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Navigating the impact of AI systems in the workplace: strengths and loopholes of the EU AI Act from a labour perspective.

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Abstract

The rapid integration of artificial intelligence (AI) in the workplace presents both opportunities and risks. It may improve productivity and working conditions, but if misapplied or opaquely used, may exacerbate existing vulnerabilities. In the European Union, developments in the AI landscape have prompted legislative efforts, most notably reflected in the long-waited EU Artificial Intelligence Act. This paper aims to examine the impact of such Regulation on the use of AI systems in the field of work, providing a first assessment of its legal framework.

The paper argues that while the EU AI Act improves previous drafts, ambiguities and loopholes remain. However, it also points out that the Regulation provides only a minimum shared framework, leaving room for more favourable provisions or collective agreements. Against this background, the paper emphasises the key role of social partners in establishing context-specific regulations for AI use in the workplace and concludes by affirming that only multi-stakeholder synergies will be capable of keeping pace with fast-evolving technology such as AI.

Keywords: Artificial Intelligence; EU AI Act; workers' protection; risk-based approach; transparency

1. Introduction: AI in the workplace as a harbinger of opportunities and risks.

Developments in artificial intelligence (hereafter AI) are unfolding at an impressive pace.[1] Within only a few years, this technology has rapidly advanced from struggling to classify

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[1] There is no universal definition of artificial intelligence, but the most common one is provided by emeritus Stanford Professor John McCarthy, who coined the term in 1955 and defined it as "the science and engineering of making intelligent machines". (McCarthy J., *What is artificial intelligence?*, Stanford University, Stanford, 2007,

objects in images to consistently outperforming humans on standard benchmarks, such as basic reading comprehension and natural language inference.[2]

Such progresses have pushed towards a growing integration of AI tools in the workplace. Organisations in the private and public sectors more frequently rely on such technology for employer-driven decisions across the employment lifecycle.[3] These include leveraging machine-based systems to create job descriptions, screen and shortlist CVs, conduct comparisons, assess employee productivity, and monitor employees' activities, performance, and location.

AI is often depicted as a tool that can boost productivity,[4] narrow the performance gap between low- and high-skilled workers,[5] enhance workers' health and safety, and allow for the adoption of objective and fair employment decisions.[6] Yet, various research and real-world practices show that AI systems, like any new technology, are a harbinger of both opportunities and risks. AI may lead to better working conditions, but if incorrectly designed, misapplied, or opaquely used, may exacerbate workers' vulnerability.

AI surveillance and monitoring tools, perhaps the most high-profile uses of AI in the workplace, are prominent examples of such framing. Indeed, algorithms allocating tasks might not consider workers' break time, shifts, and designated work hours appropriately, thus affecting work organisation and working conditions. Moreover, constant surveillance and automated decision-making systems may increase work stress, amplifying psychological and social risks.[7] Additionally, surveillance and monitoring AI applications often process

available at https://www-formal.stanford.edu/jmc/whatisai.pdf). Currently, in practice, there are two types of AI. The weak AI, also called narrow AI, which is capable of performing a specific task. The program does not engage in conversation or learning; it simply performs the job it was designed to perform. Strong AI, also known as artificial general intelligence or AGI, is capable of learning, thinking and adapting as humans do. The latter system is still theoretical and without practical examples currently in use.

[2] Human-Centered Artificial Intelligence, *Artificial Intelligence Index Report 2024*, Stanford University, 2024, 81 reports that AI has surpassed human capabilities across a range of tasks. AI achieved a higher level of performance in image classification in 2015, basic reading comprehension in 2017, visual reasoning in 2020, and natural language inference in 2021.

[3] Kellogg K.C., Valentine M.A., Cristin A., *Algorithms at work: the new contested terrain of control*, in *Academy of Management Annals*, 2020, 14, 1, 366 ff., where the labour functions of Automated Decision Making are identified in the so-called 6R: Restricting, Recommending, Recording, Rating, Replacing, Rewarding; Adams-Prassl J., *What if your boss was an algorithm? Economic incentives, legal challenges, and the rise of artificial intelligence at work,* in *Comparative Labor Law and Policy Journal,* 41, 1, 2019, 131 ff.; Klengel E., Wenckeback J., *Artificial intelligence, work, power imbalance and democracy – why co-determination is essential,* in *Italian Labour Law E-Journal*, 14, 2, 2021, 157-160.

[4] *See* Cambon A., Hecht B., Edelman B., *et al.*, *Early LLM-based Tools for Enterprise Information Workers Likely Provide Meaningful Boosts to Productivity. A first update from Microsoft's research initiative on AI and Productivity*, Microsoft Technical Report, 2023, https://www.microsoft.com/en-us/research/uploads/prod/2023/12/AI-and-Productivity-Report-First-Edition.pdf. The study shows that AI enables workers to complete tasks faster and produce higher-quality work.

[5] Dell'Acqua F., McFowland III E., Mollick E., *et al.*, *Navigating the Jagged Technological Frontier: Field Experimental Evidence of the Effects of AI on Knowledge Worker Productivity and Quality*, Harvard Business School Working Paper, No. 24-013, September 2023.

[6] On the issue, *see* Raghavan M., Barocas S., Kleinberg J.K., Levy K., *Mitigating Bias in Algorithmic Hiring: Evaluating Claims and Practices*, in *Proceedings of the 2020 conference on fairness, accountability, and transparency (FAT*),* 2020, 469 ff.; Brunerv á S., Ceccon D., Holubová B., *et al. Collective bargaining practices on AI and Algorithmic management in European Services sectors*, Friedrich-Ebert-Stiftung, Bonn, 2024, 6.

[7] Adams-Prassl J., nt. (3), 134 ff.; Todolí-Signes A., *Making algorithms safe for workers: occupational risks associated with work managed by artificial intelligence*, in *Transfer: European Review of Labour and Research*, 27, 4, 2021, 433-452; Jarota M., *Artificial intelligence in the work process. A reflection on the proposed European Union regulations on artificial*

employees' personal information in the development or deployment phase, entailing risks of unjust handling of data.[8]

AI tools are exerting pressure also on the principles of equality and non-discrimination in employment and occupation. In recent years, scholars have heightened awareness of the extent to which human biases have made their way into automated decision models, amplifying the resulting negative effects.[9] For example, Amazon developed an algorithmic hiring prototype, which was later found to discriminate against women and had to be abandoned.[10] Meanwhile, Facebook's targeted online ads have been found to potentially reinforce stereotypes and segregation in the labour market.[11]

These issues have prompted a flourishing debate on AI's impact in the workplace. The establishment of adequate measures to govern its use has been advocated by various quarters. Some scholars have claimed the introduction of a tailored regulatory framework to address the workplace challenges,[12] while others discussed to a great extent how to adapt the existing

intelligence from an occupational health and safety perspective, in *Computer Law & Security Review*, 49, 2023, 2-3; EU-OSHA, *Foresight on new and emerging occupational safety and health risks associated with digitalisation by 2025. European Risk Observatory, Report,* Publications Office of the European Union, Luxembourg, 2018, 6-7, available at https://osha.europa.eu/sites/default/files/Foresight_new_OSH_risks_2025_report.pdf.

[8] De Stefano V., Taes S., *Algorithmic management and collective bargaining*, in *Transfer*, 29, 1, 2023, 21-36; Aloisi A., Gramano E., *Artificial Intelligence Is Watching You at Work: Digital Surveillance, Employee Monitoring, and Regulatory Issues in the EU Context*, in *Comparative Labor Law & Policy Journal*, 1, 2019, 95 ff.; Molé M., *The Internet of Things and Artificial Intelligence as Workplace Supervisors: Explaining and Understanding the New Surveillance to Employees Beyond Art. 8 ECHR,* in *Italian Labour Law E-Journal,* 15, 2, 2022, 87-103. The 45th Global Privacy Assembly has adopted a resolution (*see Resolution on Artificial Intelligence and Employment*, 45th Closed Session, October 2023, https://globalprivacyassembly.org/wp-content/uploads/2023/10/1.-Resolution-on-AI-and-employment-1.pdf) in which organisations that develop or deploy AI systems in the employment context are urged to ensure the use is human-centric and in compliance with principles of data protection and privacy by design.

[9] On the topic, without claiming to be exhaustive: King A.G., Mrkonich M., "*Big Data" and the Risk of Employment Discrimination*, in *Oklahoma Law Review*, 68, 3, 2016, 555 ff.; Kullmann M., *Platform Work, Algorithmic Decision-Making, and EU Gender Equality Law,* in *International Journal of Comparative Labour Law and Industrial Relations,* 34, 1, 2018, 8 ff.; Gerards J., *Xenidis* R., *Algorithmic discrimination in Europe. Challenges and opportunities for gender equality and non-discrimination law,* Publications Office of the European Union, Luxembourg, 2021; Capuzzo G., *A Comparative Study on Algorithmic Discrimination between Europe and North-America*, in *Italian Equality Network*, 2022, https://www.italianequalitynetwork.it/a-comparative-study-on-algorithmic-discrimination-between-europe-and-north-america/. Kelly-Lyth A.*, Algorithmic discrimination at work,* in *European Labour Law Journal,* 14, 2023, 152 ff.

[10] Dastin J., *Amazon scraps secret AI recruiting tool that showed bias against women,* in *Reuters*, 2018; Gillis T.B., Spiess J.L.*, 'Big Data and Discrimination',* in *University of Chicago Law Review,* 86, 2019, 459.

