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## Market Intelligence

# ARTIFICIAL INTELLIGENCE 2022

Global interview panel led by Lisa Peets, Sam Jungyun Choi and Jiayen Ong of Covington & Burling LLP

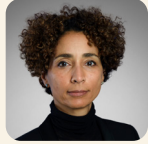
Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by Covington & Burling LLP, this Artificial Intelligence volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

- Government strategies
- Ethics & human rights
- Data protection & privacy
- Industry sector application

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## About the editors



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# Global trends

Lisa Peets leads the technology regulatory practice in Covington & Burling's London office and is a member of the firm's management-committee. Ms Peets divides her time between London and Brussels, and her practice embraces regulatory counsel and legislative advocacy. In this context, she has worked closely with leading multinationals in a number of sectors, including some of the world's best-known technology companies. Ms Peets counsels clients on a range of EU law issues, including data protection and related regimes, content moderation, copyright, e-commerce and consumer protection, and the rapidly expanding universe of EU rules applicable to existing and emerging technologies.

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Artificial intelligence (AI) has the potential to change our lives. The possibilities offered by AI-driven technologies have led to a rapid uptake of AI across a range of sectors, including pharmaceuticals, medical devices and healthcare, financial services, education and employment, energy, transportation and logistics. AI has been recognised as a power to achieve good, from helping hospitals to diagnose and treat illnesses to mitigating the impact of climate change to protecting us from fraud. At the same time, policymakers in many jurisdictions are also concerned about how to mitigate potential harms arising from the use of AI, including discrimination and bias. This Market Intelligence report will detail the ways in which different jurisdictions are regulating AI, including through both the introduction of new legal and policy frameworks and the application of existing ones.

A review of the AI policy and regulatory developments in the United States, European Union, Middle East and China point to several trends, among them the following.

- Recognising the potential value of AI. Governments worldwide are beginning to recognise the significant potential benefits of AI. Many governments have developed AI strategies focused on increasing investment in AI innovation and building capacity through training and education.
- Managing the potential risks of AI. Policymakers are also becoming increasingly sensitive to the potential risks of using AI technologies in certain contexts, particularly where AI could cause harm to individuals' health and safety or affect their rights. Some jurisdictions are considering new legislation to regulate certain applications of AI. Others are taking a 'softer' approach, publishing guidance or encouraging the development of industry best practices.
- Addressing AI-related harms. In many jurisdictions, AI technologies are already regulated to some extent through existing laws, including data protection laws. In the past



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“Most governments have developed AI strategies focused on the growth of AI innovation.”

year, there has been an increased interest by data protection regulators in the use of AI systems in areas such as the use of facial recognition technology. We anticipate that data protection regulators will continue to take a close interest in AI applications that process personal data.

In this Global Trends chapter, we will discuss each of these three trends in further detail.

### **Recognising the potential value of AI**

In each of the jurisdictions surveyed in this Market Intelligence report, governments have recognised the potential value of AI. Most governments have developed AI strategies focused on the growth of AI innovation in their respective jurisdictions.

The EU has been at the forefront of seeking to drive this innovation. In 2018, the European Commission (EC) launched its Coordinated Plan on AI, which sets out a joint commitment by the EC and the member states to work together to encourage investments in AI technologies, develop and implement AI strategies and programmes, and align AI policy to reduce fragmentation across jurisdictions. According to the 2021 review of the Coordinated Plan on AI, the European Innovation Council, which supports AI start-ups, provided over €1 billion in grants and equity for start-ups and SMEs with a focus on deep tech. In addition to this form of direct investment, the EC plans to continue funding various initiatives relating to AI through Horizon Europe, and establish a number of European AI partnerships to engage both private and public partners.

