost of failure will already be on your to-do list, and you'll have considered how to mitigate and manage the risks identified. Less obvious is the need to understand the true cost of success. If everything goes to plan with the pilot and there is a business imperative to deploy more widely, do you know what the costs will be?

Integration Success

Things go wrong when not enough attention is paid to how the new solution will fit in with legacy systems—and we're not just talking about technical issues.

From a legal perspective, the interaction between existing contractual frameworks and new legal documentation will need to be de-risked. If you're procuring a new solution then internal due diligence, and possibly some discussion with your existing vendor base, will be required. On the other hand, if you're offering an AI solution your customer may be looking to you to assist them in de-risking the implementation.

We've mentioned sourcing talent in the context of AI expertise, but there is also the matter of retaining business process experience. It's inevitable that at some stage your solution will need human intervention—either if there is a problem, or simply to make decisions. If you lose access to the talent needed to deal with this as part of the deployment, then you may face problems down the line.

"Consider who will be available to provide the business knowledge needed to build on the success of your AI project."

The AI vendor won't usually have the deep expertise and knowledge of your business, which will generally come from your own organisation. When it comes to solution-specific knowhow, on the other hand, don't forget to ensure you have appropriate knowledge transfer mechanisms during the project to become self-sufficient once the deployment is complete.

Contracting for Success

Take care to ensure the right processes are followed when contracting for the delivery of a new AI solution, whether you are a vendor or a customer. And don't assume this will happen by default!

We've often come across real-life examples of technical and business teams contracting for free licences without legal scrutiny, and ending up with critical problems.

Free trials and pilots are often poorly documented, and this can undermine the later process of contracting for full production solutions. From a customer perspective they can also act as Trojan horses, bringing unacceptable levels of risk into the organisation. Remember that the purpose of a contract is to allocate risk, and so signing up to standard terms without redressing (or at least understanding) the balance could prove to be costly. This is bad news for the vendor too, because it can prove very difficult to convert the prospect to a full sale, even after all your investment in delivering the free (or low cost) pilot.

If you're purchasing or developing AI to get an edge over your competitors, then you will need to capture that in the contract. Addressing intellectual property rights appropriately and including watertight confidentiality provisions will undoubtedly be important, even if this isn't the way you choose to safeguard your advantage. Alternatively, you might decide to negotiate exclusivity or contractual restraints on the other party's ability to deliver competing products.

It's often in a software vendor's interest to deploy licensing models that give the most opportunity to generate revenue from the AI solution. But the upshot of this is often very complex documentation, which can be viewed by customers as unattractive (even impenetrable!) and increase friction in the sales process. Well advised customers will be seeking to understand whether the licensing metrics used allow the freedom to use the solution in the way desired to support the business proposition, whilst taking into account the potential for plans to change. Key to this will be whether the vendor can make changes to its products or fees which would undermine those plans.

Data Compliance

When letting an AI loose on data, any potential cybersecurity, data privacy, and GDPR-compliance aspects need to have been resolved. Otherwise a brilliantly innovative use of customer data might become an expensive mistake! With an AI learning all about the inner workings of the business, great care will be needed to make sure that information doesn't end up in the wrong hands.

Around the world, legal frameworks exist to protect individuals by requiring clear explanation about how their data will be used (and in some cases requiring consent), and the collection, use, and retention of data can be strictly controlled.

If the AI project requires personal data to be processed, you may need to conduct a data privacy impact assessment under European law (even if you're not based in Europe).

If the full regulatory implications are not fully understood up front, then data collected as part of a small pilot could already have caused a breach of law, leading to costly compliance steps to be taken after the event. Not only could this lead to delays and extra costs, and the data needing to be deleted, but the whole project may need to be re-engineered or even shelved completely.

In the middle of contract negotiations would be the wrong time to start thinking about data protection law. Data privacy by design means careful planning when designing the solution and how it will fit into an existing business environment, not trying to retrofit compliance and security later.

Ethical Business

Whilst we think that ethical conduct is a necessary part of good business in any case, customers are increasingly asking their suppliers to demonstrate ethical credentials—for example adherence to environmental, anti-corruption, and anti-exploitation policies. A logical future step would be for them to ask about the ethical use of emerging technologies such as AI. There are substantial reputation risks to organisations that are judged to acted wrongly in the court of public opinion.

There are now numerous sets of 'ethical principles' proposed by governments, public bodies, and major corporates. We think these are going to play an important role in shaping future legislation. But, in the meantime, organisations must not ignore their moral compass when considering a new AI development or deployment.

It is often the role of the in-house counsel to be that moral compass, although there has been some discussion recently about the merits for larger enterprises to implement 'ethics boards'. This may be a good way for larger organisations to ensure good governance and accountability, as well as giving structures and lines of communication to accumulate and distribute institutional knowledge about how emerging technologies are being deployed across the organisation. The key however when using technology that is breaking new ground, will be to be able to demonstrate to regulators and the public that ethical considerations have been taken into account. And, ideally, that it is being used fairly and in accordance with law.

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