

Managing Director liability in connection with Artificial Intelligence

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Agenda

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- 3 AI and Managing Director liability
- 4 Measures to be taken

Introduction of speakers



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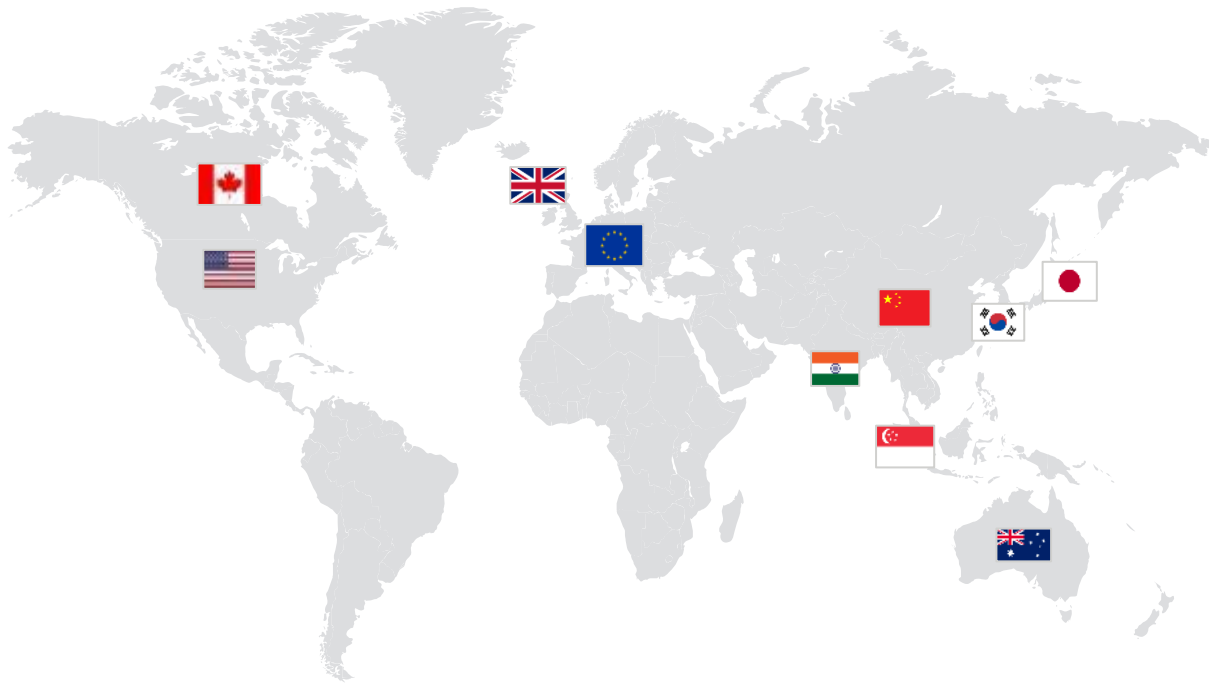
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Legal challenges when using AI








Overview of the legal challenges when using AI

Navigating the global AI regulatory framework and key areas of substantive law

Emerging global AI regulatory framework



Challenging domains of substantive law

-  Intellectual property
-  Data privacy & data use
-  Confidentiality
-  Data usage rights
-  Corporate law
-  Liability
-  Contracting



