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TECHNOLOGY MARATHON

**Legal and Regulatory Issues in AI
(US, EU, UK)**

Mike Pierides and Oliver Bell

June 1, 2022 | 11:00-12:00 pm ET

Presenters



Mike Pierides



Oliver Bell

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Agenda

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AI and its Uses



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AI Defined

“Use of automated, computer-based means by which large amounts of data are processed and analyzed to reach **reasoned conclusions.**”

ABA Op-ed

Artificial general intelligence is the intelligence of a machine that could successfully perform any intellectual task that a human being can.

Wikipedia

“A core objective of AI research...has been to automate or replicate intelligent behavior.”

The Obama White House

Weak artificial intelligence, also known as **Narrow AI**, is non-sentient artificial intelligence that is focused on one specific task.

Popular Science

Related (and more useful) Terms

Deep Learning/Neural Networks:

A subset of machine learning where artificial neural networks, algorithms inspired by the human brain, learn from large amounts of data. Similarly to how we learn from experience, the deep learning algorithm would perform a task repeatedly, each time tweaking it a little to improve the outcome.

Forbes

Natural Language Processing:

Systems that enable computers to understand and process human languages, to get computers closer to a human-level understanding of language.

Wikipedia

Machine Learning:

The use of algorithms and statistical models to perform specific tasks without explicit instructions. Instead, these systems rely on patterns and inference, and adapt with supervised learning and feedback.

McKinsey

And for Science (Fiction) Buffs

The Singularity:

The tipping point when machines become smarter than humans. Or, when biological and machine intelligence merge and human/machine intelligence can live free of biological constraint.

Ray Kurzweil et al

The Turing Test:

A machine's ability to exhibit behavior indistinguishable from that of a human. Alleged to have occurred for the first time in 2014 by a computer mimicking a 14-year-old-boy named Eugene.

Time Magazine

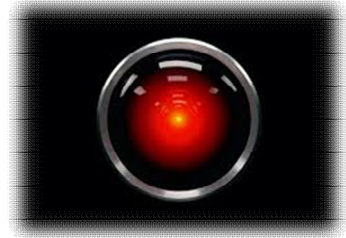
AI Apocalypse:

Unabated use of AI, without built-in constraint, poses existential threat to humanity.

Stephen Hawking

Look Dave, I can see you're really upset about this. I honestly think you ought to sit down calmly, take a stress pill, and think things over. I know I've made some very poor decisions recently, but I can give you my complete assurance that my work will be back to normal. I've still got the greatest enthusiasm and confidence in the mission. And I want to help you.

HAL



Popular Uses



**Recruitment
Processes**



**Insurance
Decision Making**



**Monitoring User
Behaviors**



**Credit
Referencing**



**Underwriting Loans,
Anti-money
Laundering and
Fraud Detection
Processes**

Popular Uses – Potential Issues

Recruitment

- Male candidates' CVs favored
- Lower salaries offered to minorities

Insurance

- Higher premiums for the elderly
- Premiums for same policy differing due to name

