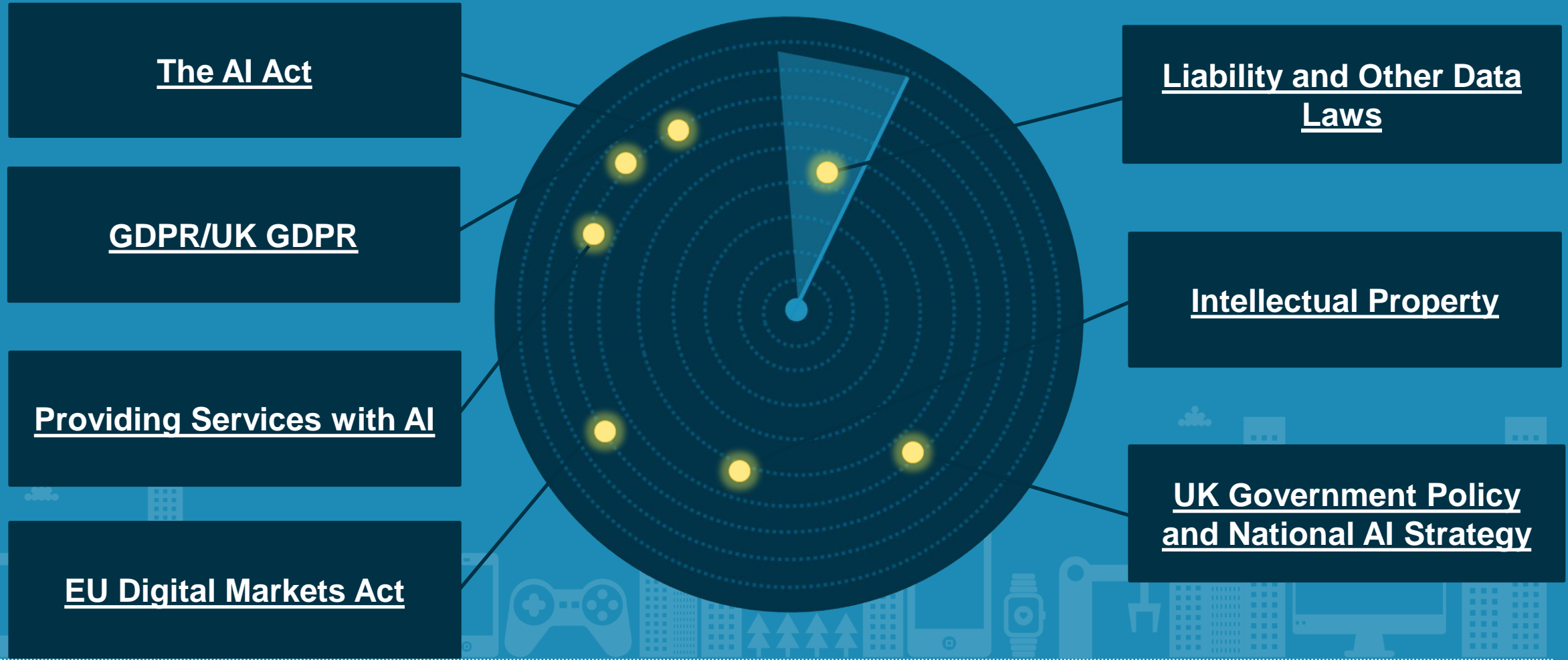


# The Osborne Clarke AI Radar

Guiding your development of AI to get ready for the EU and UK markets.



# Why we developed the AI Radar

## Our Practice and Experience

The team at Osborne Clarke is one of the leading legal practices on applied artificial intelligence and machine learning.

Why advise clients on a range of AI related issues such as big data and GDPR, causation and liability, bias, IP and licencing, and competition. For example, team members are involved in the following initiatives.

### Our Initiatives

We don't just do the work, we are active thought leaders, adding to the wider debate and ultimately helping to shape public policy in this area.

#### UK All Party Parliamentary Group (APPG) on AI

We are Advisory Board members of this committee which is a cross-parliament body made up of Members of Parliament and peers, as well as industry experts.

#### International Technology Law Association (ITechLaw)

We chair ITechLaw's Responsible AI Committee, which is tasked with developing a practical global ethical framework for the use of artificial intelligence.