[11] Hao K. *Facebook's ad algorithms are still excluding women from seeing jobs*, in *MIT Technology Review*, 2021, 1 ff. In more detail, an audit revealed that Facebook's advertising platform showed different job ads to women and men. Cashier positions in supermarkets reached an audience composed of 85% women, while advertisements for taxi driver positions reached a 75% black audience and ads for lumberjack positions reached an audience that was 90% male and 72% white. Similar cases have happened to Uber (*see* Hanrahan B., Ning M., Chien Wen Y.*, The Roots of Bias on Uber,* in Lewkowicz M., Sarcevic A. (eds), *Proceedings of 15th European Conference on Computer-Supported Cooperative Work,* 2017, 1 ff.) and LinkedIn (Simon V., Rabin N., Chalutz-Ben Gal H., *Utilizing data driven methods to identify gender bias in LinkedIn profiles,* in *Information Processing & Management,* 60, 5, 2023, 1 ff.).

[12] *See* Ponce del Castillo A., *The AI Regulation: entering an AI regulatory winter?, Why an ad hoc directive on AI in employment is required*, ETUI Policy Brief, ETUI aisbl, Brussels, 2021.

legislation to the digital enterprise[13] or how to strengthen the role of collective bargaining to protect workers' fundamental rights.[14]

Building on such literature, this paper aims to contribute to the debate by examining the EU Artificial Intelligence Act (EU AI Act) from a labour and employment perspective. While some countries opted for a rather *laissez-faire* approach,[15] the European institutions have been pioneering in the establishment of a legal framework for the use of AI. After years of intense negotiation, on 13th March 2024, the European Parliament endorsed the Final Provisional Text, which contains significant changes from the European Commission's initial AI proposal, published on 21st April 2021. A month later, the *AI Act: European Parliament 'Corrigendum' of 16th April 2024* was issued to correct the Parliament's stance.[16] This version is expected to be adopted without further changes, becoming the world's first comprehensive framework for regulating the development and use of artificial intelligence.

[13] Among the many contributions on the subject, *see* Barbera M. *Discriminazioni algoritmiche e forme di discriminazione,* in *Labour & Law Issues,* 7, 1, 2021, I.3-I.17; Peruzzi M., *Il diritto antidiscriminatorio al test di intelligenza artificiale,* in *Labour & Law Issues,* 7, 1, 2021, I.50 ff.; Molé M., nt. (8), 87 ff.; Todolí-Signes A., nt. (7), 433 ff.; Adams-Prassl J., *Regulating algorithms at work: Lessons for a 'European approach to artificial intelligence*, in *European Labour Law Journal*, 13, 1, 2022, 30 ff.; Aloisi A., De Stefano V., *Between risk mitigation and labour rights enforcement: Assessing the transatlantic race to govern AI-driven decision making through a comparative lens*, in *European Labour Law Journal*, 14, 2, 2023, 283 ff.; Lo Faro A., *Algorithmic Decision Making e gestione dei rapporti di lavoro: cosa abbiano imparato dalle piattaforme,* in *Federalismi.it,* 25, 2022, 189 ff.

[14] De Stefano V., *"Negotiating the algorithm": Automation, Artificial Intelligence, and Labor Protection*, in *Comparative Labor Law & Policy Journal,* 41, 1, 2019, 15-46; Dagnino E., Armanoli I., *A seat at the table: negotiating data processing in the workplace,* in *Comparative Labor Law & Policy Journal,* 41, 1, 2019, 193-194; Zappalà L., *Intelligenza artificiale, sindacato e diritti collettivi*, in Biasi M. (eds), *Diritto del lavoro e intelligenza artificiale*, Giuffré, Milan, 2024, 173 ff.

[15] Whilst there have been attempts to coordinate international actions (*see* Lee J., *Artificial Intelligence and International Law*, Springer, Berlin, 2022; Chinen M., *The International Governance of Artificial Intelligence*, Edward Elgar, Cheltenham, 2023), many nations and jurisdictions are taking different approaches to AI. They range from the adoption of non-binding guidelines and principles to binding legal regulatory frameworks. For instance, the United States of America has not yet legislated at the federal level. Instead, the White House issued an executive order in October 2023 designed to set key principles and essential guidelines to ensure the safe development of AI. Moreover, since 2019, 17 states have enacted 29 bills on AI, focusing on data privacy and accountability. Canada launched a strategy in 2017, called the *Pan-Canadian Artificial Intelligence Strategy*, to create research and jobs, while China launched its project in 2017, titled *A Next Generation Artificial Intelligence Development Plan*, and in 2021 published ethical guidelines for its use. Similarly, the United Kingdom has progressed up to date with a pro-innovation approach (Department for Science, Innovation and Technology and Office for Artificial Intelligence, *A pro-innovation approach to AI regulation*, March 2023, available at https://www.gov.uk/government/publications/ai-regulation-a-pro-innovation-approach/white-paper). However, in November 2023, the Artificial Intelligence (Regulation) Bill was proposed, taking a regulatory stance. On 18th April 2024, the British Trade Union Congress (TUC) published the Artificial Intelligence (Regulation and Employment Rights) Bill, to govern "the use of AI systems by employers in relation to workers, employees and jobseekers to protect their rights and interests in the workplace" (the text is available at: https://www.tuc.org.uk/research-analysis/reports/artificial-intelligence-regulation-and-employment-rights-bill).

[16] On 16th April 2024, the European Parliament published a corrigendum on its position, which corrected errors in the language and numbering present in earlier drafts. The corrigendum also amended references in the EU AI Act to ensure that they are correct before publishing the text in the Official Journal of the European Union (*see* Corrigendum to the position of the European Parliament adopted at first reading on 13 March 2024 with a view to the adopting of Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), Cor01, 19.04.2024).

The EU AI Act is not specifically designed to govern the impact of artificial intelligence in the world of work, taking the form of a cross-sector regulatory framework.[17] Nonetheless, it has undeniable significant implications for employment and labour relations, defining the extent and limits to which such technology can be developed, put into service and deployed in the workplace. Thus, the Regulation impacts the exercise of employers' managerial power and the protection of workers' rights.

Against such backdrop, the purpose of this paper is to provide a first assessment of the new legal framework. It will begin with a general overview of the EU AI Act (Section 2). Then, the following sections will be dedicated to an in-depth analysis of the Regulation's most relevant provisions. First, the consequences of the risk-based approach on the use of AI tools in the workplace will be discussed (Section 3). Subsequently, the requirements for providers (Section 4) and deployers (Sections 5-6) will be examined, highlighting strengths and loopholes. Lastly, the paper will provide conclusive remarks on future perspectives.

2. The European Union's regulatory approach: objectives and legal bases.

The European Union started developing the regulatory framework on artificial intelligence through non-binding acts. This strategy began with the adoption of the *Communication on Digitalising European Industry*,[18] in which the transformative potential of AI for the European economic development was emphasised. Subsequently, a multitude of documents were approved in just a few years, including the *Communication on Artificial Intelligence for Europe*,[19] the *Coordinated Plan on Artificial Intelligence*,[20] and the Resolution on a *Comprehensive European Industrial Policy on Artificial Intelligence and Robotics*.[21] These acts paved the way for the adoption of the *White Paper on Artificial Intelligence*, where the European institutions further emphasised the benefits of promoting an ecosystem for AI innovations, but also acknowledged the need to address the associated risks. In fact, the *White Paper* highlights the potential improvements to healthcare, security and productivity, while pointing

[17] The European Union opted for a Regulation with a cross-sectoral scope rather than adopting specific rules for the individual sectors where AI systems are most used. On the dilemmas raised by such a choice *see* Scorza G., *Regolamentare, non regolamentare, come regolamentare. Questi sono i dilemmi*, in Cerrin G., Ferroni A., Fontana C., Raffiotta E.C. (eds), *Ai Anthology*, Il Mulino, Bologna, 2022, 53.

[18] European Commission, *Digitising European Industry Reaping the Full Benefits of a Digital Single Market*, 19.04.206, COM(2016) 180 final.

[19] European Commission, *Artificial Intelligence for Europe*, 25.04.2018, COM(2018) 237 final.

[20] The Coordinated Plan on Artificial Intelligence was introduced in 2018 to accelerate investment in AI technologies and align AI policy to avoid fragmentation. The plan represents a joint commitment by the European Commission and the Member States to work together on the development of artificial intelligence technologies and was revised in 2021. *See* European Commission, *Fostering a European approach to Artificial Intelligence*, 21.04.2021, COM(2021) 205 final.

[21] European Parliament, *Resolution on a comprehensive European industrial policy on artificial intelligence and robotics*, C 449/37, 23.12.2020, which urge the adoption of a "strong policy guidance on how to maximise the benefits and minimise the risks for society and ensure a safe, equitable development of artificial intelligence".

out that the growing use of algorithms entails risks in terms of "opaque decision-making, gender-based or other kinds of discrimination".[22]

These considerations served as the foundation for the establishment of a legal framework tasked with balancing two demands: fostering competitiveness on the one hand and cultivating a human-centred, trustworthy AI ecosystem on the other.

Against this backdrop, the EU AI Act is grounded in Article 114 of the Treaty on the Functioning of the European Union (TFEU), which provides for the adoption of measures to approximate national provisions affecting the establishment and functioning of the internal market. The choice of such a legal basis is significant because it indicates that the Regulation is primarily an internal market piece of legislation.[23] The predominant aim is not to norm the use of AI, but to set harmonised rules on the development, placement and deployment of AI systems as products and services, to ensure their free movement in the internal market.