Jurisdictional
differences

EU AI Act: objectives, implementation, and sanction system

A regulatory approach to ensuring ethical and safe AI systems in the EU



Purpose and objectives



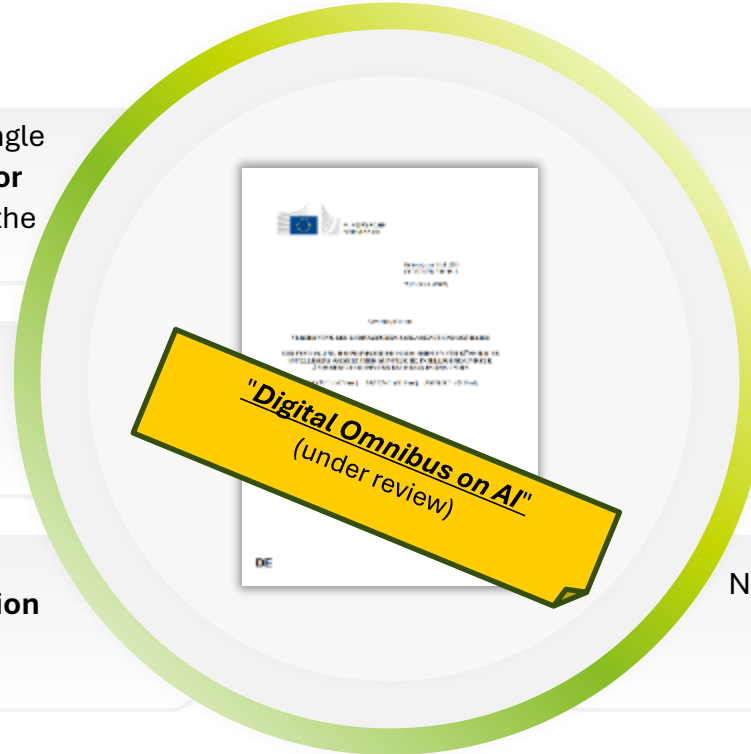
Improving the functioning of the European single market through a **uniform legal framework for AI** and a **uniform high level of protection** in the EU



Definition of **procedures, roles, and responsibilities** for **quality assurance** throughout the AI lifecycle



Ensuring **legal certainty to promote innovation and investment** in AI



Implementation instruments

Risk classification of AI systems with corresponding **obligations** for the respective operators

Copyright

AI training, prompting, and content generation (output)



Damages

Warning letter / cease and desist

Criminal consequences

Works within the meaning of German copyright law are only **personal intellectual creations** that are the result **of individual intellectual effort**.

Economic considerations

Due to the possibility of generating endless unprotected output, the focus of monetization and value creation is shifting from content to AI itself.

AI training

- Training material and data may be subject to **copyright or other third-party rights** (e.g., database rights, rights of use, trademark rights, etc.).
- **Text and data mining** is permitted under Section 44b of the German Copyright Act (UrhG) (but opt-out by the rights holder is possible).



Prompting

- User inputs (so-called prompts) are generally **not protected by copyright**.
- The use of **third-party content** protected by copyright or other rights may constitute a legal violation
- However, prompts are becoming increasingly complex (*prompt engineering*).



Output

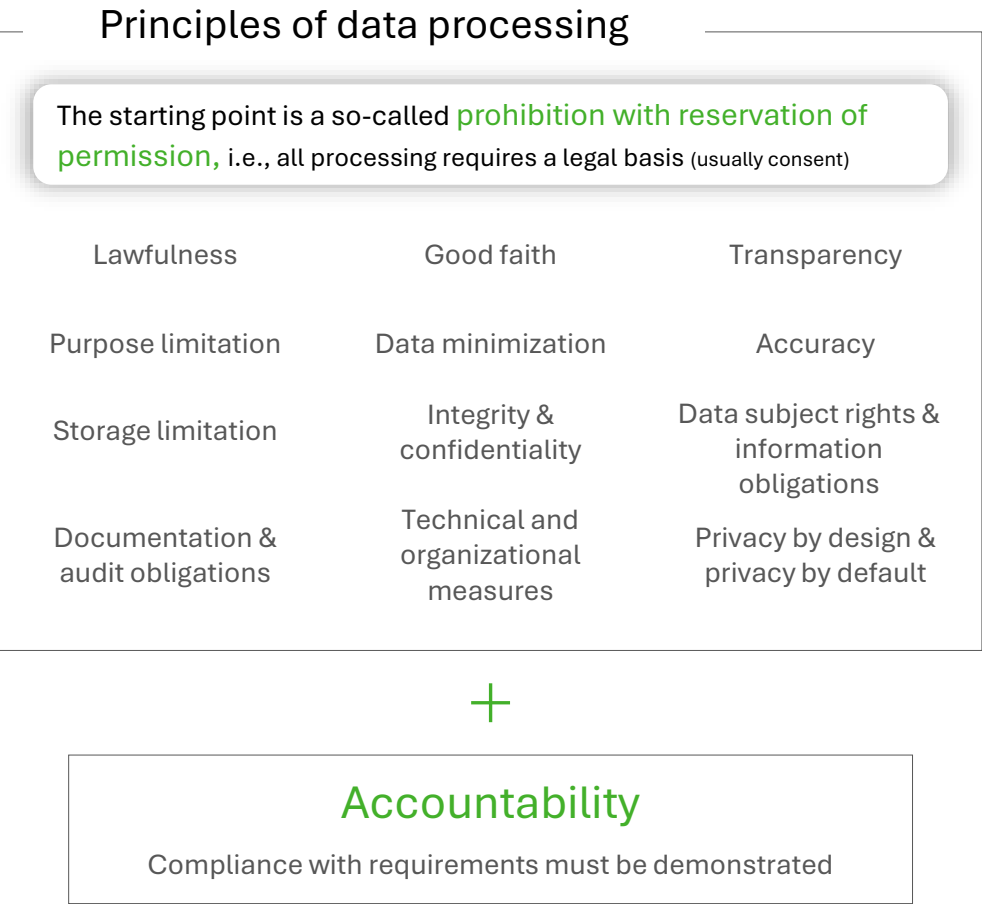
- Users and data subjects generally **do not** achieve a **level of creativity**
- The provider may have **copyrights to the source code** of the AI, but not to the output
- Generative AI itself **has no legal capacity** and therefore cannot hold copyright




