GLI GLOBAL LEGAL INSIGHTS

AI, Machine Learning & Big Data

2021

Third Edition

Contributing Editors: **Matt Berkowitz & Emma Maconick**

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GLOBAL LEGAL INSIGHTS – AI, MACHINE LEARNING & BIG DATA

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Trends

Artificial intelligence and other forms of innovative technology will continue to shape our ways of life and all sectors of society. Be it health, education, finance, entertainment, or other economic sectors, there is no escaping the disruptive effects of technology. This said, technology is a remarkable enabler which, if implemented appropriately, will reward the efforts made in meeting the various challenges that it poses.

Conscious of the global shift towards a digital economy, Malta has, over the past years, embarked on a number of policies and strategies aimed at placing innovation and emerging technology at the centre of its developmental strategy.

The Malta Digital Innovation Authority (MDIA) was set up in 2018 as the public authority to promote and foster innovative technology by, amongst others, offering a certification system for innovative technology arrangements. This framework, which was originally limited to distributed ledger technology (DLT) and smart contracts, in line with the country's vision of a "Blockchain Island", is being widened to capture other forms of technology, including Artificial Intelligence (AI). Having a public authority that is focused entirely and specifically on infusing trust in technological solutions, through adequate regulation where required, is deemed critical in ensuring that technological solutions and developments will be embraced by what have always been highly regulated sectors, including health and financial services.

It is expected that, over the coming months, a number of schemes and policies aimed at fostering the development of technology and building upon other initiatives and policies that had already been launched, including Malta's AI and Digital strategy, will be launched.

The public policy focus on technology in Malta is supported by a network of other authorities and bodies, each having their own scope and purpose. These include MITA (the public agency tasked with assisting the Government in transforming technology innovations into real business solutions and to provide ICT infrastructure, systems and services to the Government), the Chamber of Commerce and Enterprise (the constituted body that represents businesses in Malta), TechMT (a joint initiative between the Government and the Chamber of Commerce, aimed at providing support to the technology industry and start-ups) and Malta Enterprise (the Government agency that supports businesses through grants and schemes).

Whereas digital policy and strategy seems to be high on Malta's political agenda, the enthusiastic pace has not been matched when it comes to adapting legal principles to the change in realities brought about by technology. Apart from a thorough legislative framework aimed at DLT, which is still to be enacted, there have been few legislative

projects that were not egged on by European Union directives or regulations. This said, it is also true that, over the past few years, the EU has legislated rather extensively, and is currently in the process of discussing or adopting laws, on most legal aspects surrounding technological developments; which begs the question whether any Member State will be allowed to legislate on aspects such as ethics and civil liability, any differently from other Member States.

As things currently stand in Malta (and subject to changes at an EU or domestic level over the coming months), there is scope for better and more effective legislation relating to, amongst others, the taking of security over IP assets, in particular computer programs, and liability for actions performed by autonomous machines with no, or limited, supervision. It is a well-known fact that traditional Civil law concepts are not the most adapt to deal with such matters. Similarly, intellectual property laws and data protection principles do not adequately address novel issues coming to the fore through automated generation of inventions or works of art and processing of data, whilst the immense value of big data sets used to train machines is not necessarily sufficiently protected by the trade secrets framework. On the flip side, current competition laws cannot be expected to cater adequately for anti-competitive practices through algorithmic collusion and monopolisation of data sets. Consequently, unless harmonisation of these aspects of law is achieved at EU level, we expect the Maltese legislator to have to provide adequate solutions in the not-so-distant future.

Finally, ethics and the adoption and application of ethical standards in AI development is likely to become more central to policy formation and regulation, in line with the stance taken at EU level.

Ownership/protection

The Intellectual Property law aspects relating to AI-generated works and technical solutions are amongst the most debated in the field of emerging technology.

The Maltese IP office (IPRD) has not issued any guidelines relating to the patentability of AI systems and AI-generated solutions. Neither does Maltese law specifically deal with such matters at this point in time.

The Maltese patent registration system is a registration-based system (as opposed to an examination-based one) and, consequently, it is expected that, if a patent is challenged on the basis of lack of inventive step and excluded subject matter, it would be the Maltese Courts or Patent Tribunal that would have to decide this issue. Guidance will be drawn from the European Patent Office (EPO) and precedents of the UK Courts, except where the two diverge, such as in the instance of "mixed-type inventions" (a term used by the EPO to refer to inventions containing technical and non-technical features).