Nonetheless, the Regulation texture is enriched with threads of social values. This is mainly thanks to the Parliament, which amended the Commission's initial proposal[24] to explicitly state that the legal framework shall be developed "in accordance with Union values" as enshrined in Article 2 of the Treaty on European Union (TEU), the fundamental rights and freedoms enshrined in the Treaties and, pursuant to Article 6 TEU the Charter of Fundamental Rights of the European Union (CFREU). As a pre-requisite, AI should be a human-centric technology". This reference, which appears in the Recital 6 EU AI Act, is further articulated in the binding part of the Regulation. As per Article 1(1) EU AI Act, the purpose of the Regulation is "to improve the functioning of the internal market" and "ensure a high level of protection of health, safety, fundamental rights" enshrined in the CFREU. Moreover, the EU AI Act lays out relevant provisions governing the use and process of personal data to protect individuals' privacy rights. For this reason, it is legally based not only on Article 114 TFUE but also on Article 16 TFUE concerning the adoption of measures to safeguard individuals from the processing of their personal data. Consequently, ethics and fundamental rights considerations balance the economic rationale to promote the development of a "human-centric and trustworthy" system.[25]

The Regulation is bound to have a wide scope of application since it embraces a broad and flexible definition of "AI system", capable of accommodating rapid technological developments and covering a wide range of technologies. This technology is described as a

[22] European Commission, *White Paper on Artificial Intelligence - A European approach to excellence and trust*, COM(2020) 65 final, 19.02.2020.

[23] Giorgi N., *Standardising AI – a trade union perspective*, in Del Castillo Ponce A. (eds), *Artificial intelligence, labour and society*, ETUI aisbl, Brussels, 2024, 116; Delfino M., *Artificial Intelligence, Robotics and Fundamental Rights,* in *Italian Labour Law E-Journal,* 16, 2, 2023, 39.

[24] The Commission's initial proposal was widely criticised for not adequately protecting workers' rights. Among the main critical voices, see Aloisi A. De Stefano V., *The New EU Regulation on Artificial Intelligence and Worker*s, 4 May 2021, retrieved from https://www.rivistailmulino.it/a/regolamento-ue-sull-intelligenza-artificiale-una-minaccia-alla-protezione-dei-lavoratori; Adams-Prassl J., nt. (13), 30-50.

[25] According to Almada M., Radu A., *The Brussels Side-Effect: How the AI Act Can Reduce the Global Reach of Eu Policy*, in *German Law Journal*, 2024, 3 the Regulation is a "two-headed beast". On the social dimension, *see* Alaimo A.*, Il Regolamento sull'Intelligenza Artificiale: dalla proposta della Commissione al testo approvato dal Parlamento. Ha ancora senso il pensiero pessimistico?,* in *federalismi.it,* 25, 2023, 138-139.

machine-based system that has: a) the capacity to operate with varying levels of autonomy from human actions, and b) the capability to infer from the input received how to generate outputs, such as predictions, content recommendations, or decisions that can influence physical or virtual environments (Article 3(1) EU AI Act).[26] As such, the keywords of the definition are autonomy and inference. These features distinguish AI from simpler traditional software systems or programming approaches: systems based on the rules defined solely by natural persons are excluded from the scope of application, even though they automatically execute operations. On the contrary, machine learning, computer vision, natural language processing and understanding, intelligent decision-support systems, and autonomous systems are included.

The interpretative key to analysing the EU AI Act from a labour and employment perspective is outlined in Recital 9, which emphasises that the Regulation shall not affect the existing European and national legal framework concerning employment and working conditions, and the exercise of fundamental rights, including the right to negotiate and enforce collective agreements. In other words, the Regulation creates an "interwoven system" between its provision, the Union harmonisation legislation, and national legal sources. The Regulation's complementary nature is further articulated in Article 2(11) EU AI Act, which states that the European institutions and the Member States are not prevented from maintaining or introducing more favourable provisions or promoting the application of more favourable collective agreements to safeguard workers' rights.[27]

Against this background, the EU AI Act remains only one facet of a broader whole, intrinsically linked with other provisions, especially those regarding the processing of personal data, the protection of health and safety legislation, and equal treatment and non-discrimination.[28]

[26] According to Article 3(1), "AI system" means "a machine-based system designed to operate with varying levels of autonomy, that may exhibit adaptiveness after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments". This definition is the result of an amendment to the Commission's proposal which defined AI system as "software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with". Thanks to the amendment, the Regulation aligns the European definition with the work of international organisations, especially with the definition provided by the OECD (*see* OECD, *Recommendation of the Council on Artificial Intelligence*, 2019, available at https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449).

[27] The initial proposal from the Commission, instead, did not explicitly envisage the possibility for Member States to introduce more favourable conditions. This was criticised in the literature, *see* De Stefano V., Taes S., nt. (8), 21-36; Klengel E., Wenckeback J., nt. (3), 166.

[28] On the importance of the EU AI Act to allow for the application of existing EU labour law *see*: Cefaliello A., Kullmann M., *Offering false security: How the draft artificial intelligence act undermines fundamental workers rights*, in *European Labour Law Journal*, 13, 4, 2022, 544; Peruzzi M., *Intelligenza artificiale e lavoro: l'impatto dell'AI Act nella ricostruzione del sistema regolativo UE di tutela*, in Biasi M. (eds), *Diritto del lavoro e intelligenza artificiale*, Giuffré, Milan, 2024, 132 ff.

3. The consequences of the risk-based approach on the use of employment-related AI systems.

The EU AI Act follows in the footsteps of Reg. no. 2016/679 (General Data Protection Regulation – GDPR)[29] grounding the legal framework on the risk-based approach. This way, the Regulation aligns itself with the internationally shared perspective, according to which risk evaluation and appropriate mitigation measures should primarily be adopted by those to whom regulation is addressed.[30] Moreover, it confirms the methodological approach promoted at the European level by the social partners in the June 2020 *Framework Agreement on Digitisation*,[31] as well as by the *European Declaration on Digital Rights and Principles for the Digital Decade* signed on 15th December 2022.[32]

More precisely, the EU AI Act distinguishes four levels of risk, assigning corresponding legal burdens to providers and deployers. The "risk pyramid" is composed of i) unacceptable risk; ii) high-risk; iii) limited risk; iv) minimal risk. Broadly speaking, the legal framework is built on the principle 'the greater the risk, the more burdensome the obligations'. However, General Purpose AI ("GPAI") models (also known as "foundational models") are subject to specific governance and transparency obligations to adequately consider their peculiar characteristics.[33] Moreover, providers or deployers of systems intended to interact directly with natural persons or to have a generative nature must meet additional transparency requirements regardless of the risk category (Chapter IV, Article 50).

The so-called "unacceptable risks" refer to AI systems that contravene European values and fundamental rights, thereby warranting their prohibition. The Regulation excludes, among others, the placing on the market, the putting into service, or the use of AI systems that exploits the "vulnerabilities of a natural person or a specific group of persons" (Article 5(1) EU AI Act), such as those relating to age, disability or a specific social or economic situation (Article 5(1)(b) EU AI Act). Untargeted scraping of facial images from the Internet or CCTV footage is also prohibited when used to create or expand facial recognition databases (Article 5(1)(e) EU AI Act). Lastly, it is prohibited to use emotion recognition systems in the workplace or biometric categorisation systems that employ sensitive characteristics (e.g. political or religious beliefs, trade union affiliation, sexual orientation, race).[34] There is, however, a caveat meant to legitimise the use of AI systems that infer

[29] Reg. no. 679/2016 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
[30] Delfino M., nt. (23), 38; Aloisi A., De Stefano V., nt. (13), 283 ff.; Loi P., *Il rischio proporzionato nella proposta di regolamento sull'IA e i suoi effetti nel rapporto di lavoro*, in *federalismi.it,* 4, 2023, 239 ff.; Ingrao A., *Hic sunt leones! La piramide del rischio costruita dalla proposta di Regolamento sulla intelligenza artificiale (emendata)* in *Lavoro e Previdenza Oggi,* 11-12, 2023, 778 ff.
[31] ETUC, BusinessEurope, SMEunited, SGI Europe, *European Social Partners Autonomous Framework Agreement on Digitalisation*, June 2020.
[32] The Declaration was signed by the President of the Commission, the European Parliament and the Council, reflecting the shared political commitment of the EU and its Member. The document is available at https://digital-strategy.ec.europa.eu/en/library/european-declaration-digital-rights-and-principles.
[33] Examples of such technologies are GPT-4, which provides the world-famous chatbot ChatGPT, and Bard/Gemini. *See* Sections 2 and 3 of the EU AI Act.
[34] For further insights on the prohibited AI practices *see* Ingrao A., nt. (30), 784 ff.

emotions for safety and medical reasons (e.g. preventing a driver from falling asleep) (Article 5(1)(f)(g) EU AI Act).[35]

Notwithstanding its apparent clarity, the wording of Article 5(1)(f) contains ambiguities, as it limits the scope of application by using the term in the area of "workplace". A narrow interpretation of this provision would mean that the protection does not apply during the recruitment phases, despite these situations being recognised among those with the highest discriminatory impact. Such exclusion creates a paradox where, as we shall see in a moment, pre-employment phases may be classified as 'high-risk', while the category of 'unacceptable risk' only applies once the employment relationship is established. Moreover, this framework would run counter to the rationale behind the European Directives on discrimination,[36] which apply to both the employment relationship and access to employment. On such basis, the literature has emphasised that an extensive interpretation seems preferable to align the provision with the existing European legal framework.[37] As a result, the prohibition of placing on the market, putting into service, or using AI systems to infer emotions shall be understood to apply both in the access to employment and during the employment relationship.

Many of AI's core uses in the workplace that do not fall within this first classification are likely to be addressed by the so-called 'high-risk' category (Article 6). In fact, the Regulation explicitly classifies the AI systems used in the area of "employment, workers management and access to self-employment" as high-risk if they pose a significant risk of harm to health, safety or fundamental rights (Annex III, point 4). This category includes two broad groups: the first considers AI systems intended to be employed in the recruitment or selection of natural persons processes, notably for targeted job advertisements, screening and filtering job applications, and candidate evaluation. The second group includes AI systems intended for making decisions that affect the terms of work-related relationships, the promotion or termination of work-related contractual relationships, task allocation and monitoring and evaluating performance and behaviours.