Monitoring Behaviour

- Promotions offered to employees without children

Credit Referencing

- Disabled and ethnic minorities given lower credit scores

Loans, AML, Fraud

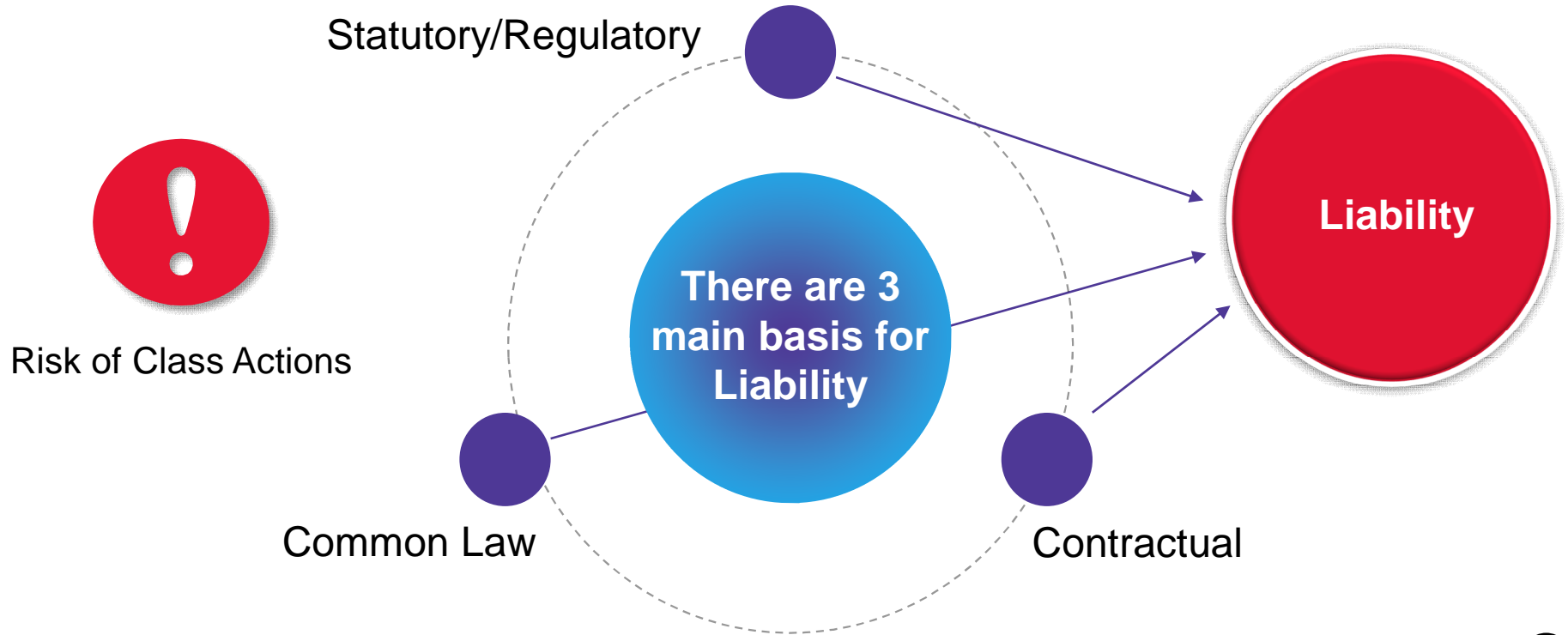
- More AML issues flagged for ethnic minorities
- Loans not extended to those living in certain areas

AI - Risks & Liabilities



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Potential Liabilities



Statutory Liability - Examples

The Fair Housing Act prohibits housing-related discrimination on the basis of race, color, religion, sex, disability, familial status, and national origin.

Penalties – Compensation for discriminated persons and/or fine of up to \$65,000 for repeat breaches



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The Equality Act prohibits discrimination, in relation to nine protected characteristics: age, sex, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief and sexual orientation.

Penalties – Compensation for discriminated persons

Common Law Liability

Tort of Negligence?

Duty of care to the claimant?

Breach of that duty?

Breach has caused harm?

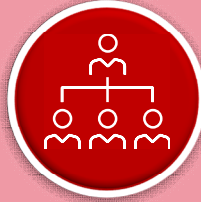
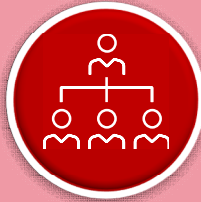
Damage or loss has resulted from that harm?

Contractual Liability

Liability relating to AI could arise under a number of contractual relationships



**Organization
and
AI Provider**



**Organization
and
Corporate Customer**



**Organization
and
Consumer**

Contractual Liability – Exclusions and Limitations

Standard liability exclusions and limitations may be helpful



- Loss of profits
- Loss of business
- Loss of opportunity
- Indirect and consequential Loss
- Loss of goodwill
- Liability caps

Should AI specific exclusions and limitations be considered?