#### European Union AI Alliance

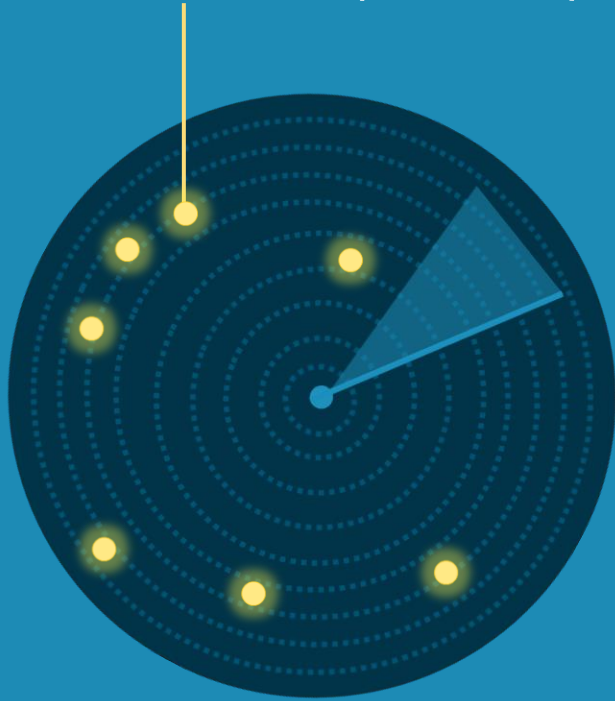
We're part of a wider consultative body to the EU High-Level Expert Group on Artificial Intelligence. We act for some of the world's most significant developers and users of this technology.



The AI Radar gives a snapshot of the current state of AI law in the EU and UK. This horizon scanning document gives an overview with high level practical key takeaways for businesses.

Last updated: 19 April 2024.

