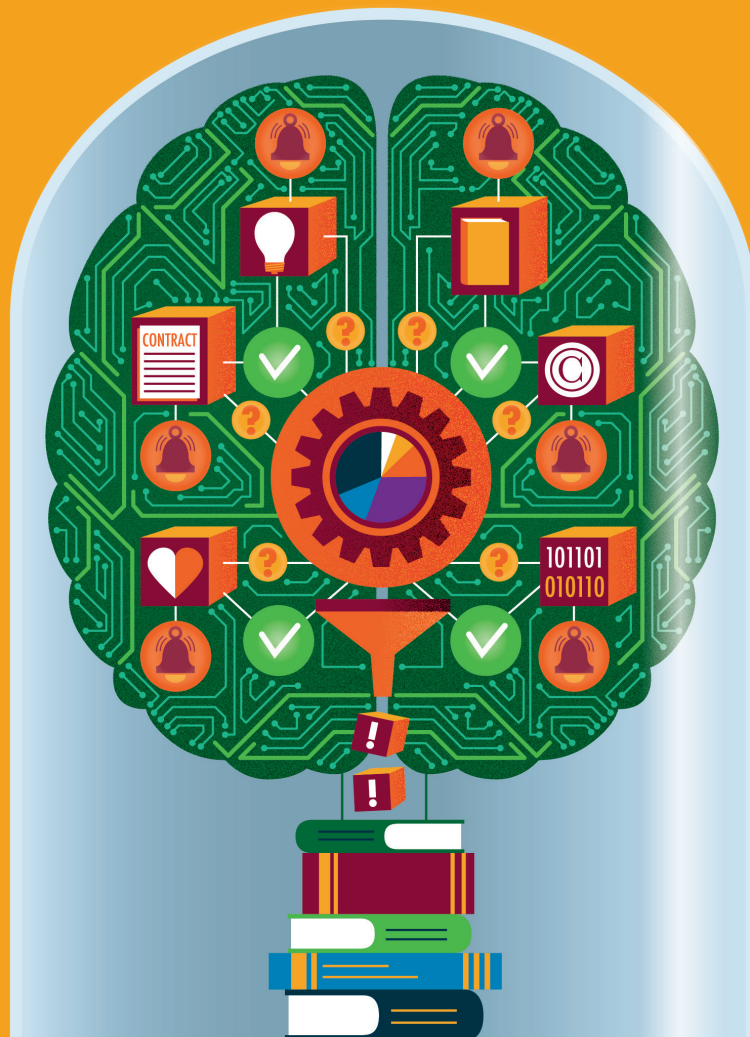


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Artificial Intelligence Review 2023



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Introduction

Welcome to our Artificial Intelligence (AI) Review for 2023. There is no doubt that we are living in unprecedented times when it comes to the advancement of technology generally, and AI in particular, which is a central part of the “fourth industrial revolution”. Indeed, since the launch of ChatGPT last year, AI has come to dominate our headlines. More than just a “meme”, however, the use and development of AI is of increasingly central importance to many of our clients’ commercial objectives.

Accordingly, anticipatory regulatory compliance and managing the risk of enforcement activities are likely to be key for our clients adopting AI. This is crucial, especially now that the EU has adopted its AI Act, a landmark achievement as the first AI regulation in the world.

While much remains uncertain in the world of AI governance at present, we take this opportunity to review recent trends and emerging themes in AI regulation in the EU and the wider world.

In this edition of the AI Review, we focus on:

- The EU’s recently-adopted AI Act. While the final text has not been published, the EU reached a high-level agreement on the core elements of the regulation in early December 2023, which is expected to come fully online in 2026. We also consider some related EU developments, such as model contractual clauses for the procurement of AI by public organisations
- We look at the emerging and contrasting regulatory approaches in the USA and UK
- Rowena Fitzgerald from our Fintech team reviews the likely impact of the AI Act on Fintech AI providers
- James Gallagher and Aisling Morrough review the WHO’s views on AI regulation
- In terms of the interaction between AI and intellectual property law, Gerard Kelly addresses the challenging question of whether a work generated entirely by an AI system should be eligible for copyright in the light of recent case law from the USA

We have included a link to our [first](#) and [second](#) editions of our AI Review which contain information on the AI Act, useful notes on contracting with AI, AI from a data protection perspective, and information on the Artificial Intelligence Liability Directive.



Brian McElligott
Partner,
Head of AI
+353 86 150 4771
brianmcelligott@mhc.ie



Oisín Tobin
Partner,
Privacy & Data Protection
+353 86 021 5362
otobin@mhc.ie



Gerard Kelly
Partner,
Head of Intellectual Property
+353 86 820 8066
gkelly@mhc.ie



James Gallagher
Partner,
Product Regulatory & Liability
+353 86 068 9361
jamesgallagher@mhc.ie

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2023, AI and the Law



Brian McElligott

Partner,

Head of AI

brianmcelligott@mhc.ie

As we advance into 2024, the shaping of artificial intelligence (AI) regulations and laws is beginning to take centre stage in much legal discourse. This is presenting certain challenges to legislators, and to businesses as they continue to adapt to new governance landscapes. The AI arena is evolving rapidly, coloured by distinct regulatory philosophies in the European Union, the United Kingdom, China, and the United States, representing a fragmented and complex global regulatory landscape. As ever, there is tension between the direction of travel of the regulators and the entrepreneurs seeking to bring their technology to the global masses.