- No liability for decisions made based on outputs
- No liability for incorrect input data
- No liability for faults caused by organization's instructions/specification

Who is potentially liable?

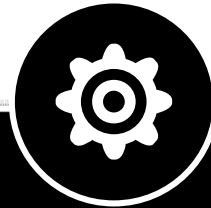
Who has legal responsibility for issues resulting from AI use?



The Organization?



The AI Provider?



The AI Itself?

Is a third-party data provider involved?

Who is potentially liable? – The Organization



In the UK an All-Party Parliamentary Group on Artificial Intelligence concluded that organizations must be accountable for the decisions made by the algorithms they use.

Primary Liability?

- Uses the AI tool
- May develop the algorithm itself or contract with a third party for development
- Responsible for the principles of how the AI tool works?
- May be responsible for the input data
- Makes decisions based on the outputs

Who is potentially liable? – The AI Provider



- Provides the AI tool (off-the-shelf or bespoke)
- Responsible for the code of the algorithm
- May also provide input data



Two key potential sources of liability



- Liable contractually to the customer it supplies the AI solution to?
- Vicarious liability to end users?
- The impact of decisions at the time of development may not be known – issues with liability for unknown issues!

Who is potentially liable? – The AI Itself



Can (and should) AI have a legal personality itself?

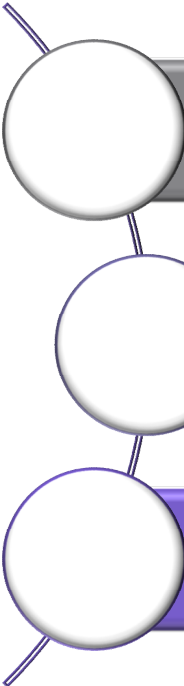
Recent case law, including the 'DABUS' decisions in the UK, EU and US, suggests not.



- AI is not a legal person and so cannot be held liable at law
- If there is harm then one or more legal persons connected to the AI must have liability – Fair?
- Some issues left open!

At present, only natural and legal persons can have liability.

Liability – Grey Areas



If an algorithm designed largely or completely by computers makes a mistake, whose fault is it?

True AI systems don't just implement human-designed algorithms, they create their *own* algorithms!

Do existing liability regimes provide for AI-related loss, or should new systems be created?

Considerations for Organizations using AI

In-house development vs
third party development

Ensure accurate
data inputs
Own data vs third party data

Requirements to
include safeguards
in the code

Auto stop if issues identified to
stop escalating issues

Confidentiality requirements
to stop disclosure of data
inputs without consent

Keep control of AI use

Considerations for Organizations using AI

Only use AI where there are clear rules that can be followed as this ensures appropriate labels can be used

Requirements to monitor outputs and override

Heavy oversight of development and regular testing

Contractual commitments from AI providers

Considerations for AI Providers

Requirements on organization to ensure input data is accurate and does not cause issues

Clear specification/requirements

Importance of testing procedures – working with the customer to ensure results are correct prior to live use

No liability for use of the results of the AI tool




Regulatory Developments


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Data Protection - GDPR

GDPR requires data subjects to be informed of any automated decision making used in respect of their personal data – organizations will need to update their privacy policies to reflect their use of AI and may want to consider reputational issues when considering using AI tools for decision making!



Even where such transparency is not a legal requirement, organizations should be working to ensure transparency of data use as far as possible



Undertake Data Privacy Impact Assessments – this may be a legal requirement in certain jurisdictions (e.g. Europe and the UK)

International Standards



International Organization of Securities Commissions has published a list of risks and expectations in the use of AI by asset managers, including:



- appropriate governance, controls and oversight frameworks over the development, testing, use, and performance monitoring of AI;
- ensuring staff have adequate knowledge, skills and experience to implement, oversee and challenge the outcomes of AI tools;
- consistent and clearly defined development, testing and monitoring processes of algorithms, particularly ensuring that AI algorithms do not behave inexplicably owing to any subtle shift in operating conditions or excessive 'data noise';
- data quality and bias, ensuring the quality of sources used as well as the relevance and completeness of data; and
- appropriate transparency and explainability of algorithms, recognizing the need to balance the necessary understanding by clients and regulators with the commercial sensitivity of the AI developer.