# The AI Act (Part 1)

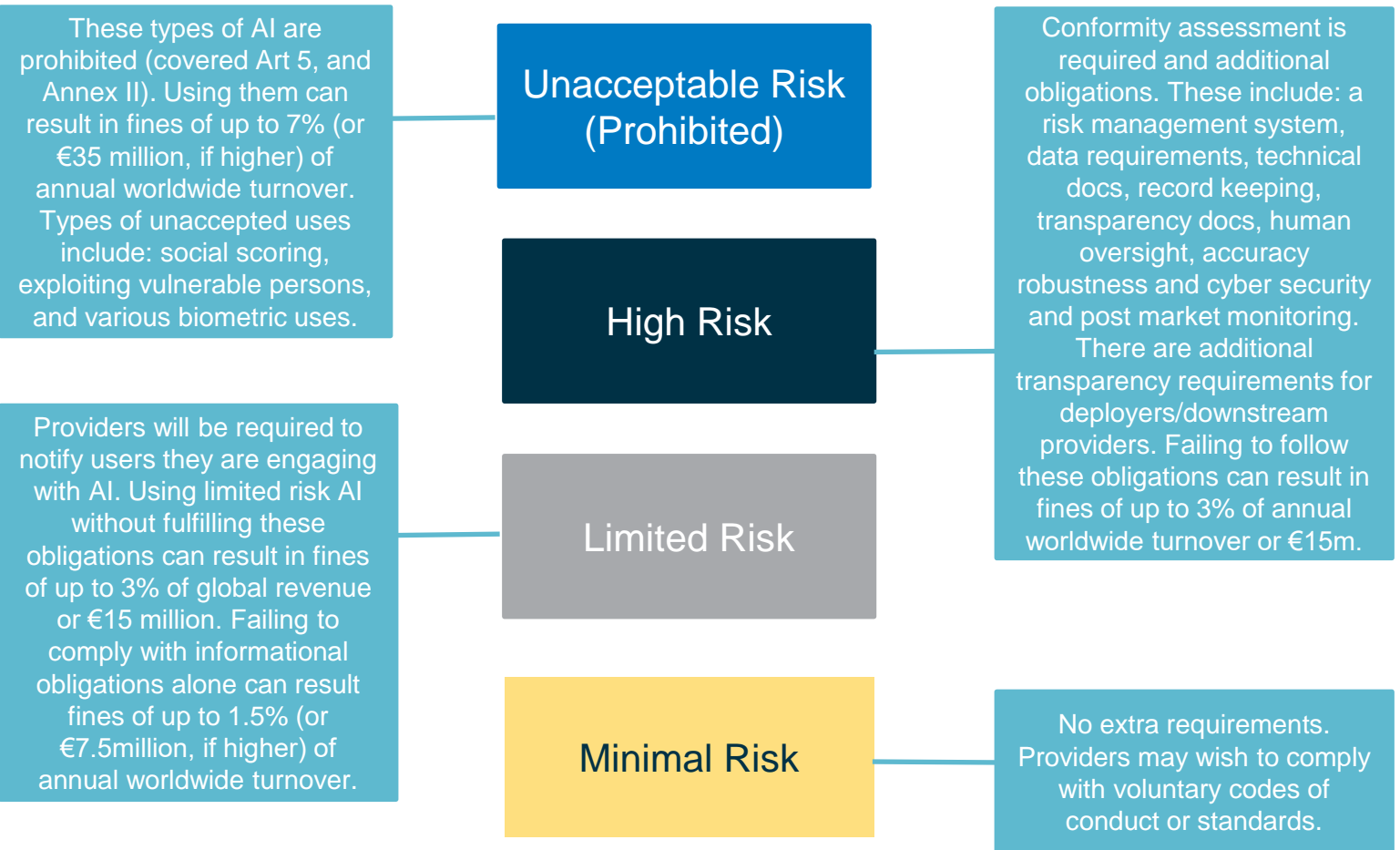


## Who will it apply to?

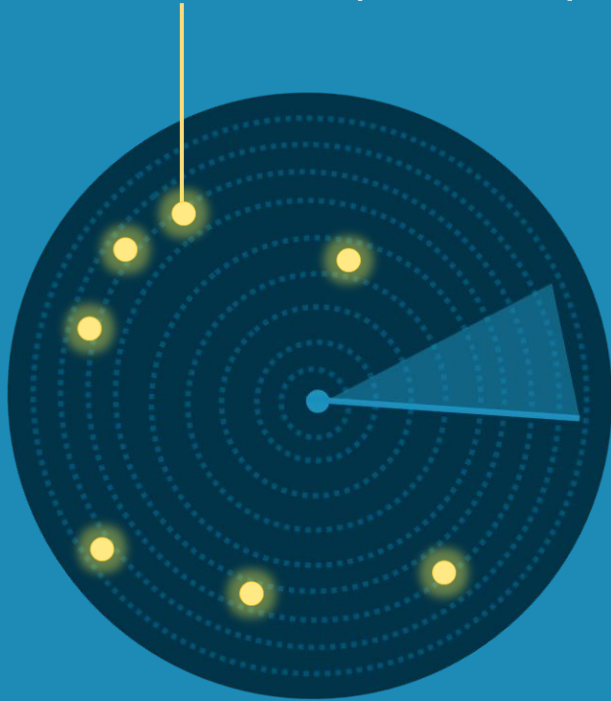
Article 2(1) - Providers of AI systems (or general-purpose AI systems) in the EU, deployers of those systems, providers and deployers who are established in EU, or where the output of the AI is used in the EU, importers and distributors or AI systems, manufacturers putting into service AI systems, authorised representatives and providers, affected persons in the EU.

## Risk-based obligations

When the AI Act comes into force, companies will need to identify the type of AI they are developing and the level of risk as described under the AI Act. The actions required will depend on the level of risk.



# The AI Act (Part 2)



## What is General Purpose AI?

The AI Act defines this as a model that is "trained with a large amount of data using self-supervision at scale, that displays significant generality and is capable to competently perform a wide range of distinct tasks".

The exact wording of the definition can be found in Article 2 of the AI Act. See our latest insight [here](#).

## General Purpose AI Obligations

The AI Act contains a parallel set of obligations where companies are dealing with general purpose AI (GPAI). A good example of GPAI is ChatGPT or similar models which are used and integrated into other systems. Providers of such models will have a variety of obligations, and more if that AI is considered to have 'systemic risk'.