As we near the end of 2023 however, from a regulatory perspective at least, all eyes are on the AI Act; what will be the details of the agreed text and what will the regulation of large language models (LLMs) and foundation models look like? Based on recent UK announcements, it's clear that they are now looking more closely at also regulating AI sooner rather than later. The experience of the EU AI Act project will likely influence theirs and the US AI regulatory journey to a great extent.

Key developments in 2023

2023 has been action-packed from an AI regulation perspective. There has been a long list of developments in this regard, not least including:

- Agreement on the AI Act
- The UK AI White Paper
- The EU Parliament's draft of the AI Act, with the first mention of foundation models and generative AI
- The progression of AI standards
- The Trilogue negotiations
- The US Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence
- The London AI Safety Summit
- Major industry statements calling for a pause on the development of foundation models
- Calls for more and tougher regulation of AI, and
- Calls for less and no regulation of AI for fear of over-regulation, regulating too soon and stifling innovation

UK AI White Paper

The UK published its White Paper on AI – a pro-innovation approach to AI regulation in March. Like other territories grappling with regulating AI, they pointed out the link between trustworthy AI and the need for some form of regulation.

“Public trust in AI will be undermined unless these risks, and wider concerns about the potential for bias and discrimination, are addressed. By building trust, we can accelerate the adoption of AI across the UK to maximise the economic and social benefits that the technology can deliver, while attracting investment and stimulating the creation of high-skilled AI jobs.”

To marry a regulatory approach founded on innovation, they specifically shied away from legislation and opted instead for a softer principle-based framework. However, in a curious turn of events in late November 2023, the House of Lords in the UK published the Artificial Intelligence (Regulation) Bill, which appears to be a framework for an AI law based on internationally recognised trustworthy AI principles. It will be interesting to see how tension will play out in 2024 between the UK government's preference for a 'light-touch', pro-innovation approach to regulation, and the Lords' apparent direct path to AI legislation.

The US Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence

While the EU was trying to finalise the AI Act under the Trilogue negotiations, President Joe Biden issued an Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence to advance a coordinated, federal government-wide approach to the safe and responsible development of AI. The Order reflects the Biden administration's desire to make AI more secure and to cement US leadership in global AI policy. The fact that it was published only days before the London AI Safety Summit undermined to an extent the global safe AI platform the UK was constructing for itself.

Standards setting

These major developments on the AI regulatory front seem to be the only stories with the clout to puncture the ever-present wall of AI lobbying reported in the media.

These lobbying efforts persist in an effort to highlight the perils of regulating AI at this early stage on one side, and the weakness of the regulatory proposals on the other. Little or no attention is given to the equally important issue of AI standards. Indeed, in the eyes of companies facing compliance with anticipated laws like the EU AI Act, the standards setting work being done by CEN / CENELEC on drafting the standards following the standardisation request from the European Commission, is more important. Companies will ultimately rely on these standards to help them operationalise trustworthy AI in compliance with the EU AI Act.

Conclusion

2023 will principally be remembered as the year of foundation models and generative AI as well as agreement on the AI Act. It will also be remembered for the significant advances in AI governance, AI safety and responsible AI. This is demonstrated by the international race in 2023 by governments to set out their respective stalls on AI regulation.

As we face into 2024, however, it is becoming apparent that while these governments have distinct AI regulatory philosophies, they do appear to be coalescing around more concrete proposals for regulating AI as opposed to steadfastly clinging to an exclusive light-touch approach to regulation. Could it be that the EU got this one right from the start? Bear in mind that the EU AI legislation project first kicked off in June 2018 with the first convening of the High Level Expert Group that would go on to produce the policy recommendations that would form the basis for the AI Act. That five-year head start may prove to be crucial in 2024.

As a final note, stakeholders are urged not to forget about AI standards and the anticipated CEN / CENELEC publication possibly as early as the end of 2024. 2023 was all about the technology, 2024 will likely focus on regulating the technology.

Political Agreement on AI Act



Brian McElligott

Partner,

Head of AI

brianmcelligott@mhc.ie



After lengthy and intensive negotiations, the European Parliament and the Council of the European Union eventually reached political agreement on the European Commission's proposal for a regulation on artificial intelligence – the AI Act on Friday, 8 December 2023. Touted as the world's first legislative regulation of AI, we expect that the final agreed text of the AI Act will not be published for a number of months yet. However, we take this opportunity to identify and reflect on some of the key points which were agreed on during the Trilogue.

Prohibited AI

The co-legislators agreed that certain applications of AI would be prohibited in the EU. These include:

- Biometric categorisation systems that use sensitive characteristics
- Untargeted scraping of facial images from the internet or CCTV footage to create facial recognition databases, such as Clearview AI
- Emotion recognition in the workplace and educational institutions
- Social scoring based on social behaviour or personal characteristics, and
- AI used to exploit the vulnerabilities of people

However, there will be a series of narrow exceptions for the use of biometric identification systems in publicly accessible spaces for law enforcement purposes, subject to prior judicial authorisation. Similar exceptions were originally provided for in the Commission's proposal for an AI Act but were removed by the Parliament in June this year. Their reintroduction implies a genuine need for law enforcement to use these systems, albeit in limited circumstances.