Data protection

Principles of data protection law when using generative AI

Lawfulness of processing





Fines

Claims by affected parties

Administrative orders

Processing steps for personal data when using generative AI



- Training and fine-tuning** Data processing through AI training
- Depending on the model/provider, publicly available information from the internet, data licensed by the provider, user input ("prompts") or input from human trainers, books, articles, emails, social media posts, etc.
 - Responsibility lies with the provider who trains the AI
 - Possible legal basis: legitimate interest (Art. 6(1)(f) GDPR)
- Problematic:** training with sensitive data, extensive information obligations, right to be forgotten



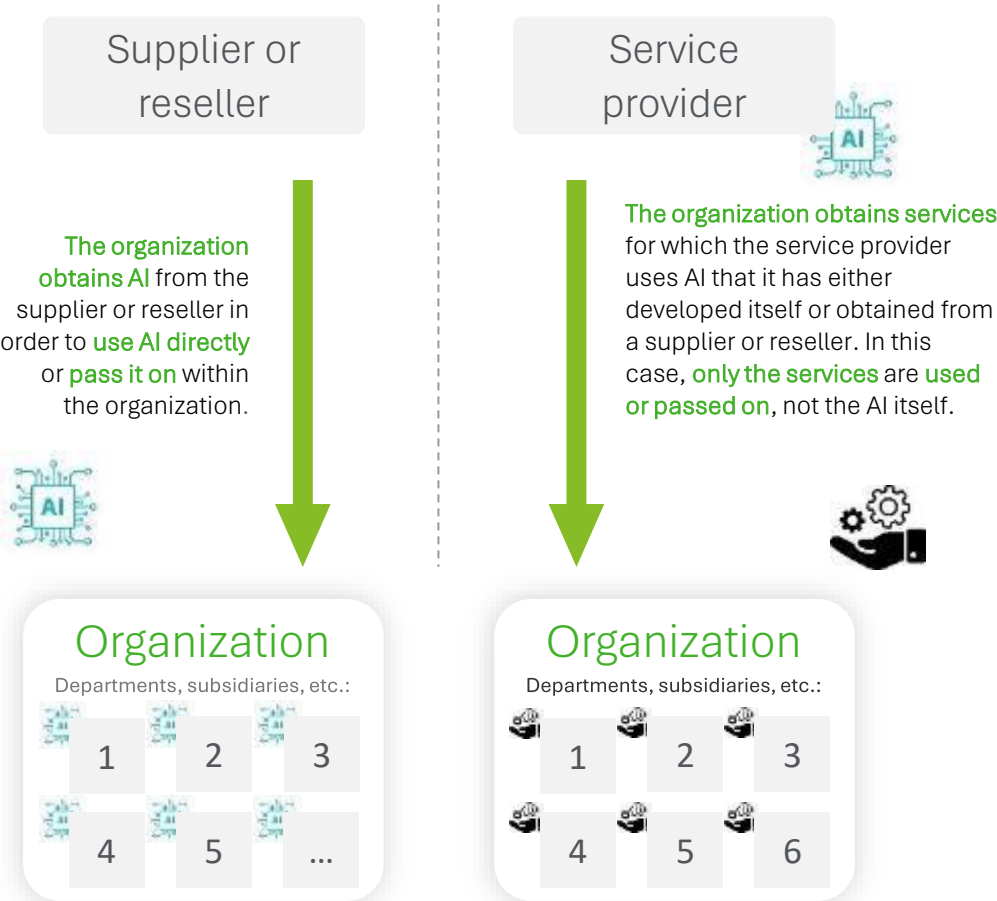
- Provision of AI** Data protection roles
- Regularly in the form of order data processing
 - However, contract review is necessary to determine whether own processing purposes are being pursued
- Problematic:** Responsibility, input of third-party data