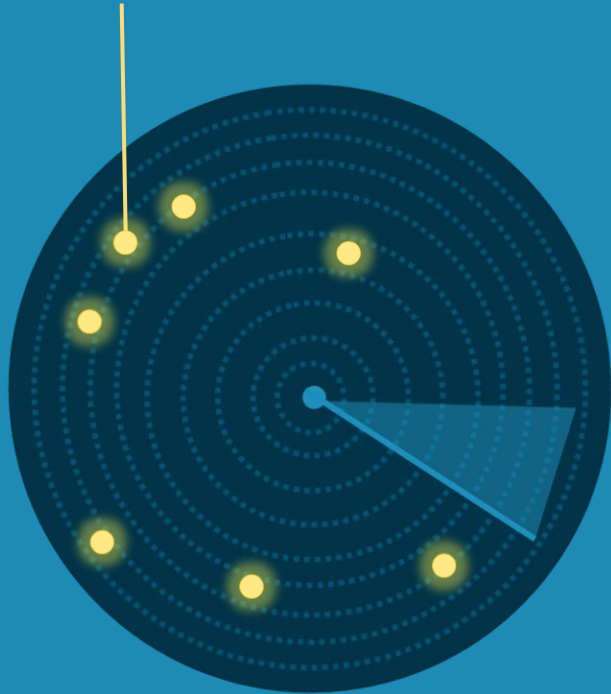
### Obligations that apply to ALL General Purpose AI

- Transparency obligations to the supply chain and end user customers, including disclosures about the use of copyrighted work.
- Have policies to comply with EU copyright law (even if the model is trained outside of the EU).
- Prepare and publish a statement about the data used to train the general-purpose AI model.

### Extra obligations for General Purpose AI with 'systemic' risk

- General Purpose AI with 'systemic risk' defined further in Article 51.
- Applies to AI models trained with at least a certain amount of computing power (which could be subject to future change – currently set at more than  $10^{25}$  FLOPs).
- Risk assessments and risk mitigation required.
- Serious incidents will be required to be reported.
- Providers will need to conduct state-of-the-art tests and model evaluations.
- Ensure cyber-security requirements are met.
- Must provide transparency information about energy consumption.

