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Artificial Intelligence

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1 What is the current state of the law and regulation governing AI in your jurisdiction (including any legislation, non-binding guidance and case law)? How would you compare the level of regulation with that in other jurisdictions?

Switzerland does not have a draft piece of legislation similar to the EU's AI Act. However, the latest public available version of the EU AI Act states that the Act itself will be applicable to AI systems developed and used outside of the EU but whose output is intended for use within the EU, if the output of the system is intended for use within the EU. As a result, the EU's AI Act will potentially significantly impact whoever develops or offers AI services from Switzerland, as long as these are (also) directed to the EU.

The Swiss government is actively observing the legislative development in the EU and it will decide whether and to what extent similar rules should be introduced in Switzerland only once the final version of the AI Act is known. The Swiss government's current focus lies on the current discussions in the Council of Europe on a binding treaty related to artificial intelligence. In the government's view, if this treaty is signed and ratified, it will likely create an obligation to draft basic AI regulations in Switzerland too.

A report commissioned by the federal government and published in 2019 concludes, inter alia, that the existing legislative framework is sufficient and able to deal with new uses and business models based on AI. Swiss law is generally drafted in a technology-neutral way, which enables the application of existing rules and principles to new technologies.

Switzerland has, nevertheless, published several non-binding and sector-specific set of rules, in particular the Guidelines on Artificial Intelligence for the Confederation.

In a paper published in March 2023 by the Federal Department of Foreign Affairs, the Federal Council confirms that it considers the current legal framework to be sufficient to deal with uses and business models based on AI. Therefore, no major and overarching legislative activity is expected, but sector-specific rules are already on the way, as will be set out in other questions below.

There are numerous parliamentary initiatives to regulate AI in specific sectors, such as cybersecurity, and to improve education on AI issues. It is too early to determine whether and which of these initiatives will be followed by legislative action.

In short, Switzerland's approach to AI regulation is characterised by its flexibility and sector-specific application. While it does not have a comprehensive AI-specific legal framework, Switzerland leverages existing laws to govern AI applications. This can be seen as a middle ground between the regulatory approach of the EU and the more fragmented approach of the US. As AI continues to evolve, it is likely that Switzerland, like other countries, will adapt its regulatory framework to address new challenges and opportunities.

2 Has the government released a national strategy on AI? Are there any national efforts to create data sharing arrangements?

Switzerland has published the Guidelines on Artificial Intelligence for the Confederation, in which seven fundamental guiding principles were set out regarding the use and future endeavours of the federal government relating to AI. These are as follows:

- putting the human in the centre;
- creating framework conditions for developing and using AI;
- transparency, traceability and explainability;
- liability;
- security;
- active participation in the governance of AI; and
- coordinating with all relevant national and international stakeholders.

These Guidelines must be adhered to in the following specific contexts: when developing sectoral AI strategies; when introducing or adapting specific, sectoral regulations; when developing and using AI systems within the Federal Administration; and when helping to shape the international regulatory framework on AI.

With respect to data sharing, the Federal Statistical Office is responsible for implementing the Swiss Open Government Data strategy (for 2019 to 2023). This strategy aims at making open government data available to the public on the opendata.swiss portal.

Recognising that researchers, businesses, civil society and the government have an interest in creating the conditions for the legal, secure and fair sharing of non-personal data by private companies and organisations, the Swiss IP Office has been tasked to prepare a report on access to non-personal data in the private sector. Among the outputs of this effort, some model agreements aimed at facilitating data sharing have been prepared and made available online.

3 What is the government policy and strategy for managing the ethical and human rights issues (including algorithmic bias) raised by the deployment of AI?

Switzerland is a member of the Council of Europe and it has delegated several representatives into the Council of Europe's Ad Hoc Committee on Artificial Intelligence (CAHAI). In December 2021, the CAHAI published a report entitled Possible elements of a legal framework on artificial intelligence based on the Council of Europe's standards on human rights, democracy and the rule of law.