- Use of AI and its results** Data processing through "prompting"
- Data entered by the end user is used to generate output
 - Legal basis (e.g., contract fulfillment/informed consent) to be determined for the individual use case
- Problematic:** fulfillment of information obligations, entry of protected content

Contractual conditions for AI procurement

Typical key questions












Vendor lock-in

Data use

Cost risks & liability

-  **Data protection & cybersecurity:** Due to the black-box nature of many AI applications, compliance with data protection and cybersecurity requirements is complex. Ensuring compliance is essential in order not to jeopardize business operations.
-  **Regulation:** Due to differing regulatory approaches to AI around the world, both sector-specific ("vertical") and sector-independent ("horizontal") regulations must be complied with in order to avoid sanctions.
-  **Rights to data and outputs:** Often unclear rights to training data pose risks with regard to intellectual property rights. Clear regulations on data sources, output rights, and the prevention of data misuse are crucial.
-  **Liability:** Risks and responsibilities should be carefully assessed and contractually defined to avoid liability gaps.
-  **Costs and pricing:** AI applications are expensive and require transparent pricing mechanisms that are tailored to the needs of the respective company.
-  **Term and exit:** The deeper AI applications are integrated into core processes, the more important it is to have contractually secured exit and termination rights.
-  **ESG:** Since AI applications have a high environmental impact, the contractual integration of ESG guidelines and targets is recommended.

 We examine this in more detail in our [white paper "Contracting for Generative AI and mitigating Generative AI supply chain risks."](#)

AI and Managing Director liability

Managing Director liability in connection with AI

Applicable liability regime in connection with AI



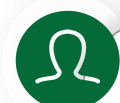
Corporate liability

Corporate liability in relation to AI is linked to the fact that AI is used, operated, or offered.

- Liability law points of reference
 - Regulatory framework, e.g., EU AI Act, GDPR, etc.
 - Civil liability, contractual, tortious in the event of damage caused by the use of AI, product liability
 - Labor and co-determination law
- Attribution



Fines and damages may lead to recourse against managers*



Managing Director liability

- **No special AI organ liability law** for managers
- General liability principles and standards,
 - "Due diligence of a prudent businessman" (Section 43 GmbHG)
 - or
 - "Due diligence of a prudent and conscientious manager" (Section 93 AktG)

