GC

Global Counsel

Artificial Intelligence: navigating a fragmented global policy landscape

ChatGPT: disrupting the AI policy consensus

The launch of ChatGPT in November 2022 has transformed the political debate around artificial intelligence (AI). While AI systems had already been deployed widely across many businesses, the sophistication of ChatGPT and the fact that the public were able to directly interact with it, has sharply shifted appreciation of AI's future potential.

Prior to this, AI policy had become eclipsed by debates around other technologies such as the metaverse, crypto-assets and social media. The AI policy discussion had also reached a stage of relative maturity. A set of governance principles had emerged, even if the means of achieving these differed between jurisdictions. This apparent consensus has now been shattered.

One of the main distinctions between the AI debate and previous rounds of digital change is there are public calls from senior industry voices in favour of regulation. This is in turn driving political and media sentiment and it has re-opened dormant policy questions, such as whether there should be dedicated AI regulators or a licensing system. Specific sectors, such as media and education, are already anticipating disruption and there are growing political concerns that existing challenges, such as disinformation, will worsen ahead of major elections in 2024.

Faced with a rush to regulate but without a clear agenda for international cooperation and coordination, companies deploying AI systems face an increasing patchwork of competing compliance obligations globally. With increasing AI competition between the US and China, and the rise of AI nationalism more broadly, such fragmentation could develop into contradictory and competing obligations which companies must navigate globally.
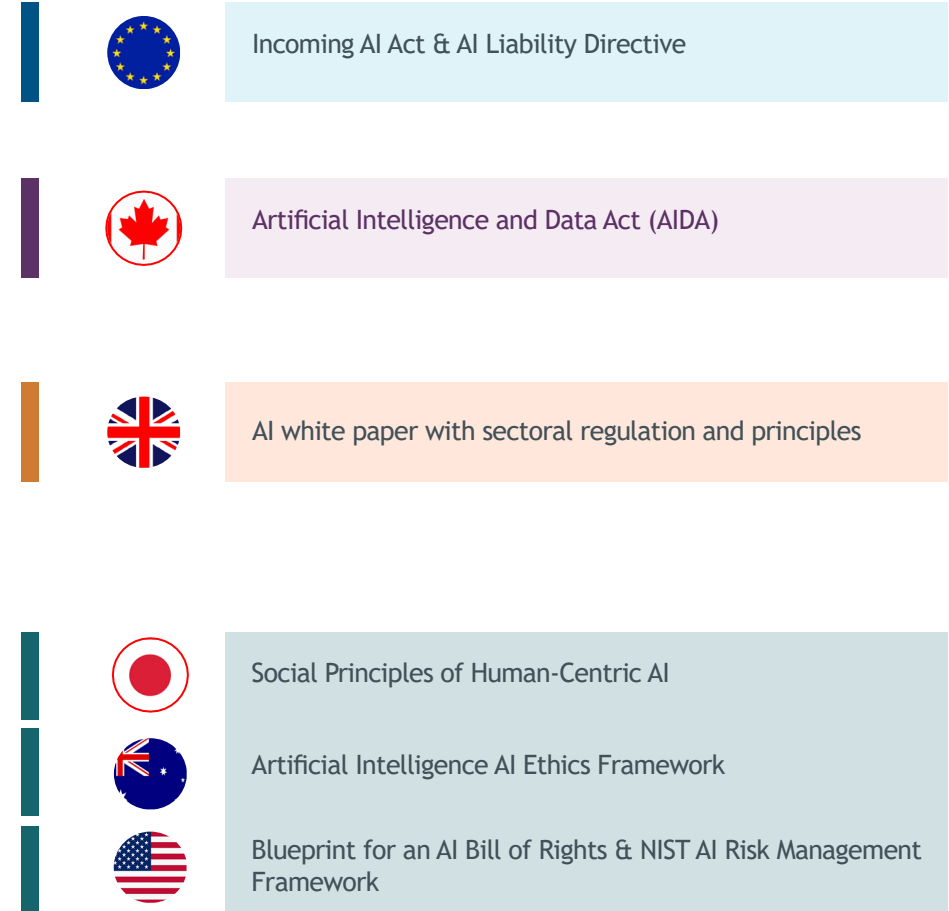
The status quo: a fragmented compliance landscape

There is a broad consensus on the principles of AI governance that underpin existing AI regulatory regimes. This derives from long-standing OECD principles promoting AI that is robust, safe, fair and trustworthy. However, governments vary in the legal instruments used, and the degree to which businesses are bound by compliance. For example, the EU's AI Act is designed to be prescriptive and mandatory, whereas the US' NIST AI risk management framework is a voluntary scheme.

Both of these initiatives, as well as others like the UK's AI white paper, were conceived prior to the latest developments in AI. This has left policymakers questioning whether these new legislative efforts are out of date before even being enacted. For example, the concept of 'explainability' of AI decisions is being challenged by the unexpected results seen in the outputs of some generative AI systems.

