

Artificial intelligence, work, power imbalance and democracy – why co-determination is essential

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Abstract

Artificial intelligence (AI) has growing impact on working life. Risks of job losses, discrimination, data protection violations, surveillance pressure and health hazards require legal regulation. But which legal framework is necessary to effectively protect the rights and interests of workers?

Workplace co-determination can help to minimize risks and reap the benefits of AI systems. It is therefore a problem that collective, co-determined solutions do not seem to be considered in the drafting of the AI Act at EU level. This does not live up to the aspirations currently expressed in the European Pillar of Social Rights, and some member states go decidedly further, too. Fair AI requires involvement and empowerment of the workforce. Otherwise, the intended "human-centered" approach to AI in the world of work remains just a phrase.

Keyword: Artificial intelligence; Algorithmic management; Works council; Co-determination in the digital transformation; Collective regulation; Data protection; Democracy at workplace

1. Introduction.

Moral and social consequences of "intelligent" technical systems have been debated for some time – be it in art with the motif of technology taking on a life of its own, in social science research on technology and the future, or in the media. Now the point seems to be getting closer where further increases in computing power and digital networking will lead

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to profound changes in society as a whole and in the world of work in particular. As is so often the case, light and shadow are being drawn. The light: machines take over unpleasant work and enable creative development and more autonomy at the workplace. Efficiency gains allow working hours to be reduced, new jobs are being created, access to the labour market gets easier. The shadows: Artificial intelligence eliminates jobs and takes over command, human needs count for little, precarious, monotone work is created. Comprehensive personality profiles increase pressure on workers, working behaviour is monitored around the clock and the boundaries between work and private life disappear. There are signs in both directions. Which way the pendulum will swing also depends on political decisions and the balance of power in society. Good work, through and with digitalisation, remains a question of power, but under new conditions. Collectives – works councils and trade unions – are the crucial factor to redress the balance of power in companies in favour of the workers' side, they democratize work and AI.

With reference to AI legislation in Germany and the EU, this text makes clear why collectives must be considered in the European legislative processes and why they need new competences in order to be able to exercise their important function of democratisation also in the introduction and application of AI. In the first chapter, we point out which areas of the labour environment are effected by AI and what changes this entails for employees. Next, the need for regulatory action is discussed, noting that in some member states, collective actors often play an important role in protecting workers' rights. This is illustrated by the case of Germany, where AI was an important issue in the last revision of the Works Constitution Act (BetrVG). In contrast, a look at the EU shows that workplace co-determination has not played a significant role in the AI Act, as will become clear in Chapter 4, although co-determination is firmly anchored in the fundamental treaties. Finally, the summary raises the question of a procedural approach specifically for the regulation of AI at EU level.

2. AI in the world of work.

Big Data is already making its way into the world of work, albeit to varying degrees in different sectors and regions of the world. One of the areas in focus is logistics – courier services, including digital giants such as Amazon, Uber or Deliveroo, as well as start-ups already worth billions, such as the Berlin-based company Gorillas, rely on algorithmic control. But AI-supported systems are also finding their way into offices and production¹ – here, the efficiency of employees is illuminated in detail by workplace analytics, humans and machines are increasingly interacting in production, and algorithms are used in human resources management for ranking, clustering and even decision-making.² It goes hand in

¹ De Stefano V., Taes S., *Algorithmic management and collective bargaining* in *Foresight Brief*, ETUI, #10 – May 2021, 2021, <https://www.etui.org/publications/algorithmic-management-and-collective-bargaining>, accessed 3 Oct. 2021.

² Schubert C., Hütt M., *Economy-on-demand and the fairness of algorithms*, in *European Labour Law Journal*, 10, 1, 2019, 3 and ff.

hand with permanent monitoring and evaluation of workers' behaviour. Employees become transparent – for example, where every visit to the toilet by warehouse workers affects their own score, or every interaction with colleagues is being evaluated. Obviously, the digitalised production mode has consequences for labour relations.