High-risk AI

One of the major additions of the Parliament's amendments to the Commission's original proposal was the introduction of a fundamental rights impact assessment for high-risk AI systems. At the end of the Trilogue, the Parliamentarians were successful in ensuring that this remained part of the AI Act. In addition, EU citizens will have the right to launch complaints about AI systems and receive explanations about decisions based on high-risk AI systems that impact their rights. However, the precise parameters and contours of these rights are yet to be established.

General-purpose AI

In addition to transparency requirements initially proposed by the Parliament this summer, general-purpose AI systems “with systemic risk” may rely on codes of conduct to comply with the AI Act before harmonised EU standards are adopted. Those standards will concern the obligations to:

- Conduct model evaluations
- Assess and prevent systemic risks
- Conduct adversarial testing
- Report to the Commission on serious incidents
- Ensure cybersecurity, and
- Report on their energy efficiency

While the information currently available regarding these measures is scant, at a high level they appear similar but less stringent than those initially proposed by the Parliament earlier this year.

Conclusion

According to the Parliament, non-compliance with the proposed AI Act can lead to fines ranging from €7.5 million or 1.5 % of turnover to €35 million or 7% of global turnover, depending on the infringement and size of the company. To put these figures in context, the maximum fines under the GDPR are €20 million or 4% of worldwide turnover. If the fines handed down by national supervisory authorities under the GDPR are anything to go by, fines under the AI Act could be even more significant.



Regulation of Artificial Intelligence in the UK and US



Brian McElligott

Partner,

Head of AI

brianmcelligott@mhc.ie

Artificial Intelligence and how best to regulate this transformative technology has been front and centre for global policy makers throughout 2023. They are struggling with balancing the desire to invest in and promote this transformative technology and at the same time mitigate and manage any perceived serious harms.

In this article, we look specifically at the proposed regulatory approaches being considered by the US and UK and where we might land in 2024.

Introduction

Artificial Intelligence (AI) has dominated headlines throughout 2023, promising transformative advancements across all industries and sectors. The media frenzy and hype had begun to calm towards the end of 2023, but are likely to be invigorated again in 2024 as the technology continues to evolve. While the main narrative is one of how this technology is to be embraced, there are also huge concerns about the significant adverse consequences which may result.

On the one hand, AI is hailed as an era-defining technology, capable of forcefully driving economic growth and transforming the world we live in. On the other, the associated risks are painted as potentially catastrophic. As a result, policymakers have been grappling with how exactly this technology should be governed – an undertaking which is proving to be remarkably challenging.

The regulatory ask

Legislators, regulators, and policymakers are seeking to develop legal frameworks which maximize AI's benefits to society whilst also mitigating against its perceived worst risks.

Since 2018, the EU has been preparing a path for the regulation of AI, involving many teams of experts from a very broad range of backgrounds and skillsets. It is now leading the way with agreement on the AI Act finally reached on 8th December 2023. The AI Act aims to adopt a risk-based approach that increases compliance obligations depending on the specific use case.

In stark contrast, the United Kingdom has committed to abstaining from implementing new legislation for the time being, relying instead on existing regulations with an AI-specific overlay. The United States, meanwhile, has pushed for national AI standards through executive orders but has also adopted some AI-specific rules at the state level, both through comprehensive privacy legislation and for specific AI-related use cases. As a result, these three territories are putting forward three different approaches to the regulation of AI.

Diverging approaches

The EU AI Act has the potential to be the world’s first comprehensive regulation of this emerging technology. This could result in setting the global standard for the regulation of AI akin to how the EU’s General Data Protection Regulation (GDPR) did for the regulation of data protection. For more on the current EU position see [2023, AI and the Law](#).

The UK has adopted a very different approach. It plans to refrain from regulating artificial intelligence for now. The UK’s First Minister for AI and Intellectual Property, Viscount Jonathon Camrose stated that there would be no law on AI “in the short term” as the UK government is concerned that heavy-handed regulation could hamper innovation.

As a result, the UK government wants to adopt a pro-innovative approach in respect to this technology.

The approach being adopted by the US is one distributed across federal agencies, with many adapting to AI without the creation of new legal authorities. However, the US approach, although lacking substance for now, is somewhat conceptually aligned with the EU’s approach:

- Implementing a risk-based methodology
- Aligned key principles of trustworthy AI, and
- Understanding the importance of recognised international standards

US v UK:

It is interesting to look at aspects of the US and UK proposals side by side.

US approach	UK approach
<p>Legislative based regime</p> <p>Unlike the UK, the US is proposing some AI-specific legislation.</p> <p>President Biden signed a new executive order placing guardrails on the use and development of AI, including provisions that will make large AI models like ChatGPT subject to oversight before they are released.</p> <p>As a result, any company building an AI model that could pose a risk to national security must disclose it to the government and share data about what is being done to secure it in accordance with federal standards to be developed by the National Institute of Standards and Technology.</p> <p>The order also establishes the creation of guidelines and standards for the use of AI by the government.</p>	<p>Principle-based regime</p> <p>The UK’s White Paper opts to regulate AI by adopting a principle-based regime. It outlines five broad cross-sectoral principles:</p> <ol style="list-style-type: none"> 1. Safety, security and robustness: This mandates that AI systems should function safely, meaning regulators may need to introduce measures for regulated entities to ensure their AI systems are technically secure 2. Transparency and explainability: AI systems should be appropriately transparent and explainable, meaning parties should have access to the decision-making processes of an AI system 3. Fairness: AI systems should not undermine the rights of individuals and organisations, discriminate unfairly or create unfair outcomes

US approach

In addition, during 2023, approximately 190 bills related to AI were introduced by US state and local governments. These bills encompassed a wide range of AI-related topics, including:

- The oversight of specific AI applications
- The establishment of frameworks to govern AI
- The creation of inventories to monitor the usage of AI at the state level, and
- The formation of task forces and committees dedicated to addressing the implementation of AI in government

AI Commission

The US introduced a draft bill, The National AI Commission Act, on 20 June 2023 to create a commission focused on the regulation of AI.