US Regulation - General



Approach has largely been a cross-application of agency guidance and activity-specific rules, such as data privacy, intellectual property, product liability and anti-discrimination laws.

Currently no comprehensive federal regulation of AI, but recent trends suggest that such a regulation is on the way.

In June 2020, the Financial Industry Regulatory Authority ("**FINRA**") published a report which summarizes the use of AI in the securities industry and provides guidance to firms.

In September 2021, the Biden administration announced a National Artificial Intelligence Advisory Committee to advise the federal government on a range of AI-related matters and issues.

Also note operational resilience guidance, including the US federal banking regulators' consolidated guidance in October 2020.

Guide recently published by the US Equal Employment Opportunity Commission (EEOC) which, among other things, requires employers to ensure that any hiring tools based on algorithms or AI do not negatively impact applicants with disabilities.

US Regulation – AI Bias



Algorithmic Accountability Act of 2019

- Require companies to affirmatively evaluate and minimize the risks of algorithms that result in inaccurate, unfair, biased or discriminatory decisions
- Large companies to audit their algorithms for potential bias and discrimination

Commercial Facial Recognition Act of 2019

General ban the commercial use of facial recognition technology to "identify or track an end user" without obtaining their consent. Requirement for third-party testing

New York City Council - Local Law 49

Address algorithmic bias and discrimination occurring as a result of algorithms used by city agencies

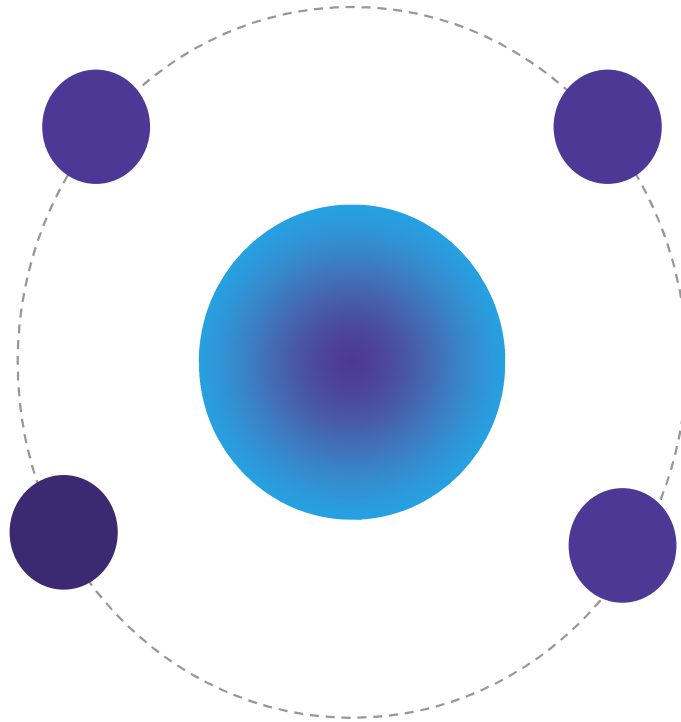
One Federal Law?

Companies starting to call for regulation – overarching federal approach potentially preferable

UK AI Strategy



UK government has announced an assertive agenda on artificial intelligence (AI) by launching a UK Cyber Security Council and in September 2021 published a National Artificial Intelligence Strategy (the UK Strategy).



The UK's strategy is focused in particular on promoting growth of the economy through widespread use of AI with, and at the same time, an emphasis on ethical, safe, and trustworthy development of AI.