The employment-related category has been extended appropriately compared to the Commission's AI proposal,[38] thus reflecting the wide range of AI systems already in use as

[35] Ponce del Castillo A., *The AI Act: deregulation in disguise,* in *Social Europe,* 11th December 2023, emphasises the challenges of distinguishing between safety and surveillance purposes within the scope of the exception outlined in Article 5(1)(f).

[36] Notably, Directive no. 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Directive no. 2000/78, establishing a general framework for equal treatment in employment and occupation and Directive no. 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, as well as the national employment discrimination laws (within the Italian legal system these are: Decreto Legislativo 9 July 2003, n. 215; Decreto Legislativo 9 July 2003, n. 216; Decreto Legislativo 11 April 2006, n. 198).

[37] Topo A., *Nuove tecnologie e discriminazioni, XXI Congresso Nazionale "Diritto antidiscriminatorio e trasformazioni del lavoro*", Messina, 23-25 May 2024, 52-53, available at: https://mcusercontent.com/b38a5df6d9903fe9ae7c56ccf/files/cfa36d59-bdc8-279f-d002-37959f34ba9b/Relazione_Topo_Nuove_tecnologie_e_discriminazioni.pdf.

[38] According to the Commission's proposal, instead, the second group encompassed only "AI systems intended to be used for the purpose of assessing students in educational and vocational training institutions and for assessing participants in tests commonly required for admission to educational institutions". This definition has been deemed restrictive by scholars, as it excluded various types of AI systems, such as those utilised in the

workplace tools. This indicates that the European institutions aimed to address the issues that emerged from the practice so far, especially those related to discrimination, surveillance, and data protection (*see* Section 1).

However, AI workplace systems are not automatically considered high-risk, creating loopholes and legal uncertainty. Contrary to the initial Commission's proposal, the Final Provisional Text differentiates based on whether such systems pose a "significant risk of harm." The conditions and criteria to identify a non-significant risk AI system are enlisted in Article 6 and include, among others, cases in which such technology is intended to perform a narrow procedural task or a preparatory task or situations in which AI systems don't replace or influence previously completed human assessment without proper human review (Article 6(3)(a-d) EU AI Act). Yet, the provisions' wording is somewhat open to interpretation. For instance, while AI-automated shift planning is undoubtedly covered, the inclusion of AI-assisted shift planning remains questionable.

The issue arising from the practical implementation of such provision shall be addressed moving from the consideration that Article 6(3) expressly states that the list constitutes a "derogation" from the general framework. Based on this, it could be argued that the conditions enlisted shall be interpreted narrowly. This means that the term 'non-significant' should be understood to exclude only situations in which AI systems merely add an extra layer to human activities with consequently lowered risk.

In addition, another important element shall be brought to the discussion. The EU AI Act specifies that AI mechanisms that perform the profiling of natural persons are to be considered high-risk in any case (Article 6(3)(d) EU AI Act), in light of the severe consequences of biased results and discriminatory effects, especially in case of sensitive characteristics such as age, ethnicity, race, sex or disabilities. This exception is very likely to cover not only the automated monitoring systems but also the automated decision-making processes used at work, as both strongly rely on processing employee data.[39] As emphasised in literature, it is difficult to envision scenarios in which an individual's personal data not leading to profiling could be used for automated decision-making processes.[40]

Based on these considerations, it could be argued that the classification of AI systems used by the employer to exercise his power of directive, control, and discipline as posing 'limited risks' or 'minimum risks' is restricted to specific circumstances only.

Despite the interpretive cautions, however, the upstream classification leaves other problematic loopholes. These are nested within the application of the risk-based approach in the AI field, which requires the providers to rank the risk level of their technology before putting it on the market. In practice, it can be challenging to properly classify and determine the "significance of the risk of harm" in the development phase. Assessing which fundamental rights to consider, how to appraise the severity of violations of those rights, and what constitutes an acceptable risk-benefit trade-off are all complex and context-dependent

assessment of employees' annual bonuses. *See* Cefaliello A., Kullmann M., nt. (28), 546; Klengel E., Wenckeback J., nt. (3), 165.

[39] *See* Peruzzi M., nt. (28), 128.

[40] Brkam M., *Do algorithms rule the world? Algorithmic decision-making and data protection in the framework of the GDPR and beyond,* in *International Journal of Law and Information Technology,* 27, 2019, 97-98.

issues.[41] Harm, for instance, can accumulate without a single event tripping a threshold of seriousness or may not appear immediately. This is particularly the case for workers' physiological effects (e.g., stress due to constant monitoring), which are usually the result of gradual processes and might vary from one worker to another.[42]

Moreover, the severity of the harm is to be evaluated in light of the AI system's intended purpose, which Article 3(12) EU AI Act defines as "the use for which an AI system is intended by the provider". Yet, AI systems might have harmful effects simply because they are used in the context of employment. For instance, tools developed to improve the safety of drivers might be used for monitoring purposes once implemented in the workplace.[43]

As these distinctions are not clear-cut, providers may be able to claim that their applications could pose risks to workers but classify them as non-significant. Therefore, the European Commission should consider these nooks and crannies when providing guidelines specifying the practical implementation of the high-risk classification under Article 6(5) EU AI Act. The providers' freedom to design the AI systems should be limited by the need to comply with European Labour law in light of the horizontal and complementary nature of the Regulation, which requires consistency with the existing legislation. The provider shall take into consideration the employer's obligations arising from the existing legislation – such as the anti-discrimination law, privacy law and health and safety obligations – both in the development procedure and in the risk self-assessment phase.

4. The obligations of providers of high-risk AI systems: a critical assessment.

When AI systems are deemed high-risk, the EU AI Act imposes extensive obligations on the provider and deployer. The first is a natural or legal person, public authority, agency or other body that develops an AI system (or a general-purpose AI model), places it on the market or puts it into service (Article 3(3) EU AI Act). In the employment context, this may be companies that develop or procure comprehensive worker management programs to the extent that they have integrated AI tools. Nowadays, these systems go beyond job advertisements to include, for instance, predictions on the fit of applicants for the job position and assessments of employees' productivity and satisfaction.

The deployer, instead, is defined as "a natural or legal person, public authority, agency, or other body using an AI system under its authority except where the AI system is used in the course of a personal non-professional activity" (Article 3(4) EU AI Act). This will be the

[41] For example, research has shown that there are different ways to define fairness in machine learning and that it is "impossible for a model to satisfy several of these constraints at the same time, except in exceptional cases which are unlikely to hold in the real world". Moreover, once a model has been developed, there are different ways in which it can be used in practice thus opening additional issues (*see* Veale M., Binns R., *Fairer Machine Learning in the Real World: Mitigating Discrimination without Collecting Sensitive Data*, in *Big Data & Society*, 4, 2, 2017, 3).

[42] In this regard, it is worth noting that most of the risks associated with AI in the workplace are related to psychosocial rather than physical hazards. *See* Todolí-Signes A., nt. (7), 433 ff. Nonetheless, the provider is required to estimate and evaluate the risks that may emerge under conditions of "reasonably foreseeable misuse" only for AI systems that are already classified as high-risk (Article 9 (2)(b) EU AI Act).

[43] Cefaliello A., Kullmann M., nt. (28), 560.

employer implementing an AI system in the workplace, such as human resources management software.

Although the deployer/employer represents the primary figure from a labour perspective, his role and actions are significantly influenced by the provider. This influence is evidenced by the delineation of obligations imposed on each party by the Regulation. Upstream, the provider must design and develop AI systems in a way that ensures their operation is sufficiently transparent to enable deployers to interpret a system's output and use it appropriately (Article 13(1) EU AI Act).[44] Additionally, the provider must give the deployer the instructions for the use of the AI system, containing "concise, complete, correct and clear" information in a format that is "accessible and comprehensible to deployers". This includes data on the intended purpose, accuracy levels, metrics and robustness, and any known or foreseeable risks to health and safety or fundamental rights to put the deployer/employer in the position to make reasoned decisions. Downstream, deployers are required to use such a system "in accordance with the instructions for use" received (Article 26(1) EU AI Act). As a result, it is the provider who defines the AI's use, functioning and aims, directly impacting the employer's work organisation and the operations of high-risk AI tools in the workplace. Against this backdrop, any future labour analysis of AI's impact on workers must now encompass the figure of the provider and the associated obligations outlined in the Regulation.

The EU AI Act introduces strict obligations on providers of high-risk AI systems, which include adopting data governance measures, registering high-risk AI systems in an EU-wide database, undergoing conformity assessment procedures to ensure that the technology complies with predetermined requirements, and implementing enhanced risk management.

These last two obligations are the ones that are destined to assume the greatest significance in the labour perspective.

When it comes to the risk management requirement, it is worth remembering that the significance of the harm shall be evaluated in light of the potential "harm to the health, safety or fundamental rights of natural persons" (Article 6(3)). Therefore, the risk management system shall evaluate and counteract risks to such rights. In the employment context, this means that providers shall consider workers' rights and employer's obligations emerging from the existing legislation. For instance, providers shall evaluate the potential harm resulting from the use of AI systems on the operational work processes, occupational health and safety, or handling of workers' personal data. Similarly, potential biases and discriminatory effects should also be verified and assessed.[45]

Regarding the conformity assessment requirement, instead, it should be noted that it can be carried out in different ways depending on whether AI systems are parts of already tested

[44] This provision tackles a major issue highlighted in recent studies, that emphasise the lack of transparency among AI developers, particularly in disclosing training data and methodologies, hindering efforts to assess the safety, robustness, and fairness of AI systems. For further insights on the topic, *see* CRFM, *The Foundation Model Transparency Index. A comprehensive assessment of the transparency of foundation model developers*, 2024, available at https://crfm.stanford.edu/fmti/May-2024/index.html; Human-Centered Artificial Intelligence, nt. (2), 183-184. Concerns regarding transparency and accessibility have been raised also in the literature, *see* Ponce del Castillo A., nt. (12), 7-8; Cefaliello A., Kullmann M., nt. (28), 549.