The commission would be a bipartisan group of legislators, members of industry and civil society. The bill proposes 12 members, 3 each from the Democratic and Republican members of the House and the Senate. An additional 8 members will be chosen by the President.

The commission would be tasked with considering how AI regulation might:

- Mitigate risks and harms of AI, and
- Protect the United States’ “leadership in artificial intelligence innovation and the opportunities such innovation may bring.”

Balancing between these two considerations would mean developing a comprehensive regulatory approach that acknowledges the importance of addressing potential drawbacks while harnessing the transformative power of AI.

The commission would also review the different ways that existing agencies regulate or otherwise conduct oversight of AI.

UK approach

4. **Accountability and governance:** AI systems should be subject to governance measures ensuring effective oversight with clear lines of accountability across the AI life cycle
5. **Contestability and redress:** The White Paper proposes that, where appropriate, impacted third parties and actors in the AI life cycle should be able to contest an AI decision or outcome that is harmful or creates a material risk

No new regulators

Unlike the EU and US approach, the UK Government does not propose to introduce a new AI regulator. Instead, regulatory responsibility will be shared amongst existing regulators rather than establishing a new and bespoke regulator:

- Medicines and Healthcare products Regulatory Agency (MHRA)
- The Equality and Human Rights Commission
- The Information Commissioner’s Office (ICO), and
- The Competition and Markets Authority

US approach

Bespoke AI specific guidance

US Vice President Kamala Harris recently announced that the Office of Management and Budget is releasing a new draft policy on ‘Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence’. This guidance aims to:

- Establish AI governance structures in federal agencies
- Advance responsible AI innovation
- Increase transparency
- Protect federal workers, and
- Manage risks from government uses of AI

This proposed guidance builds on the other US AI-specific guidance documents, namely, the AI Bill of Rights and the AI Risk Management Framework.

This specific guidance document proposes to mandate a set of minimum evaluation, monitoring and risk mitigation practices derived from the above-named frameworks and tailoring them to the context of the federal government.

UK approach

Vertical sector-specific guidance

The UK government considers that a contextual-based approach allows AI-related risks to be identified and assessed at the application level. The benefits of this are that it will arguably enable a targeted and nuanced response to risk because an assessment can be made by the appropriate regulator of the actual impact.

As a result, this approach is focusing on guidance for specific sectors and risks.

The Bank of England, Prudential Regulation Authority and Financial Conduct Authority have published a paper addressing AI in financial services.

Where does that leave us?

As is evident from this comparison, the question is not whether AI will be regulated but when and to what extent? Between the US, EU and UK, there are multiple approaches to AI regulation, from a soft principle-based approach right through to full-on horizontal laws. 2024 will likely be the year when some of these approaches crystallise and we will start to see how some of these guides / regulations might work in practice. The challenge for AI creators and users is how to deploy the technology against such a diverse regulatory landscape. It seems to us that a well-structured approach to AI governance is a good place to begin to create and roll out an AI compliance project.

Next steps?

AI is already reshaping our society and world economy. With key sectors and industries set to be transformed, governments need to make hard calls and take decisive action so that industry stakeholders can ascertain the legal framework to which they are subject.

However, while the legal landscape is currently uncertain, organisations should keep a vigilant eye on the ongoing debates and government updates to ensure that any AI-focused projects, deployments etc are developed with the latest legislative course of action borne in mind.

AI Model Contractual Clauses & Procurement



Brian McElligott

*Partner,
Head of AI*

brianmcelligott@mhc.ie



James Gallagher

*Partner, Product
Regulatory & Liability*

jamesgallagher@mhc.ie

Ensuring contractual certainty in agreements related to innovative technologies with complex and changing regulatory requirements is a challenge for in-house counsel and their external advisers. Contracting for software medical devices currently regulated under the EU Medical Device Regulation (MDR), and soon to be regulated under an EU AI Act, is a good example. Model clauses from a credible source can often be particularly helpful.

Against this backdrop, a multi-stakeholder group within the European Commission has published a draft proposal for standard contractual clauses (SCCs) for the procurement of AI by public organisations. One of the template SCCs that has been developed deals specifically with high-risk AI systems, which are a major focus of the requirements in the proposed AI Act due to be passed by the end of this year. These SCCs will be particularly relevant to digital health stakeholders operating in the EU because the majority of software medical devices incorporating AI are expected to be regulated as high-risk AI systems under the AI Act. The SCCs are intended for use by public organisations but are a useful reference for developers of medical device software incorporating AI who are reviewing and drafting their own contractual provisions.

What do they do?