# GDPR/UK GDPR

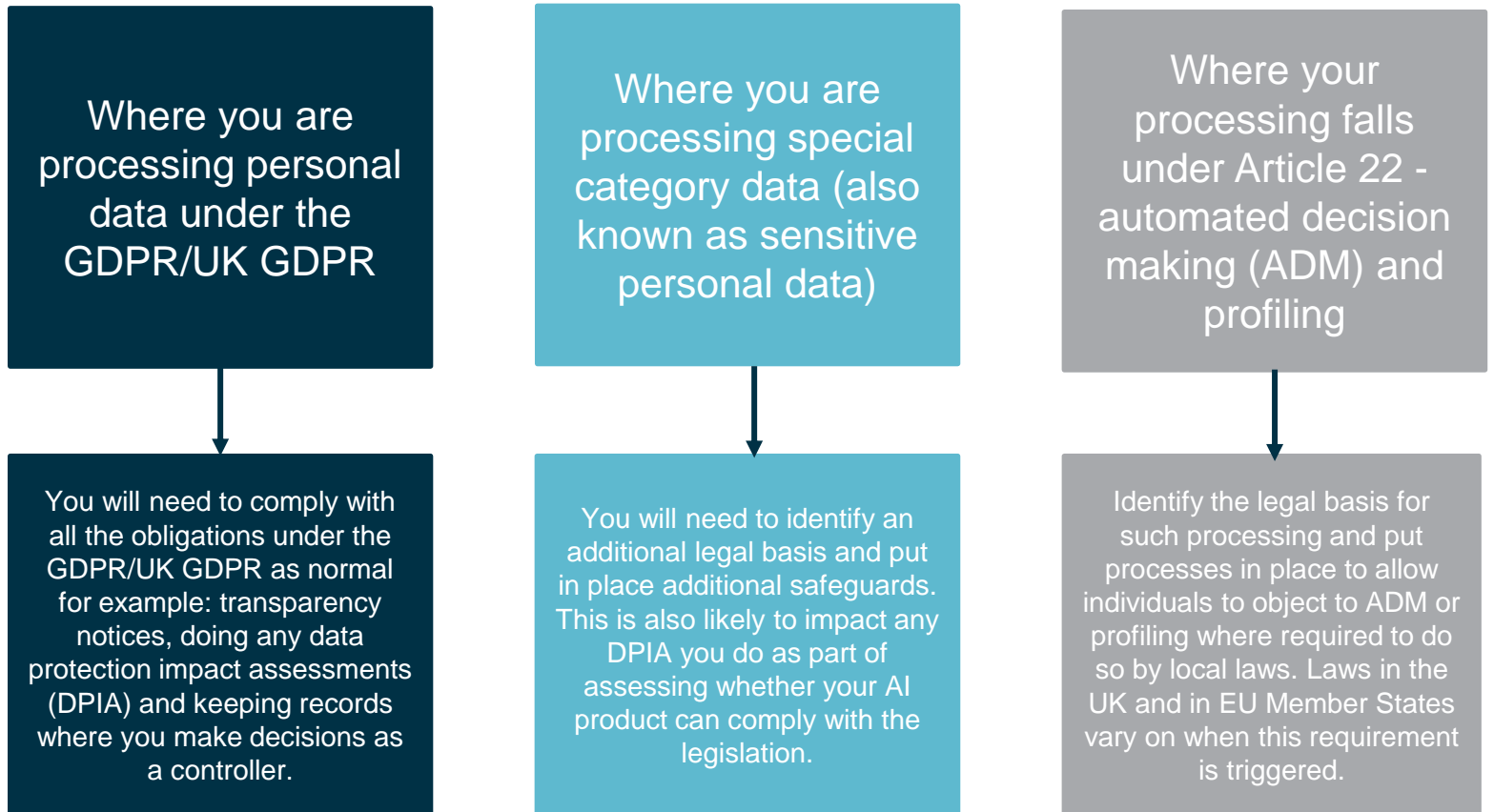


## Who does it apply to?

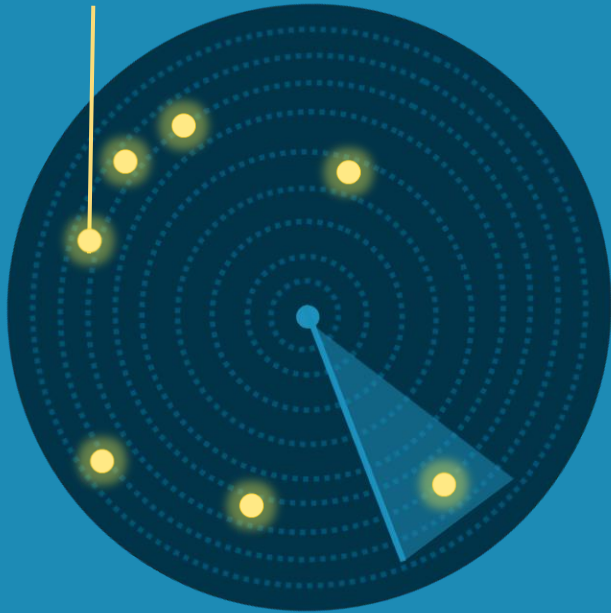
- Anyone processing 'personal data' that has come from the UK or EU as part of their AI product
- Art 22 applies to 'automated decision making including profiling'.

## What does it require companies to do?

Companies will need to identify whether they are processing any personal data from the UK and EU and take steps to comply with the GDPR/UK GDPR accordingly. The actions required for compliance depend on the data and type of processing.



# Providing Services with AI



## Who does it apply to?

The Digital Services Act applies to all digital service providers that provide services in the EU, including those established outside the EU.

The Online Safety Act applies to most user-to-user and search services with a significant number of UK users or that target the UK market, regardless of where they are located.

## Offering digital services in the EU and UK

Both the EU and UK have wider rules around offering digital services. Both sets of rules have the aim of making the internet a safer place and reducing online harm. This will apply to AI where AI is used to deliver or is part of the digital services offered.



