EFET European Federation of Energy Traders

EFET Legal Committee Meeting
22 September 2023, London

EFET

DAY 1: MEETING AGENDA

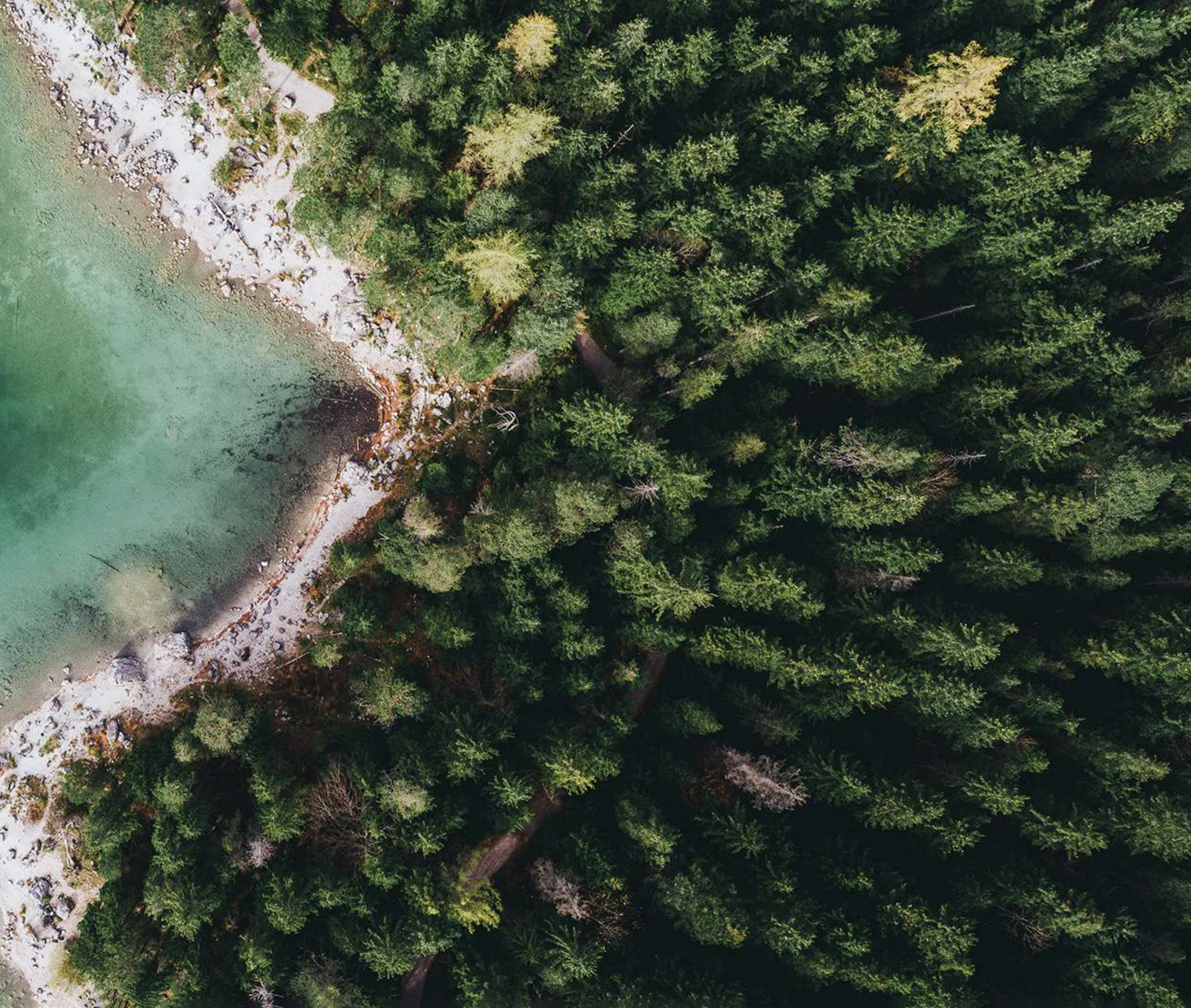
1. Fit for 55 and its impact on the current industry EU carbon trading documentation – Peter Zaman, Partner, HFW law firm
2. Proposed EU Directive Harmonising Insolvency Law: EFET advocacy position - Gerd Stuhlmacher, Partner, Luther law firm
3. Legal opinions: status quo review and new legal opinions – Sonia Auguscik, EFET
4. Everything you want to know about ChatGPT – uncovering the risks, discussing the challenges and problems faced by our members – Peter Church, TMT Counsel, Linklaters
5. Update reports from the Legal Committee Working Groups:
    - Hydrogen Working Group – Michaela Duve, EFET
    - Biogas Working Group - Aygul Adamson, EFET
    - Digitalisation Working Group – Michaela Duve, EFET
6. AOB, date and venue of the next Legal Committee meeting

1. Fit for 55 and its impact on the current industry EU carbon trading documentation

Presentation by Peter Zaman, Partner, HFW law firm

HFW

Fit for 55 - Impact on Current Industry EUA Trading Documentation



Prepared for European Federation of Energy Traders (EFET)

22 September 2023

Peter Zaman

Partner

WHY CHOOSE HFW?
OUR INTERNATIONAL REACH

With more than 500 lawyers working across Asia, Australia, the Middle East, Europe and the Americas, we provide a global and seamless service 24 hours a day. We are dynamic, entrepreneurial and leaders in our specialist areas.

We are unapologetically, true sector experts. Clients come to us because of our deep industry expertise, and our ability to talk their language. We think about the commercial solution first, and then underpin our advice with a solid foundation of legal expertise.

Global reach

We have scaled ourselves to be big enough to provide the right level of support and resource globally, while remaining flexible enough to adjust to our clients' needs and maintain a collaborative and personal approach.

AGENDA

FIT FOR 55

Potential/Necessary EFET Allowance Appendix Amendments

Linking Arrangements under Art 25

Q&A

FIT FOR 55

BACKGROUND

What is the EU's 'Fit for 55' package?

- A series of legislative amendments to the laws governing the EU ETS
- Intended to reduce net greenhouse gas emissions by at least 55% by 2030 compared to 1990 levels
- Significant amendments to the EU ETS legislation were agreed on 25 April 2023 after intense debate and negotiation
- The amendments, which set out across different EU directives and regulations, became law on 5 June 2023
- The proposed package aims to bring EU legislation in line with the 2030 goal

What are the new provisions for the EU ETS?

- Extension to emissions from maritime transport (between 2024 and 2026)
- Faster reduction of emissions allowances in the system and gradual phasing-out of free allowances for some sectors
- Implementation of the global carbon offsetting and reduction scheme for international aviation (CORSIA) through the EU ETS
- Increase of funding for the modernisation fund and the innovation fund
- Revision of the market stability reserve

EU ETS COMPLIANCE CYCLE

1 January
Start of monitoring period of current year

31 March (may be earlier but not before 28 February)
Submit verified emissions report to CA for previous year

30 June
From 2024, receive free allowances (if applicable)
Submit improvement / non-conformity report on the previous year to CA (if applicable)

3rd quarter
Verifier to start verification process for the current year

30 September
Surrender allowances in Registry for the previous year (from 2024)

December
Prepare annual emissions report for the current year

31 December
End of monitoring period of the current year
Submit non-significant changes in installation to CA

Continuous monitoring, trading, seeking approval for significant changes to monitoring plan or installation

EFET ALLOWANCE APPENDIX - NECESSARY AND POTENTIAL AMENDMENTS

EFET ALLOWANCE APPENDIX AMENDMENTS

What may need to change

Compliance Time Period Changes	Infrastructural Changes					Supply / Demand of EUAs		Other Requirements
Surrender Deadline	Allowance Types	EUTL References	Transaction Limits	Registry Fees	Different Holding Account Types	Payment Dates and Longstop Dates	Re-visiting EEP	Bilateral Trade Reporting Obligations

Surrender Deadline	**"Reconciliation Deadline" means, in respect of an Allowance Transaction, 30 April in any calendar year in relation to the immediately preceding calendar year, or as otherwise specified under the EU ETS** • Reconciliation Deadline has been moved from 30 April to 30 September • Deadline for Member States to issue free allowances also moved from 28 February to 30 June: Articles 3d(1a) and 11 Directive. • Reconciliation Deadline should be amended. Long Stop Date <u>may</u> also need to be amended Definition used in Allowance Appendix in provisions relating to termination for force majeure, grace period for failure to transfer or failure to accept, EEP calculation formula, waiver of Buyer's or Seller's Cover Costs, definitions of "Compliance Year" and "Registry Operation", and "Long Stop Date".

EFET ALLOWANCE APPENDIX AMENDMENTS

Annex 1 to the Allowances Appendix (Defined Terms)

Allowance	**"Allowance" means an allowance to emit one tonne of carbon dioxide (C02) equivalent during a specified period, or such other type of unit as may be recognised as, valid for the purposes of meeting the requirements of applicable law and the relevant Emissions Trading Scheme on the Delivery Date, including, without limitation, for the purpose of meeting emissions' related commitment obligations under the EU ETS** • (proposal) aviation allowances will no longer be issued after 1 January 2025; general allowances will be issued instead • (proposal) introduction of new type of allowance - "regulated entity allowances" created pursuant to Chapter IVa of Directive 2003/87/EC (i.e. for fuels used for combustion in buildings and road transport). Not fungible with other allowance types • <u>May</u> need to distinguish between "Allowance" types because CHUs are compliance units and Aviation Allowances may be used for operator compliance needs.