Although HR management based on automated decision-making (ADM) frequently leads to staff cuts, its primary focus is on more efficient use of the workforce. With the aim of optimally deploying the skills of employees in the interests of the company, it is by no means only finding its way into the "new economy", but also into more traditional industries. It is being used with different objectives:³ Human resource analytics working with *descriptive* ADM make it possible to refine data that has already been collected, such as employee absences, staff turnover and performance feedback. The software makes this data available for complex evaluations, but also to observe communication behaviour within the company and uncover internal social networks. *Predictive* ADM relies on such present-related data to describe future developments. It is also used in the recruitment process to allow a forecast of which applicant is best suitable for a specific position or with which emotionality an employee reacts to challenges or who has intentions of changing jobs. *Prescriptive* ADM, on the other hand, generates solutions for specific questions and thus provides automated decisions. An example of this is the logistics software that controls the delivery of parcels.

The use of such systems becomes a (supposed) competitive advantage that a company must make use of at the threat of losing its existence. Work intensification is therefore the logical goal of automatic personnel management, and the small-scale evaluation of performance is the means, which in turn requires permanent data collection. Although hierarchies often disappear and are less visible, workers increasingly become objects of the algorithm. The character of work as a social process recedes into the background, processes of alienation are fostered: The app appears as the boss,⁴ internal and external crowdsourcing and contracting are on the rise, the protection of labour law is narrowing down.

Algorithmic decisions have the appearance of an objective and unquestionable procedure. This is also problematic in light of discrimination: since the data with which AI systems work comes from a world of work in which categories such as gender, age and origin play a role, automated decision-making processes can reinforce existing disadvantages under the guise of a "neutral procedure".⁵ But anti-discrimination law is not made for automated decision-

³ Gießler S., *Was ist automatisiertes Personalmanagement?*, 2021, 8 and ff., <https://algorithmwatch.org/de/wp-content/uploads/2021/05/Was-ist-automatisiertes-Personalmanagement-Giesler-AlgorithmWatch-2021.pdf>, accessed 3 Oct. 2021.

⁴ Adams-Prassl J., *What if your Boss was an Algorithm? Economic Incentives, Legal Challenges, and the Rise of Artificial Intelligence at Work*, in *Comparative Labour Law and Policy Journal*, 41, 1, 2019, 123 and ff; Ivanova M., Bronowicka J., Kocher E., Degner A., *Foodora and Deliveroo: The App as a Boss?*, 2018, https://www.boeckler.de/de/faust-detail.htm?sync_id=HBS-07048, accessed 3 Oct. 2021.

⁵ Federal Government of Germany, *Digitalisierung geschlechtergerecht gestalten – Gutachten für den Dritten Gleichstellungsbericht der Bundesregierung*, 2020, 91 and ff., <https://www.dritter-gleichstellungsbericht.de/de/topic/73.gutachten.html>, accessed 3 Oct. 2021; Schubert C., Hütt, T., nt. (2), 6 and ff.

making.⁶ Here it becomes a problem that in many cases it is not transparent how AI tools are working⁷ and on the basis of which data the algorithms deployed have come about.⁸

AI in the world of work therefore entails considerable and, in this dimension, new dangers for the personality and health of workers and does not necessarily lead to better working conditions.

3. AI: A collective labour law approach is necessary.

Freedom of association and consultations at plant level are structural elements of the labour law across the EU. In the legal order of the union, collective elements have been strengthened in the recent past. The Charter of Fundamental Rights includes not only the freedom of association and the freedom to conclude collective agreements, but also the right to information and consultation within the undertaking (Article 27). The Pillar of Social Rights of 16 November 2017 refers to the Social dialogue and involvement of workers as a principle of a strong social Europe.⁹ The Union has established minimum standards in the area of informing and consulting through European Works Councils through the directive 2009/38/EC.¹⁰ The current *Proposal for a Directive on adequate minimum wages in the EU*¹¹ goes further and focuses on collective rights in the EU. Every Member State is obliged to take measures to strengthen “social partners”, even more if collective bargaining coverage is less than 70%.¹² Although industrial relations in the member states differ greatly in their regulatory approach, there is a convergence in the essential concepts of collective labour law. This must be reflected in the legal approach of new phenomena in the world of work life.

The regulation of the use of AI is still in its early stages. Nevertheless, first regulatory approaches of the states and the collective actors show that employee participation and self-regulation in labour law could be decisive in ensuring the use of AI contributes to a humane world of work and reduces dangers associated with the introduction of AI.