The CAHAI paper advocates creating an 'appropriate legal framework on AI based on the Council of Europe's standards on human rights, democracy and the rule of law' in the form of a 'legally binding transversal instrument'. The main aim of this instrument is to prevent and mitigate risks emanating from applications of AI systems to human rights, democracy and the rule of law. It advocates a risk-based approach, where the legal requirements should be proportionate to the nature of the relevant risk.

The successor committee to the CAHAI, namely the Committee on Artificial Intelligence (CAI), established in January 2022, is chaired by the representative of Switzerland. In this context, the presidency issued a Consolidated Working Draft in July 2023 to serve as the basis for further negotiations of the framework convention, containing provisions that have preliminarily been agreed so far within the work of the CAI. Finally, the CAI published a 'Draft Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law' in December 2023.

4 What is the government policy and strategy for managing the national security and trade implications of AI? Are there any trade restrictions that may apply to AI-based products?

There is currently no published policy related to the national security and trade implications that specifically relates to AI or AI-based products. However, some AI-related products are subject to export control regulations.

The Federal Act on the Control of Dual-Use Goods (GCA) applies to goods that may be used both for civilian and military purposes. The Swiss Federal Council (government) issues lists of dual-use goods that are subject to government control. Such goods can only be exported from Switzerland subject to a licence from the State Secretariat for Economic Affairs.

Among the dual-use goods subject to export licence requirements are, in particular, neural computers and integrated circuits for neural networks. Neural networks are a branch of machine learning models built on the basis of neuronal organisation and an essential part of many AI-based products and services.

Under the current rules, only hardware related to neural networks (that is, neural computers and integrated circuits for neural networks) are controlled. Software products (such as large language models or programs running on the aforementioned hardware) are not covered by these rules. However, some AI software products may qualify as dual-use goods for reasons unrelated to artificial intelligence (namely the purpose of the software).

5 How are AI-related data protection and privacy issues being addressed? How will these issues affect data flows and data sharing arrangements?

From a Swiss law perspective, the main AI-related data protection and privacy issue relates to an increased reliance on automated decisions based on algorithms. A typical example is the automated decision in an application procedure for a new loan or an automated termination of an agreement or

service.

In Switzerland, automated decisions are now specifically addressed in the revised Data Protection Act (DPA), which entered into force on 1 September 2023. The revised DPA contains specific provisions dealing with decisions that are taken exclusively on the basis of automated processing (ie, no human in the loop). In substance, the new regime requires that the data controller informs data subjects of automated individual decisions that have legal effects or affect them significantly (subject to exceptions). Although this provision is similar and inspired from the GDPR, the Swiss requirements are based on a completely different premise: the new regime provides merely for a duty to inform, as opposed to a prohibition by default in the GDPR (unless an exception applies). If the requirements of the duty to inform are met, data subjects can express their views and obtain an explanation as to the underlying logic of the automated decision upon request. Data subjects may also request that such a decision be reviewed by a natural person. However, there is typically no possibility for data subjects to challenge the decision, as is the case under the GDPR.

Transparency is important when relying on AI applications, especially in regulated industries, in order to be able to understand with which data an algorithm has been trained, how the algorithm is constructed and be in a position to explain (eg, to the auditors and regulators) how the implementation of an AI-based tool meets the applicable regulatory requirements. In that context, where the draft EU AI Act specifies under the provisions on transparency requirements for high-risk AI systems what is required in the GDPR regarding the disclosure of logic in automated decision-making, Swiss law does not contain such legal requirements – although the revised DPA explicitly provides that data subjects may request to be informed ex post about the underlying logic on which an automated decision is based. However, the DPA does not specify how the logic of automated decisions must be disclosed. Typically, the prevailing view is that no detailed explanation of the actual algorithms used or disclosure of the entire algorithm are required, but simply an explanation as to what logic was applied in the given case to allow data subjects to understand the reasons behind the decision.