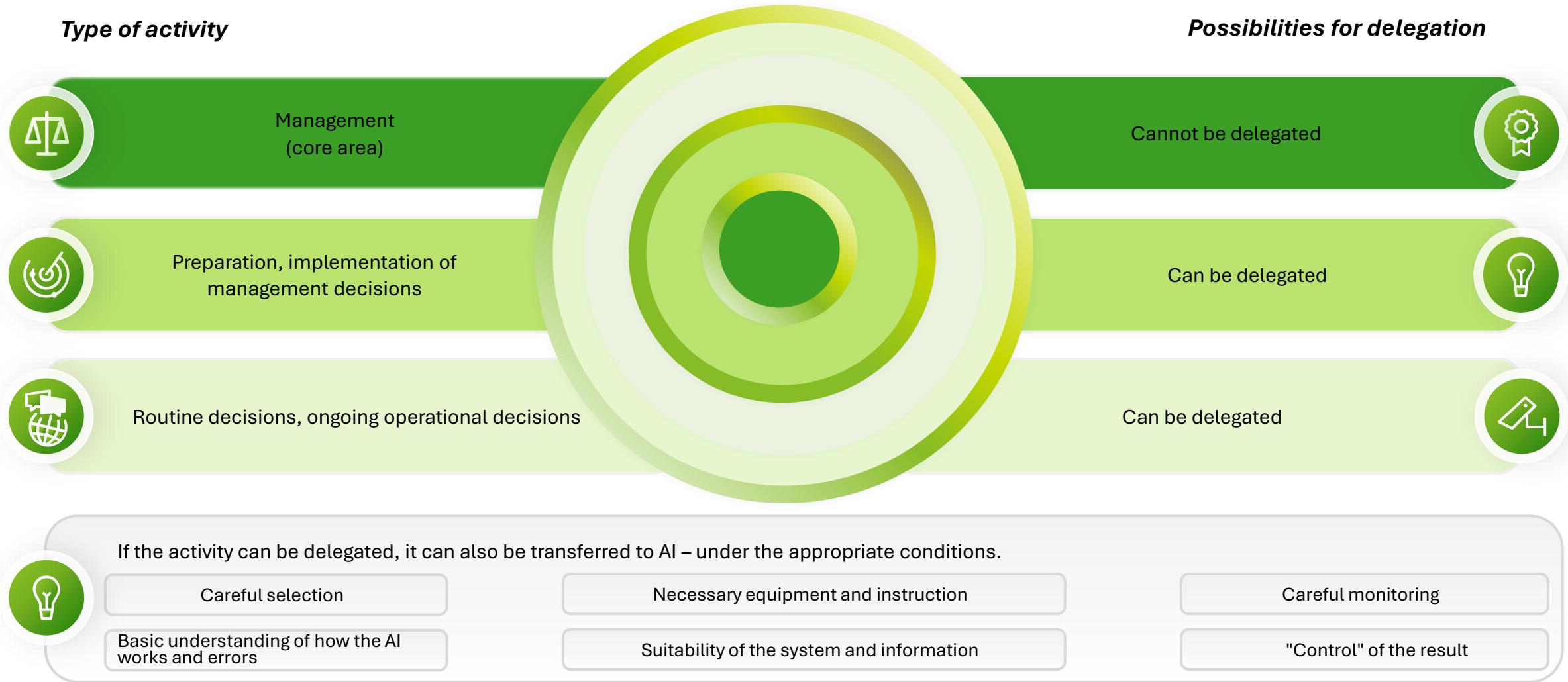


Violations may result in liability for damages on the part of managers

*see most recently OLG Frankfurt v. 31.10.2025 – 31 U 3/25

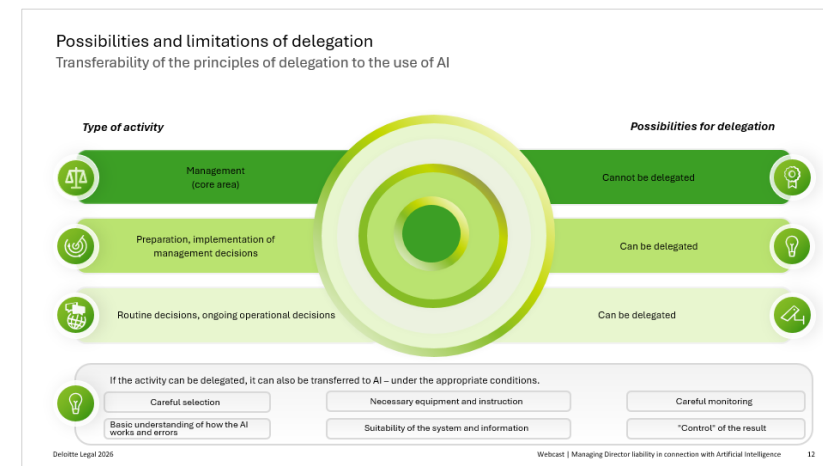
Possibilities and limitations of delegation