⁶ Bodie M. T., Cherry M. *The Law and Policy of People Analytics*, in *University of Colorado Law Review*, 88, 4, 2017, 961, 1020 and ff.; Wachter. S., Mittelstadt B., Russell C., *Why Fairness cannot be automated: Bridging the gap between EU non-discrimination law and AI*, in *Computer Law & Security Review*, 41, 2021.

⁷ De Stefano V., Taes S. nt. (1), 7.

⁸ Köchling A., Riazzy S., Wehner M.C., Simbeck K., *Highly Accurate, But Still Discriminatory*, in *Business & Information Systems Engineering*, 63, 2021, 39-53; Orwat C., *Diskriminierungsrisiken durch Verwendung von Algorithmen*, 2019,

https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/studie_diskriminierungsrisiken_durch_verwendung_von_algorithmen.pdf?__blob=publicationFile&v=62019, accessed 3 Oct. 2021.

⁹ Nr. 8 of the European Pillar of Social Rights of the European Parliament, the Council and the Commission.

¹⁰ Schulten T., Müller T., *A paradigm shift towards Social Europe? The proposed Directive on adequate minimum wages in the European Union*, in *Italian Labour Law e-Journal*, 14, 1, 2021, speak of a paradigm shift towards a social Europe, see for the discussion the contributions in the *Italian Labour Law e-Journal*, Vol. 14 No. 1 (2021).

¹¹ European Commission, *Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union*, Brussels, 28 October 2020, COM(2020) 682 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0682&from=EN>, accessed 3 Oct. 2021.

¹² Art. 4 of the Proposal.

For example, in Spain, according to the new drafting of Article 64(4) of the Ley des Estatuto de los Trabajadores,¹³ the works council has a right to information on the functioning of AI tools, albeit limited to "people who work on delivery and distribution".¹⁴ A weak point of the new regulation seems to be the enforcement in case of conflict. Transparency provisions are included in Spanish collective agreements, for example in the banking sector: the XXIV Convenio colectivo del sector de la banca contains digital rights in Art. 80, with paragraph 5 addressing the transparency of AI. It obliges employers to disclose to workers' representatives what data is being processed, the logic according to which it works and how the results are to be classified.¹⁵ This example shows that it is crucial to give the collective actors room for maneuvers in terms of requirements and procedures tailored to sectors and well-established systems above minimum standards.

Another good example is the situation in Germany, which will be explained below by way of a case in point.

3.1. The legal framework of works council rights in AI in Germany.

Workplace co-determination is one of the pillars of employee participation in Germany, alongside trade union rights (collective agreements) and company co-determination in supervisory boards. There is discussion about the extent to which the far-reaching works council rights are applicable to AI systems.

German works councils are no trade union bodies (although trade unions are represented in them in many cases) but elected by the whole workforce.¹⁶ They do not have the right to strike, instead they have various legally defined rights of participation. These range from information rights and monitoring compliance with labour law to rigid rights of co-determination, especially on collective issues (so-called "social matters", whereas matters as working time and remuneration are reserved for collective agreements of labour unions).

Albeit the use of AI systems is technologically new, it can already be subsumed under the regulations of the Works Constitution Act (BetrVG) in various respects.¹⁷ For example, the works council must be informed about plans of the employer concerning technical plants, working procedures and about manpower planning (Sections 90, 92). The information given by the employer must be comprehensive and in a good time so that the body can fulfil its legally defined tasks.

¹³ Introduced by Real Decreto – ley 9/2021, de 11 de mayo, https://boe.es/diario_boe/txt.php?id=BOE-A-2021-7840, accessed 3 Oct. 2021.

¹⁴ Villarroel Luque C., *Workers vs Algorithms – What can the new Spanish provision on artificial intelligence and employment achieve?*, 2021, <https://verfassungsblog.de/workers-vs-ai/>, accessed 3 Oct. 2021; Todolí-Signes A., *Spanish riders law and the right to be informed about the algorithm*, in *European Labour Law Journal*, 12, 3, 2021, 399–402.

¹⁵ See https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-5003, accessed 3 Oct. 2021.

¹⁶ For more details see Weiss M., Schmidt M., Hlava D., *Labour Law and Industrial Relations in Germany*, 5th ed., 2020, para. 577.