The UK will not, it appears, be moving to a single legislative framework for AI. If anything, this will be done on a sectoral basis.

On 17 February 2022, the Bank of England and the FCA published a report on AI. It does not detail any specific regulatory guidance, but instead highlights considerations for the UK regulatory framework. It suggests a 'wait-and-see' approach; that regulators should continue to monitor and support the safe adoption of AI in financial services and provide clarity on how existing regulation and policies apply to AI.

UK Review – AI Bias



Update Equality Act to reflect issues with AI Algorithms

Create national policing bodies

Information Commissioner's Office to update guidance

Mandatory transparency obligation on all public sector organizations using algorithms

EU Regulation



EU Commission has published a proposed EU-wide AI legislative framework (the EU Regulation) which is part of the Commission's overall "AI package".

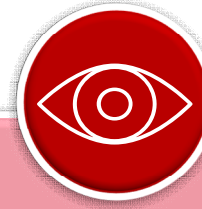
Much of the EU Regulation is focused on imposing prescribed obligations in respect of such high-risk use cases, including obligations to undertake relevant "risk assessments", to have in place mitigation systems such as human oversight, and to provide transparent information to users

The EU Regulation is focused on ensuring the safety of individuals and the protection of fundamental human rights, and categorizes AI into unacceptable, high- or low-risk use cases.

We expect that as well as driving AI policies within providers and users of AI, many of these obligations will be flowed down by customers to their contracts with AI providers.



Non-compliance with the regulation could mean heavy GDPR-style fines for companies and providers, with proposed fines of up to the greater of €30m or 6% of worldwide turnover.



The regulation anticipates the establishment of a European Artificial Intelligence Board to oversee the matters covered by the regulation.

EU Regulation – High Risk AI Systems



High-risk AI systems are permissible, subject to the implementation of the controls specified in the regulations.

High-risk activities include:



Use of AI to access credit worthiness or provide credit scores.



Use of AI in employee matters such as performance reviews.



AI systems whose use may have an impact on fundamental rights.

EU Regulation - Controls



The subject to requirements users of AI systems are also as set down in the regulations.

Extra-territorial effect.



Technical Documentation:

Should include necessary information for the notified bodies and authorities to verify compliance with the regulation.

Transparency and provision of information to users:

High-risk AI systems to be designed and developed to ensure sufficient transparency to enable users to interpret the outputs and use them appropriately. For that purpose, the system falling into this category of risk should be accompanied by satisfactory and comprehensible instructions in a digital format.



Human oversight:

AI systems to be designed and developed to enable effective oversight by natural persons – to prevent or minimize e.g. risks to health and safety or fundamental rights. Also worth highlighting oversight in the context of bias.

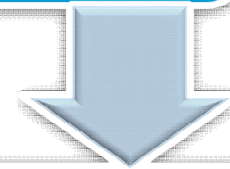
Accuracy, robustness and cybersecurity:

High-risk AI systems to be designed to ensure appropriate level of accuracy, robustness and cybersecurity. While accuracy metrics are to be provided in the instructions, the Proposal sets a resilience standard as to errors: (i) training, validation and testing data sets shall be “free of errors”... (ii) high risk AI systems shall be “resilient” in respect of errors, third party vulnerability etc – which providers will need to ensure.

EU Regulation



To indicate conformity with the proposed regulation, a specific CE marking for high-risk AI systems will need to be obtained following a conformity assessment procedure led by the manufacturer itself.



Likely impact on the sector is that the development and market entry of high-risk AI systems will be delayed / impacted by the new regulation.