Transferability of the principles of delegation to the use of AI



Managing Director liability in connection with AI

Typical list of duties



Duty of legality

- Use of AI only within the framework of applicable laws
- Compliance with data protection law
- Right of co-determination
- Copyright and business secret protection
- Requirements of the EU AI Act



Fiduciary duty

- Obligation to check whether the use of AI is in the interests of the company
- Duty to disclose material AI risks to shareholders
- No use of AI as a means of increasing risk in breach of duty



Duty of care

- Careful selection of AI systems in the company
- Obligation to perform human
 - Plausibility check
 - Risk assessment
 - Discretionary decision
- Increased diligence in personnel, compliance, or management decisions



Confidentiality obligation

- Ensuring that no business secrets are disclosed through the use of AI
- No uncontrolled processing of sensitive data
- Obligation to check data flows, storage locations, etc.



Organizational and monitoring obligations

- Establishment of
 - AI governance
 - Responsibilities and AI guidelines
 - Control and approval processes
- Obligation to continuously monitor AI use and results
- Obligation to intervene in the event of undesirable developments

Managing Director liability in connection with AI

Typical liability scenarios

ORGANIZATIONAL FAULT

- No AI inventory/register (areas of application, systems, purposes)
- No responsible contact person and responsibilities (professional, technical, legal)
- Lack of AI guidelines (use cases, limitations, approval process)
- No AI compliance system and lack of control structures
- Lack of training for relevant employees
- Lack of monitoring, no intervention in the case of misdevelopments



AI may provide support – but it must not make decisions.

Decisions should only be made on the basis of adequate information and after critical scrutiny.

VIOLATION OF LEGAL OBLIGATIONS

- No measures taken to implement AI competence
- Use of impermissible AI practices and applications
- Disregard for co-determination rights
- Disregard for data protection rights
- Disregard for copyrights

ERRORS WITHIN THE SCOPE OF THE BUSINESS JUDGMENT RULE

The use of AI does not exclude the Business Judgement Rule; it can even be helpful in gathering information, but:

- Do not blindly trust AI recommendations without checking the database, logic, or assumptions
- No knowledge of the limitations or known errors of the AI tool
- No plausibility or risk assessment, especially for management decisions

Use of generative AI – summary

Option or even obligation?

1

Possible use

Possibility of use: Provided that the use of AI in a specific case is legally compliant and decision-makers have a basic understanding of how it works (and its shortcomings and risks), there is no reason not to use AI *purely in a supportive role*.

2

Core area

Core areas of management cannot be delegated. In these areas, no (liability-exempting) transfer to AI is possible.

3

Obligation to use?

The obligation to use AI is currently only conceivable if *non-use appears completely unjustifiable*, taking into account the wide scope for entrepreneurial discretion. At present, this is probably only conceivable in exceptional cases (mainly due to the lack of reliability of the results).

4

Business Judgement Rule

Use of AI to support decisions in accordance with the **Business Judgement Rule** is possible, but decisions made by AI itself are not privileged by the **Business Judgement Rule**

5

"Ision" principles

When it comes to the question of when **AI results** can be *trusted*, it is advisable to apply the **"Ision" principles** (BGH ruling from 2011 on the question of when legal advice can be trusted):

1. **Professional qualification of the consultant/AI:** Selection of an AI system that meets the relevant requirements.
2. **Providing the consultant/AI with a comprehensive information base:** all relevant information must be loaded into the AI system.
3. **Ensuring independent analysis by the advisor/AI system:** in particular, no "framing," i.e., "steering" the AI toward a specific result, for example, through selective selection of the information base/suggestive questioning.
4. **Independent plausibility check:** Checking in particular for completeness and logical contradictions

Then: it is possible to trust the result with liability-avoiding effect.

Both **general risks** (especially hallucinations, bias) and **case-specific risks** (e.g. confidentiality, data protection, IP) must be taken into account.

6

Future

A **look into the future** shows that big data analytics and AI will play an increasingly important role for decision-makers as effective means of gathering information.

Due to **rapid technological progress** and the **development of the legal framework** (e.g., AI Regulation), a broader scope of application and an obligation to use AI in the preparation of business decisions is conceivable.