¹⁷ Klebe T.: *Künstliche Intelligenz – eine Herausforderung für die Mitbestimmung*, in *Soziales Recht* 2018, 128 and ff.; an English version of the Act can be found at www.gesetze-im-internet.de/englisch_betrvg, accessed 3 Oct. 2021.

In the case that AI-technologies lead to job losses, works councils have options to mitigate the consequences for workers. Above all, further training and qualification are crucial to prevent job losses due to digitalisation. Both, the fundamental change in requirement profiles through AI and the elimination of jobs in the longer term, must be countered through education. Qualification and training during ongoing employment for workers whose jobs are likely to be lost due to future digitalisation and ecologic transformation is a main strategy of the German labour market policy to prevent unemployment and social divide.¹⁸ Therefore, the existing co-determination rights in qualification and further vocational training are all the more important.

The introduction of AI technologies may lead to increased intensity and monitoring pressure. A mandatory co-determination right exists (section 87 (1) no. 7 of the Works Constitution Act). Of particular note are the far-reaching rights of the works council in the protection of personality, which also includes the protection of personal data. But the relevant section 87 (1) no. 6 BetrVG was created in the 1970s when the technical facilities were still rather rudimentary.¹⁹ The technical possibilities and with them the dangers of monitoring and performance control have increased since then. Case law suggests that the introduction and modification of all technical equipment (including software) that processes employee data, which is common in AI applications, is covered by this co-determination right.²⁰ That means: The tool is not be used until the works council gives its consent or the consent is replaced by a conciliation committee.²¹ What is missing is the statutory right of the works council to take the initiative itself.²² Other co-determination rights relate to guidelines on personnel selection.

The overview shows that, regardless of reforms for co-determination of AI systems, in theory, AI already is subject to co-determination in the German labour law system.

3.2. AI in the practice of workplace co-determination.

Works councils have several functions in the introduction of AI: Firstly, they monitor compliance with the individual rights of workers, which include health, privacy and protection against discrimination. Works councils are thus guarantors for the implementation of the legal framework for AI. In addition, they have a policy-shaping role: In the best case,

¹⁸ Federal Government, *Entwurf eines Gesetzes zur Stärkung der Chancen für Qualifizierung und für mehr Schutz in der Arbeitslosenversicherung (Qualifizierungschancengesetz)* of 19 Sep. 2018, <https://www.bmas.de/DE/Service/Gesetze-und-Gesetzesvorhaben/qualifizierungschancengesetz.html;jsessionid=90572B9411AFADB80713BB3DA44555E5.delivery1-master>, accessed 3 Oct. 2021.

¹⁹ For more details on the concept of co-determination, see Weiss M., Schmidt M., Hlava D., nt. (16), para 620 and ff.

²⁰ Settled case law, cf. Federal Labour Court, order of 14 May 1974 – 1 ABR 45/73; see also Fitting, *BetrVG commentary*, 30th ed., 2020, § 87 para. 226.

²¹ See Däubler W., Klebe T., Wedde P., *BetrVG commentary*, 17th ed. 2020, § 87 para. 5 and ff.

²² Federal Labour Court, order of 28 November 1989, 1 ABR 97/88 – a position that is currently increasingly being challenged, see e.g. Regional Labour Court Hamm, order of 27 July 2021 – 7 TaBV 79/20; Klebe, T., nt. (17), 135 and ff.

they help to structure the processes concerning the introduction, application, evaluation and further development of new technical systems in the workplace. Collective actors relieve the individual worker of the burden of litigating as an individual with her or his employer, on whom she or he is dependent. This makes works councils a decisive factor for better enforcement of individual rights in labour law.

When exercising these rights, works councils in Germany generally take a constructive approach. The reason for this is probably also to be found in their legal constitution and their operational focus: The company agreements concluded by works councils have a lower legal status than collective agreements reached by trade unions. Works councils are, as mentioned above, prohibited from calling strikes and advertising for trade unions, and their bodies are limited to the company, the enterprise and, at most, the group. Trade secrets must be kept.