In terms of inventions made through the assistance of AI solutions, it is expected that the defining point would be the extent to which the invention was made through an automated AI solution. Where the invention is generated by an AI system without human intervention, the invention would not be patentable until and unless the law would specify that ownership to the patent of the AI-generated invention would lie with the designer(s)/creator(s) of the AI system. Such specific laws regulating the ownership of IP generated entirely by automated systems, in particular AI, have to date not been adopted.

In terms of protection, AI, being in the most part code, is protected through copyright under the Copyright Act,[1] where a "computer program" is identified as falling within the definition of a "literary work". In the context of the Copyright Act, the definition of computer programs extends to such programs irrespective of the mode or form of their

expression, including those which are incorporated in hardware, interfaces which provide for the physical interconnection and interaction or the interoperability between elements of software and hardware and preparatory design material leading to the development of a computer program, provided that the nature of the preparatory design material is such that a computer program can result therefrom at a later stage.

In order to be eligible for copyright protection as a literary work, a computer program must have an original character and be written down, recorded, fixed or otherwise reduced to material form by an author. Whilst this would not seem to pose any difficulties to the AI code itself, the definition of "author" would seem to exclude the possibility of a fully automated AI-generated literary or artistic work to be copyrightable. This is due to the fact that an author is defined as "*the natural person or group of natural persons (including a body of persons) who created the work eligible for copyright*".[2] Naturally, the argument will focus on whether the automated AI was created specifically to produce the results that it did produce and whether, in such a case, the AI was merely a tool in the hands of the "author" and not the "author" itself.

In terms of copyright ownership, both with respect to the AI application itself, as well as any works generated by the AI which (based on the discussion set forth above) would qualify for copyright protection, it is pertinent to note that the Copyright Act defines the term "owner of copyright" as the "*author who is first owner, an assignee or an exclusive licensee, as the case may be of, of a copyright and in the case of a collective work, the first owner of copyright shall be the natural or legal person under whose initiative and direction the work has been created*".[3] Co-ownership would arise where two or more individuals author the literary or artistic work and, in the case of the AI being created by an employee in the course of his employment, the economic rights conferred by copyright shall be deemed to be transferred to the author's employer, subject to any agreement between the parties excluding or limiting such transfer.

An aspect of IP rights that is often overlooked in the academic debate is the all-important and economic effect of commercialising these rights which are deemed to be assets (albeit intangible) of high value. These assets may be used as a form of collateral to raise finance and allow for the further development of the same or other (complementary) assets. This is of particular relevance to start ups that, generally, would have little other means to finance their projects.

The granting of credit and collateral go hand in hand. Underlying most credit facilities supplied by lenders is some form of collateral or "security".

Malta has, over the past decade, maintained its position as a financial hub in the Mediterranean, and the market is very familiar with the traditional requests of lenders to have the credit secured by a general and/or special hypothec attaching to land or real estate. However, the discussion now is whether real estate security will continue to adequately serve Malta's economy and financial sector in a digital and non-traditional future.

To date, Maltese law has not been very accommodating when creating security over intellectual property. This is expected to change in line with Malta's ambitions for a digital economy.

This shift in the way security is granted is perfectly evidenced by the recently enacted Trademarks Act, 2019[4] and the Trademark Rules 2021[5] which finally cater, legislatively, for the granting of a trademark by way of collateral. In simple words, a bank can now lawfully accept a valid pledge over trademarks with much less legal uncertainty than was the case prior to these Trademark Rules 2021.

Further attention to this critical area of law, together with concomitant provisions, would allow for the taking of security over other forms of intellectual property assets, namely patents, designs and copyrights, the latter being central to AI.

Regulations/government intervention

In 2018, the Maltese Parliament adopted three acts regulating blockchain technology and cryptocurrencies: the Virtual Financial Assets Act; the Innovative Technology Arrangements and Services Act[6] (the ITAS); and the Malta Digital Innovation Authority Act[7] (the MDIAA). The MDIAA and ITAS, under the supervision of the MDIA, creates a framework for blockchain, DLT and smart contracts. This is now being extended to cover AI and other forms of innovative technology arrangements.

The MDIA's mission is to raise the levels of technology assurances within innovative technology arrangements. With the advent of blockchain, DLT and smart contracts, a new type of digital paradigm emerged, a paradigm that is decentralised, where there may not necessarily be an identifiable owner and developer behind the systems.

Therefore, one driving factor for a regulator in this space is to ensure that adequate levels of diligence have been applied and high levels of assurances have been implemented by the Innovative Technology Arrangement (ITA).