The goal with the SCCs is to make provision for compliance with the EU AI Act in existing agreements. It is hoped that the SCCs will also ensure that the respective rights and responsibilities of the parties to agreements involving AI systems are clear. They are not standalone sets of template contractual provisions, however. They are drafted in such a way that they can be attached as a schedule to an existing agreement. Given the variety among AI-systems, the SCCs also contain a number of Annexes relating to system-specific features that can be populated in accordance with the system the subject of the agreement. These include:

- Descriptions of the system itself and its intended purpose (Annex A)
- Data sets used for training of the system (Annex B), and
- Measures taken to meet transparency requirements (Annex E)

The SCCs are largely based on the requirements of high-risk AI systems under the proposed AI Act. They essentially mimic the terms of the AI Act regarding certain core definitions, such as the “intended purpose”, “reasonably foreseeable misuse” and “substantial modification” of an AI system.

They also address the key requirements for AI systems, such as:

- The implementation of a risk management system
- The development of technical documentation and instructions for use, maintaining adequate records, and
- The requirement that AI systems are sufficiently transparent to enable the user to reasonably understand the system's functioning

The obligations of high-risk AI system providers under the AI Act are also provided for in the SCCs. These include the obligation that a quality management system is implemented, and that the AI system undergoes a conformity assessment.

Rights to use data sets

The SCCs aim to ensure clarity regarding the rights of parties in the use of data when training and operating high-risk AI systems. For instance, in the case of public organisations employing these clauses, all rights, including intellectual property rights, pertaining to the datasets of public organisations should be vested in those bodies. The supplier of an AI system is prohibited from utilising these datasets for purposes beyond those explicitly permitted by the public organisation. However, suppliers retain entitlement to all these rights concerning their own datasets but are obliged to grant public organisations a non-exclusive right to use these datasets for the purpose of employing the AI system. The SCCs also propose the inclusion of provisions for public organisations and suppliers to indemnify each other in case of any infringement of their intellectual property, privacy, and related rights concerning their datasets.

What's missing?

As well as the AI Act, AI systems tend to be regulated under various EU regulatory frameworks. The SCCs are specifically addressed to AI systems as regulated under the AI Act only, however.

In other words, the SCCs do not incorporate requirements and obligations that may arise under other EU frameworks such as the GDPR or the MDR.

It is also common for public procurement contracts to incorporate certain more extensive and onerous terms and impose additional obligations on technology suppliers than would otherwise be seen in traditional commercial contracts. For example, additional obligations around sustainability requirements and human rights protections are increasingly common. The European Parliament's proposed revisions to the text of the AI Act were marked by their addition of human rights due diligence and other obligations. For the time being, however, these types of obligations have not been provided for in the SCCs.

Conclusion

Digital health stakeholders should review the SCCs and consider them as a useful benchmark for assessing and possibly updating their own internal contractual provisions dealing with AI systems in the EU. They do not amount to a template for a "complete agreement" solution, but they do offer important insights when it comes to recognising and providing for sophisticated EU regulatory requirements as part of contracting processes.

The versions currently available are still in draft form and have been published with a view to collecting initial feedback from stakeholders. Digital health stakeholders can also read them and consider whether there are any unique features of AI systems that are also regulated as medical devices in the EU that could or should be provided for in a final version of the SCCs.



Irish Parliamentary Report on Workplace AI



Brian McElligott

Partner,

Head of AI

brianmcelligott@mhc.ie

Ireland's Joint Oireachtas Committee on Enterprise, Trade and Employment published its [Report on Artificial Intelligence in the Workplace](#) in October 2023. The report is based on two public sessions the Committee held with industrial relations representatives, academics and lawyers. The Committee held meetings with representatives from the Financial Services Union (FSU) and the Irish Congress of Trade Unions (ICTU), academics from the University of Limerick and Trinity College Dublin and a senior barrister at the Bar of Ireland. We outline the contents of the Report and consider its implications for the use and regulation of workplace AI in Ireland.

Workplace surveillance and monitoring

The Committee's engagement with the FSU largely concerned the role of AI systems in workplace surveillance and monitoring. AI-based workplace surveillance and monitoring is not limited to monitoring employees for criminal activity; it also involves monitoring all aspects of the performance or management of their contract of employment. This may extend to the use of webcams, keystroke logging and even emotion-detecting badges. The FSU emphasised the need for an evolving and ongoing regulatory response to these privacy-invasive technologies.

In particular, the FSU advocated for a governmental report on the issue of workplace surveillance which should address the potential for employee involvement in the decisions to adopt such technologies.

The AI Act and workers' rights

The EU's AI Act is a world-leading proposal to govern the use of AI systems across the EU. However, at present, the draft provides limited guidance as to how AI should be used in the workplace. While its use in the workplace is categorised as 'high-risk', there is nonetheless little specific guidance in the AI Act regarding crucial employment issues such as recruitment, performance management and dismissal. As a result, the ICTU has expressed concern at the fact that the use of AI in these scenarios will only be restricted if it poses a significant risk to workers' safety or fundamental rights. It is not clear when a risk is considered high enough to be significant or how to forecast the risk in future scenarios.

ICTU and academics raised a number of other concerns from a labour law and fundamental rights perspective, such as the impact of workplace AI on persons with a disability, downward pressure on wages and the need for collective bargaining.