Contrary to what many employers claim, works councils therefore prove in practice not to be impeders, but often even drivers of digitalisation, or at least actors who put the use of AI systems on a more rational basis.²³ Comprehensive studies show that co-determination is also a decisive factor for the willingness of the workforce to contribute with their potential to change and see digitalisation as a positive, less frightening process.²⁴ Employers often lack a future concept for digitalisation, which recently became clear in a survey in the industrial sector.²⁵ Moreover, it is often not clear what an IT tool actually does and whether it can fulfil the provider's promise. AI systems turn out to be a black box, and some employers claim that their development has taken place outside their sphere of influence and therefore neither influence could be exerted, nor transparency established. Works councils that persistently ask critical questions and demand information can play an important role here. A problem in practice is often that works councils are informed about new technologies too late to be able to assess the consequences and initiate their own checks. In general, works council rights are often disregarded, especially in small and medium-sized companies. If not a workers representation is missing at all:

Co-determination practice in AI in Germany has other, not specifically AI-related deficits. One is the permanently decreasing number of works councils. In the absence of a works council, the aforementioned rights do not apply. Especially in the IT sector, works councils are often only established when the employer runs into economic difficulties. In part, the Works Council Modernisation Act has currently addressed this issue (see the next subsection).²⁶ Furthermore, many works councils are far from being able to exercise the rights to which they are entitled. There is often a lack of resources to deal with the complex

²³ See e.g. the case studies of Massolle J., *Die Transformation von Arbeit mitgestalten*, 2021, https://www.imu-boeckler.de/fpdf/HBS-008086/p_mbf_praxis_2021_41.pdf, accessed 3 Oct. 2021; Falkenberg J., Haipeter T., Krzywdzinski M., Kuhlmann M., Schietinger M., Virgillito A., *Digitalisierung in Industriebetrieben*, 2020, https://www.boeckler.de/fpdf/HBS-007638/p_fofoe_report_006_2020.pdf, accessed 3 Oct. 2021.

²⁴ Kirchner S., *Zeit für ein Update – Was die Menschen in Deutschland über Digitalisierung denken*, 2019, <http://library.fes.de/pdf-files/fes/15549.pdf>, accessed 3 Oct. 2021.

²⁵ Allmendinger J., Schroeder W., *Die Situation von Industriebeschäftigten während der Corona-Pandemie: Ergebnisse der Beschäftigtenbefragung 2020 der IG Metall*, 2021, <https://bibliothek.wzb.eu/pdf/2021/p21-001.pdf>, accessed 3 Oct. 2021.

²⁶ Wenckeback J., *Eine echte Modernisierung steht weiterhin aus*, 2021, <https://www.boeckler.de/newsletter-rest/t/review/ANONYMOUS.2H3SZ.3C0B6F1843878586EC95A652D52FEA52/>, accessed 3 Oct. 2021.

and – in the view of a large number of systems in use – extensive issues. Works councils are vulnerable to pressure, especially in difficult economic situations, such as when employers threaten relocations.

Trade union rights in the workplace are therefore crucial. Both for works councils and trade unions, the isolation and individualisation of working people caused by digitalisation is a problem. It is not only a question of how solidarity can be organised when, for example, crowd workers meet less frequently, and more and more people work remote. Direct communication between workers and unions – starting point for any collective movement and solidarity – no longer takes place in all workplaces of the digitalized world of work. Here, too, the applicable law reaches its limits. This is why in Germany, digital access rights for trade unions and works councils are being discussed to expand the legal framework for this. It is about access to apps, intranet sites, email addresses and chat groups.

3.3. The 2021 Law on the Modernisation of Works Councils.

The challenges posed by AI to the pillar of collective rights in its German version have already given rise to some legal reforms. The last major revision of the law on workplace co-determination took place decades ago and coincided with a time when technological developments of today seemed utopian. Now, digitalisation, but also globalisation, pose major challenges to labour law as a whole. It is being questioned whether central labour law concepts such as employee, employer and establishment will capture the reality of the working world of the future.²⁷ The changes do not only affect new forms of employment such as crowd and gig work, but also traditional industrial companies. In addition to digitalisation, the ecological transformation of the economy is a central social challenge. The question is whether the "Green Deal" will also be a "social deal" – a European question. Trade unions and academics are calling for a democratisation of these transformation processes, which have the dimension of an industrial revolution.²⁸

Legislators in Germany have recognised the issue. In spring 2021, the coalition of Conservatives and Social Democrats had set out to reform workplace co-determination – not only about shaping digitalisation, but also about curbing union busting and counteracting the trend that fewer and fewer employees in Germany have a representation of their interests at their side.²⁹ In addition to the slightly simplified and better-protected election of works councils, new regulations for co-determination in the use of AI in the company were a focal point: The rights of the works council in the design of the working environment and work procedures and operations will now explicitly also cover the use of AI. The rights of the works council in setting up guidelines for the selection of personnel shall also apply if they

²⁷ See for the concept of the employer e.g. the contributions on the concept of “employer” in Vol. 13 No. 1 of the *Italian Labour Law e-Journal*.

