The German Trade Union Confederation's Position on

the EU Commission's draft of a European AI Regulation

November 2021

1.   General assessment of the European AI initiative

In general, the German Trade Union Confederation (DGB) welcomes the initiative for a European regulatory framework for the terms of authorisation and use of AI applications. AI has the potential to significantly contribute to an improvement in working conditions. The basic prerequisites for using AI in order to promote Good Work and to avoid negative effects are, in particular, (a) transparency about how AI applications work, (b) the skills to assess and control AI applications when using them and (c) sufficient participatory and co-determination rights for employees. These prerequisites are fundamental for the necessary assessment of impact in the workplace as well as a continuous evaluation which includes the need for possible adaptation.The DGB has summarised the requirements for use of AI in the workplace in the [DGB concept paper for AI in the workplace](#) (2020).

The **transparency requirements** are discussed in the EU Commission's draft, but only to the extent that they apply to the approval of AI applications/systems. This addresses an essential basic prerequisite for the use of AI. However, due to the nature of the 'EU Regulation', it does not cover all transparency issues. In particular, the transparency requirements which the providers are placed under apply vis-à-vis the supervisory authorities and, in the case of high-risk AI systems, also vis-à-vis the users (cf. Art. 13), but not vis-à-vis the affected parties and thus not vis-à-vis the affected employees and their representative bodies. The intention is that not all, but only certain AI systems will actually be discernible as AI systems for the affected natural persons (cf. Art. 52). Nevertheless, such an approach, which is unique in the world to date, is an important component of AI use in line with 'Good Work by design' (cf. DGB 2019).

2.   Regarding the nature of the AI Regulation

The basis of jurisdiction of the planned EU Regulation relates to 'the placing on the market, putting into service and use' of AI systems to harmonise provisions within the framework of the EU's internal market (TFEU 114). From the point of view of the legal system, one must consider that the legal acts of the internal market according to the New Legislative Framework (NLF) take into account quality requirements and responsibilities of placing products on the market – i.e. authorisation – but that the AI Regulation does not cover labour law or co-determination issues. Accordingly, such labour law regulations cannot draw upon the basis of jurisdiction according to Art. 114 TFEU, to which the EU Commission refers in this Regulation, but require a different basis of jurisdiction.

- **The DGB nevertheless demands that the Regulation clarify that more specific provisions for the employment context remain permissible in national legislation or collective agreements. The AI Regulation should offer corresponding possibilities for this as part of an escape clause (see 5.). At the same time, it must be ensured that labour law at the national level is not undermined by the AI Regulation.**

3.   Regarding the definition of AI

The DGB welcomes that the EU Commission has chosen a very broad definition with its regulation draft, which is further specified in Annex I[1]. Any definition of AI should be kept as open as possible. This broad approach to definition covers as many applications as possible. Any restrictions should take place based on the effect of the AI systems within the framework of a risk-based approach.

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[1]   AI systems are defined as 'software that is developed with one or more of the techniques and approaches listed in Annex I [of the Regulation] 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.' (Art. 3 No. 1 AIA-E).

4. Regarding the risk-based approach

The EU Commission proposes horizontal regulation with a risk-based approach for classifying AI applications. The DGB generally approves of this approach and welcomes the interlinkage with sectoral regulations such as, in particular, the revision of the Machinery Directive. However, the EU Commission's proposed limitation of the scope for high-risk applications must be viewed critically.

5. Regarding the classification of work, education and employment as a 'high-risk' area

The DGB approves that the fields of 'work, employment and education' are generally classified within the scope of high-risk applications. These are to be combined with special requirements for providers of AI applications. At the same time, the EU Commission is planning a clear limitation in 'Annex III'[2] of the draft regulation: the high-risk classification is intended to apply only to AI usage in job applications and hiring processes, promotion or termination of employment and task assignment as well as monitoring and performance evaluation.