The role of collective bargaining was also emphasised by the FSU to highlight how worker involvement through co-governance could be a way to manage the introduction of workplace AI systems. This would be particularly relevant to those jobs which are at serious risk of automation or where upskilling was needed most.

Recommendations

The Committee made four recommendations as follows:

- A Joint Oireachtas Committee on AI should be established to examine AI in general
- The Committee also recommended 'comprehensive discussions and regulatory measures' that both safeguard workers' rights and employer interests
- Noting the potential for the abuse of workplace AI, the Committee recommended the development of transparency measures to ensure that the risks associated with such abuse are minimised

Finally, the Committee recommended that the Minister for Enterprise, Trade and Employment seek more inclusive representation from trade unions and other bodies in his GovTech consultancy forum board.

Conclusion

The observations and recommendations of the Committee are high-level and do not address, in detail, many of the concerns of unions and academics. They do, however, give the Oireachtas licence to further discussions, conferences and reports on the thorny issue of workplace AI. Indeed, we are likely to see significant growth in this space over the next few years in advance of the expected coming into force of the AI Act in 2026.



Fintech AI in EU Regulators Sights



Brian McElligott

Partner,

Head of AI

brianmcelligott@mhc.ie



Rowena Fitzgerald

Partner,

Co-Head of Financial Regulation

rfitzgerald@mhc.ie

Providers of AI systems used to evaluate the creditworthiness of consumers or establish their credit score will be subject to an exacting new compliance regime under the EU AI Act. Our Artificial Intelligence and Fintech teams review the scope of the new regulatory regime and its likely impact on Fintech AI providers which was agreed on 8 December 2023.

The “move fast and break things” mantra, once the loudest guest at tech events from California’s Silicon Valley to Dublin’s Silicon Docks is ever closer to being shown the exit. It would seem that EU regulators are relishing their role as the polite but stern doorman.

The EU is on a roll these last few years and has been dialling up the regulatory pressure on tech companies of all shapes and sizes. We’ve had updated medical device legislation, the Digital Services Act and the Digital Markets Act, to name a few. Next up is the prominent and far-reaching AI Act which was agreed on 8 December 2023. It will regulate the intended use of artificial intelligence systems placed on the market in the EU, and Fintech AI is firmly in its sights.

The plan

The AI Act will likely be a poster child for Europe’s “Digital Decade” but will be greeted more like a sullen and demanding relative by those pushing the boundaries of service offerings in Fintech.

Although it’s easy to grumble, there’s no arguing with the EU’s goal for the AI Act to deliver trustworthy AI to all citizens of the EU. The more people that trust the technology, the higher the adoption rates, and ultimately all players in the AI ecosystem will prosper... that’s the plan at least.

Implications for fintechs

Fintech companies delivering AI systems intended to be used to evaluate the creditworthiness of natural persons or establish their credit score will fall into the category called “high-risk” AI systems. These will be subject to a significant conformity assessment regime based on seven separate requirements.

Scope for conformity assessment

These requirements include:

- Incepting and maintaining a risk management system for the regulated AI system
- Data governance and management practices involving bias monitoring
- Creating and maintaining appropriate technical documentation for assessment by notified bodies, and
- Creating and maintaining appropriate documentation for users

The nature of the proposed conformity regime bears some comparison to the EU CE marking system. Some of the obligations are even as detailed as one might expect to see in the regulation of medical devices.

Benefits for all?

Credit scoring technology is not new, but it is becoming more sophisticated and to an extent, if managed appropriately, can have significant benefits for all parties in the credit market. Providers can crunch the numbers in a more efficient and reliable manner. With superior technology they can deliver more nuanced solutions to the market, which can improve the chances of consumers accessing lines of credit appropriate to them.

Comment

The EU is sensitive to the public's misgivings regarding the use of AI technology for the purposes of assessing creditworthiness and determining credit scores. To soothe this trepidation, it will soon deploy far reaching laws that will compel Fintech AI providers to subject their products to conformity testing and compliance akin to CE marking. This will be a massive step change for providers of that technology. Now is the time to learn about your potential exposure to these changes and invest time and resources to understand what you will need to do to update your product processes for compliance in due course.



WHO's View on AI Regulation



Brian McElligott

*Partner,
Head of AI*

brianmcelligott@mhc.ie



James Gallagher

*Partner, Product
Regulatory & Liability*

jamesgallagher@mhc.ie



Aisling Morrough

*Senior Associate, Product
Regulatory & Liability*

amorrough@mhc.ie

The World Health Organisation has published a document setting out what it views as the key regulatory considerations on AI for health. We highlight and explain some of the key points.

Artificial intelligence (AI) is already having a significant impact on the way that healthcare services are designed and delivered across the globe. However, ongoing debate and discussion relating to issues like data integrity and security, transparency, risk management and bias that are relevant to the use of AI more generally can become particularly nuanced when looking at AI deployed in a healthcare context. A recently published World Health Organisation (WHO) publication therefore aims to outline key healthcare-specific principles that governments and regulatory authorities can follow to develop new guidance or adapt existing guidance on AI at national or regional levels.

The WHO publication focusses on a number of key areas, for example:

Documentation and transparency

Documenting all aspects of AI systems – throughout the AI system's lifecycle – is an essential way of establishing trust, guarding against bias and minimising risks which may be associated with a given AI system. Effective documentation of AI in healthcare should include, at a minimum, the identification of the purpose of the particular AI system in its clinical context.