²⁸ Boeckler Impuls 7/2021 <https://www.boeckler.de/de/boeckler-impuls-no-green-deal-without-a-social-deal-32649.htm>; <https://democratizingwork.org/>, accessed 3 Oct. 2021.

²⁹ Explanatory memorandum to the law, Bundestags-Drucksache (printed material of Bundestag) 19/28899 of 22 April 2021, p. 12 and ff.

have been created by or with the help of algorithms. These regulations are important clarifications of the legal situation as it is already widely shared today.³⁰

It was also clarified that in order to carry out its duties under the Works Constitution Act, the works council must assess the introduction or application of AI and can call in an expert, who must be paid by the employer. This is the legislator's response to practical needs. It requires know-how to be able to assess algorithms. Democratic rights only make sense if collectives have access to this expertise and the financing of technical expertise is ensured. Even if there are certified AI applications at some point, this practical need for advice will not disappear.

4. The Commission's draft of an AI Act.

The EU is tackling the issue of regulating AI, too. The Commission published a "Regulatory Framework for AI" in April 2021, which resulted from a consultation process which took several years.³¹ This regulatory framework lays down harmonized rules for introduction of AI in the market. Its consequences for the labour relations are only one aspect. The act implements a "risk-based" approach that classifies different AI applications into different risk categories (Articles 5, 6 of the proposal): unacceptable risk, high risk, low risk and minimal risk.

The good news is: Work-related AI systems are to be classified as "high-risk", at least according to recital 36 of the proposal. More concrete is No. 4 Annex III to the proposal, in which, based on Article 6(2), Article 7(1)(b), (2), the Commission defines certain categories of AI systems whose risks have already materialised or there is a tangible risk of them doing so: According to No. 4 of Annex III, recruiting systems as well as AI used to decide on the beginning and end of the contractual relationship, for task assignment and for monitoring, performance and success control are qualified as high-risk. This by no means covers all relevant risk areas of working life. And besides that, in practical application, it will be questionable when an AI is "intended to be used (...) for monitoring and performance control and behavior" and whether its *suitability* for monitoring and performance control should not suffice. After all, the particular risk of AI lies precisely in the fact that personal data, once collected, form a panopticon of monitoring so the suitability of the software should be sufficient, its purpose is not what matters (on the German legal situation in the context of the works constitution, see above under point 2 a).

Providers of AI systems bear several obligations, of which only the most important can be mentioned here. According to the proposal, a detailed risk management system is required. This should be applied during the entire life cycle of the system and includes various defined steps. AI-tools must be tested which ensures that high-risk AI systems perform

³⁰ Klebe T., „Nur ein Schritt in die richtige Richtung“, 2021, <https://www.bund-verlag.de/betriebsrat/aktuellesbr~Nur-ein-Schritt-in-die-richtige-Richtung~.html>, accessed 3 Oct. 2021.

³¹ European Commission: *Proposal für a Regulation laying down harmonized rules on artificial intelligence*, 21 April 2021, COM(2021) 206 final, <https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-laying-down-harmonised-rules-artificial-intelligence>, accessed 3 Oct. 2021.

consistently for their intended purpose and follow the legal requirements, Article 9. It also specifies a certain procedure for AI systems that are trained with user data whereby biases are to be avoided, inter alia (Article 10). Furthermore, the system must be subject to ex ante technical documentation (Article 11). The principles of transparency, human oversight, verifiability, accuracy, reliability (Articles 12 – 15) are laid down for dealing with AI. These principles must already be fulfilled in the design and development of the systems. For example, events must be automatically documented (logs). Users must be able to interpret the system's output and use it appropriately and human oversight shall prevent risks for the health, safety, or fundamental rights. Providers of AI systems are obliged to introduce a quality management system (Article 17). Of particular importance is that providers must subject the AI tool to a conformity assessment procedure (Article 19), which can, however, take the form of a self-assessment (Article 43 (2) of the proposal and its Annex VI).³² Providers must carry out quality and risk management and are subject to ex-post control and enforcement.

