

AI, Machine Learning & Big Data 2024

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Portugal

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Trends

Introduction

For the purposes of clarity, it should be noted that there is not a uniform definition of Artificial Intelligence (“AI”) in Portugal or in the EU (with the exception of the definition of AI set forth in the recently approved Regulation laying down harmonised rules on AI – the Artificial Intelligence Act (“AIA”). As such, any reference to AI should be understood as referring only to machine learning, including deep-learning AI, while the terms “AI” or “algorithm” or “AI system” are used interchangeably.

When identifying the main AI trends in Portugal, it is useful to distinguish between AI providers – entities that design, develop and provide AI solutions – and AI deployers – entities using AI solutions either internally in their organisations or to provide products and services to their end users.

AI providers market

The AI providers market is soaring in Portugal, with startups and SMEs offering a wide variety of AI-based solutions ranging from virtual assistants and translation tools to biometrics and anti-fraud solutions.

An example showcasing the dynamic of the market is the Center for Responsible AI Consortium, funded in the context of the national Recovery and Resilience Mechanism, created by the Portuguese Government as part of the Next Generation EU package of the European Council. The Center for Responsible AI counts with the participation of 25 Portuguese entities, including two unicorns and 10 startups specialising in AI (Unbabel, Feedzai, Sword Health, Automaise, Emotai, NeuralShift, Priberam, Visor.ai, YData and YooniK), eight research centres from Lisbon, Porto and Coimbra (Champalimaud Foundation, Centre for Informatics and Systems of the University of Coimbra, Faculty of Engineering – University of Porto, Fraunhofer Portugal AICOS, the *Instituto de Engenharia de Sistemas e Computadores – Investigação e Desenvolvimento*, *Instituto Superior Técnico* (“IST”), IST-ID/Institute for Systems and Robotics and IT), one law firm (Vieira de Almeida – VdA), and five industry leaders from the life sciences, tourism and retail sectors (BIAL, *Centro Hospitalar de São João*, Luz Saúde, Grupo Pestana and SONAE). The Consortium’s goal is to position Portugal as a global leader in Responsible AI technologies, principles and regulation by creating 21 new AI products, standards and recommendations for regulation and best practices in Responsible AI and 132 postgraduate academic degrees, among other initiatives.

AI deployers market

According to a 2021 Eurostat report (https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Use_of_artificial_intelligence_in_enterprises#Enterprises_using_artificial_intelligence_technologies), 8% of enterprises in the EU with 10 or more employees and self-employed persons utilised various AI applications, including text mining, image recognition and natural language processing. When comparing the adoption of at least one AI technology among EU countries, Denmark led with the highest share at 24%, followed by Portugal at 17% and Finland at 16%. This initial qualitative analysis of AI adoption in 2021 highlighted the significance and potential of the Portuguese AI industry.

An increasing number of entities from different sectors are acquiring either off-the-shelf or tailor-made AI solutions. The following sectors have been the most active in adopting AI systems: (i) life sciences; (ii) banking and finance; (iii) insurance; (iv) public sector; (v) retail; and (vi) telecommunications. Regardless of the sector and the varying levels of complexity of the AI systems acquired, there has been a marked increase in the use of the following solutions: (i) recruitment and HR management; (ii) digital marketing; (iii) biometric data; (iv) virtual assistants; (v) natural language models and machine translation; and (vi) generative AI.

Main legal challenges

The main legal challenges for AI providers or AI deployers can be grouped in the following categories:

- **Data:** Definition of a robust data strategy by clearly identifying the personal and non-personal data used in the various stages of the AI lifecycle, ensuring its quality for data-mining purposes, its sources and processing purposes, as well as the data protection relationships with different stakeholders. In addition to these considerations, AI stakeholders subject to the AIA will also be required to comply with the data governance obligations stipulated.
- **Fundamental rights:** Identification and mitigation of the risks related to fundamental rights of individuals, as well as any risks related to bias and errors in datasets, and concomitantly to discriminatory outputs of AI systems.
- **Safety and (cyber)security:** Identification, implementation, monitoring and updating of organisational and technical security measures to ensure the robustness, safety and security of the AI system throughout its lifecycle, while ensuring compliance with any sector-specific cybersecurity and safety rules or international standards. In addition to these considerations, AI stakeholders subject to the AIA will also be required to comply with the robustness, cybersecurity and human oversight obligations stipulated.
- **Intellectual property:** Clear management of the intellectual property rights relating to the results generated by AI, as well as matters related to trade secrets and other proprietary information used to train and fine-tune the system, while ensuring compliance with transparency obligations.
- **Transparency:** Provision of clear information to stakeholders in conformity with the consumer protection and data protection frameworks and with best business practices, including based on the reporting obligations of the AIA, to ensure future-proof governance. It should be noted in this regard that compliance with the transparency obligation does not require disclosure of the AI algorithm or of any proprietary information of the AI provider or user. In addition to these considerations, AI stakeholders subject to the AIA will also be required to comply with the transparency obligations including the right to explanation, where applicable.