It is believed that this regulatory framework should be technology neutral and could easily be extended to other innovative technologies, in order to provide assurances to such technologies which, as disruptors, bring with them their own challenges and doubts.

The certification scheme applied by the MDIA is a voluntary one, where entities may seek to certify their ITA to provide comfort to potential consumers and investors whilst maintaining a degree of fairness and explicability.

Levels of technology assurances are ascertained through independent system audits conducted by MDIA-approved system auditors, thus heightening the integrity and trust of the framework. The MDIA vets and scrutinises system auditors and their various subject matter experts to ensure the levels of quality of audits undertaken are maintained and satisfied. Although the MDIA's regulatory framework is voluntary, it has been the case that other national authorities or ministries have mandated technology system audits through the MDIA's framework. This is a firm example of Malta's efforts to build and maintain a technological environment on the basis of quality assurance and integrity.

Only recently, the Malta Financial Services Authority (as the financial services regulator) has published a joint consultation paper with the MDIA promoting greater collaboration between the two authorities whereby the MDIA will be mandated with the regulation and certification of the technology aspects relating to applicants of Virtual Financial Assets services licences and licence holders. This healthy collaboration between regulators is especially beneficial in light of the various fintech-related obligations emanating from European legislation, such as the recommended DORA Regulation,[8] which will see a harmonisation of regulatory measures aimed at ensuring resilience of critical digital infrastructure that is central to the financial services sector.

Similar initiatives between the MDIA and other regulators should lead to building trust in technology wherever it intersects with regulated and critical sectors, including health, for instance.

It is apt to note that, through its recently published Draft Regulation for AI, the European Commission is proposing a similar approach towards certifying high risk AI applications through independent certifiers that are licensed and scrutinised by the Member States' appointed

regulatory bodies. Albeit mandated, as opposed to voluntary, the European Commission's proposal, as does Malta's framework, aims at embedding trust in the technology by ensuring that the necessary levels of care and diligence were applied in the design of the particular applications, such that the risks posed by the applications are mitigated.

Other start-up friendly technology certification and assurance schemes, such as sand boxes, are envisaged and expected to be launched in the near future.

In 2019, the Maltese government invited members of the public, industry and academia to provide feedback on its high-level policy document for public consultation: "Malta: Towards an AI Strategy". The objective for Malta is to gain a strategic competitive advantage in the global economy in the field of AI. To achieve this objective, the policy report presents three pillars to lay the foundations for Malta's AI strategy:

- The creation of a solid AI ecosystem based on investments, start-up support and innovation.
- Support for increased adoption of AI in the public sector.
- Support measures for the adoption of AI in the private sector.

The successful achievement of these objectives relies on three horizontal enablers that cut across the three aforementioned areas: education and workforce; legal and ethical framework; and infrastructure. The National AI strategy highlights the importance of and need for a legal and ethical framework to ensure that certain standards and norms are adhered to in the development of AI and to ultimately increase public trust in the technology. In this regard, a National Technology Ethics Committee will be set up under the MDIA to oversee the Ethical AI Framework, which was established by the Malta AI Task Force (Task Force), and its intersection across various policy initiatives, including investments in tools and continuous monitoring mechanisms, skills and capabilities, innovation ecosystem and regulatory mechanisms.

Discussions are ongoing in the Task Force as to whether it might be necessary to develop local regulations, and/or adopt and enforce international standards and laws, to sustain trust in how citizens are applying, using or being impacted by AI. The resulting strategy document made provision for the setting up of a Law Review Commission, which will have the mandate to carry out an analysis of local regulatory gaps and to assess whether local regulations are appropriate. That said, Malta will undoubtedly evaluate the final outcome of the EU's proposed legislation of the EU.

Implementation of AI/big data/machine learning into businesses

Through a Public-Private Partnership in 2019, the Government of Malta and the Malta Chamber of Commerce, Enterprise and Industry established Tech.mt, to promote Malta as a centre for innovative technologies and assist the Government in adopting and implementing incentives that are needed by the industry to flourish.

In juxtaposition with Tech.mt, Malta Enterprise is the country's economic development agency, tasked with attracting new foreign direct investment as well as facilitating the growth of existing operations. Malta Enterprise provides a wide range of incentives in order to ensure that the setting-up process and ongoing operations of an undertaking in Malta are as cost-effective as possible. Malta Enterprise is also the national contact point for the Enterprise Europe Network through which companies based in Malta can develop links with counterparts in other countries.

Civil liability

Malta currently has no specific legislation or legislative proposal on non-contractual liability for damage caused by AI or any other innovative technology field.