Beyond that, the level or degree of documentation required should be determined on a risk-based approach. In certain circumstances it may even be appropriate to publish a version of the training data set on which the AI system is developed for external, independent validation.

Risk management

The EU's AI Act embodies a risk-based approach to the regulation of AI, which is traditionally associated with product safety legislation. The WHO's regulatory guidelines are aligned with this style of approach. In addition to documentation, a central feature of a risk-based approach to regulating AI involves monitoring and managing the development and use of an AI system. An integral part of such a risk-management approach is the need to determine the level of scrutiny required based on the risk-level or categorisation of the AI system.

Some AI systems will be riskier than others and vice versa. In general, all AI systems should be subject to a system of pre- and post-market monitoring. This is done through data collection and evaluation, with a view to minimising known risks and adapting to emerging or unforeseen risks going forward. These processes should be more intense for high-risk AI systems and correspondingly less intense in scenarios involving low-risk AI systems.

Data Privacy

Given the vast amounts of data involved in the development and use of many AI systems, privacy and data protection will remain a significant focus area for governments and regulators. This is particularly the case where personal data will be necessary for the effective operation of the AI system. Not only must data be of a certain quality to ensure that AI in healthcare really works, but it must also be secure and respect the fundamental rights of data subjects.

While transparency contributes to privacy, the WHO believes that developers of AI for healthcare should consider privacy and data protection norms when developing and deploying their AI systems. This might involve the adoption of a separate and distinct compliance programme in relation to privacy and data protection.

Conclusion

The WHO's views on the regulation of AI in healthcare are not groundbreaking. Rather, they largely emphasise and give greater force to the emerging views of regulators worldwide. This suggests that the WHO endorses the views of national and regional regulators, while emphasising, in particular, the themes of transparency, risk and privacy. These should predominate regulatory approaches to AI in healthcare. Notably, these themes are perhaps best exhibited in the EU's GDPR and AI Act and so one might consider that the WHO is quietly endorsing the EU's approach so that other regulators can follow suit.



Artificial Intelligence and the Built Environment



Brian McElligott

Partner,

Head of AI

brianmcelligott@mhc.ie

Ambient intelligence is the name given to creating an environment that is sensitive, responsive, and adaptive to the presence of individuals. It involves embedding various types of smart devices, sensors, and technologies into the surrounding built environment to enhance and optimise processes in real time. Examples range from in-door climate control to public transport services. Powerful algorithms and artificial intelligence (AI) are integrated into those devices, sensors, and systems to actively manage those environments in a smart, intuitive, and energy efficient manner.

Developers and investors are now looking at the potential for deploying AI in decisions in real estate to improve efficiency, accuracy, and decision-making. Uses include predictive analytics where AI algorithms analyse large volumes of historical data, including:

- Property prices
- Rental rates
- Economic indicators, and
- Demographic trends

This data is used to identify patterns, forecast future trends, and predict investment opportunities. It helps investors make informed decisions about property acquisition, rental rates, and potential returns on investment. Sentiment analysis can be used to analyse vast amounts of unstructured data from social media, news articles, and online forums to gauge market sentiment and public opinions about real estate markets.

This analysis helps investors understand market dynamics, public perception, and potential risks or opportunities.

Currently, these data scraping and analytics practices are subject to data privacy (GDPR), intellectual property, and internet laws which regulate the collection and processing of these data sets. The EU also now has imminent plans to regulate the intended use of the algorithms and AI systems being used to crunch this data.

The EU Artificial Intelligence Act (AI Act) will regulate certain uses of AI systems in PropTech deemed as “high-risk” AI, including uses in lifts and critical infrastructure like road and rail traffic and where that AI is used as a safety component in the management and operation of the supply of water, gas, heating, and electricity. These high-risk AI systems will be subject to a significant conformity assessment regime based on seven separate requirements.

These requirements include:

- Incepting and maintaining a risk management system for the regulated AI system
- Data governance and management practices involving bias monitoring
- Creating and maintaining appropriate technical documentation for assessment by notified bodies, and
- Creating and maintaining appropriate documentation for users

The nature of the proposed conformity regime bears some comparison to the EU CE marking system. Some of the obligations are even as detailed as one might expect to see in the regulation of medical devices.

Conclusion

Technology providers operating in the PropTech and Built Environment spaces need to recognise and understand the potential for some uses of their technology to fall into the high-risk artificial intelligence category under the AI Act. If they do, the implications for their design, engineering and manufacturing processes are significant and will likely result in changes to those processes in order to comply with the conformity assessment regime required under the AI Act. One route to compliance in due course could be operationalising common standards but we await the drafting of those standards. The AI Act was agreed on 8 December 2023 and will likely be signed into law in early 2024 and be effective two years later.



Human After All

US Court Rejects Copyright Application for “Creativity Machine” AI



Gerard Kelly
Partner,
Intellectual Property
gkelly@mhc.ie



Should a work “generated entirely by an artificial system absent of human involvement.... be eligible for copyright”? The US District Court does not think so having recently issued a decision denying Stephen Thaler’s appeal regarding his application to register his computer system “Creativity Machine” as the author of a copyright work in the US. We explain the grounds of Mr Thaler’s appeal of the US Copyright Office’s refusal to register “Creativity Machine” as copyright author for lack of human authorship.