### Digital Services Act

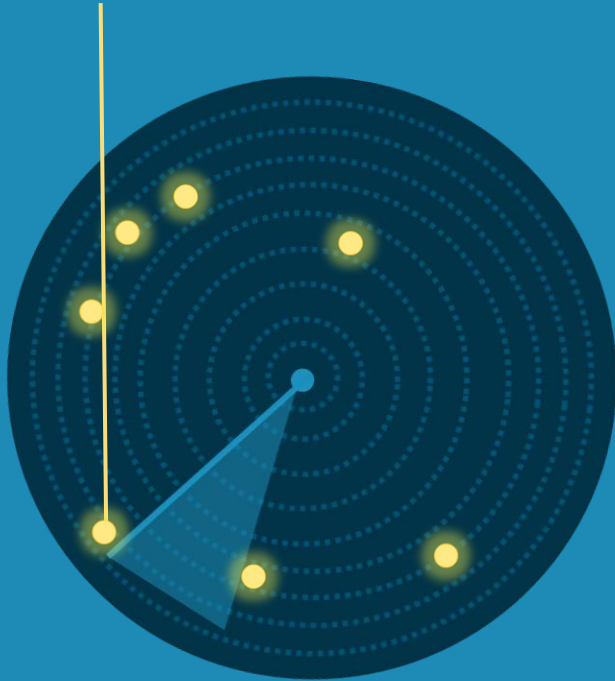
- Applicable to all digital services since 17 February 2024.
- The Digital Services Act (DSA) regulates providing digital services, including marketplaces, that act as intermediaries in their role of connecting consumers with goods, services, and content.
- There are additional rules that apply to very large online platforms and very large online search engines. Some of these rules have applied since the end of August 2023 and additional obligations will apply at the end of April 2024.
- Contains rules around advertising (including extra transparency obligations, bans on some targeted advertising and a ban on manipulative advertising techniques called 'dark patterns').
- Regulators can fine up to 6% of worldwide turnover and enforce other regulatory measures.



### Online Safety Act

- Enacted on 26 October 2023.
- Like the Digital Services Act, larger services are subject to stricter additional rules.
- The Act is dependent on several codes and secondary legislation which has not yet been enacted.
- The duties around illegal harms (e.g., child sexual exploitation, abuse, terrorism, fraud and hate speech) are expected to come into force spring 2025. Obligations relating to child safety and pornography expected summer 2025.
- Fines up to 10% or £18m (whichever is higher) of worldwide revenue.

# EU Digital Markets Act



## Who does it apply to?

- "Gatekeeper" providers – typically "big tech" operators that have an annual turnover of 6.5 billion Euros or more in the last 3 years and more than 45 million monthly EU end users.
- DMA entered into force November 2022, applicable from May 2023, and creates a deadline for "Gatekeepers" to comply by March 2024.

## What does it require companies to do?

The DMA is designed to “ensure a competitive and fair digital sector with a view to promoting innovation, high quality digital products and services, fair prices and high quality and choice in the digital sector”.

The DMA introduces a set of obligations targeted at “gatekeeper” digital players with significant scale and reach in the EU, and provides a framework for the European Commission to amend these rules. Generally speaking, the measure is targeted at “Big Tech” operators. Although its primary focus is "walled garden" ecosystems, it is likely that it will apply to the providers of packaged end-to-end AI systems.

### Prohibited Behaviour

- Self preferencing own services
- Preventing links to third party services
- Combination of personal data obtained from core platform services with any other service

### Gatekeeper Obligations

- Permitting third parties to interoperate with gatekeeper provided services
- Permitting business users to access data they generate in their use of gatekeeper services

### Merger Notifications

- Gatekeepers must notify the EU Commission of any mergers involving other core platform or digital providers – even if not generally notifiable under EU rules

# Liability and Other Data Laws



## Who will it apply to?

- The AI Liability Act is likely to apply the same way the AI Act does.
- The Data Act applies to manufacturers of connected products and providers of related services that are placed on the market in the EU.
- The DGA applies to the provider data sharing services where this services is offered in the EU.

# AI Liability, Data Act and Data Governance Act

## Proposed AI Liability Directive

The proposed directive creates product liability laws for AI products.

- It would create a '**presumption of causality**'. This means that the causal burden of proof will be **reversed**: it will be for providers to rebut a presumption that their system caused the loss claimed by the victim.
- It would introduce the 'right of access to evidence'. This means that victims could get information about high risk AI systems to help them identify who is liable for compensation.

Note that the AI Liability Directive has not progressed much since late 2022 and is unlikely to be in place before summer 2024 (which is the end of the EU Parliamentary term).