[45] Cefaliello A., Kullmann M., nt. (28), 542-562.

products or stand-alone AI systems.[46] Unlike other AI tools, for employment-related high-risk AI systems (i.e. those concerning employment, workers management and access to self-employment), providers shall follow the conformity assessment procedure based on internal control, which does not require the involvement of a notified body to assess their quality management system and technical documentation (Article 43 (2) EU AI Act). This means that the entity responsible for assessing the risk is also the one verifying whether such an AI tool is safe: the legislation relies on the provider's risk self-assessment and self-regulation without the mandatory involvement of an independent authority.[47]

Such an approach is questionable due to the potential overreliance on providers' self-governance, which neglects the information asymmetry in AI development, the power imbalances in the employment relationship and the lack of technical expertise of workers.[48] Most importantly, the lack of independent control heightens concerns raised by the literature about the role that harmonised standards are expected to play in guiding providers through the implementation of the risk management system and other compliance requirements.[49] These standards are anticipated to translate the Act's essential obligations into actionable steps. Although not mandatory in principle, providers that follow standards "published in the Official Journal of the European Union" in accordance with Reg. no. 1025/2012 will benefit from a presumption of conformity (Article 40(1) EU AI Act). These will be adopted by the European standard development organisations – the European Committee for Standardisation (CEN) and the European Committee for Electrotechnical Standardisation (CENELEC) – in conjunction with their international counterparts – the International Organization for Standardisation (ISO) and the International Electrotechnical Commission (IEC) –.[50]

However, the delegation of rule-making powers to private entities such as CEN and CENELEC has been a highly controversial practice for years.[51] Reg. no. 1025/2012 on

[46] The EU AI Act outlines different procedures based on whether AI systems are safety components of products that have already undergone testing and evaluation (e.g. medical devices, toys, lifts) or are stand-alone AI systems. In the first case, no specific conformity assessment is required. The obligations are integrated into existing sectoral safety legislation, to avoid duplicating administrative burdens (Recital 50; Article 8(2) EU AI Act). High-risk AI systems that do not fall into the first category are known as stand-alone systems. The EU AI Act contains two procedures for these systems: one involves a conformity assessment based on internal control, and the other involves the participation of an auditor (referred to as the notified body). For further considerations on the conformity assessment, *see* Mökander J., Axente M., Casolari F., Floridi L., *Conformity Assessments and Post-market Monitoring: A Guide to the Role of Auditing in the Proposed European AI Regulation*, in *Minds and Machines*, 32, 2022, 241–268.

[47] This provision, which already featured in the Commission's proposal, has been criticised for being weak and insufficient in ensuring the protection of fundamental rights. Ponce del Castillo A., nt. (12), 3; European Economic and Social Committee, Opinion. AI/Regulation, INT/940, 2021

[48] More generally, for a critique of the self-governance system, *see* Yeung K., Howes A., Pogrebna G., *AI Governance by Human Rights-Centered Design, Deliberation, and Oversight: An End to Ethics Washing,* in Dubber M.D., Pasquale F., Das S. (eds), *The Oxford Handbook of Ethics of AI*, Oxford University Press, Oxford, 2020, 79.

[49] The issue is thoroughly addressed by Giorgi N., nt. (23), 117-118.

[50] The participation in European standardisation activities is channeled via the National standardisation body (NSB) *see* ETUC, *Trade union access to national standardisation committees*, ETUC, Brussels, 2022, 12-13, available at: https://www.etuc.org/sites/default/files/page/file/2023-05/Brochure%20Accesse%20Condition%20to%20national%20mirror%20committee_EN_v4.pdf.

[51] Veale M., Zuiderveen Borgesius F., *Demystifying the Draft EU Artificial Intelligence Act*, in *Computer Law Review International*, 4, 2021, 103; Cuccuru P., *The Public and Private Sides of Harmonized Standards: James Elliott Construction*

European standardisation[52] acknowledges the role of societal stakeholders, including trade unions, in the development of standards and set rules about their participation.[53] Yet independent reviews have emphasised that "industry remains the core element of the European standardisation system, being the main standards user and, at the same time, leading the contribution to technical standardisation work".[54] The uneven participation stems from differences in resources and expertise: societal stakeholders, such as trade unions, often struggle to participate in complex and arcane private processes due to insufficient funding and experience in standardisation.[55] As a result, the adoption of harmonised standards in the field of artificial intelligence brings back the delicate issue of involving all relevant stakeholders in the standard development process.

Against this background, the European institutions and the Member States shall take broader actions to promote deep and meaningful participation of trade unions (and other societal stakeholders) in shaping the standards to support the implementation of the EU AI Act. This is fundamental to adequately enforce the risk-based approach and the self-governance mechanisms. At the same time, trade unions should take a more active stance in the matter to rebalance the current asymmetries, including strengthening skills and competencies through dedicated training programmes for workers' representatives. With the increasing significance of harmonised standards and risk-based approaches, trade unions will be faced with the challenging task of becoming proactive interlocutors to minimise the impact of AI tools on the protection of workers' fundamental rights.

5. The rights and obligations of the employer as a deployer.

The requirements discussed in the previous paragraph are coupled with obligations placed upon deployers of high-risk AI systems. In the employment context, this refers to the

v. Irish Asphalt, in *German Law Journal,* 19, 6, 2018, 1399-1416; Cuccuru P., *Regulating by Request: On the Role and Status of the Standardisation Mandate under the New Approach,* in Eliantonio M., Cauffman C. (eds), *The Legitimacy of Standardisation as a Regulatory Technique,* Edward Elgar, Cheltenham, 2020, 48-63; Iversen J.E., Vedel T., Werle R., *Standardization and the Democratic Design of Information and Communication Technology,* in *Knowledge, Technology & Policy,* 17, 2, 2004, 104 ff.

[52] Reg. no. 1025/2023 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council.

[53] In more detail, the European standardisation organisations must encourage and facilitate the appropriate representation and effective participation of all relevant stakeholders in their standardisation activities (Article 5 (1) Reg. no. 1025/2012). Moreover, the European stakeholder organisations representing SMEs, consumers, environmental interests, and social interests (e.g. trade unions) are granted financial support (Annex III) and formal access to the annual European Union standardisation work programme (Article 8). Furthermore, Reg. no. 1025/2012 provides for the participation of societal stakeholders, including trade unions, at all the stages of the development of European standards or European standardisation deliverables (Article 5(1) Reg. no. 1025/2012).

[54] European Commission, *Independent review of the European standardisation system: Final report – Annexes*, Publications Office of the European Union, Luxembourg, 2015, 102.

[55] Giorgi N., nt. (23), 117. Veale M., Zuiderveen Borgesius F., nt. (51), 106 reach similar conclusions with regard to the consumer organisations.

employer intending to introduce AI systems that are classified as high-risk in the workplace. The decision of the employer to implement such technologies is a manifestation of the freedom to conduct business under Article 16 CFREU and national Constitutions of the Member States, such as Article 41 of the Italian Constitution.[56] Thus, the use of AI systems illustrates entrepreneurial discretion in the management of business operations and personnel. However, this right must be exercised in compliance with fundamental workers' rights, such as those enshrined in Articles 21 and 31 CFREU, which is where the AI Regulation comes into play.

In more detail, the EU AI Act outlines several requirements.[57] One of the most important is the employer's obligation to use the high-risk AI systems in accordance with the instructions received from the provider and take appropriate technical and organisational measures for this purpose (Article 26(1) EU AI Act). From such provision, it may be inferred that the employer will be required to use the AI system in compliance with the intended purpose specified by the provider in the instructions and may be held liable in the case of misuse (Article 13(3)(b)(i) EU AI Act). This may entail significant consequences, considering that the providers' intended purpose may differ from the employer's actual use. Existing practices show, for instance, that even software not meant to monitor workers can nevertheless be used for such purposes, leading to the application of sanctions.[58]

The Regulation further requires deployers to appoint a competent, properly qualified, and resourced individual to oversee the AI technologies (Article 26(2) EU AI Act). This obligation is designed to uphold the human-in-command principle, ensuring human input and oversight. It is especially important in labour relations because the oversight will be carried out by a worker or a group of workers, who must have received specific training to perform the related tasks.[59]

Among the most significant new features of such legislation is the Fundamental Rights Impact Assessment (hereafter FRIA), which marks a turning point in how enterprises will have to approach AI (Article 27 EU AI Act). This requirement is the result of intense negotiations and builds upon the EU's existing *acquis* of similar impact assessments foreseen under Reg. no. 679/2016 (General Data Protection Regulation – GDPR) and Reg. no. 2065/2022 on a single market for digital Services (Digital Services Act).[60]

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[56] In relation to the Italian system, *see* Ciucciovino S., *La disciplina nazionale sulla utilizzazione della intelligenza artificiale nel rapporto di lavoro*, in *Lavoro Diritti Europa*, 1, 2024, 4.

[57] *See* Section 3 "Obligations of Providers and Deployers of High-Risk AI Systems and Other Parties" of the EU AI Act.

[58] Cefaliello A., Kullmann M., nt. (28), 547-548.

[59] The Final Provisional Text reflects the debate on the need for such individuals to receive adequate training on how to perform this task and appropriate resources to address potential risks. *See*, European Economic and Social Committee, *Opinion. AI/Regulation,* INT/940, 2021, 9, EESC-2021-02482-00-00-AC-TRA, available at https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/regulation-artificial-intelligence.