“EUTL”	**“EUTL” or “European Union Transaction Log” means the independent transaction log provided for in Article 20(1) of the EU ETS Directive, the operation of which is further detailed in Article 5 of the Registries Regulation** • EUTL originally introduced into the EU ETS to reconcile information held on various national registries. • Since all EUAs issued from 1 January 2012 onwards are held in the Union Registry, EUTL has become irrelevant. • Removed from the Registries Regulation in June 2023. • Definition used in Allowance Appendix in definitions of “Administrator Event” and “Registry Operation”, which are relevant to “Suspension Event”.

EFET ALLOWANCE APPENDIX AMENDMENTS
)

Transaction Limits

Registry Regulation changes:

EU 2023/1642:	**Polish emissions trading authority**:
'3a. The central administrator may set a threshold above which transactions can only be performed to accounts that appear in the trusted account list. 3b. Account representatives may set thresholds for transactions for their own accounts. Such limits have to be approved by a second account representative or a national administrator.'	The mandatory threshold of a **one-off transaction of 2 million units** for transactions performed outside the List of Trusted Accounts – a threshold set by the Central Administrator (European Commission); and **Voluntary limits** set independently by authorized representatives assigned to accounts (applies to transactions made both to accounts on the List of Trusted Accounts and outside it): a. for a single transaction, b. daily c. weekly (last 7 days), d. weekly (Monday to Friday, working days) e. monthly (calendar month).

EFET documentation already require Buyer accounts to be specified as 'trusted accounts'.

If voluntary limits are imposed – should a failure to deliver due to the limit be expressly carved out of force majeure because it is within the party's control?

EFET ALLOWANCE APPENDIX AMENDMENTS

Limitations on transfer process

<table>
<tr><th>Trading Account</th><th>Operator Account</th></tr>
<tr><td colspan="2">Both must have a trusted account list: (Proposal) amended Art 23(1)</td></tr>
<tr><td colspan="2">If receiving account is not on trusted list, will be subject to a minimum 24-hour delay</td></tr>
<tr><td colspan="2">Both subject to threshold set by Central Administrator, above which transactions can only be made to accounts on the trusted account list. Both have options for voluntary thresholds: (Proposal) amended Art 23</td></tr>
<tr><td>Below the Central Administrator threshold, can transfer allowances to accounts not on trusted list

Above the Central Administrator threshold, cannot transfer allowances</td><td>Below the Central Administrator threshold, can only transfer allowances to accounts on trusted list, unless account holder specifically opts out of this requirement: Art 55(2) & (Proposal) Art 55(3)</td></tr>
</table>

Account	**"Holding Account" means the form of record maintained by and in the relevant Registry to record the allocation (if applicable), Transfer and holding of Allowances**
	
	• Existing account types:
	  • Operator holding account
	  • Trading account
	
	• (Proposal) Addition of new account types:
	  • regulated entity holding account
	  • third country government deletion accounts
	  • tax derogation deletion accounts
	
	• May need to distinguish the 'regulated entity holding account'

COMMISSION DELEGATED REGULATION (EU) 2019/1122

Article 81

Registry Fees	**Art 81 (Proposal): The central administrator may charge reasonable annual fees to account holders…National administrators may charge reasonable fees to account holders and verifiers administered by them.** • Mostly an administrative change with no obvious documentation impact. • EFET Annex provides that *"§ 6.7 Seller and Buyer Risks. Subject to § 8 (Remedies for Failure to Transfer or Accept), in respect of each Individual Contract, the Buyer and Seller shall, unless otherwise expressly agreed between them, each bear all risks associated with and shall be responsible for its own respective costs in performing its obligations under § 4 (Primary Obligations For Delivery and Acceptance of Allowances). Further, absent express agreement to the contrary between Buyer and Seller, all costs, fees and charges assessed or imposed by Relevant Authorities shall be the responsibility of the Party upon whom such cost, fee or charge is allocated by the Relevant Authority."* • Timeframe – TBC within Q4/2023?

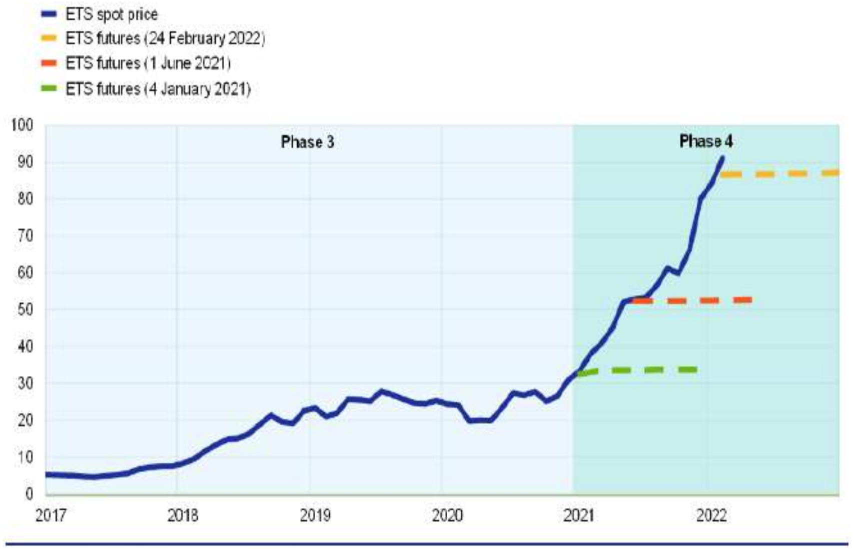
Payment Cycle & Long-Stop Dates

§ 13.2 Allowances Appendix: Payment…

Payment Cycle A: "On or before the later to occur of either (a) the twentieth (20th) day of the calendar month or if not a Business Day the immediately following Business Day or (b) the fifth (5th) Business day following receipt of an invoice (the "Due Date"). A"; or

Payment Cycle B: "On or before the fifth (5th) Business day after the later to occur of (a) the Delivery Date or (b) following receipt of an invoice (the "Due Date"). B".

- Inclusion of shipping from 2024 and phase out of free allocation for aviation from 2026: Articles 3d and 3ga Directive.
- Increasing EUA price
- Increased credit risk from payment after delivery mechanism.
- "Long Stop Date" (41 - 42 months after original delivery date) creates significant credit and market risk when a Suspension Event occurs.



Sources: Refinitiv, Bloomberg and ECB calculations.

EFET ALLOWANCE APPENDIX AMENDMENTS

§ 8.3 Excess Emissions Penalty ("EEP") and EEP Equivalent

EEP

§ 8.3 Allowances Appendix: Excess Emissions Penalty. If EEP is applicable, the Buyer may invoice the Seller in the amount of an EEP it incurs as the result of the Seller's failure to Transfer to it Allowances when required pursuant to the terms of an Allowance Transaction.

- EEP is the penalty payable to the relevant Member State for failure to surrender enough EUAs to cover emissions.
- Currently set at EUR 100 / tonne, increasing in line with European Index of Consumer Prices: Article 16 of Directive 2003/87.
- Allowance Appendix (§ 8.3) deals with EEP similarly to a claim for damages, with the Buyer required to evidence its liability for EEP, subject to causation and a duty to mitigate. However, the burden of proving lack of causation or reasonable mitigation is contractually on the Seller.
- Historically, these provisions were not used due to the abundance of EUAs but may be more relevant as supply is reduced. Perhaps some room for simplification

"bilateral" or "group" transactions	**Art 55(4) Registries Regulation: Upon initiation of a transfer, the authorised representative initiating the transfer shall indicate in the Union Registry if the transfer represents a <u>bilateral transaction</u> unless that transaction is registered at a market venue, or it is cleared at a central counterparty, or it represents a transfer between different accounts of the same account holder in the Union Registry.** **Art 55(5) Registries Regulation: Upon initiation of a transfer, the authorised representative shall indicate whether the transfer has been executed between account holders that belong to the <u>same group</u>.** • These requirements are intended for ESMA (European Securities and Markets Authority) to monitor trading.

LINKING ARRANGEMENTS UNDER ART 25

EFET ALLOWANCE APPENDIX

Swiss ETS is currently linked with the EU ETS

Article 25 Linkages

Swiss EU Linking Agreement came into force 1 Jan 2020

Linking under Article 25 is not the same as trading EUAs with EEA countries (e.g. Norway and Lichtenstein)

Swiss units:

CHU – Swiss Allowances
CHUA – Swiss Aviation Allowances

Usually traded in CHF

Issues for consideration in the context of the EFET Allowances Appendix

- To include or exclude
- If included:
  - Do you make it generic to future proof the Allowances Appendix (e.g. to apply to Linked Units) or specific (e.g. to CHU/CHUAs only)?
  - Will the Allowances Appendix allow trading in CHF as well as Euros?
  - Will need to deal with consequences of delivery/receiving accounts in the Swiss Registry
  - New trade confirmations will be needed
  - Definitions relating to Compliance Period, Suspension Events, linked ETS systems will need to be amended / introduced

Q&A

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2. Proposed EU Directive Harmonising Insolvency Law: EFET advocacy position

Presentation by Gerd Stuhlmacher, Partner, Luther law firm

Luther.