- **Accountability:** Ensuring there are technical, organisational and contractual mechanisms in place to promote the auditability of AI outputs and that the responsibility of the various stakeholders for any damages caused due to errors and biases of the AI system is clearly identified contractually, including the obligation to provide evidence and relevant information to support or refute claims. These obligations should already reflect some of the provisions of the upcoming EU Directive on liability for defective products (the Directive of the European Parliament and of the Council on liability for defective products – “**PLD II**”), which was formally approved by the European Parliament on 12 March 2024, and the AI Liability Directive (Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to AI).
- **Compliance:** Ensuring future-proof compliance by proactively fulfilling the AIA obligations, depending on the role of the entity, as well as specific obligations related to the intended application of AI or the sector in which the AI provider or user operates. The complexity of the compliance obligations will increase following the entry into force of the AIA.

Government initiatives

In 2019, the Portuguese Government published its AI Portugal 2030 Strategy (available in English at: <https://www.portugal.gov.pt/>) with the aims of boosting innovation and investment in the AI ecosystem, attracting and retaining talent and promoting the adoption of AI across the country’s various industries. These objectives translate into an Action Plan consisting of seven lines of action: (i) inclusion and education: disseminating generalist knowledge on AI; (ii) qualification and specialisation; (iii) thematic areas for research and innovation in European and international networks; (iv) public administration and its modernisation; (v) specific areas of specialisation in Portugal with international impact; (vi) new developments and supporting areas in European and international networks; and (vii) facing societal challenges brought by AI: ethics and safety. These objectives reflect to a large extent the EU Declaration of Cooperation on Artificial Intelligence of 2018, which Portugal has signed, as well as the OECD AI principles.

In 2023, the revision of the national AI strategy as well as the design of the national Data and Web 3.0 strategies begun. INCoDe.2030 – the joint initiative of the essential governmental areas – is responsible for aligning the different strategies, with a focus on people, public and private organisations and the third sector, and ensuring the involvement of all players.

Additionally, with a view to boosting innovation in emerging technologies, and as part of the Portuguese Government’s Action Plan for Digital Transition (available in English at: https://portugaldigital.gov.pt/wp-content/uploads/2022/01/Portugal_Action_Plan_for_Digital_Transition.pdf), the Portuguese Government published Resolution 29/2020 of the Council of Ministers, establishing the general principles for the preparation of the legislative framework for Technological Free Zones (*Zonas Livres Tecnológicas* – “**ZLTs**”), and Decree-Law 67/2021, setting forth the legal framework for establishing ZLTs. ZLTs are real-life geographical areas set up as regulatory sandboxes aimed at promoting and facilitating research, development and testing activities related to innovative technologies, products and services, including AI, across all industries.

Furthermore, in 2022, the Agency for Administrative Modernisation (“**AMA**” – *Agência para a Modernização Administrativa*) published its Guide to ethical, transparent and responsible

Artificial Intelligence in the Public Administration (available only in Portuguese at: <https://bussola.gov.pt/Guias%20Prticos/Guia%20para%20a%20Intelig%C3%Aancia%20Artificial%20na%20Administra%C3%A7%C3%A3o%20P%C3%ABlica.pdf>). This Guide provides an overview of the main characteristics of AI, the AI market and the Portuguese ecosystem, presenting a series of principles that must be followed in the use of AI systems by Public Administration.

Notwithstanding the above, since the entry into force of the AIA is pending, there have been no developments regarding its implementation in Portugal, particularly as to which national authority will be tasked with monitoring compliance with the AIA obligations, what will be the structure of the regulatory sandboxes, or whether the real-world testing contemplated in the AIA will operate as part of the ZLT initiatives. Nonetheless, developments are expected during 2024 (please refer to the Regulations/government intervention section below).

Ownership/protection

In Portugal, there are no intellectual property provisions specifically referring to AI.

As such, the Portuguese Code of Copyright and Related Rights and the Industrial Property Code, transposing the EU intellectual property framework into national law, are applicable. Intellectual property concerns arise at different stages of the AI lifecycle, while the complexity of the AI ecosystem and the involvement of various stakeholders in the AI value chain exacerbate the intellectual property-related issues.