[60] Reg. no. 2022/2065 of the European Parliament and the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act). Initially, the AI Act proposed by the European Commission only required providers to rank their technology between minimal and high risk. Then, the Parliament's Committees on Legal Affairs and Internal Market and Consumer Protection pushed for the FRIA introduction. On such requirement, *see* Viviani S., *Luci ed ombre degli strumenti di tutela dei diritti*

The FRIA requires those deploying AI systems to assess the impact on fundamental rights before using them. The evaluation must consider various elements, including the categories of individuals and groups likely to be affected in the specific context, the "specific risks of harm likely to have an impact", and the "measures to be taken in the case of the materialisation of those risks, including the arrangements for internal governance and complaint mechanisms" (Article 27(1) EU AI Act).[61]

Such assessment is fundamental, as deployers are best positioned to determine how the high-risk AI system will be used in real-world scenarios. This is especially true in the employment context, where different AI tools can pose varying levels of risk and may lead to unforeseen issues not accounted for during the development phase.

Yet, the framework of protection is undermined by major exclusions. Indeed, the Regulation does not consider all deployers/employers, restricting the scope of application to three categories only: i) deployers that are bodies governed by public law; ii) deployers that are private entities providing public services; and iii) deployers of certain high-risk AI systems.

Private employers that don't provide public services and that use general AI systems in the workplace are inexplicably exempt from conducting the FRIA.[62] What is more, on close reading, the type of deployers considered indicates that the legal protection is primarily intended to address individuals as citizens and consumers, rather than as employees. For instance, the last category mentioned by the EU AI Act considers the deployers of the high-risk AI systems referred to in points 5 (b) and (c) of Annex III. These are public or private entities that use AI systems to evaluate the creditworthiness of natural persons or establish their credit score or for risk assessment and pricing in relation to natural persons in the case of life and health insurance. As is clear from the wording of the provision in question, these are entities operating mostly in the banking or insurance sectors. However, such entities are included not because of their use of AI in the workplace, but because of the potential for discrimination against their clients stemming from the use of AI systems to assess creditworthiness or credit scores. In other words, even the deployers subject to the FRIA are likely to have their focus on the protection of fundamental rights of users and consumers (e.g. the impact on public services or on the assessment and pricing), while the employment-related use of AI takes a back seat.

As a result, the procedure is, to some extent, a missed opportunity. Nonetheless, the FRIA's limited scope does not absolve the employer from the responsibility to consider the impact on workers' fundamental rights and identify appropriate protective measures.[63] This argument is based on two considerations.

nell'architettura dell'AI Act basata sul rischio, in Lunardon F., Menegatti E., *I nuovi confini del lavoro: la trasformazione digitale*, Italian Labour Law e-Studies, Bologna, 2024 (*forthcoming*).

[61] The EU AI Act does not specify how the FRIA should be conducted. However, the AI Office – established in February 2024 within the Commission with the aim to oversee the Regulation's enforcement and implementation – is expected to develop a template for a questionnaire to facilitate deployers' compliance (Article 17(5) EU AI Act).

[62] The previous version automatically identified all the employment-related AI systems as "high-risk". *See* Cefaliello A., nt. (28), 543; Ciucciovino S., nt. (56), 4.

[63] Peruzzi M., nt. (28), 130.

First, all deployers are required to oversee the functioning of the high-risk AI system and halt its use if they have reason to believe that it may pose a risk to health and safety and fundamental rights (Art. 26(5) EU AI Act). If such a situation arises, deployers must inform the provider or distributor and the national supervisory body. This means that, although not all deployers are mandated to evaluate the risks in advance, every deployer will be obliged to proactively oversee the impact after the implementation.

Secondly, the legal framework on deployers' requirements conveys more than others the EU AI Act's complementary nature. The Regulation clearly states that its provisions introduce new obligations for AI deployers without affecting existing Union or national laws (Article 26(3)(6)(7)(9) EU AI Act). Therefore, they must be coordinated and read in conjunction with other European and national pieces of legislation.[64] This "interwoven system" creates the need for an interpretative process of recomposition of individual European and national regulations. Such a complex and articulated interpretative framework cannot be dealt with in detail here. However, two illustrative examples elucidate the implications of the Regulations' complementary nature.

The first example that can be considered is Directive no. 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work can be considered. This Directive – the cornerstone of the European legal framework on occupational safety and health (OSH) – mandates that employers must take the measures necessary for the safety and health protection of workers, including the prevention of occupational risks and the provision of information and training (Article 6(1) Dir.).[65] The employers must develop a coherent and comprehensive prevention policy which encompasses various aspects, including the use of technology in the workplace (Article 6 (2)(g) Dir.).[66] Additionally, employers must ensure that each worker receives adequate safety and health training when new technology is introduced (Article 12(1) Dir.).

In light of this Directive, employers must elaborate a prevention policy that verifies and assesses the risks associated with the introduction of AI tools in the workplace. They also need to provide proper training to ensure that workers can use the technology safely. The EU AI Act facilitates compliance with these obligations, by imposing on the providers the transparency obligation and the duty of information to deployers under Article 13(1). This provision is aimed at enabling deployers "to interpret a system's output and use it appropriately" and to be aware of "any known or foreseeable circumstance, related to the use of the high-risk AI system in accordance with its intended purpose or under conditions of reasonably foreseeable misuse", which may harm health and safety or fundamental rights. The employer can draw on this information and data to elaborate the prevention policy.

The second example is Reg. no. 679/2016 (GDPR) on the protection of personal data. When automated or AI-assisted decisions involve data processing, they are very likely to fall

[64] The regulatory implications of the EU AI Act must be assessed in the context of an existing set of rules at the European level that condition their application. De Stefano V., Wouters M., *AI and digital tools in workplace management and evaluation. An assessment of the EU's legal Framework*, EPRS, European Parliamentary Research Service, 2022; Loi P., nt. (30), 242.
[65] Jarota M., nt. (7), 4 and 8.
[66] Cefaliello A., Kullmann M., nt. (28), 560.

under the scope of the GDPR and, most importantly, under the Data Protection Impact Assessment (DPIA) required by Article 35.[67] In more detail, when two of the criteria identified by the Article 29 Working Party Guidelines are met the data controller (in our case, the employer) will be required to carry out the DPIA.[68] These criteria are likely to be fulfilled in the case of the use of AI tools.[69] Therefore, the employer will be required to carry out the DPIA. Even in this case, the EI AI Act facilitates the fulfilment of the obligation, as the deployer will use the information and the instruction received from the provider under Article 13(1) to comply with the obligation to carry out the DPIA (Article 26(9)).

6. Transparency and information requirements: strengths and weaknesses.

A final element of interest of the EU AI Act from a labour perspective concerns the provisions on transparency and information. Among the most significant amendments to the Commission's initial proposal is the requirement for employers to "inform workers' representatives and the affected workers that they will be subject to the use of the high-risk AI system" before putting into service or using a high-risk AI system at the workplace.[70] In this context, individual and collective information constitutes a prerequisite for the legitimate exercise of the employer's right to introduce and use AI tools in the workplace. This way, workers and their representatives are afforded the opportunity to oversee the deployment of systems that pose a risk of harm to their fundamental rights. As AI tools become more complex, transparency, communication, and information play crucial roles in building trust in the workplace and preventing abuses. This is particularly important because workers often face challenges in understanding the functioning of AI systems and controlling their logic and rationality when processes are obscured by the "black box" effect of such technology.

Moreover, with regard to the individual right to information, it is worth noting that the "affected workers" will be able to compound such right granted for the implementation phase with the prerogative recognised by Article 86(1) EU AI Act. This provision acknowledges the right of every person impacted by a deployer's decision based on high-risk AI technologies to receive "clear and meaningful explanations of the role of the AI system in the decision-making procedure and the main elements of the decision taken". Pursuant to the combined provisions of Article 26(7) and Article 86(1), affected individuals are granted

[67] Peruzzi M., nt. (28), 135-136; Cefaliello A., Kullmann M., nt. (28), 544.
[68] Art. 29 Data Protection Working Party, *Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is "likely to result in a high risk" for the purposes of Regulation 2016/679*, WP 248 rev.01, Adopted on 4 April 2017, as last Revised and Adopted on 4 October 2017.
[69] Examples of the criteria enlisted in the abovementioned Guidelines are: the reliance on automated decisions that may produce legal effects or similarly significant effects on natural persons (e.g. processing that may lead to discrimination against individuals); the systematic monitoring (e.g. surveillance of the employee's workstation, internet activities etc.); the collection of data concerning vulnerable subjects (e.g. employees' data); the implementation of new technological or organisational solutions.
[70] The Commission's AI proposal did not confer to individuals and worker representatives the right to be informed about the introduction of high-risk AI systems in the workplace. This shortcoming has been strongly criticised (*see*, among others, European Economic and Social Committee, nt. (59)) leading to an amendment of the Regulation.

the right to transparency and information regarding the use of high-risk AI tools throughout the employment lifecycle. Therefore, they should not only be informed about the introduction of high-risk AI systems, but they should also have the right to receive information whenever the employer relies on such technologies for employment-related decisions. Prospective candidates, employees and workers should, therefore, be able to comprehend the rationale behind the decision-making process and have access to straightforward and timely explanations.