EFET Legal Committee: EU Insolvency Law Harmonisation
Gerd Stuhlmacher | 22 September 2023

unyer GLOBAL ADVISORS

EU Insolvency Law Harmonisation – Background and Objectives

Background:

- *The lack of harmonised insolvency regimes has been identified as one of the key obstacles to the freedom of capital movement in the EU and to greater integration of the EU's capital markets.*
- *Insolvency rules are fragmented along national lines. As a result, they deliver different outcomes across Member States, and in particular they have different degrees of efficiency in terms of the time it takes to liquidate a company and the value that can eventually be recovered*
- *The ongoing **energy crisis** and the limited fiscal space for public subsidies may result in an increase in business exits in the future. More companies may experience conditions where their debt level turns out to be unsustainable*
- *This EU action therefore addresses a **genuine legislative gap**.*
- *This proposal targets the three key dimensions of insolvency law: (i) the recovery of assets from the liquidated insolvency estate; (ii) the efficiency of proceedings; and (iii) the predictable and fair distribution of recovered value among creditors.*

Current status:

- Draft proposal for a Directive of the European Parliament and of the council harmonising certain aspects of insolvency law

(Doc COM 2022 702 final EUR-Lex - 52022PC0702 - EN - EUR-Lex (europa.eu)

- Proposal prompted lots of criticism and will be subject to changes in the legislative process – process to be observed, still room for EFET to raise suggestions and concerns

EU Insolvency Law Harmonisation – Main content *Avoidance Actions*

<u>**Harmonisation of Avoidance Actions:**</u>

- *The proposed Directive would require Member States to ensure that preferences, transactions for inadequate consideration and acts intentionally detrimental to creditors can be set aside if they take place within* ***prescribed periods prior to the opening of insolvency proceedings.*** *Member States would be able to adopt or maintain additional provisions relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors in the context of insolvency proceedings where such provisions provide a greater protection of the general body of creditors.*

  - ➢ *Draft contains minimum standards; most jurisdictions already foresee even stronger protection of general body of creditors*
  - ➢ *However, netting clauses, in particular such outside the scope of the Financial Collateral Directive should be explicitly protected against avoidance actions*

EU Insolvency Law Harmonisation – Main content *Pre-pack proceedings*

Pre-pack proceedings:

Introduction of pre-pack proceedings in which the sale of the debtor's business is negotiated ***before the opening of insolvency proceedings*** *and the sale executed shortly after the opening of such proceedings. Key features:*

- *Secured creditors permitted to participate but limitations on secured creditors' ability to credit bid,*
- *the need for a court to authorise the pre-pack sale, and*
- ***the fact that necessary ongoing contracts would generally be assigned to the purchaser, even without the consent of the contractual counterparty/ies***

➢ *such pre-pack proceedings should not overwrite* ***contractual assignment clauses*** *and* ***material termination events****. Netting needs to be protected and uphold.*

EU Insolvency Law Harmonisation – Protection of close-out provisions

Areas of concern:

➢ *No protection of material termination rights and netting provisions in the proposed Directive*

Currently, the proposed Directive does not include a general provision ensuring that, in the first place, the SFD, FCD and EMIR apply notwithstanding the provisions of the proposed Directive. In addition, the proposed Directive only provides limited protection for set-off and netting provisions not covered by the FCD.

Provisions of the FCD do not, for example, protect close-out netting provisions in EFET GAs where both counterparties do not belong to the categories specified in the FCD as applied in the relevant Member State.

➢ *such close-out netting provisions should also be protected in the same way as close-out netting provisions that fall under the FCD*

EU Insolvency Law Harmonisation – Assignment of contracts in pre-pack proceedings

Areas of concern:

➢ Assignment of contracts without counterparty consent

- The proposed Directive would require Member States to ensure that the acquirer of the debtor’s business or part thereof in a pre-pack sale is assigned the **executory contracts which are necessary for the continuation of the debtor’s business** and the suspension of which would lead to a business standstill (Article 27(1)). The proposed Directive would require Member States to override any restrictions on assignment in the EFET-GA requiring consent of the debtor’s counterparty or counterparties. There would only be a limited exception if the acquirer of the debtor’s business or part thereof is a competitor to the debtor’s counterparty or counterparties.
- The proposed Directive could conflict with the protection counterparties provided for in the EFET-GA. It could, for example, potentially allow the transfer of individual transactions that are part of a single netting or hedging set, adversely affecting the rights of the parties under collateral arrangements or netting and set-off arrangements.
- In addition, it prohibits the other party from refusing a transfer to a party, which has not the required creditworthiness or is not compliant with internal onboarding requirements.

EU Insolvency Law Harmonisation – Proposed Amendments and next steps EFET

➢ Protection of close-out netting provisions, draft ISDA proposal

The proposed Directive should be amended to include a provision ensuring that other close-out netting provisions (i.e., close-out netting provisions under contracts that are not close-out netting provisions as defined in the FCD) are enforceable in accordance with their terms, notwithstanding the provisions of the proposed Directive, where such other close-out netting provisions would otherwise be enforceable in accordance with national insolvency law, e.g.:

- *Member States shall ensure that other close-out netting provisions are enforceable in accordance with their terms notwithstanding the national measures implementing the provisions of this Directive where those other close-out netting provisions would otherwise be enforceable in accordance with national insolvency law*

➢ Next steps

- Proceed with developing and aligning association position
- Determine key areas of concern of the member firms and develop amendment proposals
- Align with ISDA and other stakeholders

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3. Legal opinions: status quo review and new legal opinions

Report by Sonia Auguscik, EFET

EFET NETTING OPINIONS 2022/2023 UPDATE

Austria	Schoenherr, Vienna	Combined Electricity & Gas	Published 14.11.2022
Baltic States	TGS Baltics	Combined Electricity & Gas	Pending review
Belgium	Stibbe BV/SRL, Brussels	Combined Electricity & Gas	Published 19.06.2023 NEW
Bulgaria	Kambourov & Partners, Sofia	Combined Electricity & Gas	Published 12.06.2023 NEW
Croatia	Wolf Theiss, Zagreb	Combined Electricity & Gas	Published 27.11.2022
Czech Republic	Allen & Overy, Prague	Combined Electricity & Gas	Published 17.01.2023
Denmark	Kromann & Reumert, Copenhagen	Combined Electricity & Gas	Published 08.11.2022
France	Reed Smith, Paris	Combined Electricity & Gas	Pending review
Germany	Luther, Munich	Combined Electricity & Gas	Published 16.12.2023
Greece	Karatzas & Partners, Athens	Combined Electricity & Gas	Pending review
Hungary	Faludi Wolf Theiss, Budapest	Combined Electricity & Gas	Pending review

EFET NETTING OPINIONS 2022/2023 UPDATE

Italy	Parola Angelini Law Firm, Milan	Combined Electricity & Gas	Pending review
The Netherlands	Clifford Chance LLP, Amsterdam	Separate Electricity and Gas	Published 16.03.2022
Poland	Wolf Theiss, Warsaw	Combined Electricity & Gas	Review of the 3rd draft
Portugal	Morais Leitão, Lisbon	Combined Electricity & Gas	Published 04.09.2022
Romania	Leroy Law, Bucharest	Combined Electricity & Gas	Published 27.03.2022 NEW
Slovakia	Schoenherr, Bratislava	Combined Electricity & Gas	Published 21.08.2022
Slovenia	Schoenherr, Ljubljana	Combined Electricity & Gas	Published 20.01.2023 REFORM
Spain	CMS, Madrid	Combined Electricity & Gas	Published 16.05.2022
Switzerland	Lenz & Staehelin, Zurich	Combined Electricity & Gas	Published 20.12.2022

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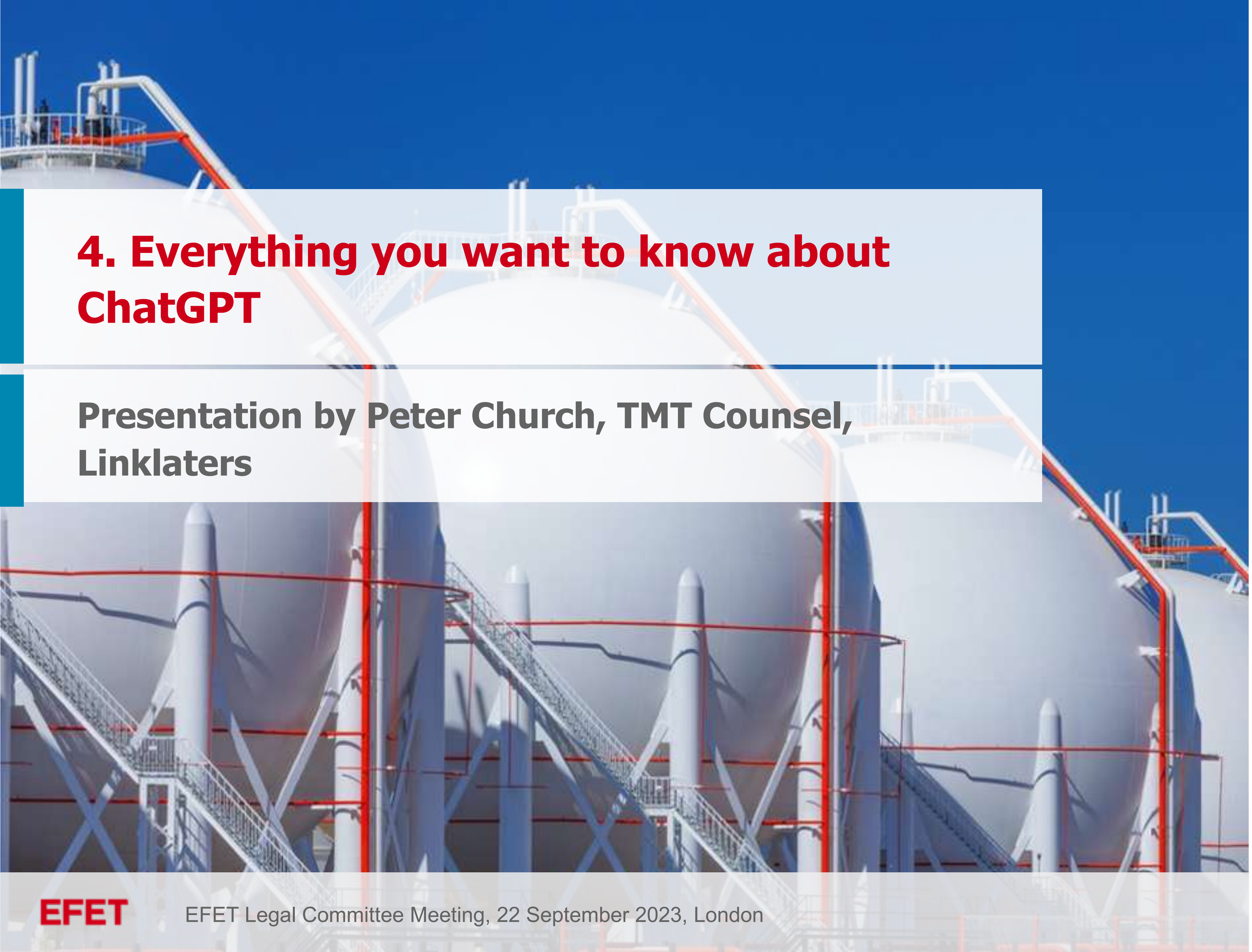
Legal Opinions Review WG