In this context, Swiss businesses relying on AI-tools are advised to develop simple procedures to inform the data subjects concerned about the underlying business logic and criteria of any automated individual decisions, if applicable, or rely on exemptions from such requirements (eg, consent of the data subject). However, for regulated actors using AI, the expectations of Swiss regulators such as FINMA go much beyond the requirements of the new DPA and, in particular, require a comprehensive risk assessment and management of the AI-tools and their implementation, including internal control systems (ICS), governance, security, ethics, and exit management, as appropriate.

6 How are government authorities enforcing and monitoring compliance with AI legislation, regulations and practice guidance? Which entities are issuing and enforcing regulations, strategies and frameworks with respect to AI?

Switzerland's approach to AI is multi-faceted and in the current state of legislation relies on existing legal framework, which is principles-based and can be applied 'as is'. As a result, there is no specific enforcement or compliance monitoring efforts in Switzerland. In practice, the expectation is that each respective sector-specific regulator (eg, the FDPIC for general data protection legislation, or FINMA for regulated financial institution) will adopt a regulatory approach and develop practices to ensure that AI is deployed in compliance with prevailing legal requirements and practice.

7 Has your jurisdiction participated in any international frameworks for AI?

Switzerland is actively involved in various international AI negotiations and initiatives aimed at developing AI related frameworks. The main involvement is certainly the work as part of the CAI – Committee on Artificial Intelligence, chaired by Switzerland and involving multiple Departments of the Swiss government.

Further, Switzerland is also heavily involved in most international bodies that focus on AI standards. This is also the position of the Swiss government, which believes that Switzerland must actively participate in AI standards setting. In particular they note that the country should be represented in international bodies that focus on AI standards and exchanges with Geneva-based international standards organisations are to be promoted.

Of note, the International Organization for Standardization, based in Geneva, has adopted several standards related to AI, including ISO/IEC 23053:2022 (Framework for Artificial Intelligence (AI) Systems Using Machine Learning (ML) and ISO/IEC TS 421:2022 (Information technology — Artificial intelligence — Assessment of machine learning classification performance). Several other AI-related standards are under development at ISO.

8 What have been the most noteworthy AI-related developments over the past year in your jurisdiction (eg, regarding cybersecurity, privacy, intellectual property and competition)?

There have been a number of AI-related developments over the past couple of years in Switzerland. The most noteworthy of those are highlighted below.

Data protection

The revised Swiss Data Protection Act (DPA), which entered in force on 1 September 2023, now covers some of the questions related to AI use in business, but only, of course, when personal data are involved. Most notably, the new Swiss DPA introduces specific requirements when 'automated decision making' is involved – in a nutshell, requiring data subjects to be informed and provided with

ex post explanation as to the underlying logic, upon request, subject to exceptions (eg, consent to automated decision making). In this respect, the Swiss data protection regime is more flexible and permissible than the requirements applicable under GDPR.

Intellectual property

The Swiss government recently started a legislative process to amend the Copyright Act. The preliminary draft bill aims at creating a new neighbouring right to monetise the publication of snippets (short excerpts of third-party media publications) by online service providers (such as search engines and social media). A wide consultation process of interested parties (organisations, associations, etc) is ongoing. It transpires from the consultation process that the Swiss authorities are considering whether or not to extend the planned neighbouring right to the use of journalistic content by AI-applications.

In this context, it should be recalled that in Switzerland, like in other jurisdictions, there are ongoing debates as to the ownership of AI-generated content and, more importantly, as to whether and under what circumstances copyright-protected training data can be used to feed AI applications.

At the time of writing, it is unclear what the shape of the amendment will be and the amendment is not expected to enter into force before at least one or two years.

Unfair competition

The 2019 report commissioned by the federal government states that the Swiss Federal Act on Unfair Competition may apply to companies that make use of AI in customer communications (eg, chatbots or phone calls) and customer-facing tools if they do not disclose such use of AI. The report mentions that further guidance may be given by the State Secretariat for Economic Affairs.

Competition

The Swiss Competition Commission (ComCo) has not published any specific guidance addressing how uses of AI may be dealt with from a competition law perspective. It is, however, interesting to note that, in collaboration with the University of Fribourg, the ComCo has developed an AI tool to support the identification of potential unlawful behaviour in the context of public tendering processes.

