Digital Transformation Webinar Series

AI liability demystified – legal complexities and accountability

FAQ Sheet

1. We are developing an AI-application based on a major large language model. We would also like to offer this application in the EU through our subsidiary in Germany. Even though this is not a high-risk AI system under the EU AI Act, should we adhere to the AI Act when it comes to documentation and logging duties so as to optimally mitigate liability risks?

As set out in our presentation, in Germany (and as far as the Product Liability Directive will be applicable and/or the AI Liability Directive will be passed by the EU Parliament also in the rest of the EU) the developers of AI tools or AI systems will very likely have to prove that their tool/system acted in accordance with the law and that it was not their tool/system that caused a damage to an injured party.

In order to prove that, logfiles and also documentation regarding the development of the tool/system would likely be very helpful. In addition, showing that the provisions of the AI Act have been adhered to (even though this was not strictly necessary) may be a good line of argument to show that a company had a high standard of care which would also be a good defence to such an action.

On the other hand, as of now and if the Product Liability Directive is not applicable (e.g. because the application does not lead to personal injury or other types of harm covered by the directive), having logfiles and detailed documentation available may also make it easier for a judge to put the burden of proof on the developer / provider of an AI tool that they would generally not bear. In most cases, having the logs and documentation will still be preferable from the perspective of potential litigation.

2. Does the law deal with liability issues arising out of "traditional" AI (deterministic) and generative AI differently? Should it?

In Singapore, there is little caselaw as of yet to help analyse what nuances the law may take to various kinds of AI going forward. What does seem evident is that many of the new legal issues provoked by AI will be exacerbated in cases involving the latest models of generative AI. This is because of the increasingly potent self-learning abilities of these models, and of the consequent inability for human programmers or users to foresee or even explain the outcomes produced by the AI. Indeed, tackling issues arising specifically out of generative AI is a current priority for the Singapore government, with the release of the Model AI Governance Framework for Generative AI earlier this year.

With deterministic AI programmes on the other hand, however technically complex or large the model may be, it will theoretically remain possible for humans to oversee and understand the outcomes produced, which will make it easier potentially to establish fault, or establish causal links between the damaging outcomes and a potentially liable human person. This was stressed in the *Quoine* case handed down by the Singapore Court of Appeal in 2020: because the software in question in that case was deterministic, the court was able to focus on "*the state of mind of the programmers of the algorithms at the time of the programming*" [97] in order to investigate, in effect, any wrongdoing.

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3. What safeguards can be implemented where a task by a professional is delegated to AI?

A key safeguard is controlling the level of autonomy that the AI system has over the entire professional service being provided. If the AI system has more autonomy, this would invariably lead to a loss of control over the general professional service being provided.

Some safeguards can be implemented by:

- Attempting to understand the nature of data provided to the AI system and how the program functions such that you would be able to explain and justify why a task has been delegated to AI;
- Appropriate and sufficient training of staff in the use of AI systems and in performance monitoring of the AI systems;
- Ongoing training ensuring there are validation processes of the output. For example, if you were to give the AI system certain documents to be sorted into desired categories, and you were able to review and correct the algorithm's categorisations, you would be able to verify the results produced by the AI system to justify why the task has been delegated to AI;
- Ongoing maintenance and updates of the AI system – both in terms of the AI system itself and training of personnel who use the AI system.

Meet our speakers for Episode 2

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