- Review of the netting instruction letter – drafting session in the first half of October
- Poll on priority jurisdictions – vote by October 13, 2023
- Review of the MNA/CPMA instruction letter – work to get started
- Proposed EU Directive Harmonising Insolvency Law – work in progress



4. Everything you want to know about ChatGPT

Presentation by Peter Church, TMT Counsel, Linklaters

How to use AI safely, ethically and lawfully

Peter Church

September 2023

How to use AI safely, ethically and lawfully

Agenda for today

1. Why is AI attracting so much attention?
2. Are you crossing the creepy line?
3. From data privacy to specific AI regulation
4. Governance, risk assessment & “go to market” tools

Why is AI attracting so much attention?

Why is AI attracting so much attention?

AI is generating a lot of interest right now

> Generative AI has improved **<u>very signficantly</u>** in the last 12 months

> Large Language Models (LLMs) seem (scarily) capable across a broad range of knowledge domains

> Fits in with our anthropomorphic stereotypes of AI

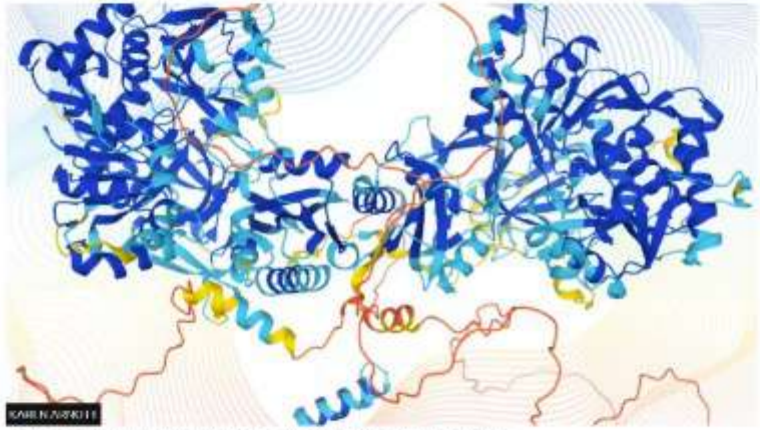
> Implications for potential improvements over the next 12 months - GPT-5, GPT-6 etc?

> Reverse deployment barrier

> But don't forget about developments in "traditional" AI…

AI breakthrough could spark medical revolution

22 July 2021 Comments



Only a fraction of proteins made by the human genome have confirmed structures

By Paul Rincon
Science editor, BBC News website

Artificial intelligence has been used to predict the structures of almost every protein made by the human body.

The development could help supercharge the discovery of new drugs to treat disease, alongside other applications.

Proteins are essential building blocks of living organisms; every cell we have in us is packed with them.

Understanding the shapes of proteins is critical for advancing medicine, but until now, only a fraction of these have been worked out.

Why is AI attracting so much attent

What is an Large Language Model? An incredibly so

Show the raw vector of «dog» in model MOD_enwiki_upos_skipgram_300_2_2021:

[-0.03301828354597092, 0.05134638026356697, 0.0036009703762829304, -0.04066073149442673,
0.10361430048942566, 0.013021323829889297, 0.028161464259028435, -0.0027567853685468435
0.03388035297393799, -0.044882044196128845, 0.005169689189642668, -0.05818631127476692,
0.0533536821603775, 0.016616210341453552, 0.02030780538916588, -0.008570297621190548,
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0.05367768555879593, 0.0917837843298912, 0.031899698078632355, 0.055091146379709244,
-0.025078952312469482, -0.048126623034477234, -0.09730836749076843, -0.07128141075372696

1 *What does each word mean?*
This is done by relying on multidimensional word vectors for each word

2 *What sente*
This is
"transformer" to
out how the word
to each other.

the LLM to predict what words come next.

The dog chewed the bone because it was hungry. What does "it" refer to?

ChatGPT4 :

"It" refers to the dog.

The dog chewed the bone because it was tasty. What does "it" refer to?

ChatGPT4 :

"It" refers to the bone.

Why is AI attracting so much attention?

What are the limits of Large Language Model?

> Unclear, but it will have a go at all sorts of questions (see the example to the right, inspired by the Microsoft paper *Sparks of Artificial General Intelligence: Early experiments with GPT-4*, April 2023)

> However, the answers are sometimes just very convincing nonsense

> We are conducting a comprehensive benchmarking exercise of various LLM's ability to deliver legal advice – early testing suggests it is miles away from replacing human lawyers, and often "hallucinates" answers and citations

You have 16 eggs and some bluetack. Describe how to use those materials to create a tall and stable stack of eggs.

ChatGPT4 :

1. Start by laying out a flat surface, such as a table or countertop.
2. Place the bluetack in the center of the surface and press it down firmly to create an even base for your stack of eggs.
3. Carefully place one egg on top of the bluetack, making sure it is centered and balanced.
4. Take another egg and place it on top of the first one, again making sure that it is centered and balanced before pressing down lightly to secure it in place.
5. Repeat this process until all 16 eggs have been stacked on top of each other, creating a tall tower of eggs that should be stable due to the support provided by the bluetack at its base!

Why is AI attracting so much attention?

What use cases are Linklaters exploring?

> Summarising

> Document review and clause extraction

> Thesaurus+++: "*give me 10 different ways of saying this sentence*"

> Tone and style manipulation: "*Make is more concise*", "*Make this more formal*", "*Make this less formal*", "*Use plain English rather than jargon terms*"

> Proofreading and sense checking: "*Identify and correct errors in the following text: [ ]. Indicate clearly what corrections you have made.*"

> Ideation: "*Give me 20 suggestions for a podcast name with this audience*"

Why is AI attracting so much attention?

People are worried about the prospects for robots to replace humans

> OECD estimate that 27% of jobs at risk from AI*

> Impacts unlikely to be evenly distributed, see the diagram** on the left

> e.g. Octopus Energy's use of AI to deal with customer queries – it is doing the work of 250 people and getting better results with customers

* *OECD Employment Outlook 2023*

** *The Potential Impact of Artificial Intelligence on UK Employment and the Demand for Skills*, BEIS, August 2021

Why is AI attracting so much attention?

There is a lot of froth in the market and some snake oil salesmen

> Babylon Health was a leading AI health company but is now insolvent

> Did the marketing department get ahead of the technology?

> Was it just to ambitious based on the state of the art (then and now) and the very limited tolerance for failure in this space?

Again, some AI technology is amazing (and far ahead of our expectations at this point in time) but is it good enough?

Its worth testing the limits of this technology, but also planning to fail fast and gracefully?

Do you have the right decision points, at the right stages of the project?

Hugh Harvey @DrHughHarvey · 4d

The day I started I was on the 'clinical AI' team and was shown the 'ground-breaking AI system'. Turns out it was just a bunch of Excel spreadsheets with some decision trees written by junior doctors. It was a disappointing start.

7 58 237 37K

Hugh Harvey @DrHughHarvey · 4d

Babylon started working on a probabilistic graph model of medicine - pumping millions into AI teams to do NLP, Bayesian mathematics and curate a medical ontology.

These three components were supposed to create a better AI....