The United States has been similarly focused on driving AI innovation. In 2019, the then President Trump launched a coordinated federal government strategy for AI, which set out five key areas of focus: investing in AI research and development, unleashing AI resources, setting AI governance standards, building the AI workforce, and engaging internationally and protecting the US AI advantage. In

**“Although policymakers recognise the benefits of AI technologies, they are concerned about the potential risks of AI, particularly when used in contexts where it could cause physical or psychological harm, or impact human rights.”**





January 2021, the US National Defense Authorization Act (NDAA) established the National AI Initiative to coordinate ongoing AI research and development. The NDAA mandates the creation of a National Artificial Intelligence Initiative Office to undertake AI Initiative activities, and a National Artificial Intelligence Advisory Committee to coordinate federal activities. To support these efforts, Congress appropriated US\$400 million to the National Institute for Standards and Technology (NIST), and authorised \$1.2 billion for a Department of Energy (DOE) artificial intelligence research programme through 2025.

China has also been active in supporting the use of AI by encouraging integration of AI in various industries, and releasing AI-related guidance and standards. In 2022, China published guidance that identifies a list of sectors and scenarios where AI application is actively encouraged, including suggestions to facilitate the development of AI in those use cases.

There is no single harmonised strategy in the Middle East on AI or related data sharing. However, many countries in the Middle East have published national AI strategies and initiatives. Saudi Arabia, for example, has published its Vision 2030, which anticipates the establishment of AI-specific legislation, and UAE plans to become a global leader in the responsible use of AI by 2031. Other countries, including Qatar, Jordan, Egypt and Bahrain, have also developed AI policies.

### Managing the risks of AI

Although policymakers recognise the benefits of AI technologies, they are concerned about the potential risks of AI, particularly when used in contexts where it could cause physical or psychological harm, or impact human rights. Different jurisdictions take different approaches to managing the risks of AI. Some jurisdictions have introduced or are considering legislation that will regulate certain types of AI systems. Others are taking a more industry-driven approach, choosing to

rely on non-binding guidance and encouraging the development of industry standards on best practice.

The EU is one of the first jurisdictions to consider a comprehensive law to regulate AI. In April 2021, the EC proposed a Regulation Laying Down Harmonised Rules on Artificial Intelligence (the AI Act Proposal). If adopted in its current form, the AI Act Proposal will require providers of 'high-risk' AI to undertake a pre-market conformity assessment prior to putting such systems into service or making them available in the EU. The AI Act Proposal would also ban certain types of AI systems outright, such as AI systems that materially distort a person's behaviour or exploit the vulnerabilities of specific groups where physical or psychological harm is likely to occur. The AI Act Proposal will also require providers of certain types of non-high-risk AI systems to make mandatory disclosures to individuals interacting with such systems.

More recently, the EC has also proposed (in September 2022) a Directive on Adapting Non-Contractual Civil Liability rules to Artificial Intelligence (the AI Liability Directive Proposal). The AI Liability Directive Proposal seeks to make it easier for claimants to bring non-contractual fault-based civil claims for damages caused by AI systems, by imposing certain disclosure obligations on providers of high-risk AI systems and harmonising the rules on burden of proof. See the EU chapter for a more detailed discussion of this development.

Both the AI Act Proposal and AI Liability Directive Proposal are still under review by the EU institutions, and have not yet been adopted.

The UK government's approach in regulating AI is set out in the UK Office for Artificial Intelligence policy paper published in July 2022 called 'Establishing a Pro-Innovation Approach to Regulating AI'. In this policy paper, the UK government announced that it will adopt an innovation-friendly and flexible approach to regulating AI. The



UK government does not currently intend to follow the EU's plans to adopt AI-specific legislation. Instead, the UK government will adopt a set of high-level AI principles (based on the OECD's Principles on AI). UK regulators in various sectors and domains (eg, the Information Commissioner's Office, the Competition and Markets Authority, Ofcom, the Medicine and Healthcare Regulatory Authority and the Equality and Human Rights Commission) will interpret and implement these AI principles as appropriate to their sectors, and provide sector-specific guidance.