## EU Data Act

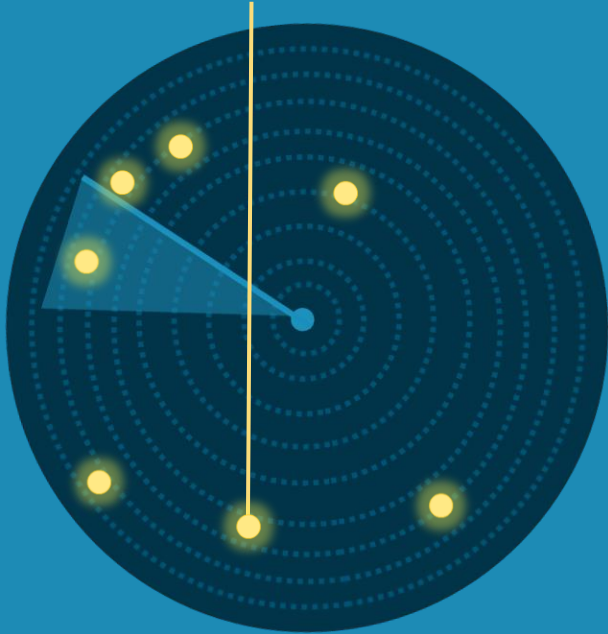
- Came into force 11 January 2024 and will become applicable September 2025.
- The Data Act aims to enable a fair distribution of the value of data by establishing clear and fair rules for accessing and using data within the European data economy.
- Will contain rules to enable public sector bodies to access and use data.
- Cloud providers will have to help with customers switching services.
- Includes transparency obligations.

## EU Data Governance Act

- Entered into force on 23 June 2022 and applied since September 2023.
- Creates mechanisms to facilitate the reuse of certain public sector data.
- Creates principles to ensure that data intermediaries function as trustworthy organisations.
- Contains measures to facilitate data sharing and restricts anti-competitive measures which limit data sharing.
- Includes further transparency obligations.



# Intellectual Property Rights and AI



## Who does it apply to?

- Companies developing AI within the UK and EU or using data from the UK or EU.
- Companies wishing to protect intellectual property which was developed in the UK/EU with the assistance of an AI tool.

## What will it require companies to do?

IP laws are complex and vary between the UK and EU countries, so companies will need to check on the rules of the country they are planning to launch their AI product in. This will be especially important where they are using UK or EU data or where their AI product may itself create output in those countries.

- Software can be protected under copyright.
- Whether data can be protected depends on various factors (e.g., whether it qualifies as a database right, or whether it is personal data).
- Some narrow copyright exceptions for text and data mining.
- Check license terms of open-source data – some require flow down requirements.
- Both the EU patent office and UK Supreme Court have ruled that AI cannot be the inventor of a patent.
- Copyright can only currently vest in the software embodying an AI algorithm and not the AI system itself.
- Output of a generative AI system is not likely protected by copyright unless significantly modified by a human creator, but this has been subject to numerous ongoing legal challenges around the world.