1 12 96 24.7K

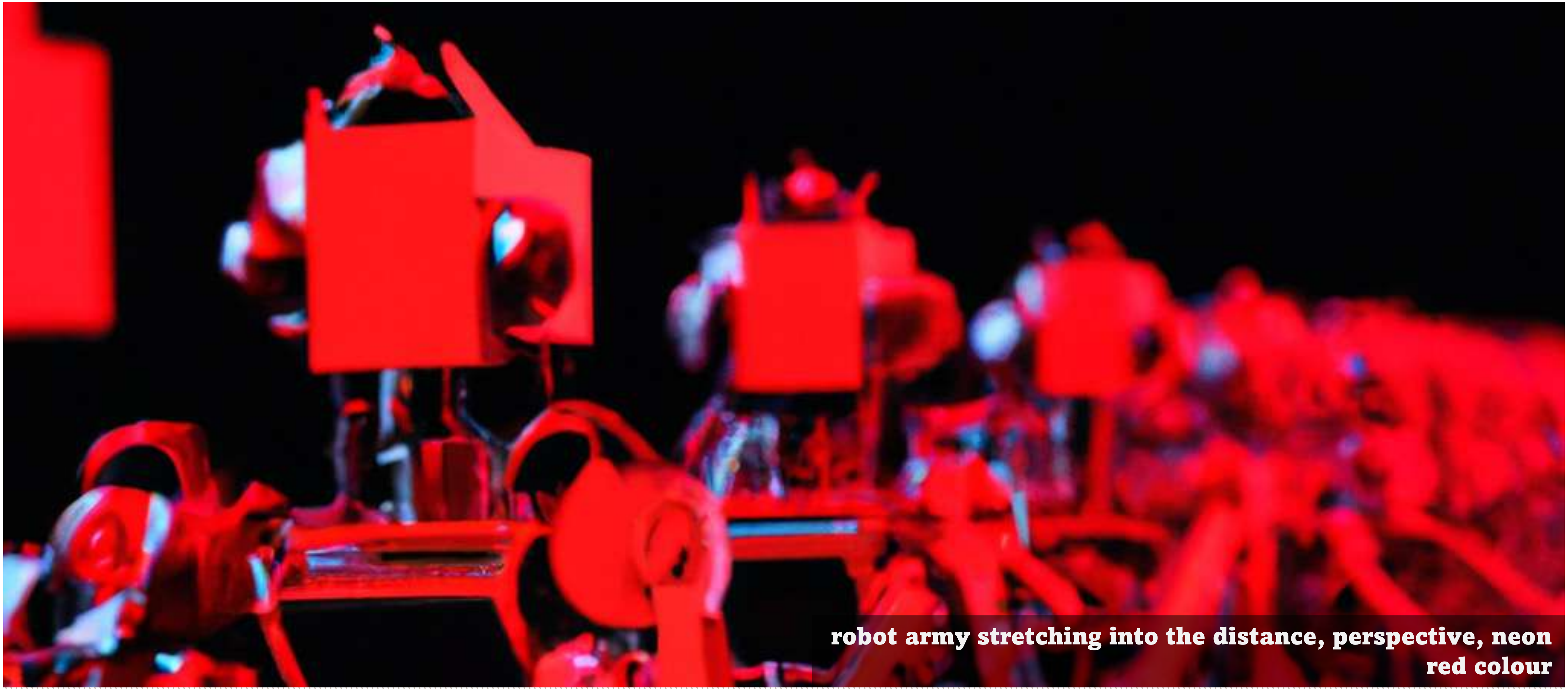
Hugh Harvey @DrHughHarvey · 4d

It didn't work. Well, the NLP did to an extent - if someone wanted to ask about a nasal problem, it could recognise they were talking about their nose, but that was about it.

The graph model became a tangled mess of data linkages, overly complex and practically dangerous.

5 19 118 22.5K

Are you crossing the creepy line?



Are you crossing the creepy line?

This is important in a fluid legal, technical and political environment

> “Creepy” activity gets press and political attention

> Which leads to regulatory attention

> Which leads to civil claims

More importantly…

> “Creepy” is bad for your brand and reputation

> Eric Schmidt’s comments are less clever these days

> Why do people think what you are doing is creepy?

> How can you address that with transparency and other “go to market” tools?

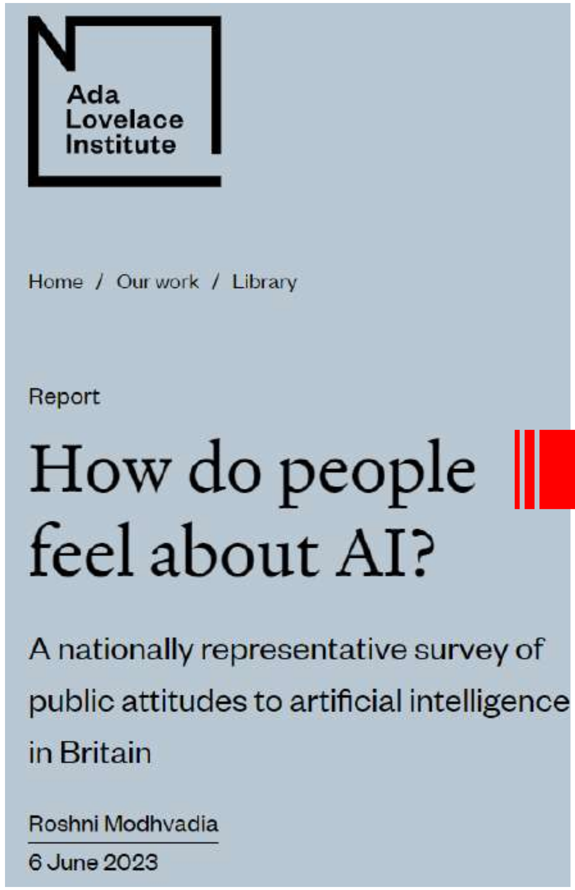
"There's what I call the creepy line, and the Google policy about a lot of these things is to get right up to the creepy line but not cross it."
Eric Schmidt, (at the time) Google Chairman and CEO

Linklaters

Are you crossing the creepy line?

Where do you fit on this scale?

Are you introducing a killer robot or a robot vacuum cleaner?


Ada Lovelace Institute

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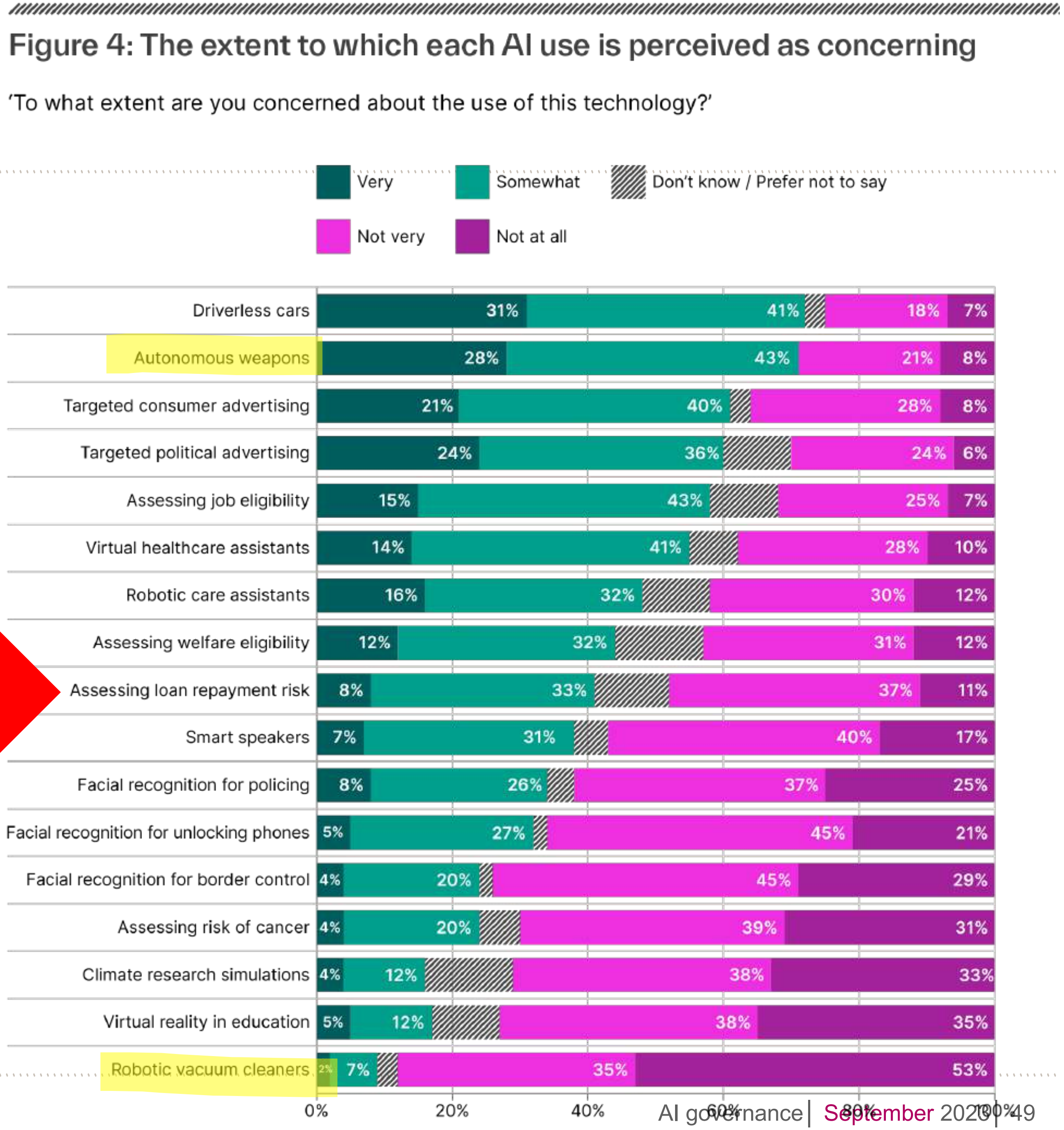
Report

How do people feel about AI?

A nationally representative survey of public attitudes to artificial intelligence in Britain

Roshni Modhvadia

6 June 2023



The creepy line

What are the concerns and how can you address them?