With the transparency requirements, the Commission's regulatory proposal takes up an important regulatory approach known from data protection, which should be consistently pursued. Given the wide range of duties, however, the crux of the matter is: Under which circumstances are employers AI providers? According to Article 3 (2), Article 28(1) they are in the role of providers, if they put an AI system into service under its own name or trademark, modify the intended purpose of a high-risk AI system already put into service or make a substantial modification to the high-risk AI system. This may be the case but does not seem to be the norm. Rather, they will often qualify as users, for whom most of the duties do not apply.

The draft's lack of labour law is further exacerbated by the fact that employees cannot be regarded as "users" of an AI system within the meaning of the Directive. According to Article 3 (4) of the draft, only those "using an AI system under its authority" are to be considered as such. In an employment relationship, this is the employer. And in the important case of platform work, it must be questioned whether the tools used by employers are to be regarded as AI in the sense of the Directive.³³ Thus, the draft does not provide for specific individual workers' rights in the use of AI. It is hardly conceivable that this will be realised in the final regulation.

In addition, the regulatory approach lays down a minimum standard; stricter protection by the member states is not envisaged.³⁴ Against the background of collective bargaining autonomy, it should be made explicitly clear that higher standards can always be set by the parties to collective agreements. The mechanisms of the employment relationship – the unequal power relationship and the higher personal attachment of workers to the employer – may mean that this level will often be undercut without consequences. In particular,

³² Battista L., *The European Framework Agreement on Digitalisation: a tough coexistence within the EU mosaic of actions*, in *Italian Labour Law e-Journal*, 1, 14, 2021, 105, 119: "disappointing".

³³ Purificato I., *Behind the Scenes of Deliveroo's Algorithm: in the Blindness of "Frank" its Discriminatory Potential*, in *Italian Labour Law e-Journal*, 1, 14, 2021, 169, 189 and ff.

³⁴ De Stefano V., Taes S., nt. (1), 11.

employers – within the framework of the general explainability of the system³⁵ – should not be able to rely on the absence of knowledge how the AI tool works. To avoid but also effectively prevent or defeat discrimination, data sets must not only be tested as foreseen in Art. 10. It has to be made sure that works councils or other workers representatives have access to those data sets. Training, testing and validation of data cannot be left to the employer alone.³⁶ The collective element is at the core of labour law – and, also seen internationally – of data protection law.³⁷

The short summary of AI regulation is therefore: the EU Commission leaves labour law out of the equation when regulating AI. The big step backwards compared to the European Pillar of Social Rights as well as regulation at member state level is that there is no mention of collective rights at all. This has to be made up for.

5. Conclusions.

The EU's regulatory approach reveals an important trend in the regulation of the working world of the future and especially in the use of AI: the strong role of data protection in a broad understanding of the word. This is because the mass collection, gathering, processing and transmission of personal data for the purposes of performance optimisation and behavioural control lead to a new dimension in the control of employee behaviour. This is linked to new threats to the mental and emotional health of employees. Just one example: Germany has been increasing the number of sick leave notifications due to mental health problems for years.³⁸ The protection of data and the personality of workers is thus at the same time a facet of health protection.

Besides that, the wording of the proposal remains too vague at crucial points and needs to be concretised in order to be applicable and helpful – therefore enforceable – in labour law conflicts. The scope of Annex III is too narrow. Any AI system that processes employee data should be categorised as high-risk technology. With the experience of union busting strategies from the US of spying on workers activities for unionisation³⁹ it has to be made sure that any Big Data analytics on trade union activities should be recognised as high-risk technology. Furthermore, individual rights for employees are needed to protect them from discrimination and data misuse.

³⁵ Käde L., v. Maltzan S., *Die Erklärbarkeit von Künstlicher Intelligenz (KI)*, in *Computer und Recht*, 36, 1, 2020, p. 1.

³⁶ Battista L., nt. (32), 105, 119; Purificato I., nt. (33), 169, 190.