Measures to be taken

AI compliance of the Managing Director

Measures Executives should consider – depending on the individual company



Building technological understanding and decision-making skills

- Familiarization with the technology is necessary at a level that enables an understanding of how the AI application works and its opportunities and risks for one's company in order to be able to make technically, ethically, and organizationally informed management decisions.
- Decisions must be made, for example, about which activities can be automated, where human judgement and supervision remain indispensable, and how responsibility should be distributed between employees and the AI application. An open-ended assessment of the sensible use of AI must be provided, especially since discretion in individual cases (also with regard to the success of the company) becomes an obligation.



Conscientious due diligence when introducing AI

- Management must consider the reliability and quality of the AI application, review the legal framework, and ensure that applicable law is upheld when using AI in the company.
- The early designation of responsibilities and accountabilities is essential. A comprehensive, binding AI (usage) policy must also be adopted and enforced.



Documentation and transparency

- Transparency is a prerequisite for proper corporate governance. All decisions and processes related to AI should be documented. When it comes to management decisions, the following questions should be asked: Why AI? What are the alternatives? How will the results be evaluated?
- Appropriate structures, processes, and controls for the use of AI should be established. This includes, among other things, maintaining an AI inventory.



Quality and risk management

- Management must ensure the implementation of a quality and risk management system in order to identify potential AI application errors at an early stage and mitigate risks. These must be checked regularly and continuously for errors or bias through regular audits.
- This also includes ensuring that the AI application is updated to adapt it to any new technical and legal requirements.



Learning and skills development throughout the company

- Ensuring AI literacy within the company is necessary in order to equip employees working with AI with sufficient knowledge of the subject matter. Employees must be empowered to use AI competently and to build awareness with regard to the opportunities and risks of AI and its potential for harm.
- This can be achieved through (mandatory) training courses that cover the technical, legal, and ethical aspects of AI use.



Clear contractual provisions

- If the company agrees on the use of AI with its contractual partners, clear contractual provisions on fault-based liability between the contracting parties should be ensured.
- Management should check whether there is sufficient insurance coverage to cover liability risks associated with the use of AI.

Roadmap – Introduction of AI

A structural approach to liability limitation

2. Implementation phase

- Implementation of **action plan and guidelines**
- Training of employees
- Implementation of **the works agreement**

1. Preparation phase

- **Inventory** of existing and yet to be introduced AI systems and overview of legal, ethical, and technical requirements
- Involvement and information of **the works council, conclusion of a works agreement**
- Development of internal **compliance and ethics guidelines** and measures for implementing legal requirements
- Development of **training and educational materials**

3. Monitoring

- Ongoing monitoring of regulatory and technical landscapes
- Ongoing evaluation of AI use cases and adjustment of risk classifications, guidelines, use cases, etc.
- Establishment of a system of automatic controls for continuous monitoring of new software (e.g., approval workflows)
- Ongoing communication with the works council as the systems are further developed



Do you have any questions for
us?

Further Information

Our Publications on the topic of AI

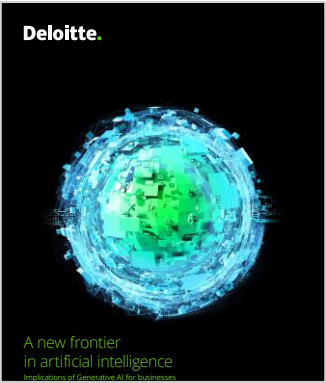
Contracting for Generative AI and mitigating Generative AI supply chain risks



Generative AI is all the Rage



A new frontier in artificial intelligence



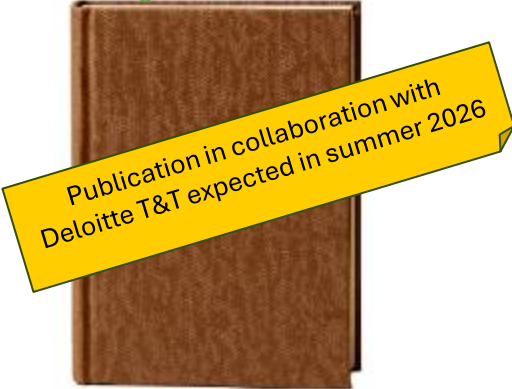
Designing for the Public Sector with Gen AI