Understanding how automated or AI-assistant decision-making systems work is instrumental in rebalancing the information asymmetry that is exacerbated by the use of AI for employment decisions. A prominent example in this regard is the issue of discrimination resulting from biased automated decisions or flawed information. The use of AI systems in employment is subject to the same anti-discrimination laws as other employment practices. More precisely, under existing European and national non-discrimination laws, employers are required not to discriminate against candidates or employees on a set of protected grounds (e.g. sex, religion or belief, disability, age, sexual orientation, ethnic origin), which apply to the use of AI systems in employment just as they apply to other employers' decisions.[71] So far, these laws have been relevant tools for uncovering and unveiling the so-called "black boxes" of management algorithms by virtue of valuable substantial and procedural mechanisms, including the recognition of trade union legal standing and the eased burden of proof.[72] Moreover, unlike US anti-discrimination law, the intention of the employer to discriminate is generally viewed as irrelevant. This means that proving the intent or motive to discriminate is not necessary to establish discrimination.[73]

To ensure effective legal protection against discrimination, however, discriminatory practices must first be detected, and access to transparent and understandable information is essential for this purpose. In such a context, the provisions for information and transparency articulated in the EU AI Act have the potential to support the exposure and redress of discriminatory practices. Such access to valuable information shall facilitate the identification of bias in algorithms.[74]

While the worker's individual right to information has been strengthened, the framework for the collective dimension is of light and shade. Article 26(7) is the result of a compromise between the original Proposal, which did not provide for the involvement of trade unions, and the amendment advocated by the Parliament, which sought to expand the information

[71] Kelly-Lyth A., nt. (9), 152-171; Morondo Taramundi D., *Discrimination by Machine-Based Decisions: Inputs and Limits of Anti-discrimination Law*, in Custers B., Fosch-Villaronga E., (eds), *Law and Artificial Intelligence. Regulating AI and Applying AI in Legal Practice*, Springer, Berlin, 2022, 77; Gaudio G., *Le discriminazioni algoritmiche,* in *Lavoro Diritti Europa,* 1, 2024, 1-26.

[72] On the burden of proof, *see* CJEU - Case C–303/06 Coleman S., v Attridge Law and Steve Law [2008] ECLI:EU:C:2008:415, par. 54; CJEU - Case C–81/12 Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării [2013] ECLI:EU:C:2013:275, par. 55.

[73] With regard to the irrelevance of the employer's intention *see* Ellis E., Watson P., *EU Anti-Discrimination Law*, Oxford University Press, Oxford, 2012, 163. Within the Italian legal system: Barbera M., *Il licenziamento alla luce del diritto antidiscriminatorio*, in *Rivista Giuridica del Lavoro*, 64, 1, 2013, 151; Lassandari A., *Considerazioni sul licenziamento discriminatorio*, in Bonardi O., (eds), *Eguaglianza e divieti di discriminazione nell'era del diritto del lavoro derogabile*, Ediesse, Rome, 2017, 193-194.

[74] On the debate regarding transparency and explainability *see* Molé M., nt. (8), 92 ff.

requirement to include consultation. The Parliament's proposal to require employers to consult workers' representatives with a view to reaching an agreement in light of Directive no. 2002/14[75] has been discarded, and the consultation of workers and their representatives has been relegated to Recital 92.[76] Consequently, trade unions shall be informed but not consulted before the employer introduces a high-risk AI system in the workplace.

More generally, the EU AI Act does not embrace the arguments made by scholars regarding the promotion of collective bargaining to address the use and limits of technology in the workplace, the organisational objectives, data collection and transparency to effectively implement the "human-in-command approach". Nonetheless, Article 2(11) clarifies that the European institutions and the Member States are not prevented from maintaining or introducing more favourable provisions or promoting the application of more favourable collective agreements to safeguard workers' rights. As such, the EU AI Act does not exclude the possibility of a stronger trade unions' participatory approach.[77]

Moreover, this provision does not prejudice the employer's obligation to inform and consult workers arising from other Union or national laws or practices. In this perspective, Directive no. 2002/14 comes to the fore, requiring undertakings with at least 50 employees or establishments employing at least 20 employees to inform and consult workers or their representatives on decisions likely to lead to substantial changes in work organisation (Article 4(2)(c) Dir.). Directive no. 89/391 further ensures that "the planning and introduction of new technologies" shall be subject of consultation with workers or their representatives "as regards the consequences of the choice of equipment, the working conditions and the working environment for the safety and health of workers" (Article 6 (3)(c) Dir.).

These remarks once again reveal the EU AI Act's complementary nature. Therefore, in this area as well, it will be necessary to intertwine the different provisions with a complementary, multilevel approach. Within the Italian framework, this new right of information will be incorporated into an already complex structure, owing to the presence of additional information requirements under Article 4(3) of the Workers' Statute (Legge 20 May 1970, n. 300) and Article 1-*bis* Decreto Legislativo 26 May 1997, n. 152 as amended by Decreto Legislativo 104 2022.[78] The interpretative activity is complicated due to the partial overlaps. Article 1-*bis* D.lgs. n. 152/1997, following the latest amendment which added the adverb "entirely", appears to restrict employers' obligation to provide information only in situations where managerial decisions are fully automated, i.e., based entirely on algorithmic systems.[79] Conversely, the Regulation under discussion relates to the use of high-risk AI

[75] Directive no. 2002/14 establishing a general framework for informing and consulting employees in the European Community.
[76] On the Parliament's proposal see the positive remarks made by Alaimo A., nt. (25), 143-144 and Ingrao A., (nt. 30), 791-793. In this regard, it is worth noting that a recent report by the OECD has found that workers are more likely to report positive impacts of AI if their companies consulted workers or worker representatives on its use in the workplace (Lane M., Williams M., Broecke S., *The impact of AI on the workplace: Main findings from the OECD AI surveys of employers and workers*, *OECD Social, Employment and Migration Working Papers*, No. 288, OECD Publishing, 2023, 77-78).
[77] Zappalà L., nt. (14), 189-190.
[78] The so-called Decreto Trasparenza was further amended by Decreto Legge 4 May 2023, n. 48, converted with modification into Legge 3 July 2023, n. 85 (the so-called Labour Decree).
[79] Peruzzi M., nt. (30), 11 ff.

systems, thus distinguishing based on the level of risk of harm to health, safety, and fundamental rights. Additionally, Article 26(7) does not specify the content of the information the employer must provide. An approach similar to that of Article 1-*bis* D.lgs. n. 152/1997, that focuses on data classification, processing methods, or algorithmic structure, including training and calculation logics/criteria, would likely be inconsistent. This information is difficult to understand for the AI programmers themselves and would likely be incomprehensible for workers and their representatives. In most cases, they lack the knowledge and capacity to identify and manage fairness issues emerging from complex technical systems.

On such premises, a parallel should be drawn with the other provision concerning information contained in the EU AI Act, namely the provider's duty to inform the deployer and the right to explanation of individual decision-making (Article 86). The first includes, where applicable, information that enables the "deployers to interpret the output of the high-risk AI system and use it appropriately" (Article 13(3)(b)(viii) EU AI Act). The second includes, as mentioned above, elements of the decision-making process. Similarly, the employer's obligation should focus on information that allows workers' representatives to "interpret the output" and to understand its use, especially with regard to its influence on decisions attributable to the deployer/employer. After all, it is the employer and the workers, not the AI system, who have a contractual relationship and legal responsibility.[80]

The Italian Council of Ministers approved a bill on 23rd April 2024 with which it intends to start the process of aligning the Italian legal system with the EU AI Act. The bill includes a provision on the right to information about AI systems, which may potentially complicate matters rather than provide clarity.[81] Specifically, Article 10(3) explicitly refers to the procedures and situations regulated by Article 1-*bis* D.Lgs. n. 152/1997. This, despite the abovementioned disparities in the definitions of high-risk AI systems and entirely automated decision-making or monitoring systems.

Against this backdrop, it is advisable for the legislator to amend the provision. Instead of referencing existing national provisions, the legislator should intervene to adapt the current text to comprehensively encompass both new (Article 26(7) EU AI Act) and old (Article 1-*bis*) information requirements.

7. Conclusive remarks.

The EU AI Act is the first attempt to establish a comprehensive legal framework for AI carried out by any major global economy. As such, it has a dual nature, functioning not only

[80] Ciucciovino S., nt. (56), 5, highlights that the term algorithmic decision-making "is a linguistic mystification insofar as the AI is not legally endowed with a power of its own and thus does not in itself have the capacity to affect the contractual relationship or autonomously produce legal effects in the sphere of the employee". The legal effects result from the employer's decision to implement the output of the AI system.

[81] Dagnino E., *Verso una regolazione dell'Intelligenza artificiale: prime note sui profili lavoristici del disegno di legge di iniziativa governativa*, in *Bollettino ADAPT* 13 May 2024, n. 19.

as a legally binding instrument for the European Member States but also as a potential benchmark in the global discussion on the regulation of AI systems.

An international consensus on AI governance is presently lacking, as most countries are at different stages of development.[82] Nevertheless, significant strides have been taken towards the adoption of regulations that align with the European institution's objective of enhancing industrial capacity, while ensuring that AI remains human-centric and trustworthy. In October 2023, the G7 nations endorsed the Hiroshima Declaration, acknowledging "the need to manage risks and to protect individuals, society, and our shared principles including the rule of law and democratic values, keeping humankind at the centre".[83] This joint commitment was complemented by two documents: the *Guiding Principles for Organizations Developing Advanced AI Systems*[84] and the *International Code of Conduct,*[85] a voluntary framework aimed at providing guidance for companies engaged in AI tool development. Furthermore, on 1st November 2023, representatives from 28 States signed the first internationally agreed document on artificial intelligence, known as the Bletchley Declaration. With this Declaration States agreed to cooperate on crafting a "human-centric, trustworthy and responsible AI".[86]

Moreover, the EU AI Act contains specific provisions that aim at diffusing the European AI model globally, producing the so-called 'Brussels Effect'. In fact, one of the core features of the Regulation is the extra-territorial scope, with specific provisions that extend their application to organisations outside the European Union. This applies when such organisations place AI products on the market or put them into service within the EU, and persons in the EU use the outputs produced by these AI products. Considering the European single market's attractiveness for businesses, this might trigger the so-called 'Brussels Effect', prompting changes in products offered in non-EU countries.[87] Currently, the EU cannot compete with leading nations like China and the US in the domain of technology production. Nonetheless, it aims at establishing itself as a global standard-setter in terms of regulation. In other words, in an era where technology and geopolitical influence intersect, the extra-territorial scope is intended not only to address worldwide concerns over the governance of AI but also to strengthen the EU's position in the ever-changing domain of AI geopolitics.