The default legal framework is the Civil Code, Chapter 16 of the laws of Malta (the Civil Code). In terms of fault-based liability, Article 1031 of the Civil Code 16 lays down the fundamental principle that every person is liable for the damage caused by his or her fault. Moreover, according to Article 1032 of the Civil Code, a person is deemed to be at fault if he or she does not use the prudence, diligence and attention of a *bonus paterfamilias*. Article 1033 of the Civil Code further provides that any person who, with or without intention to injure, voluntarily or through negligence, imprudence, or want of attention, is guilty of an act or omission constituting a breach of the duty imposed by law, is liable for any resulting damage.

Under Article 562 of the Code of Organisation and Civil Procedure, Chapter 12 of the laws of Malta (the COCP), and without prejudice to any other provision of the law, the burden of proof rests on the claimant. The evidence produced must be the best evidence possible otherwise the Court may disallow it. Where evidential presumptions apply, the burden of proof is reversed. For example, Article 627 *et seq*. COCP mentions documents requiring no proof of authenticity other than that which they bear on the face of them. Although the general rule is that it is up to the claimant to prove the negligence of the tortfeasor, the Courts of Malta (the Courts) have admitted certain facts giving rise to *prima facie* proof of negligence. The Courts held that the non-observance of regulations is *prima facie* proof of negligence.[9] In such a case it is for the defendant to rebut the presumption of fault by showing, for example, that he or she was compelled to act illegally.

In civil proceedings, the Courts make findings on the basis of a balance of probabilities. Article 1045 of the Civil Code provides for two types of damages, *damnum emergens* (direct loss, or damages for actual loss suffered) and *lucrum cessans* (loss of profits, or loss of future earnings). Damages also cover expenses incurred by the injured party and any loss in actual or future earnings arising from a permanent incapacity caused. In calculating loss of future earnings, the court must have regard to the circumstances of the case, and in particular, to the nature and degree of incapacity caused and to the condition of the injured party.[10] However, contributory negligence may lead to a reduction in the damages awarded. Thus, Article 1051 of the Civil Code stipulates that if the injured party has, by his or her own imprudence, negligence or want of attention contributed to or caused the damage, the Court, in assessing the amount of damages payable to him or her, reduces the amount of damages payable by the proportion of the victim's liability for the damage. Moral damages are provided for in specific legislation, such as the Enforcement of Intellectual Property Rights (Regulation) Act Chapter 488 of the laws of Malta and the Media and Defamation Act Chapter 579 of the laws of Malta.

Article 1049 of the Civil Code provides that:

> "*Where two or more persons have maliciously caused any damage, their liability to make good the damage shall be a joint and several liability. Where some of them have acted with malice and others without malice, the former shall be jointly and severally liable, and each of the latter shall only be liable for such part of the damage as they may have caused*."

As is the case with fault-based liability, there is no general provision on strict liability for things such as AI and software, but there are limited examples of such a liability in the Civil Code which, however, do not apply to AI.

The European Commission has already hinted at the application of the Product Liability Directive (the PL Directive) to damages caused by malfunctioning AI.

Due to the opacity, autonomy (whether partial or full), intricacy and unpredictability of AI, (the black box feature), it is easy to understand the difficulties in applying and enforcing

liability on AI-related claims. These difficulties are further emphasised by the difficulty in proving the existence of a product defect, the damage, and the causal link between the two. However, in most cases the legal challenges of AI are many a time materially not so different to other technologies and so Malta's approach to the civil liability of AI echoes the stance of the Committee on Legal Affairs presented in its report to the Commission with recommendations on civil liability regime for AI:

> "*If a person suffered harm caused by a defective AI-system, the Product Liability Directive (PLD) should remain the legal means to seek compensation from the producer. If the harm was caused by an interfering third person, the existing fault-based liability system in the Member States offer (in most cases) a sufficient level of protection. In line with better regulation principles of the Union, any necessary legislative adjustments with regard to producers and interfering third persons should be discussed in these respective legal frameworks*."

It is, however, important that the EU Commission addresses the obstacles arising out of the national rules on the burden of proof in the context of national liability laws for damage caused by the operation of AI applications, so that the difficulties in identifying the responsible person, the damage as well as the causal relationship are shifted away from the victim.

Discrimination and bias

Article 22(1) of the GDPR[11] states that "*The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her*". However, sub-article 2 of the same article goes on to state that the above shall not apply if the decision:

a) is necessary for concluding or performing, a contract between the data subject and a data controller;
b) is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or
c) is based on the data subject's explicit consent.