The legal basis and framework conditions of GenAI (German)



“AI Transformation: Roadmap for the Executive Board, Supervisory Board, and Management” (German)



Proactive risk management in Generative AI



State of Generative AI in the Enterprise 2024/Q3



State of AI in the Enterprise #5, German Cut



Generative AI Dossier



Artificial Intelligence Act



Deloitte Legal Deutschland: range of advisory services on AI

Deloitte Deutschland: Artificial Intelligence

Deloitte Legal has a strong global presence

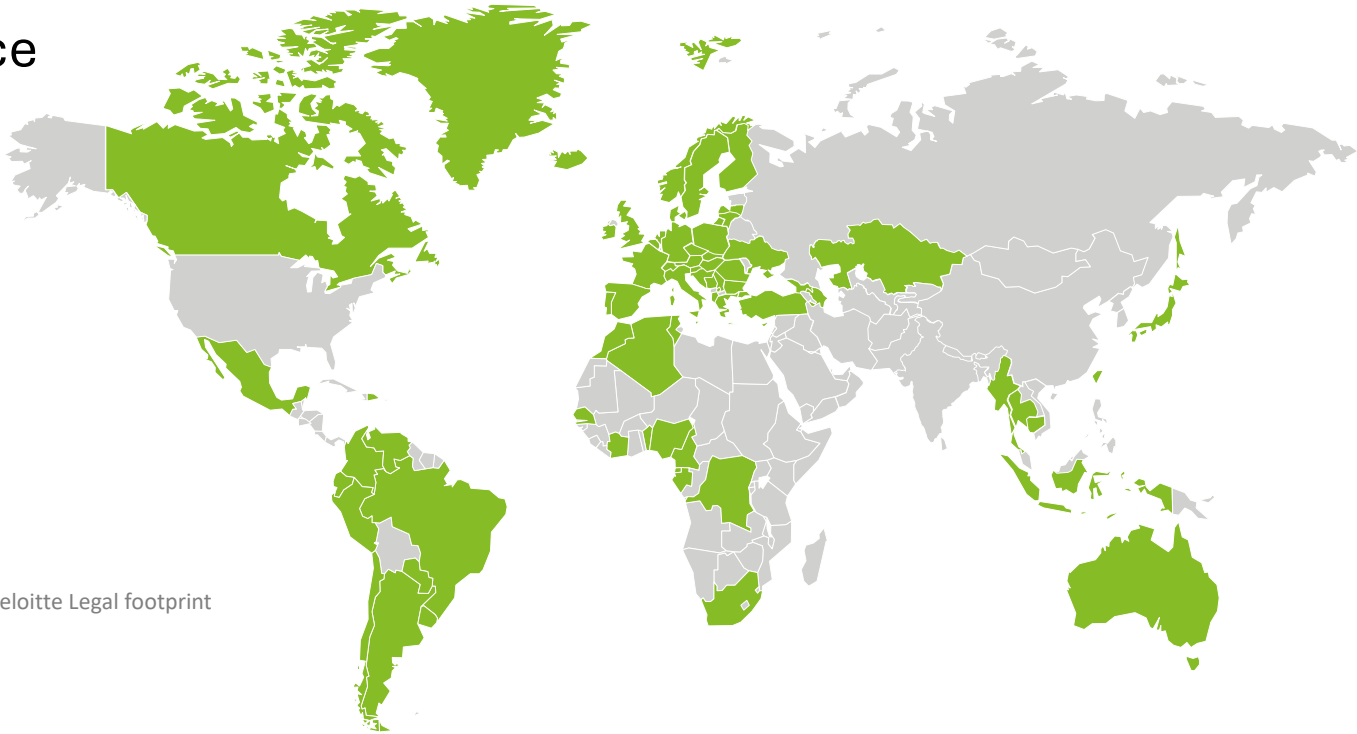
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10. Brazil	24. Ecuador	38. Indonesia	52. Netherlands	66. South Africa	
11. Bulgaria	25. El Salvador	39. Ireland	53. Nicaragua	67. Spain	
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