Morgan Lewis Blog Posts

1. [National Artificial Intelligence Strategy Announced in United Kingdom](#)
2. [Artificial Intelligence: Uk And EU Take Legislative Steps - Convergence Or Divergence?, Tech Radar](#)
3. [National AI Strategy Published in the United Kingdom](#)
4. [Legislative Approaches to AI: European Union v. United Kingdom](#)

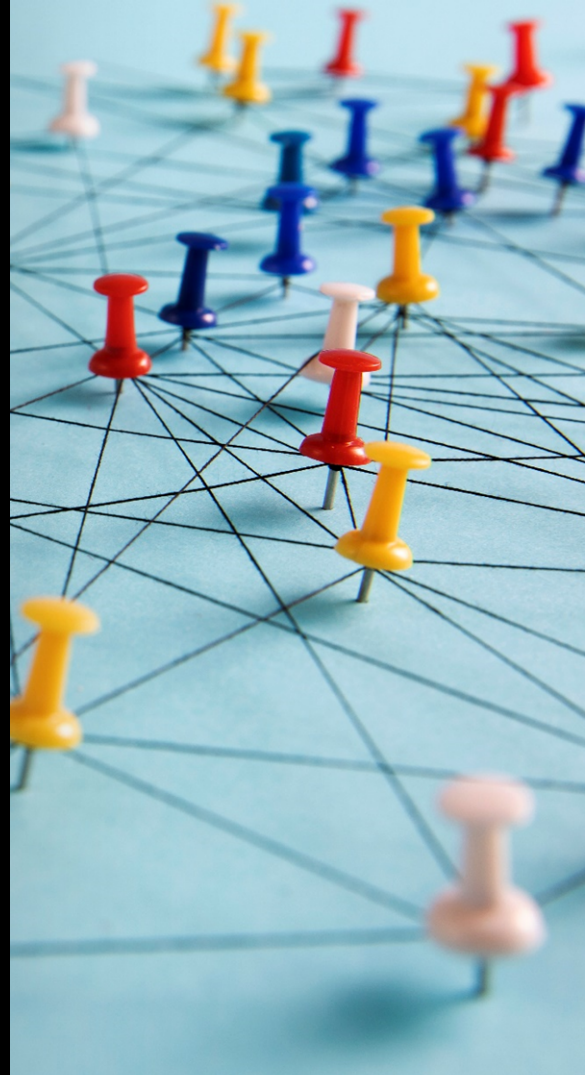
Ukraine Conflict Resources

Our lawyers have long been trusted advisers to clients navigating the complex and quickly changing global framework of international sanctions. Because companies must closely monitor evolving government guidance to understand what changes need to be made to their global operations to maintain business continuity, we offer a centralized portal to share our insights and analyses.

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Biography



Mike Pierides

London

+44.20.3201.5686

Mike.pierides@morganlewis.com

Mike Pierides' practice encompasses a wide breadth of commercial and technology transactions. Mike advises on major outsourcings, strategic restructurings following divestments or acquisitions, and technology-specific transactions such as licensing and "as a service" arrangements. He is also active advising on new technologies such as blockchain and artificial intelligence.

His clients include companies across a multitude of sectors, including technology, financial services, aviation and telecommunications. Within the financial services sector, he advises a wide range of clients, including retail banks, investment banks, investment managers, payments providers, and others. Mike has also worked at the intersection of financial services compliance and technology, advising clients on their related systems and compliance procedures. Mike represents both customers and suppliers, allowing him to bring opposing parties' perspectives to transactions.

Mike is recognized by Chambers UK as an authority on outsourcing and information technology, and is highly regarded for his work on complicated BPO and information technology outsourcing (ITO) transactions. Clients and sources told Chambers that Mike "[has] excellent understanding of our sector and the services we provide...", that "he is particularly strong around the negotiating table," and that "he leads from the front rather than merely offering opinion."

Mike was also nominated as an Acritas Star Lawyer, with a client noting he is "an expert in the industry and in the specific subject matter that we've asked advice on. He has really helped to move the deal forward by being proactive. Excellent project management skills as well."