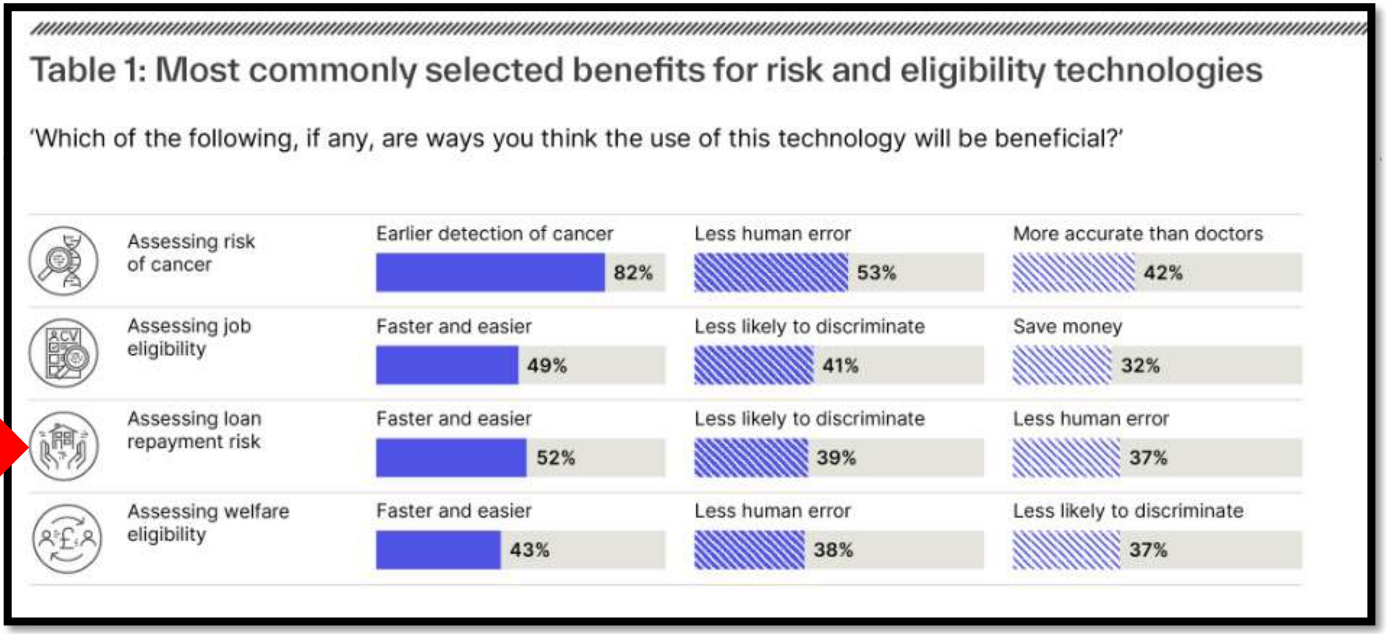


Table 1: Most commonly selected benefits for risk and eligibility technologies

'Which of the following, if any, are ways you think the use of this technology will be beneficial?'

Assessing risk of cancer	Earlier detection of cancer 82%	Less human error 53%	More accurate than doctors 42%
Assessing job eligibility	Faster and easier 49%	Less likely to discriminate 41%	Save money 32%
Assessing loan repayment risk	Faster and easier 52%	Less likely to discriminate 39%	Less human error 37%
Assessing welfare eligibility	Faster and easier 43%	Less human error 38%	Less likely to discriminate 37%

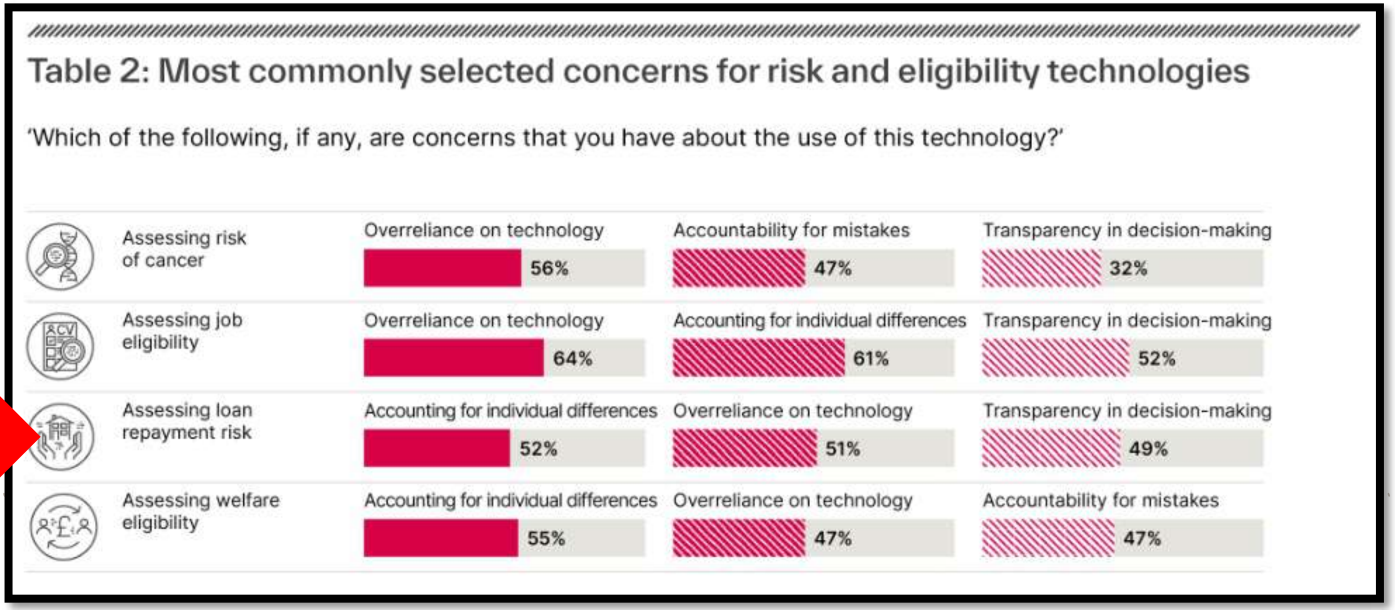


Table 2: Most commonly selected concerns for risk and eligibility technologies

'Which of the following, if any, are concerns that you have about the use of this technology?'

Assessing risk of cancer	Overreliance on technology 56%	Accountability for mistakes 47%	Transparency in decision-making 32%
Assessing job eligibility	Overreliance on technology 64%	Accounting for individual differences 61%	Transparency in decision-making 52%
Assessing loan repayment risk	Accounting for individual differences 52%	Overreliance on technology 51%	Transparency in decision-making 49%
Assessing welfare eligibility	Accounting for individual differences 55%	Overreliance on technology 47%	Accountability for mistakes 47%

From data privacy to specific AI regulation

From data privacy to specific AI regulation

So many legal issues and laws to consider; make sure you have cross-functional governance

Bias & discrimination	Fairness & lawfulness	Liability & reliance
Imp		
		viour
		uts
Spe		
Financial services law	Product liability	Contract law
Equalities law	Competition law	Duties of confidence

From data privacy to specific AI regulation

The GDPR is currently taking the strain as the "law of everything"

- The Italian DP regulator (Garante) banned ChatGPT
  - Ban issued on an urgent basis on 30 March 2023
  - Service reinstated on 28 April 2023 after remedial measures by OpenAI
- Reversal an exercise in *Realpolitik?*
- Existential GDPR issues for LLMs
  - What is the legal basis for training the AI model on public data?
  - Is the output "accurate"?
  - Do individuals get rights to erasure/objection?
- Is the position of LLM developers and LLM users different?

"One of the problems with the GDPR is that it has become the law of everything… It's drawing data protection authorities into making an awful lot of decisions that impact societies and individuals that appear to go well beyond the data processing"

From data privacy to specific AI regulation

Investigations ongoing in Italy and elsewhere and this remains an area of high risk

If you were OpenAI's DPO how would you answer these questions from the Schleswig-Holstein DPA (machine translation) …

Principles of data processing

a. How do you ensure that ChatGPT complies with all the principles for the processing of personal data from Art. 5(1) DS-GVO?

b. How are the principles of purpose limitation, data minimization and storage limitation (Art. 5(1)(b)(1)(H6), (c) and (e) GDPR) ensured, in particular with regard to the personal data used for the training of the AI, according to which only the data required for the respective functionality may be collected and these may only be stored for as long as is necessary for the purposes for which they are processed?

c. How long do you store the personal data?

d. In what way is the accuracy of the data used and the personal data that ChatGPT generates from it ensured (Art. 5(1)(d) D5- BER), in particular when a data subject exercises the right of rectification (Art. 16 DPA) or the right of erasure (Art. 17 DPA)2?

II. Legality of data processing

a. From which sources (concrete designation of natural and legal persons, establishments or other entities; firmen designations of companies and public authorities; all positions which can be considered as controllers or processors - Art. 4 No. 7 and 8 DS-GVO) are the data eifioben, with which the service acts and on the basis of which the AI, in particular GPT-3 and GPT-4, is trained†.

b. What are the legal bases for the various processing operations of personal data at ChatGPT'7?

i. If the respective processing is based on the consent (Art. 6 para. 1 UAbs. 1 lit. a) and Art. 7 DS-GVO) of the users, please provide the sample declaration of consent.

ii. Insofar as Art. 6 (1) (f) DS-GVO is used as a legal basis, please explain the background and considerations of the respective weighing of interests.

c. Is a distinction made during collection and further processing as to whether the data used is personal or not?

d. If data collected and entered by users is also used as training data for methods of machine learning in addition to the genericization of answers2

e. Are explicit consents obtained from the data subjects when data requiring special protection pursuant to Article 9 (1) of the GDPR are processed?

f. If you justify the processing of particularly sensitive data on the basis of Article 9 (2) (e) of the GDPR, please provide us with your assessment of the circumstances.