An added complexity for businesses is navigating the fragmented landscape of existing sectoral regulation. These range from financial services regulations, such as algorithmic trading rules in the EU's MIFID II, and healthcare frameworks, such as the UK's Medical Devices Regulations (MDR), to employment law, such as state legislation in Maryland and elsewhere regulating employers' use of automated employment decision tools.

HIGHLY PRESCRIPTIVE AND MANDATORY

Incoming AI Act & AI Liability Directive

Artificial Intelligence and Data Act (AIDA)

AI white paper with sectoral regulation and principles

Social Principles of Human-Centric AI

Artificial Intelligence AI Ethics Framework

Blueprint for an AI Bill of Rights & NIST AI Risk Management Framework

VOLUNTARY

Responding to generative AI: facilitation or intervention?

The launch of ChatGPT has not only re-energised interest in AI regulation but it has also surfaced a number of policy challenges that are specific to the creative nature of generative AI.

These include the way in which generative AI relies on extensive datasets, often obtained by scraping the web, and recreates them in the form of new content. This has prompted concerns about data protection and intellectual property rights. Questions are also being posed about its impact on the information landscape. This is rooted in generative AI's ability to combine authenticity and high volumes of output, in turn prompting concerns about cybersecurity and disinformation.

Barely six months after ChatGPT's launch, these perceived risks are already resulting in a policy response in various countries,

possibly prompting a further global fragmentation of AI compliance obligations. For example, there is a strong prospect that specific provisions on generative AI will be included in the EU's AI Act. Meanwhile, in China, the government has introduced a regulatory approval process for companies deploying generative AI, as well as conditions that they must be in line with "Chinese values".

Other governments are taking a contrasting approach, looking instead at how to facilitate the growth of domestic competitors in generative AI. This is driven by the perception of a global race in generative AI and a need to compete with US technology firms. In some cases, such as Japan, where availability of data reflecting local language and values is scarce, governments are looking to support the development of sovereign models.

FACILIATORY APPROACHES

Japan's Cultural Affairs Agency is reviewing how its copyright framework applies to generative AI. The current law - the 2018 copyright law - is notably faciliatory in its approach, allowing for the use of copyrighted materials for AI learning without permission, unless it unduly harms the interests of the copyright holder. The definition of unduly harms in the context of generative AI is likely to be further clarified.

INTERVENTIONIST APPROACHES

In the European Parliament's version of the AI Act, AI-generated content must be disclosed to consumers to increase transparency online with a view to tackling illegal content and misinformation. Furthermore, operators of generative AI systems must disclose training data covered by copyright law in order to inform rightsholders about the usage of their content. While these provisions are yet to be agreed by the co-legislator, the Council of the EU, it is likely that specific provisions on generative AI will be included in the final text.

International governance: competition and coordination

Governance models

Questions of AI safety and ethics are evolving into a debate on how global governance of AI might take shape, notwithstanding the fact that all attempts to coordinate digital regulation globally to date have failed. As the risks and opportunities posed both by currently available technology (generative AI and large language models) and future possibilities (artificial general intelligence, or AGI) become clearer, political leaders are now taking a direct interest in international governance. This momentum will build ahead of the UK summit on AI later this year.

AI is now at the centre of an accelerating tech arms race between the US and China, with the former explicitly bent on stalling the latter's capabilities through restricting the export of advanced chips and FDI. Both countries will seek to draw others into their orbit through a mixture of secondary sanctions, multilateral groupings and enticements, such as the of cheap infrastructure, increasing the risk of polarisation.

As research accelerates and commercial opportunities become more obvious, the potential for misaligned objectives between states and private actors will also increase. Most frontier research is performed by a small number of companies, who draw on an equally small talent pool. There is a growing chorus of voices arguing that democratically controlled "sovereign" capabilities will require a reassertion of state control and even nationalisation of capabilities, at least for deployment of generative AI within public services.

INTERNATIONAL REGULATOR

Proposals for international regulation typically argue for an initial state-led "regulatory sandbox" - enabling public and private sector actors to test controls in a safe environment – evolving subsequently into an institution similar to the IAEA. This would emulate the approach taken by the WEF and GPAI but embed it under a leading country. The UK is likely to target this type of outcome at its AI summit in late 2023.

PRINCIPLES

The UN, EU-US TTC, OECD and G20 have all sought to develop a principles-based approach to AI, but none have evolved into concrete proposals on governance. This is driven in part by competing priorities, with developing countries often arguing for a focus on developing digital infrastructure rather than safety. In the short-term, there is more potential for a broadly-supported UN declaration to emerge which insists on human control over nuclear weapons.

