AI in Corporate Transactions: Key Considerations for Purchasers

As AI adoption accelerates, so does the volume and complexity of corporate transactions involving AI-rich targets. AI-specific risks permeate every stage of a transaction, from due diligence through to post-completion integration. Thorough, pre-emptive consideration of these risks delivers a more accurate understanding of value and enables informed discussion about risk allocation between the parties.

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Use Cases

Purchasers must understand the AI systems being provided, developed, deployed or used by the target and for what purposes. Use cases inform the assessment of AI-specific risks such as algorithmic bias, intellectual property ownership and market competitiveness. A target that is an AI provider raises different considerations from one that is merely an AI user, particularly around the nature of outputs, customer exposure and whether automated decision-making affects individuals.

Intellectual Property

Where an AI system is a transaction asset, purchasers must understand the nature and ownership of the intellectual property rights in the system, including whether those rights are protectable and enforceable. Consideration should also be given to third-party licensed components (including open source), compliance with those licences, and any infringement risk associated with training data or output data.

Technical Infrastructure

Purchasers should assess the technical infrastructure on which the target's AI systems operate and the post-completion requirements for maintaining them, including whether additional hosting, compute or data centre services will need to be procured. Legacy systems may carry technical debt or outdated infrastructure requiring upgrade. These factors will directly affect valuation.

Data and Data Governance

Purchasers should consider whether the target's AI system is pre-trained or fine-tuned by the target, the origin and lawfulness of its training data, and whether the data can be used by the purchaser post-completion. Training data quality, bias risk and the robustness of the target's broader data governance and cybersecurity frameworks should also be assessed, including any assurance processes such as algorithmic risk assessments and data validation exercises.

Transparency and Explainability

The extent to which an AI system's operation can be explained varies significantly. Where a system involves automated decision-making that affects individuals, legal risk may arise if the target cannot explain how those decisions are made. Purchasers should also consider whether the degree of explainability supports their intended future use of the system and any evolving regulatory expectations.

Material Contracts

Where the target is an AI provider, purchasers should review customer contract terms for liability exposure, intellectual property rights granted to customers, performance obligations (including service levels and output quality commitments) and the target's rights to re-use personal or confidential information, including for model training. Where the target uses third-party AI systems, similar considerations apply to supplier contracts.

Governance

Purchasers should assess how the target governs its use of AI, including its internal governance frameworks, policy framework, risk registers, impact assessment processes and the clarity of AI-related roles and responsibilities. Frameworks developed by reference to established methodologies such as the OECD AI Principles, EU AI Act, ISO/IEC standards or the NIST risk management framework indicate a more mature risk posture. Gaps identified in governance may warrant warranty protection in the transaction documents.

Regulatory

Purchasers should identify all laws and regulations applicable to the target's AI use cases, including any known compliance issues. This includes AI-specific laws such as the EU AI Act (noting its extraterritorial reach) as well as adjacent regulatory frameworks including privacy, intellectual property, employment, discrimination and consumer protection laws. Purchasers should also 'horizon scan' to identify any future regulatory obligations that may arise arising from the product roadmap or purchaser's intended.

Personnel

AI-related transactions may raise particular employee transfer and redundancy issues where a system is intended to automate previously manual processes. Purchasers should also consider the need to retain key technical personnel who manage, maintain and govern the target's use of AI, as their transfer will help preserve asset value and reduce post-completion risk.

Sale Documentation

Transaction documentation must be tailored to address the risks and information gaps identified during due diligence. From a purchaser's perspective, this may require warranties and indemnities covering matters such as intellectual property infringement, privacy liability, data security risk and regulatory liability.

Valuation

The proposed valuation should be assessed in light of the rapidly evolving nature of AI technology and the potential for obsolescence, market competition for similar products, any mitigation strategies for risks identified in due diligence, and whether the purchaser will achieve outright ownership of all parts of the AI system and its data.

Transition

Where post-completion migration is contemplated, purchasers must plan for the transfer of the AI system, its data, and associated know-how and personnel. Consideration should be given to the purchaser's hosting capability, the establishment of governance frameworks for the system's ongoing operation, the procurement of any third-party consents required for licensed components, and the projected duration of transition activities.

Talk to our team

Our Technology practice helps organisations close the gap between AI commitments and operational governance. Reach out to discuss your results.

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