A brief overview of the main intellectual property concerns is presented below:

Datasets

Datasets used for AI training, validation, verification and implementation may be safeguarded by *sui generis* database rights, as outlined in Directive 96/9/EC and transposed into national law by Decree 122/2000. The contents of these datasets can vary from copyrighted material to trade secrets and other confidential information. Typically, any conflicts that arise are addressed through contractual agreements among the involved parties.

Moreover, the issue of utilising copyrighted materials for AI training has become more pronounced with the growing use of Generative AI. In this regard, it is important to highlight that Decree-Law 47/2003, implementing the Directive on Copyright in the Digital Single Market (Directive (“DCM” – Directive (EU) 2019/790), came into effect on 4 July 2023, with certain modifications becoming effective on 1 January 2024.

This Decree-Law introduces a provision for data mining, aligning with the DCM, allowing reproductions and extractions of lawfully accessible works for text and data mining purposes. Rightsholders have the choice to opt-out or properly reserve their rights to data mining. Furthermore, reproductions and extractions made under this exception must be upheld at an appropriate security level and retained as long as necessary for text and data mining activities.

Moreover, in the AIA (based on the text formally approved by the European Parliament on 13 March 2023) there is a general obligation throughout the AI value chain to respect intellectual property rights or other proprietary information used for the AI system training and testing. Moreover, a provision imposes an obligation on General Purpose AI providers of such models to draw up and publicly release a sufficiently detailed summary of the content used for training the general-purpose model to developers of systems. This obligation, once introduced, will impact the training of Generative AI, aligning with the provisions related to intellectual property obligations for foundation model providers.

AI model

The base and trained models' source code are protected by copyright under the EU framework, which includes the EU Software Directive transposed into national law by Decree Law 252/94. Resolving challenges related to identifying the owner of the intellectual property of the AI model, especially the trained model when trained on deployer's data, is typically addressed through licensing agreements between the parties.

Moreover, it is worth noting that while not impossible, obtaining a patent for a software-based AI is more challenging within the European patent framework.

Lastly, although not extensively discussed in Portugal, there is some discourse surrounding the potential intellectual property protection of works generated by AI.

Antitrust/competition laws

Competition in Portugal is primarily regulated by the Portuguese Competition Act (Law No. 19/2012), with the broader framework of EU competition law and jurisprudence from the CJEU also applicable due to Portugal's membership in the EU. Additionally, the Portuguese Competition Authority ("PCA") has bolstered its investigative tools to identify potential breaches involving AI-driven tools. The PCA has formed a digital sector task force, conducted surveys on monitoring and pricing algorithms, and released the "Defence of Competition in the Digital Sector in Portugal" policy brief in 2022. Moreover, during 2023 the PCA tried to raise awareness around the possible competition risks associated with the use of AI and especially Generative AI systems.

The increasing reliance on algorithms for pricing decisions raises concerns, and the PCA is actively addressing potential algorithmic collusion and other antitrust issues, stressing that companies bear responsibility for the algorithms they employ.

What happens when machines collude?

The ever-increasing number of commercial (namely pricing) decisions that are delegated to algorithms raises serious concerns from a competition law perspective. As a result from the 2022 Policy Brief, the PCA is well aware that *"algorithms may be used to implement price fixing and alignment strategies between competitors, thus harming consumers. Monitoring algorithms may be instrumental in price collusion agreements by making it easier to detect price deviations. More sophisticated algorithms may be able to reach collusive equilibria without direct human intervention"*.

Automated price surveillance and definition is particularly worrisome if pricing algorithms are coupled with the capabilities of reinforcement learning algorithms, as this creates a high likelihood of algorithmic collusion. Indeed, as EU Commissioner Margrethe Vestager stressed, *"it is a hypothesis that not all algorithms will have been to law school. So maybe there is a few out there who may get the idea that they should collude with another algorithm who haven't been to law school either"*. Ranking, search, recommendation and nudging algorithms also seem to be on the PCA's radar.

In the 2019 Issues Paper, the PCA warned that companies are responsible for the algorithms they use, and that the use of these tools to coordinate market strategies is not compatible with competition law. Additionally, in the 2022 Policy Brief, the PCA hinted that it will be paying attention to situations where competitors use common algorithms to coordinate prices or where there is some conscious and deliberate consensus between competitors on

price strategies. It is worth highlighting that, according to a survey carried out by the PCA on the online retail of electronic products and household appliances sector, in 2019, 21% of market operators acknowledged using price monitoring algorithms and 12% confirmed using price definition algorithms for some of their products. These percentages are likely to have increased in recent years.