Stephen Thaler claimed his computer system “Creativity Machine” generated a piece of visual art of its own accord. The US Copyright Office (USCO) had initially rejected Mr Thaler’s application, as it failed the requirement of human authorship to register copyright in the US. The US District Court for the District of Columbia upheld this decision. The court’s decision,¹ which we analyse below, reflects the fact that US law does not recognise that works solely generated by artificial intelligence systems should be eligible for copyright protection.

Background

In his application to register certain artworks, Mr Thaler noted that the works had been “autonomously created by a computer algorithm running on a machine”. In a change of tack, he later sought to claim the copyright of the work himself as a “work-for-hire” to the owner of the Creativity Machine.

Mr Thaler’s various Requests for Reconsideration, in which he contended that AI ownership should be recognised if all other criteria are met and the copyright ownership belongs to the AI owner, were rejected by the USCO. Mr Thaler appealed the decisions of the USCO to the District Court.

Judge Beryl A. Howell confirmed that the main point of contention was whether a work created by an artificial intelligence system without human involvement can be protected by copyright. Judge Howell explained that Mr Thaler spent a substantial proportion of his submission arguing about the level of his human involvement such as prompting the AI generating software. However, the judge noted that judicial review must be based on the original facts. The judge also referenced the fact that Mr Thaler’s application for copyright was submitted on the basis that the works in question were autonomously created.

Can a work autonomously generated by an AI system claim copyright?

Judge Howell confirmed that while copyright is designed to adapt with the times, human input into creativity is an essential condition of copyright. Referring to a US Supreme Court decision, *Burrow-Giles Lithographic Co. v Sarony*,² the judge explained that a camera only reproduces a scene after the photographer’s “mental conception”, which takes the form of various decisions.

In this ruling, concerning a photograph of Oscar Wilde, the Supreme Court found that the photograph was “the product of [the photographer’s] intellectual invention”, the end product relied on the human not the camera.

The US Copyright Act 1976³ provides that: “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”

Therefore, to be eligible for copyright protection, the copyright work must be fixed by an author. “Author” is not defined in the 1976 Act, so the judge relied on the Merriam Webster unabridged dictionary meaning of “Author” as “one that is the source of some form of intellectual or creative work”. It followed, the judge reasoned, that an author must then have the capacity for intellectual or creative work.

As in the *Sarony* decision, Judge Howell submitted that the US Supreme Court has consistently confirmed the human authorship requirement. Copyright was found in various cases involving celestial beings, such as *Urantia Found v Kristen Maaherra*.⁴ In this case, the *Urantia Book* was deemed copyrightable because humans were involved in selecting and arranging the revelations from the celestial beings. Another case referenced by the judge was *Kelley v Chicago Park District*, wherein the US court refused to recognise copyright in a garden devoid of human involvement.

The court also pointed to the famous “monkey selfie case” entitled *Naruto v Slater*. In this case, PETA sued a photographer on behalf of Naruto the monkey. Considering the question of who the US Copyright Act was designed to protect, the Ninth Circuit said only humans had standing. This was because the terms used to describe who has rights, including “widow” and “children”, indicated that the Act was designed to protect humans. As a result of these decisions, the monkey was not entitled to sue under the US Copyright Act.

Mr Thaler was unable to identify any case where the converse was true.

Work-for-hire

Judge Howell pointed out that Mr Thaler’s argument that the work was a work-for-hire failed because common law requires that a property right must exist in the first place. Moreover, both definitions under the 1976 Act require human involvement.

Takeaway

Whilst copyright registration occurs automatically in Europe, we might see a dispute in the European courts where an individual claims copyright infringement in an AI generated work. Under EU and Irish law there is a requirement that a work be original. In *Infopaq International A/S v Danske Dagblades Forening*⁵ the EU’s highest court confirmed that originality is defined as the “author’s own intellectual creation”. Therefore, an equivalent human requirement is implied in EU and Ireland.

Earlier this year, the USCO issued a decision rejecting a copyright application to register ‘Zarya of the Dawn’, a graphic novel that includes images created with the assistance of Midjourney, a generative AI system. The topic of artificial intelligence and ownership, as we discussed in our article “No Ghost in the Machine”, will be debated for the foreseeable future. However, given our legislative requirements it is unlikely that copyright will be granted to works generated solely by AI in the EU.

It may be the case that the courts will determine the question of how much input is necessary to qualify the user of an AI system as an author of a generated work. Until that point, generative AI companies should be mindful of the Thaler decision and the originality requirement when deciding who will be the author of a work.

1. Civil Action No. 22-1564 (BAH)

2. *Burrow-Giles Lithographic Co. v. Sarony* 111 U.S. 53, 58 (1884)

3. Title 17 of the US Code

4. 114 F.3d 955, 958–59

5. Case C-5/08 [2009]

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Key contacts



Brian McElligott

Partner,
Head of AI
+353 86 150 4771
brianmcelligott@mhc.ie



Oisín Tobin

Partner,
Privacy & Data Protection
+353 86 021 5362
otobin@mhc.ie



Gerard Kelly

Partner,
Head of Intellectual Property
+353 86 820 8066
gkelly@mhc.ie



James Gallagher

Partner,
Product Regulatory & Liability
+353 86 068 9361
jamesgallagher@mhc.ie

Dublin

London

New York

San Francisco