³⁷ De Stefano V., *Negotiating the algorithm*, in *Comparative Labour Law and Policy Journal*, 41, 1, 2019, 15, 41.

³⁸ This is shown, for example, by the absenteeism report of the AOK, the largest German health insurance association: Meyer M., Wiegand S., Schenkel A., *Krankheitsbedingte Fehlzeiten in der deutschen Wirtschaft 2019*, 2020, 403,

https://www.wido.de/fileadmin/Dateien/Dokumente/Publikationen_Produkte/Buchreihen/Fehlzeitenreport/wido_pra_fzr_2020_krankheitsbedingte_fehlzeiten.pdf, accessed 3 Oct. 2021. In the period from 2010 to 2019, absenteeism due to mental illness has successively increased by a total of 30%, in contrast to the other types of illness.

³⁹ Amazon uses social media to track environmental activism and social movements in Europe, see Gurley L. K., *Secret Amazon Reports Expose the Company's Surveillance of Labor and Environmental Groups*, in *VICE*, <https://www.vice.com/en/article/5dp3yn/amazon-leaked-reports-expose-spying-warehouse-workers-labor-union-environmental-groups-social-movements>, accessed 3 Oct. 2021.

Individuals are usually reluctant to take legal action against their employer, and often lack crucial resources. The existing EU instruments on employee involvement are not adequate to address the challenges associated with the introduction of AI, although it is hardly doubtful that their scope can be opened beside the AI Act with the introduction of an AI-tool. Article 4(2) Directive 2002/14/EC provides for informing and consulting employees in the event that a company decision could have an impact on the employment situation in the company or may affect the organisation of work. Both *can* occur with the introduction of an AI tool, but does not *have to*. A clarification that AI tools meet these requirements could help to prevent disputes at company level. However, based on the experience that AI tools overwhelm works councils due to their scope and technical complexity, it would be more important to give councils access to IT expertise and the necessary resources, as has been regulated in Germany.

For this very reason, it is a central shortcoming of the draft that the collective mechanisms of labour law are not addressed – trade unions and employers' associations, but also workplace co-determination, are not even mentioned. What is needed are procedural regulations that give collective actors substantial competences in the compliance and humane design of work with AI-supported work equipment.⁴⁰ The management systems and assessment procedures provided for in Art. 17 and Art. 43 must be democratic from the beginning, i.e. they must provide for co-determination. In this context, it is important to involve collective actors not only when the procedures to be created are not complied with, but also when they are being designed. The AI Act, which may regulate the admission procedures of such tools across the EU, is an excellent opportunity for this. What is more: In the interest of effective enforcement of the regulation, class action should be considered. In any case, it would be desirable to clarify that the implementation of the AI-Regulation must not lag the application of EU-law on information and consultation and the enforcement of national labour law, which includes collective means. The draft lacks a provision such as Art. 88 GDPR to clearly state that the AI Act leaves room for more suitable and specific measures by collective agreements, especially for those, which ensure the protection of employee's rights. This is the only way to ensure that Art. 28 CFR – the right of collective bargaining and action – is adequately taken into account.

At the same time, AI puts an instrument in the hands of employers that facilitates the reorganisation of work and thus helps to circumvent labour standards. To counter this, it would help to make the European legal acts protecting against precarious employment – whether due to AI or not – more effective. The health risks outlined can be countered by strengthening the rights of works councils in occupational health and safety, with staffing measurements being highlighted. Qualification is another important area for the enabling of employees, but also for securing jobs. The Law on Modernising Works Councils in Germany recognizes the importance of this field of action but does not go far enough: it retains rights of co-determination, but in cases of conflict the employer prevails if an attempt to reach agreement – albeit a mandatory one – fails. The reform does not provide for procedural co-

⁴⁰ De Stefano V., Taes S., nt. (1), 9.

determination rights, which are also necessary for the use of AI. Neither does a digital right of access to the digital workplace.

The regulation of AI must also take into account at the European level that algorithms in the world of work do not only raise technical or legal questions, but also questions of power. Collective actors – i.e. trade unions and works councils – are a crucial counterweight here. Fair AI requires their involvement and empowerment. Otherwise, the intended "human-centered" approach to AI in the world of work remains just a phrase.

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