9 Which industry sectors have seen the most development in AI-based products and services in your jurisdiction (eg, financial services, healthcare and defence)? Are there any emerging industry or non-governmental standards governing the development and use of AI-related technologies?

Switzerland has seen AI integration across multiple sectors and industries. The combination of a strong economic base, leading academic institutions and a supportive government has facilitated the growth of AI-driven products and services for a number of years, with applications of machine-learning and similar applications of AI technologies and algorithms already in use for decades.

Financial services

In the financial services sector, AI is already being used in many areas, with current use cases including:

- credit assessment – using AI to make faster and, arguably, more reliable assessment of a borrower, at a fraction of the cost, whilst accounting for a wider array of factors and data points;
- better fraud detection and fighting financial crime (eg, transaction monitoring and screening tools, fraud prevention algorithms);
- business processes optimisation and delivering financial services (eg, robot-advisers, high-frequency trading algorithms, etc);
- providing price forecasts and technical analysis – using AI to provide market price forecasts, based on live trading data, coupled with pattern recognition and technical analysis capabilities; and
- dealing with front office customer enquiries – in other words, using AI for customer chatbots.

In this context, open finance principles are also a catalyst for new business models, relying on open data architecture and thus a key driver of AI adoption and deployment in the financial services industry. However, it is vital for Swiss banks and financial institutions to ensure that the main risks associated with new technologies such as AI are appropriately managed and addressed. In this respect, leading industry associations, such as the Swiss Bankers' Association (SBA) play their part in addressing some of the key challenges, such as the responsible use of AI, protecting privacy and ensuring data security, technical and operational implementation (including resources, training and knowledge), and legal and reputational risks.

Healthcare and life sciences

Switzerland is home to numerous AI-based companies focusing on a wide range of applications. In particular, the use of AI in healthcare (eg, as a support for diagnosis) and life sciences (as a support for research and development of new drug products) is significant and growing. To illustrate this, pharmaceutical companies are among the top owners of AI-related patents.

Swissmedic (the Swiss health regulatory authority) recently stated that AI is used in a growing number of medical devices, in particular in medical device software. Although Swissmedic has issued no guidance specific to the use of AI in this context, medical apps that use AI to process one's data are likely to be considered as a medical device under Swiss law, involving the compliance with certain regulatory requirements such as conformity assessment and post-market surveillance.

10 Are there any pending or proposed legislative or regulatory initiatives in relation to AI?

The Digital Switzerland Strategy sets guidelines for Switzerland's digital transformation. The aim is for Switzerland as a whole to benefit from a sustainable and responsible digital transformation, following the vision of consistently prioritising digital offerings for the benefit of the people (digital first). In furtherance of this vision, the Swiss government determines two to three priorities or themes

– these serve as a starting point for new measures and for Federal Council mandates. The three focus themes of 2023 are digitalisation in the healthcare sector, digitalisation-friendly legislation and digital sovereignty.

In 2021, the Swiss government indicated that the relevant developments regarding the European regulation of digitalisation and their impact on Switzerland would be closely monitored to be able to take action at an early stage if necessary. The further development of the EU's draft AI Act will increasingly influence political processes and debates about the topic of AI regulation in Switzerland. While this does not necessarily imply that Switzerland must conform to the regulations of the EU, the need for action will undoubtedly increase once the AI Act comes into effect, although Switzerland has also been very active on the international framework setting arena, notably by the work within the Committee of Artificial Intelligence traditionally preferring an international consensus on principles, over a local or regional race to issue highly prescriptive regulation with often unforeseen extraterritorial effects.

11 What best practices would you recommend to assess and manage risks arising in the deployment of AI-related technologies, including those developed by third parties?

There are a number of risk management issues that businesses should consider before deploying AI-related technologies or engaging an AI-service provider. The processes and controls to be implemented should be proportionate to the risk posed by the proposed use of AI. Whilst the highest level of due diligence and controls will apply where critical data is being processed, applications that are to be deployed solely on internal non-sensitive data may be subject to a more tempered approach and scrutiny.