The United States has taken a middle path between the EU and UK in its approach to AI-specific legislation. There are currently no comprehensive laws that specifically regulate AI. At the federal level, while various AI-specific legislative proposals have been introduced in Congress, no laws have yet to be adopted. However many US government agencies and regulators, including the Federal Trade Commission (FTC), have published guidance on the use of AI and algorithms, highlighting the existing laws that apply to these technologies. In addition, at the state level, certain states, including Colorado and Illinois, have enacted legislation that applies to the use of AI in certain contexts, such as to make decisions in insurance or e-recruitment.

In China, there is currently no law that comprehensively or specifically regulates AI. However, in August 2021, the Chinese government published Guidelines for Establishing the National New Generation Artificial Intelligence Standards Mechanism. These guidelines set out the fundamental principles that will underpin future Chinese national and industry standards on AI. The Chinese government has also set itself the goal of developing and adopting best practice standards for data, algorithms, systems and services by 2023. To this end, in August 2022, the Chinese Association for Standardization released a draft standard regarding the use of AI technologies to collect and process consumers' 'visual representation data' (ie, biometric

identification data). It is anticipated that additional standards for other AI applications will be adopted by 2023.

In the Middle East, most countries in the region are still in the early stages of developing and implementing their AI strategies, and have not yet proposed legislation to regulate AI. One exception is Egypt's new FinTech Law. The FinTech Law requires organisations engaging in non-banking financial activities utilising 'financial technology' – including AI systems – to obtain a licence from the Financial Regulatory Authority.

### Addressing specific harms of AI

Although most of the markets surveyed in this Market Intelligence report have yet to adopt AI-specific regulation, there has been increased scrutiny of certain applications of AI under existing laws – particularly data protection and privacy laws. Facial recognition technology (FRT) is one example of an application of AI that is under scrutiny. For example, various regulators in Europe, UK and Australia have taken enforcement action against Clearview AI for its practice of scraping images of people from social media and other online accounts to train its FRT. Most recently, in 2022, the Greek and French data protection authorities have each imposed administrative fines of €20 million on Clearview AI, and ordered the company to delete the personal data of individuals residing in Greece and France, respectively, from its systems.

The US FTC has also indicated that FRT is an area of enforcement interest. In January 2021, the FTC settled an investigation of Everalbum regarding the use of FRT by its photo- and video-storage app, Ever App, to automatically sort and tag users' photos and videos (the *Ever App* case). Everalbum was required to delete the models and algorithms that it developed using users' photos and videos, and subsequently had to obtain express consent from its users before using its FRT.



In contrast to Europe and the United States, China has taken a more permissive approach to FRT. The Chinese government has set ambitious goals on the development of FRT, recognising that this technology will result in efficiencies in the delivery of both public and private services. For example, facial recognition was widely used in China to contain covid-19 by verifying identity without the need for person-to-person contact. The current rules governing the use of FRT in the public sector in China more generally encourage greater use of FRT. Although there have been some enforcement cases in China relating to FRT, it is unclear whether FRT rules would be enforceable where government agencies or state-owned enterprises providing utilities and essential services deploy the technology.

### Looking ahead

The global AI policy and legislative landscape is changing rapidly, with governments around the world announcing new policies, legislative proposals, and guidance each year. These new measures reflect a broad consensus on how AI technologies should be regulated -- whether that be through 'hard' law or 'soft' guidance. This consensus is reflected in, and often draws from, multilateral initiatives aimed at agreeing broad principles applicable to the development and deployment of AI, such as the OECD's Principles on AI, which state that AI should be developed and deployed in a way that is: inclusive and sustainable; human-centric; transparent and explainable; robust, secure and safe; and enables accountability. The key question is how these high-level principles will be implemented into specific laws and policies, applicable to both AI systems generally (as in the EU) and to specific applications, such as in autonomous vehicles or AI-driven medical devices.

Companies that develop AI technologies or that plan to use AI systems in their products and services should monitor developments in AI regulation and policy in key markets closely. Given the complexity of the technology, it is also important that AI innovators provide input to

policymakers and industry associations on the development of new laws and industry standards, to ensure that any measures ultimately adopted are workable.

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