There is no further guidance issued by the Maltese Information and Data Protection Commissioner (IDPC) on the above provision which is of critical importance to AI. It is expected that the IDPC will follow the position adopted by the European Data Protection Board (EDPB) in its "Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679", despite matters such as a clear definition of what is to be considered "necessary" for the purposes of paragraph (a) and the "suitability" of national measures under paragraph (b) not being decisively tackled.

The challenges posed by "black boxes" with respect to the requirement to "explain" the automated decision under Articles 13 to 15 of the GDPR are likely to continue to lead to a fair amount of debate, where we have already seen a number of national data protection regulators distance themselves from the rigid interpretation of the EDPB, thus leading to the possibility of an unharmonised approach. The Maltese IDPC has, to date, not formally expressed its view on the application of these provisions of the GDPR in an AI/"black box" context.

These issues of fully automated processing and unexplained outcomes give further concern to discrimination and bias based on ethnicity or sex. Protection against discrimination is

a fundamental human right protected by the Constitution of Malta, in particular Article 45 thereof. A breach of this human right would arise if the Government, or a public body, using an AI system, were to discriminate against an individual as a result of bias embedded in the system.

The possibility of bias in the data used for the purposes of machine learning is deemed to be one of the greatest risks associated with AI which is countered by ensuring the use of accurate or "full" data when feeding into the algorithmic system. This, in turn, leads to the need, and additional complexity, of processing special categories of data revealing racial or ethnic origin under Article 9 of the GDPR.

Ethics

In line with the EU's focus on ethical AI, Malta has already pitched the idea of having its own legal and ethical AI framework, under the auspices of the MDIA.[12] This framework will be based on the following four objectives:

1) to build on a human-centric approach;
2) respect for all applicable laws and regulations, human rights, and democratic values;
3) to maximise the benefits of AI systems while preventing and minimising their risks; and
4) to align with emerging international standards and norms around ethical AI.

It is therefore being proposed by the Maltese Government that the Ethical AI Framework be based on the principles of human autonomy, prevention of harm, fairness, and explicability. The Framework implementation would moreover be supported by a national supervisory committee, the Technology Ethics Committee.

Conclusion

We are living in exciting times, whereby legislative developments worldwide are playing catch up to the technological evolutions. It is becoming even more apparent that any legislation that is based on the technological *status quo* will become outdated in no time at all. This is already evident, for instance, to some extent in the case of the GDPR,[13] the IP legislative framework and even more so in the traditional civil law principles of liability.

Much is happening at EU level to harmonise the position and approach towards tackling technological innovation and the challenges it brings to the fore. In the space afforded to them, Member States will each have their fair share in attempting to provide innovative and attractive legislative solutions to help attract the desired levels of development and innovation to their shores.

However, at the basis of the various efforts to foster innovation, there should lie the ultimate goal of ensuring an ethical and beneficial technology that will truly help every member of society make a quantum leap in his/her standard of living. With the right approach and intentions on the part of legislators and developers alike, and by instilling trust in the technology and its outcomes, we can see a brighter future in the standards of health, education and commerce and, ultimately the lives of generations to come.

* * *

Endnotes

1. Copyright Act, Chapter 415 of the laws of Malta.
2. *Ibid*.

3. *Ibid.* article 2.
4. Trademarks Act, Chapter 597 of the laws of Malta.
5. Trademarks Act, Legal 50 of 2021 Trademark Rules.
6. Innovative Technology Arrangement Act, Chapter 592 of the laws of Malta.
7. Malta Digital Innovation Act, Chapter 591 of the laws of Malta.
8. The Digital Operational Resilience Act, a regulation on digital operational resilience for the financial sector.
9. It is important to understand and appreciate that whilst the case law does not follow the law of precedent, they are nonetheless strongly relied on.
10. *Trevor Grech vs Lawrence Agius* (Rik.Ġur.1030/2013 GM).
11. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (the GDPR).
12. https://malta.ai/wp-content/uploads/2019/08/Malta_Towards_Ethical_and_Trustworthy_AI.pdf.
13. See Axel Voss's interview with the Financial Times, reported in the 3 March, 2021 edition of the Financial Times under the heading, "EU must overhaul flagship data protection laws, says 'father' of policy".

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Nikolai has previously formed part of the banking and finance team, focusing on various regulatory matters and financing transactions and recently completed an LL.M. at Trinity College, Dublin, focusing on International and European Business law and specialising in sustainable finance.

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