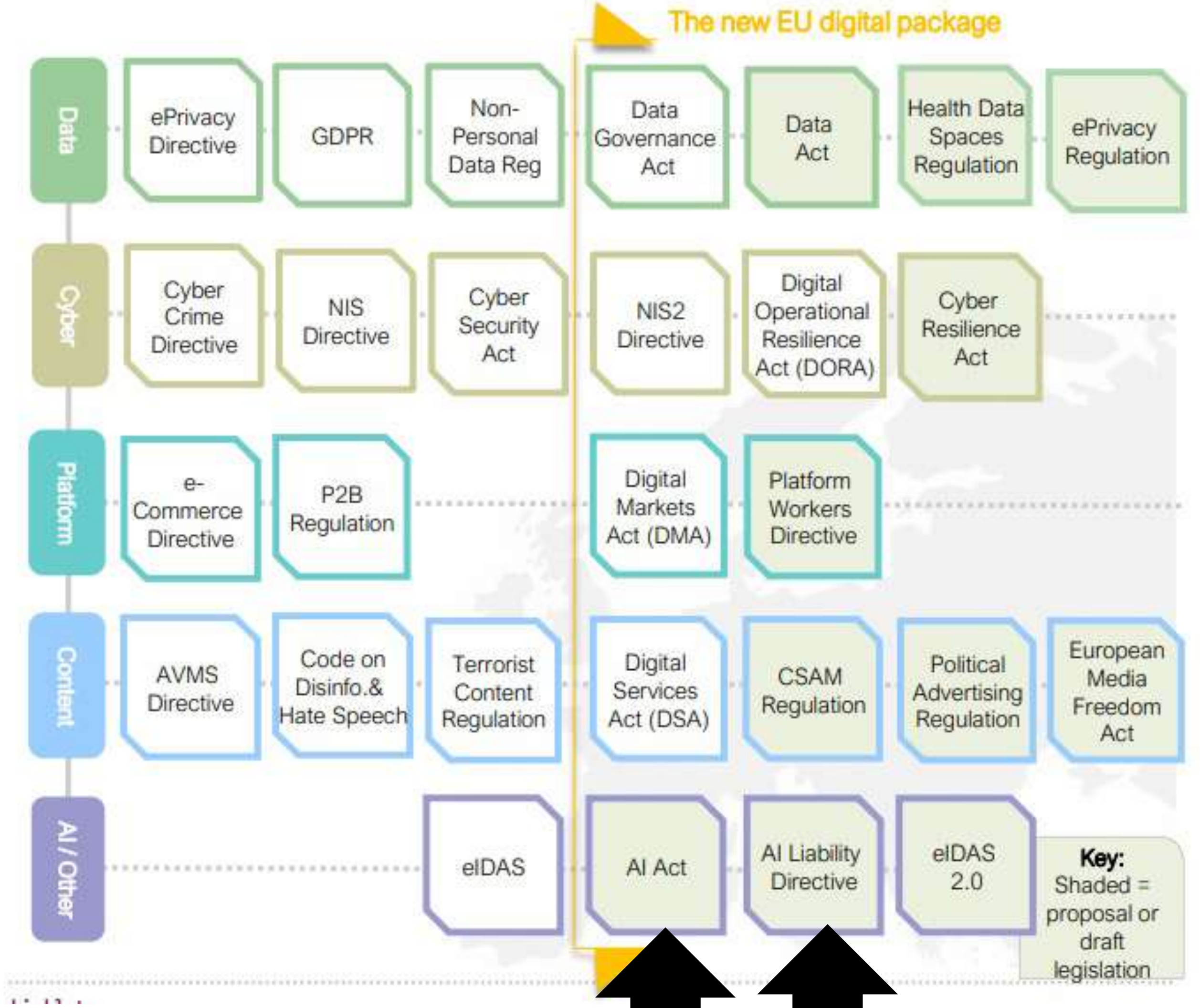
g. Does inference or combination of data derive particularly sensitive data according to Art. 9(1) DS-GVO? If yes, what is the legal basis for such processing†?

h. Are there measures in place to prevent inferences or combinations of particularly sensitive data and their further processing, even if such processing is not targeted? This applies both to OpenAI and to use by other third parties or companies.

From data privacy to specific AI regulation

EU taking the lead on specific AI regulation?

> Part of a wider digital reform package

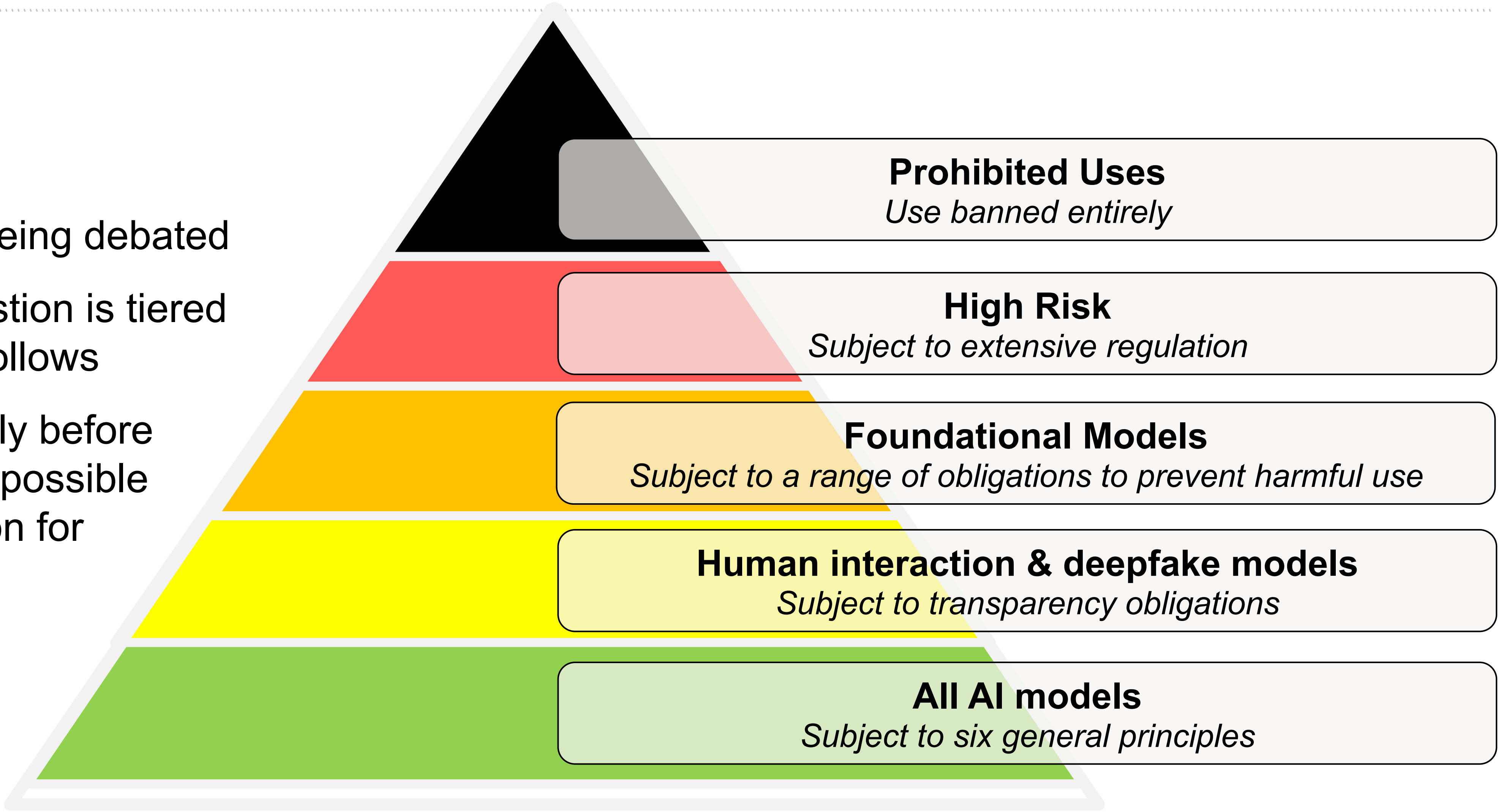


From data privacy to specific AI regulation

<u>Draft</u> EU AI Act

Tiered regulation

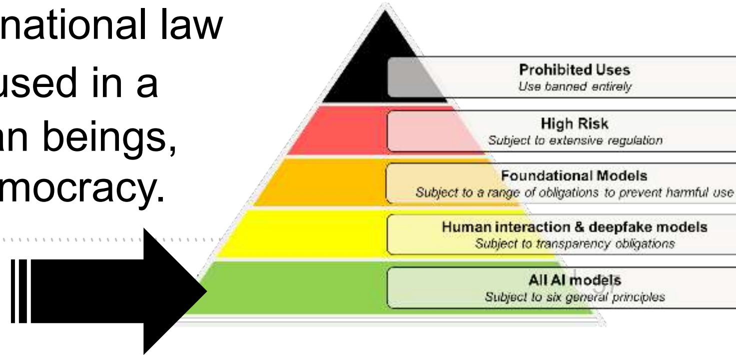
- > Proposal still being debated
- > Current suggestion is tiered regulation as follows
- > Unlikely to apply before **mid-2025** (but possible early application for Foundational Models)



From data privacy to specific AI regulation

Six principles applicable to all AI

1. **Human agency & oversight** – means that AI systems shall be developed and used as a tool that serves people, respects human dignity and personal autonomy, and that is functioning in a way that can be appropriately controlled and overseen by humans;
2. **Technical robustness & safety** - means that AI systems shall be developed and used in a way to minimize unintended and unexpected harm as well as being robust in case of unintended problems and being resilient against attempts to alter the use or performance of the AI system so as to allow unlawful use by malicious third parties;
3. **Privacy & data governance** – means that AI systems shall be developed and used in compliance with existing privacy and data protection rules, while processing data that meets high standards in terms of quality and integrity;
4. **Transparency** - means that AI systems shall be developed and used in a way that allows appropriate traceability and explainability, while making humans aware that they communicate or interact with an AI system as well as duly informing users of the capabilities and limitations of that AI system and affected persons about their rights;
5. **Diversity, non-discrimination & fairness** - means that AI systems shall be developed and used in a way that includes diverse actors and promotes equal access, gender equality and cultural diversity, while avoiding discriminatory impacts and unfair biases that are prohibited by Union or national law
6. **Social & environmental well-being** - means that AI systems shall be developed and used in a sustainable and environmentally friendly manner as well as in a way to benefit all human beings, while monitoring and assessing the long-term impacts on the individual, society and democracy.