However, there is an ongoing debate on whether Articles 101(1) TFEU and 9(1) of the Portuguese Competition Act, as currently interpreted by the CJEU and the Portuguese Courts, are suited to tackle algorithm activity without revamping, *inter alia*, the notion of contact/communication between competitors.

What antitrust concerns arise from big data?

Similar questions may arise with the increasingly widespread use of Big Data. In its *Competition Policy Priorities for 2023*, the PCA highlighted the creation of its digital team, who will continue to investigate evidence of abuse and collusion in digital markets in close cooperation with other European authorities (in particular to ensure the interplay between competition enforcement and the Digital Markets Act).

Indeed, in May 2022, the PCA opened proceedings against Google for possible abuse of dominance in online advertising, in the form of an alleged self-preferencing practice. Following this investigation, the European Commission relieved the PCA of its competence in July 2022 and decided to investigate Google's conduct on its own initiative.

All in all, certain aspects of the current antitrust framework may need to be modernised to better address the challenges posed by the digital economy. Significant efforts have already been developed at the EU-level with the adoption of the Digital Markets Act, which aims at establishing an *ex ante* regulatory system ensuring contestability and fairness in the digital economy; yet further guidance is needed on how competition law should be applied in these scenarios.

Board of directors/governance

Directors are required to comply with any laws applicable to their company and its articles of association, but Article 64 of the Portuguese Companies Code further tasks them with the duty to act diligently and always in accordance with the company and shareholders' best interests, as well as those of relevant stakeholders (e.g. employees, clients and creditors).

Directors must be available, technically qualified and knowledgeable of the company's business if they are to perform their duties properly. In addition, they are bound by a duty of care and a duty of loyalty.

Consequently, if AI can be used as a tool to help directors make complex decisions, the intuitive reasoning would be: if you have technology that can assist you, you should use it. However, to do so legally may prove more complicated. If directors are to act diligently and make well-informed decisions, they should be able to avail themselves of any information and tools, including any AI algorithm, at their disposal. As such, it is only logical that the duty of care will sooner or later have directors relying on AI as part of their decision-making process.

We already saw that directors have fundamental duties, such as the duties of care and of loyalty. According to the "business judgment rule", directors' liability is excluded if they can prove that they were duly informed, had no personal interest in the matter and that the decisions taken were based on a solid business rationale.

This begs two questions: if there were an AI algorithm or a robot that could assist directors in their decision-making, would they be required to use it or not? And could directors be held liable for a decision made by an AI algorithm or robot?

The outright answer to the first question is no, directors are not required to use AI in their decision-making. They are completely free to use such tools, as they can help them immensely in their tasks, but it would be farfetched to say that if directors choose not to use them, they are not reasonably informed and have failed to comply with any procedural rule.

Other than in exceptional situations related to certain types of activity and obligations undertaken by corporate bodies, it would go against the business judgment rule if courts could discretionarily determine what it means to be reasonably informed in every specific case. Until AI programs are consolidated and become common tools in making a good decision, directors will not be required to use them in their decision-making process.

When answering the second question, we need to bear in mind that directors are bound by duties of care and are expected to act diligently and in accordance with the corporate interest, which means they must select, feed instructions to and monitor any AI systems used. Directors will therefore answer for system decisions as if they were their own. In other words, directors' liability is not excluded but rather increased: they will answer for both their own decisions and conduct *vis-à-vis* the company, as well as any decisions made by the autonomous governance system. Moreover, if directors were to allow the algorithms to decide alone, they would be further accountable for not having taken the necessary precautions, even if they only ratified an algorithmic decision. Nonetheless, it is important to keep in mind that AI is going to become increasingly autonomous and is already starting to be considered indispensable for good governance, which means that companies will slowly have to evolve from *ex post* to *ex ante* control.

These are still complex issues, but it is likely that the duties of care and diligence will require directors to rely on AI in their decision-making in the near future.

This means that, when making decisions, it is crucially important to obtain quality information at the appropriate time. Not all information is equal, since directors only need whatever information is relevant for their decision-making. Quality of information has been at the top of the agenda during the last decade, as shown by EU Commission Recommendation 2014/208/EC on the quality of corporate governance information (“comply or explain”). This framework brought to reality some of the questions that lawyers have asked about AI and its implications for corporate law and governance.