SUPRANATIONAL LEGISLATION

The EU's AI Act is to date the most developed attempt to categorise and proscribe AI safety risks. The main criticism it faces – even from those who support the principle – is that its approach is insufficiently flexible and that the emphasis on individual rights will stifle innovation. If this holds up, it will appear increasingly at odds with both the European Commission and France's stated ambitions to achieve strategic autonomy.

HARD COMPETITION

China launched its AI plan in 2017 with the explicit ambition of becoming the undisputed global leader by 2030 in AI technology, with those resources controlled by the state. The US NSC Commisson on AI in 2022 concluded that the US state should respond in kind to protect its security, prosperity and democracy. The risk of an AI arms race, without guardrails between the two superpowers is real.

Navigating global AI policy fragmentation

UNDERSTAND AND TRACK

→ Understand the drivers of AI regulatory initiatives and what policymakers are trying to achieve.

→ Track the political and policy debates in the US, EU, UK and other major policy centres which shape the form and likely impact of regulatory frameworks.

→ Understand the interplay between competing national and regional legal frameworks, as well as initiatives at an international level to collaborate and coordinate.

ASSESS AND PRIORITISE

→ Prioritise the key markets for AI compliance and regulatory development for your business.

→ Assess opportunities and risks around evolving AI policy frameworks and develop strategies to respond to them in those key markets.

→ Assess opportunities for engaging with multilateral or plurilateral policymaking bodies to influence the establishment of global AI standards or principles before they are adopted at national or regional level.

CONTRIBUTE AND ENGAGE

→ Engage constructively with policymakers on policy design questions for emerging national, regional and international AI frameworks.

→ Contribute and deploy data points and illustrative use cases to inform government policy development with regards to private sector deployment of AI.

→ Contribute expertise and technical insights to shape the establishment of policies on the deployment of AI within the public sector.

GC's AI policy credentials

ENGAGING WITH LEGISLATORS

As part of its wider engagement strategy on AI policy, GC supported a large B2B and B2G data platform in contributing to a parliamentary inquiry on AI. This involved a comprehensive audit of the client's messaging and key data points, and preparatory sessions with the client ahead of their committee appearance.

REGULATORY RISK ANALYSIS

GC provides the client, a global content platform, with ongoing analysis and guidance on the impact of digital legislation on their business. This includes assessing the impact of the UK's AI White Paper and its implementation on the client's compliance approach and public policy strategy.

THOUGHT LEADERSHIP REPORTS

With the objective of enhancing the client's reputation with key US and UK stakeholders, GC produced a thought leadership report for an AI start-up informed by original qualitative and quantitative research. The report highlighted the role of AI solutions in improving the efficiency and sustainability of supply chains.

EARLY WARNING POLICY SERVICE

GC is integrated into the public policy team of the client, a major pharmaceutical company. The GC team provide the client with an early warning service on AI regulation – both health-specific frameworks and cross-sectoral – providing clear analysis on how these could affect its business and how its public policy strategy should respond.

STAKEHOLDER ENGAGEMENT STRATEGY

GC supports a multinational cloud enterprise in Brussels, London and other EU member states on the AI Act, the UK AI White Paper and AI policy at member state level. GC runs the client's senior engagement programme, supporting the engagement programmes with governments on AI policy.

QUALITATIVE AND QUANTITATIVE RESEARCH

GC commissioned original public polling and focus groups charting public views on the perceived benefits and concerns relevant to generative AI in education, as well as public views on the need for regulation. The assessment explored specific views on different use cases, shaping how EdTech firms approach government engagement on AI.

GC Research: the regulation of generative AI

Global Counsel has launched its latest research project looking at the regulation of generative AI. The full report will be published in autumn 2023 and will be accompanied by launch events in London, Brussels and Washington, DC.

Building on the success of last year's report "Regulating the Metaverse", the research project will explore the likelihood and likely form of regulation targeting generative AI. In particular, it will seek to understand attitudes towards particular use cases of generative AI in healthcare and financial services. This will develop and deepen our initial research into the use of generative AI in education.

The report's conclusions will be informed by qualitative and quantitative research in Brussels, Germany, the US and the UK. This will take the form of public polling, a Citizens' Jury and in-depth interviews with key opinion formers in government, regulators, legislatures and the wider AI policy community.

If you would like to understand more about GC's research project, do not hesitate to get in touch with Conan D'Arcy and the GC team.

Public

CITIZENS' JURY

Deliberative workshop to explore public perceptions of generative AI and understand how views change as participants are exposed to new information and discuss implications.

SURVEY

Quantitative survey to understand incidences of different views among the public, enable robust comparison between and within countries, and facilitate tracking of perceptions in the future.

Opinion Formers

INTERVIEWS

Qualitative interviews to explore views of experts and policy influencers in relation to generative AI, as well as expectations of future regulation.

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