# UK Government Policy and AI Strategy

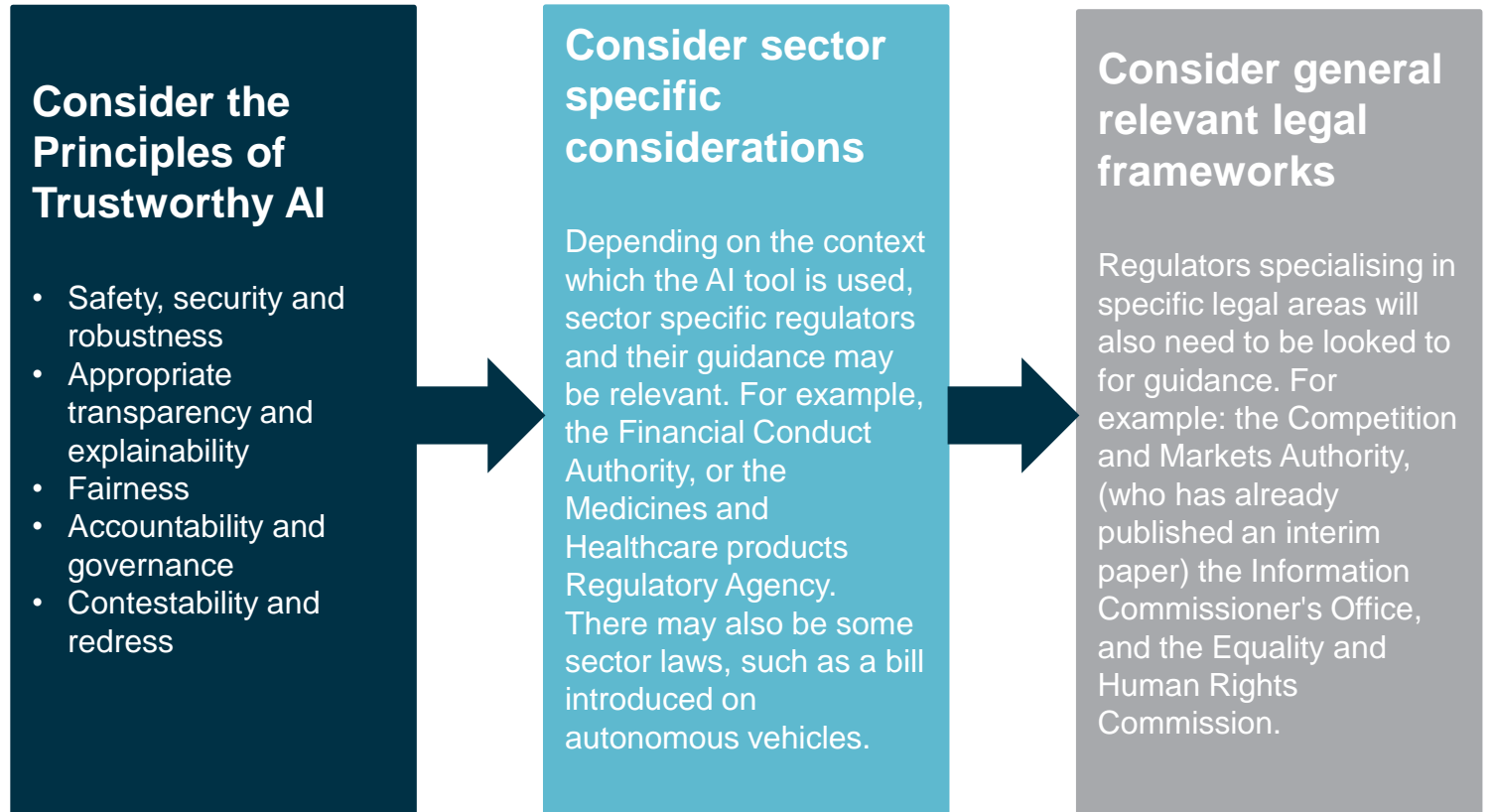


## Who will it apply to?

- Businesses developing and using AI in the UK.
- Business outside the UK, who provide products or services using AI to customers in the UK.

## What will it require companies to do?

The UK Government's AI White Paper was released on 29 March 2023, outlining the UK's approach to AI – which is focussed on principals, rather than regulating. Since then, the UK Government has consulted on this paper and confirmed that it has no plans to legislate for AI. Instead, relevant regulators will provide guidance. As part of this, regulators are required to publish their "strategic approach to AI" by 30 April 2024. See our full insight on the UK approach [here](#). As a result, businesses will need to consider the following when developing and using AI.



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\* Admitted in Germany \*\* Admitted in England & Wales

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## About Osborne Clarke

### Our global connections and 'best friends'

Through a network of 'best friends' we extend our reach across the globe, particularly in North America, EMEA & Asia Pacific. We have worked closely with like-minded firms in over 100 countries. We'll find the right local partner for you and wherever that may be, we will make sure that you receive the Osborne Clarke level of service.

Osborne Clarke is the business name for an international legal practice and its associated businesses.

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\*Services in India are provided by a relationship firm

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The Netherlands: Amsterdam

Poland: Warsaw

Spain: Barcelona, Madrid, Zaragoza

Sweden: Stockholm

UK: Bristol, London, Reading

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**1300+**

talented lawyers

working with

**330+**

expert Partners

in

**26**

international locations\*

advising across

**8**

core sectors

with

**1**

client-centred approach

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