From data privacy to specific AI regulation

The UK approach

> Currently, the UK is taking a very "light touch" approach to AI

– The clue is in the title to the white paper: *A pro-innovation approach to AI regulation*

– No plans for specific regulation (but see below)

– Instead regulator should apply existing laws in accordance with five principles: (1) safety, security and robustness; (2) appropriate transparency and explainability; (3) fairness; (4) accountability and governance; and (5) contestability and redress

> Some political pressure for a specific AI law, e.g. the recent Parliament Select Committee report - *The governance of artificial intelligence* - recommended a "*tightly-focused AI Bill*"

> Also, it is very hard to escape the EU AI Act as it applies a very broad extra-territorial test

Governance, risk assessment & “go to market” tools

Visibility and supply chain

Visibility and control

> Who is using AI within your organisation? For what? Do you need a register of use cases?

> How do you control those use cases – do you use a carrot (central support, funding, infrastructure) or a stick (monitoring or blocking access to you unapproved tools) or both?

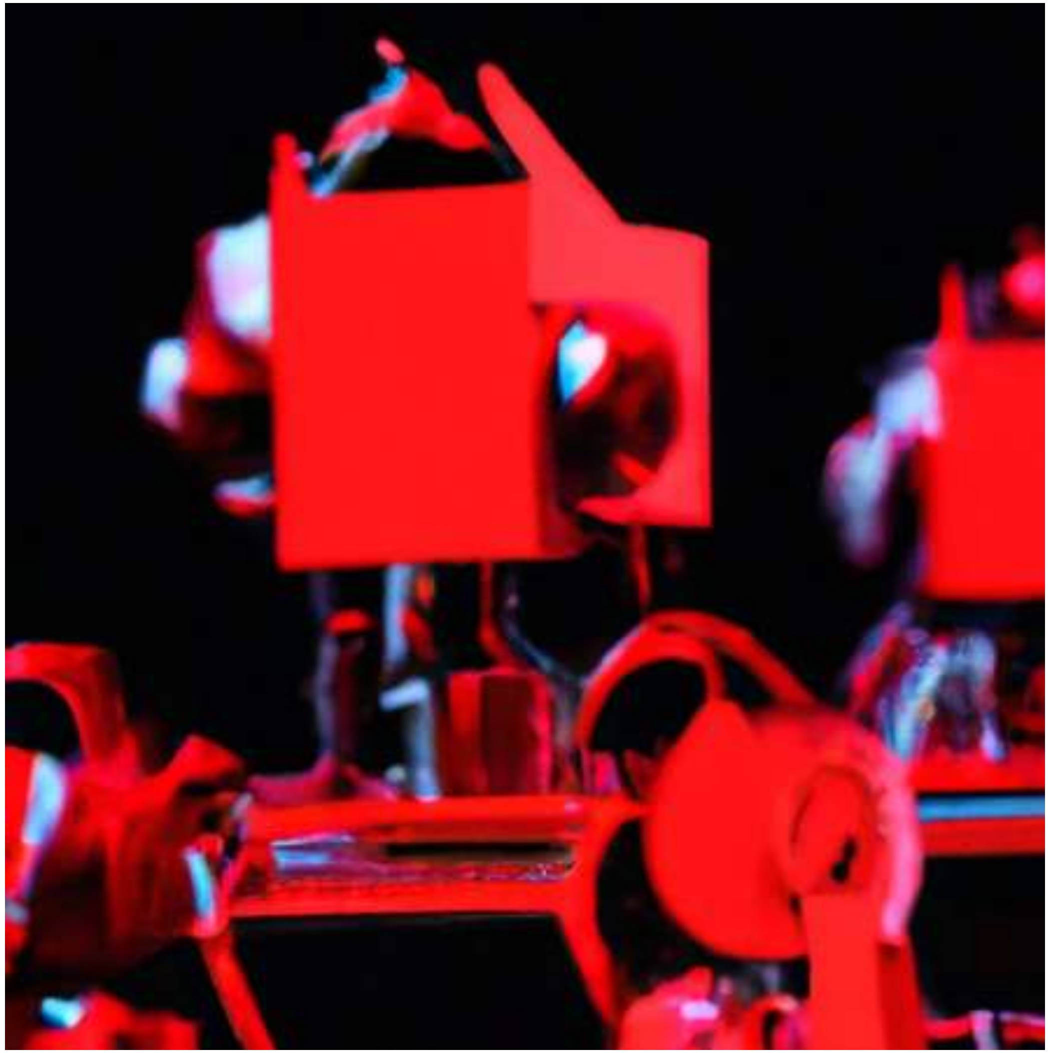
Supply chain

> Are your suppliers using AI? Do you care?

> Are they inputting your confidential information into these tools? Is it secure?

> Are they providing AI output to you? Is there an IP infringement risk? What is being done to ensure that output is correct?

> Am you benefiting from any efficiency savings?



Governance

Governance

- > How do you manage fluid regulatory requirements and fast evolving tech?
- > Reflect your core corporate values
- > Create guiding principles for AI
- > Ensure you have multi-disciplinary and cross functional governance
- > Do you want external stakeholders (see extreme example on the right)?
- > Have you identified the major risks? What is your risk tolerance?
- > How to you create a robust, but fast, approval mechanism?
- > Should you adopt a “start fast, fail fast” approach?
- > Can you create safe sandboxes for development, inc use of synthetic data or SREs?
- > What are you doing about internal awareness, guidance and training?


About the Independent Review Panel

The Independent Review Panel was announced at the same time as DeepMind Health.

They are currently:

Martin Bromiley OBE
Elisabeth Buggins CBE
Eileen Burbidge MBE
Richard Horton
Dr Julian Huppert
Professor Donal O'Donoghue
Matthew Taylor
Professor Sir John Tooke


Principles for DeepMind Health and other companies in the healthcare technology space

1 Benefit to data providers

2 Public, patient and practitioner engagement

3 Design for safety and utility

4 Evidence-driven

5 Anti-monopoly

6 A model employer

7 Legal and ethical

8 Protecting privacy

9 Secure

10 Transparency

11 Reasonable profit

12 Openness

Risk assessment

Risk assessments – Map to your current (or mostly future) obligations and identify thematic obligations, e.g.

	(1) Human agency & oversight	(2) Technical robustness & safety	(3) Privacy & data governance	(4) Transparency	(5) Diversity, non-discrim. & fairness	(6) Social & environmental well-being	(7) Accountability & governance	(8) Contestability & redress	(9) Output reflects core values
Draft EU AI Act (“*basic” tier obligations*)	✓	✓	✓	✓	✓	✓			
UK principles for regulators		✓		✓	✓		✓	✓	
Draft US AI Bill of Rights		✓	✓	✓	✓			✓	
Chinese Gen AI Regs (*detailed rules to follow*)		✓	✓	✓					✓

<u>*Note*</u>: This is just a small selection of the many draft laws, guidance documents, etc. currently in circulation at the moment.

Risk assessment

Issues

> How can I make the assessment accessible and easy to complete, particularly for low-risk projects/pilots?

> Are these questions all needed for sandbox projects or those using synthetic data?

> Are these questions answerable by the business (or anyone)? e.g. What answer do you expect to "*What key consideration were taken to ensure design fairness?*" Are there questions the business can answer?

> Should it be combined with your privacy DPIA

> What is the cadence for review/update?

> Need to refresh/expand on the move from sandbox/pilot/production?

> Would you want to disclose it to a regulator/court? Note, regulators are highly likely to want to see these documents if they investigate.

> Can I include/generate hard metrics to measure performance/bias etc?

“Go to market” tools

Risk assessment + DPIA, LIA

> See the last slide

“Full-fat” explainability statement?

> Do you want to cover all six bases (rationale; responsibility; data; fairness; safety and performance; impact as per the ICO/Turing Guidance)

Use of a regulatory sandbox?

> Such as Heathrow’s biometric passenger gates which went through the ICO sandbox

> Is the credibility boost (outside a B2B sales channel) worth the wait?

External algorithmic audit?

> For internal/external reassurance, but also likely to be asked regulators (e.g. or proposed s146A DPA 2018)

> Three levels of review: (a) “skin-deep” governance and policy review; (b) empirical assessment of input/outputs; (c) technical, e.g. code review

> Challenges – Lack of standards; Technical complexity; Dynamic configuration; Chaotic operation; Trade Secrets; Gaming etc.

> But work continues….e.g. Big Tech model card work

Generative AI – Seven rules of the road

- Get visibility and control over use within your organisation
- Don’t trust it
- Don’t feed it confidential information or personal data (unless you are sure it is safe!)
- Be aware of the output of those systems might infringe IP rights – use with care
- Be careful about bias and discrimination
- Address the GDPR issues – have you done your DPIA?
- **Try it out! Innovate! It’s only going to get better so get ready for the change**

a van gogh style oil painting of lots of brightly coloured question marks and robots

5. Update reports from the Legal Committee Working Groups

Reports from Hydrogen WG, Biogas WG and Digitalisation WG

6. AOB, date and venue of the next Legal Committee meeting