From this perspective, it is necessary to remind the fact that the EU AI Act is not a standalone piece of legislation, but rather one of the axes of the broader European Digital

[82] For an overview of the legislation regarding the use of AI in the workplace *see* OECD, *OECD Employment Outlook 2023. Artificial Intelligence and the Labour Market,* OECD Publishing, 2023, 182 ff.
[83] Leaders of the Group of Seven, *G7 Leaders' Statement on the Hiroshima AI Process*, 30.10.2023, available at https://www.mofa.go.jp/files/100573466.pdf.
[84] *Hiroshima Process International Guiding Principles for Organizations Developing Advanced AI System*, G7 2023, Hiroshima Summit, retrieved from https://www.mofa.go.jp/files/100573471.pdf.
[85] *Hiroshima Process International Code of Conduct for Organizations Developing Advanced AI System*, G7 2023, Hiroshima Summit, https://www.mofa.go.jp/files/100573473.pdf.
[86] *The Bletchley Declaration by Countries Attending the AI Safety Summit*, 1-2 November 2023, available at https://www.gov.uk/government/publications/ai-safety-summit-2023-the-bletchley-declaration/the-bletchley-declaration-by-countries-attending-the-ai-safety-summit-1-2-november-2023.
[87] The European single market is highly attractive to businesses due to its hundreds of millions of consumers with considerable spending power. Therefore, it is expected that multinational enterprises, for investment efficiency, will develop products that comply with European standards, even if they also operate in non-European markets. On the 'Brussels Effect', *see* Bradford A., *The Brussels Effect: How the European Union Rules the World*, Oxford University Press, Oxford, 2020; Almada M., Radu A., nt. (25), 1-18.

Agenda. This comprehensive framework includes a range of legal instruments that have already been enacted, including Reg. no. 1230/2023 on machinery,[88] aiming to update the legal discipline for systems with fully or partially self-evolving behaviour, as well as the Regulations on digital markets and services (Reg. no. 1925/2022, so-called Digital Market Act;[89] and Reg. no. 2065/2022, so-called Digital Service Act),[90] and the Regulations on the creation of a fair and innovative data economy (Reg. no. 868/2022, so-called Data Governance Act;[91] and Reg. no. 2854/2023, so-called Data Act).

Augmenting these existing legal instruments is a proposed set of additional measures intended to uphold the implementation of AI in Europe. This includes the proposed AI Liability Directive (AILD)[92] and the proposed revision to the Product Liability Directive (PLD).[93] Such Directives are intended to update product liability and non-contractual liability for damage caused by high-risk AI systems. They provide mechanisms to overcome the so-called black-box effect and ease the burden of proof through the use of disclosure and rebuttable presumptions.

This legislative framework shows that the European institutions are indeed taking a leading role in regulating the use of artificial intelligence and that the EU AI Act represents a significant move forward. It introduces the first operationalisation of the concept of developing and deploying human-centred AI.

However, the legal framework is not without shortcomings, exhibiting considerable limitations when it comes to the protection of workers' fundamental rights. As mentioned in the previous paragraphs, trade unions are only informed about the introduction of high-risk AI systems. Additionally, AI tools are only considered high-risk if they cause "significant harm", leaving room for interpretation. More generally, the protection of workers' fundamental rights heavily relies on the already existing legislation, requiring the interpreters to apply the existing provisions in new contexts to address the risk associated with the adoption of new technologies.

These legal gaps and ambiguities appear to derive, in part, from the evolutionary trajectory of the EU AI Act. Indeed, the Regulation was primarily conceived as a product safety instrument, leaving major employment and labour aspects outside the scope of application.[94] However, over time, the EU AI Act has transformed into a multifaceted cross-sectorial legislation with a horizontal effect. This expanded regulatory paradigm has proven problematic, creating an intricate structure that hinders internal coordination. Ultimately, the

[88] Reg. no. 1230/2023 of the European Parliament and of the Council of 14 June 2023 on machinery and repealing Directive 2006/42/EC of the European Parliament and of the Council and Council Directive 73/361/EEC.
[89] Reg. no. 1925/2022 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828.
[90] Reg. no. 2065/2022 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Service Act).
[91] Reg. no. 868/2022 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act).
[92] Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive), 28.09.2022, COM(2022) 496 final.
[93] Proposal for a Directive of the European Parliament and of the Council on liability for defective products, 28.09.2022, COM(2022) 495 final.
[94] For instance, Klengel E., Wenckeback J., nt. (3), 165-166 discuss the "lack of labour law".

legislation provides only basic coverage for each aspect and fails to present a comprehensive legal framework to address the specific challenges posed by AI in the workplace.

In any case, the EU AI Act will only serve as a minimum shared framework, given that Member States are allowed to maintain or introduce legislation that provides enhanced protection for workers. In the endeavour to safeguard fundamental rights, Member States will find a valuable framework within the Council of Europe's proposed Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law.[95] Expected to be the first legally binding global instrument to address the risk posed by AI, this Convention emphasises the imperative of upholding fundamental rights, requiring the adoption of AI systems that respect "equality, including gender equality, and the prohibition of discrimination" (Article 10), as well as "privacy rights of individuals and personal data" (Article 11(1)(a)).[96] To this end, States are mandated to take measures for the "identification, assessment, prevention and mitigation of risks posed by artificial intelligence" (Article 16) and ensure the possibility of lodging a complaint (Article 14).

In the face of the challenges posed by artificial intelligence, social partners are also poised to assume a crucial role. Ensuring trustworthy AI in the workplace not only requires a well-structured policy framework but also demands the capacity of trade unions and employers' organisations to effectively manage the profound implications of AI in the world of work.[97]

Although collective bargaining on AI is not yet as widespread as negotiations on other aspects of working conditions, it is expected to increase in relevance in the future. Trade unions and employers' organisations have already stipulated the first agreements that can serve as examples and are increasingly involved in discussions and negotiations on various AI-related topics. Collective agreements will be instrumental in shaping and adapting the legal framework to the needs of the enterprises and the workforce, establishing context-based regulations for the use of AI in the workplace.[98] Social partners are tasked especially with the responsibility of ensuring traditional rights, such as the protection of workers' health and safety and enterprise productivity, while developing the new generation of rights. These include ensuring that AI systems are transparent and understandable, that workers (and employers) receive adequate training and that workers' representatives have access to external expertise.

[95] The Committee of Ministers adopted the Framework Convention on 17th May 2022, at its Session held in Strasbourg. This Convention will be opened for signature on the occasion of the Conference of Ministers of Justice in Vilnius (Lithuania) on 5th September 2024.

[96] The Council of Europe has been at the forefront of AI regulation. Through in-depth studies, it has conducted research on the impact of this technology on the rights protected under the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Additional Protocols. In 2018, the Council of Europe commissioned a range of studies examining the intersection of discrimination and artificial intelligence. These studies highlighted the need to address the AI issues through different tools, including data protection and sector-specific regulation, such as employment laws (*see* Zuiderveen Borgesius F, *Discrimination, artificial intelligence, and algorithmic decision-making*, Directorate General of Democracy, Council of Europe, 2018; more recently, Bartoletti I., Xenidis R., *Study on the impact of artificial intelligence systems, their potential for promoting equality, including gender equality, and the risks they may cause in relation to non-discrimination*, Council of Europe, 2023).

[97] Klengel E., Wenckeback J., nt. (3), 160.

[98] For a European overview of trade union actions *see* Brunerv á S., Ceccon D., Holubová B., et al., nt. (6), 15; and the national experiences of France, Italy, Spain and Sweden discussed in Ponce Del Castillo A., *Artificial intelligence, labour and society*, ETUI aisbl, Brussels, 2024.

In crafting such a balance, the Autonomous Framework Agreement on Digitalisation, which was stipulated by the European cross-sectoral social partners on 22nd June 2020, has the potential to create a common path among the Member States. So far, its implementation has been slow,[99] but its revitalisation can be useful in enabling employers and unions to manage the use of employment-related AI tools in partnership and in a human-oriented approach at national, sectoral, and company levels, as well as in workplaces.

The Agreement outlines the directions and principles for introducing AI in the world of work. It aims to encourage the exploration of AI systems' potential to promote enterprise productivity and worker well-being, while also advocating for measures to mitigate risks associated with such innovative technology. Unlike the EU AI Act, for instance, the Agreement requires employers – not providers – to conduct a risk assessment, which includes considerations for enhancing safety and preventing harm to human physical and psychological well-being, confirmation bias or cognitive fatigue. Moreover, checks are required in advance to prevent erroneous AI output.

Building safe and trustworthy AI is a fundamental precondition for cultivating an innovation-friendly environment for users, deployers and developers. However, the strengths and ambiguities of the EU AI Act discussed in this paper show the intricate and laborious nature of such an endeavour. To some extent, the transition towards fair digitalisation and work is still an uncharted territory.

Against this background, approaches that vest the implementation responsibility solely in one entity, whether it be the European Union, national legislative bodies or social partners are doomed to failure. The scale of the changes in the workplace requires synergistic actions, based on multi-stakeholders and multi-level initiatives. These are the sole viable methods capable of keeping pace with the rapidly evolving landscape of AI technology.

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[99] *See* ETUC, BusinessEurope, SMEunited, SGI Europe, *Implementation of the ETUC/BusinessEurope/SMEunited/SGI Europe Framework agreement on Digitalisation,* 3rd Joint Report, 2023, https://resourcecentre.etuc.org/sites/default/files/2023-12/FINAL%20Third%20joint%20report%20-%20Implementation%20of%20the%20Digitalisation%20agreement.pdf. The Document reports only a few measures adopted in the AI field by countries such as Austria, Croatia, Czech Republic, Hungary, Malta, Netherlands.

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