For instance, is corporate law ready to deal with the implications that AI may have on a company's decision-making process? Can AI replace a director? The answer to that question is clearly no.

Portuguese law does not allow AI, algorithms or robots to be appointed as directors, since they lack the legal personality or capacity required by law.

We are aware that the possibility of granting legal personality to certain categories of robots and programs is being widely discussed, including in EU institutions, but right now that is not the case.

As such, because AI still lacks the legal personality and capacity which only natural or legal persons (represented by natural persons, in the case of corporate acts) have, it cannot have any right or obligation within companies. In terms of decision-making, AI can only support the directors, not perform their duties for them, which means that delegation to AI and robots is also out of the question.

Although many AI technologies can reach a decision based on their interpretation of data, keeping a record of how they reached that decision can be more problematic.

Mere administrative tasks, such as assessing a call for a general meeting or analysing reports and annual accounts, are undoubtedly faster and more efficiently performed by robots than human beings. In fact, robots will be able to manage more information and produce more reliable results in far less time, freeing directors to focus on other activities. AI systems can also arguably assist with a large part of directors' resolutions, namely where prognosis and judgment are needed.

Relying on AI to enhance the board's decision-making and data analysis capabilities may thus soon be more commonplace. And who knows, we may yet see the appointment of AI as directors in our lifetime; but right now, we should look to AI as a tool to make better decisions, while keeping an eye towards a future where we can start to think about AI in the role of autonomous director, because sooner or later we will have to address this issue and consider how it is going to affect corporate law as we know it.

To tackle the legal challenges identified (please refer to the Trends section above), both AI providers and AI deployers are gradually starting to develop their AI Governance as an incremental piece of their AI Strategy. Companies are starting by appointing an internal, ideally multidisciplinary team, dedicated on AI, offering legal and technical training to their teams and carrying out AI Legal Impact Assessments ("AILIAs"). Although the criteria assessed should be adapted to the specific AI application and the user's sector, most AILIAs assess compliance and possible risks of the AI system in relation to the following aspects:

- AI system classification and application/sector.
- Technical robustness, safety and security of the system.
- Data governance, including personal and non-personal data.
- Transparency.
- Fundamental rights, including due to biases and non-discrimination.
- Accountability.
- System sustainability.

This legal assessment helps companies identify the possible risks related to a specific AI system and application, as well as potential technical, organisational and contractual ways of mitigating these risks. It is important to note that this is not a one-off exercise. Companies should periodically monitor and update their data governance and AI governance to ensure that their AI systems remain future-proof.

Considering the upcoming AIA, this assessment can be a starting point for entities developing or implementing AI systems to identify risks and prioritise their risk mitigation measures.

Regulations/government intervention

Without prejudice to the various initiatives mentioned herein, there are currently no AI-specific laws in Portugal.

However, any EU-wide horizontal and sector-specific regulatory or policy initiatives would have a direct impact on the national AI market, starting with the AIA which, once published in the EU Official Journal, will be directly applicable in Portugal. The AIA provides for possible carve-outs in its implementation in Member States (e.g. regulatory sandboxes, designated national authorities for notification and supervision etc.). Therefore, following its entry into force, it is expected that an implementing act will be adopted in Portugal.

Moreover, once the Directive on PLD II is published in the EU Official Journal and the AI Liability Directive negotiations are finalised, the Portuguese legislator will have two years after their entry into force to transpose them into national law.

While a comprehensive overview of all national and EU laws applicable to AI systems in Portugal exceeds the scope of this analysis, we aim to provide an overview of the primary horizontal frameworks relevant to the subject matter discussed in this chapter.

- Data Governance Act, which is applicable from September 2023.
- The Data Act, which entered into force 11 January 2024.
- Common European Data Spaces initiative, with the proposal for a European Health Data Space already having been published and the proposal for European Financial Data Spaces expected during 2024.

These initiatives, which make up the three pillars of the EU Data Strategy, aim, amongst others, to ensure that there is high-quality data available to foster innovation and training, and the validation and verification of AI systems in the EU.

Moreover, in relation to cybersecurity, and more specifically the use of AI in essential sectors, we highlight the importance of the NIS 2 Directive, which should be transposed into national law by 17 October 2024.

Notwithstanding the above, the current panoply of European and national consumer protection legislation, the privacy and data protection framework, particularly the GDPR provisions pertaining to automated decision-making, the intellectual property (please refer to the Ownership/protection section above) and cybersecurity laws, as well as sector-specific laws depending on the AI application and the sector of the AI user, will all apply to AI systems operating in Portugal.



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