Risk assessment

The very first step is to establish an inventory of the systems and datasets on which an AI solution will be deployed, and on that basis to conduct a comprehensive mapping of both the risks that are specific to AI (new risks), as well as the augmentations to existing risks (by virtue of scale or breadth of uses).

Control framework

Businesses should consider first what systems they have in place to mitigate the risks that AI may pose, and, where no or limited controls are in place, a possible solution is to engage with the AI-service provider to discuss what controls can be offered through the proposed solution. In all instances, the issues of integration and implementation should also be considered from the outset (eg, legacy data, structured v unstructured data, APIs, integration in business processes, customisation of commercial solutions, etc).

Transparency and accountability

Businesses should be clear on the datasets that have and will be used to train on, test and deploy AI solutions on, respectively understand whether the AI output can be explained or traced, and where it cannot – determine whether they are comfortable with a 'black box' in particular areas of their business, having taken into consideration their legal and regulatory requirements (eg, GDPR or DPA for automated decision making, sector-specific regulatory expectations or guidance, etc).

Governance and skills

An appropriate governance approach should be considered, including designating, as the case may be, a person or group responsible for direct oversight of the AI-provider and reporting to the management, subject to any sector-specific regulatory requirements, which may require that board members or senior management to at least know where AI is involved and how it is used in the business. In this respect, businesses should consider whether they have appropriate expertise to engage with AI-service providers or whether they should build that expertise first, to avoid the risk of a 'skill gap' where a business may lose some level of control of its data and would not or no longer have resources to monitor, review or explain the decision made or relying on output from an AI tool.

Apart from the above, other key considerations include security (including cybersecurity), data protection and regulatory compliance, ethics, as well as exit management or anti-lock-in measures. Careful consideration of all of the above from the outset will assist businesses with building an accurate risk management framework, mitigating some of the issues (eg, contractually or through technical or organisational measures) and globally inform the key business decisions around use of AI and similar technologies.

The Inside Track

What skills and experiences have helped you to navigate AI issues as a lawyer?

- At Lenz & Staehelin, we always strive to be on top of new technologies, both to ensure that our legal advice remains of the highest quality and to improve our efficiency in delivering advice to our clients. We believe that a foundational technical understanding of AI is important, like with other new technologies relevant to our profession. Accordingly, as part of our 'Enhanced Lawyer' initiative, a dedicated team of lawyers, knowledge managers and IT specialists, working on an ad hoc basis with external technology experts, continuously monitor new development, undergo training and learn to understand and master those new technologies.

Which areas of AI development are you most excited about and which do you think will offer the greatest opportunities?

- We are very excited about the new opportunities (and challenges) that AI will bring to the legal world. We believe that, as AI tools become more sophisticated, they will allow us to be even more efficient (eg, in contract drafting, case preparation and research) and to focus on value-added activities. On a more general level, we expect a wave of legal proceedings in areas like

data protection and intellectual property against AI companies, which will be followed by the emergence of new business models. AI will impact many business sectors, such as the life sciences field. Some life sciences companies have already started to collaborate with or even taken over smaller AI companies. In particular, there is little doubt about the immense potential of AI in the fields of diagnostics or the modelling and development of large molecule drugs.

What do you see as the greatest challenges facing both developers and society as a whole in relation to the deployment of AI?

- Legislation generally trails behind emerging technologies, a phenomenon accentuated with AI. This lag fosters uncertainty for AI developers, simultaneously intensifying pressure on lawmakers to adopt an appropriate legal framework. From a societal standpoint, the deployment of AI undoubtedly carries multifaceted implications, ranging from labour market disruptions to potential biases in technological accessibility and ethical dilemmas in algorithmic training, as well as educational challenges, particularly in knowledge-based sectors. Notwithstanding these complexities, AI continues to hold substantial promise for advancing both economic growth and societal well-being, if used responsibly.