Biography



Oliver Bell

London

+44.20.3201.5449

Oliver.bell@morganlewis.com

Oliver Bell focuses his practice on large-scale IT and business process outsourcing arrangements. Oliver advises multinational clients on all aspects of their sourcing requirements from initial scoping of requirements through to negotiation, completion, and day to day contract management. He also advises clients on the disaggregation and exit of complex agreements.

In addition to his outsourcing services, Oliver advises clients across a number of industries, including financial services, leisure, retail, automotive, and the public sector.

Oliver advises on and negotiates a wide range of commercial arrangements, such as supply of goods and services agreements, warehousing and distribution agreements, agency agreements, wholesale agreements, concession agreements, intellectual property licenses, and sponsorship arrangements.

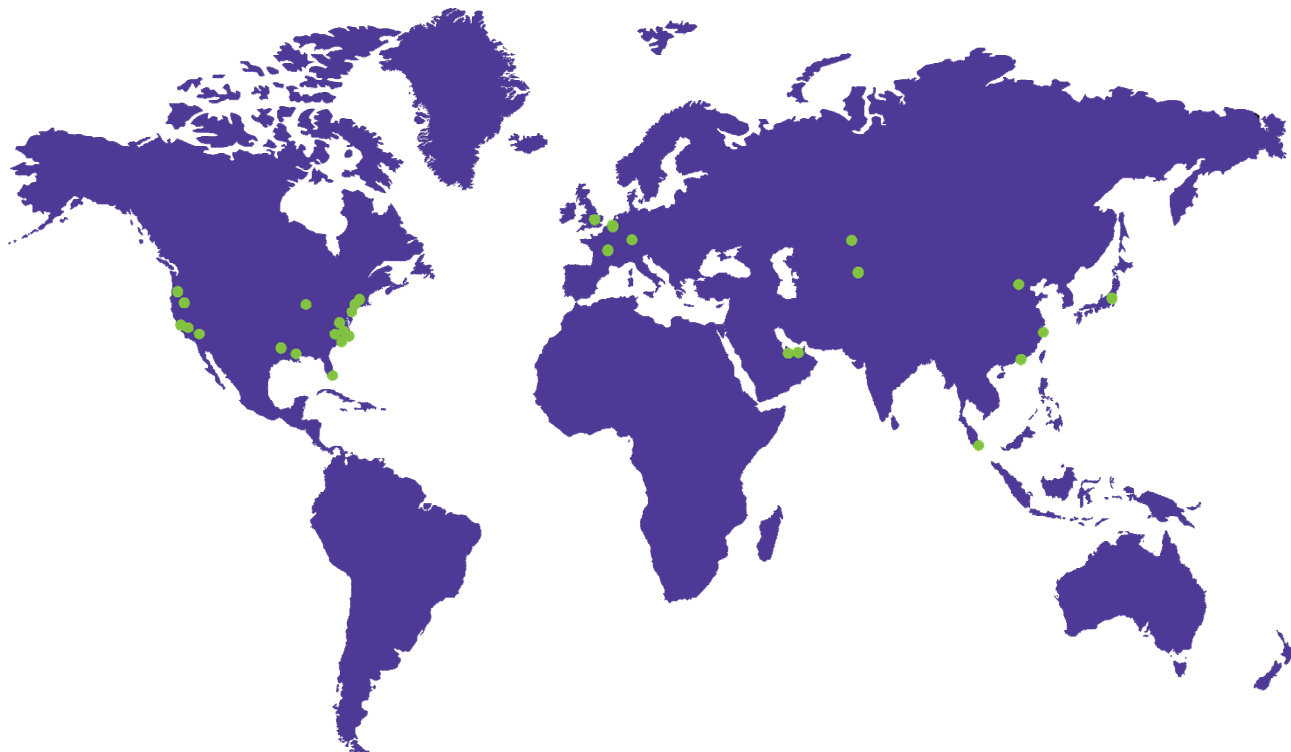
Oliver has spent time on secondment at a global bank, a UK retailer, and a UK public authority.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

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