- **The DGB reaffirms its criticism of a limitation of the scope for 'work, employment and education' (Annex II, 4.) which it issued in its 'initial assessment' (June 2021: [Initial assessment of the DGB regarding the aforementioned proposal](#)).**

- **The DGB demands that all AI systems intended for decisions affecting the initiation, establishment, implementation and cessation of an employment relationship, including AI systems intended to support collective legal and regulatory matters, be considered as high-risk AI systems in accordance with Art. 6 (2) of the Regulation.**

- **The DGB calls for AI systems to be generally classified as high risk if they affect employees, particularly through personal data processing in the employment relationship or in matters of training or further education, and demands, in principle, that an external (third-party) assessment be carried out in these cases.**

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[2] Recruitment or selection (notably for advertising vacancies), screening or filtering of applications, evaluating candidates in the course of interviews or tests as well as decisions on promotion or termination of employment; for task allocation and for monitoring and evaluating performance and behaviour.

The limitation of the high-risk classification planned in the EU Commission's draft would, in particular, not take into account AI-supported forms of human-machine interaction or algorithmic forms of control. It is true that the draft revision of the EU Machinery Directive touches on AI-supported forms of human-machine interaction or human-robot collaboration, so that the corresponding rules of the high-risk classification also apply here. Accordingly, any AI in safety components is considered a high risk and subsequently an external ('third-party') assessment by 'notified bodies' is required (Art. 5 and Annex I, No. 24 and 25). This approach in the Machinery Directive refers to Art. 6 (1) of the AI Regulation and is a significant step forward. Nevertheless, limiting the high-risk classification to safety components does not go far enough.

- **The DGB therefore reaffirms its demand that, in addition to the consideration of personal data in employment relationships, AI applications be classified as high risk in the context of human-machine interactions in the fields of 'work, employment and education' and that they be tied to an external assessment.**

The AI Regulation does not include collective bargaining and co-determination issues with regard to the legal system. Nevertheless, the design of collective bargaining and the workplace is of outstanding importance, even beyond the conformity assessment for placing an AI product on the market.

- **Therefore, the DGB demands an escape clause for collective agreements as well as for employer/works council agreements analogous to Art. 88 GDPR.**

Such a special legal escape clause for collective agreements on AI applications in the workplace is intended to ensure that the issues of collective bargaining, workplace impact assessments and effects on the work processes in the workplace can be legally formulated, which include the risk management system, testing procedures, quality management for sufficient transparency and traceability and the continuous evaluation of learning systems in the company, as well as possibilities for intervention. Such a specific escape clause for collective agreements should be located in 'Title III, Chapter 3' under 'Obligations of providers and users of high-risk AI systems and other parties'.

In this context, employee representative bodies must also be given the option to access the relevant information ('data and documentation' according to Art. 64) on high-risk AI. Collective agreements are to be explicitly taken into account, analogous to the GDPR. Also, AI applications' use of personal data in the context of employment should not be tied to individual consent alone, but should also require an agreement under collective law that includes a transparent objective, access and use regulations and their limits.

In addition, it must be ensured that employees can assert their rights in the event of negative impacts from AI applications by providing them with access to the relevant data and documentation, and that employee representative bodies or trade unions can support the assertion of employees' rights.

Finally, the EU Commission's draft regulation overlooks the fact that AI applications are linked to specific objectives in an employment relationship and usually make use of company and employee data. The 'users' themselves therefore exert a great deal of influence on the purposes, results, operation and impact of AI systems. Thus, risks not only arise on the side of the providers/manufacturers, but also in the use/application in the workplace. Therefore, the assumption in the draft regulation that manufacturers are in a position to foresee the implementation of the 'intended' purpose of the AI application is also more than questionable in the workplace context, because in many cases the purpose in workplace application is only determined by the users.

Against this background, we can assume that sufficient protection of employees against risks cannot be achieved without creating corresponding rules of use. Complying with the 'instructions for use' mentioned in the draft regulation is insufficient for this purpose.

- **Therefore, the obligations of the 'users' (Art. 29) within the framework of the above-mentioned escape clause must be strengthened with regard to workplace impact assessment.**

The fact that the draft does not contain any own rights for those affected by AI applications, although it is a stated aim of the draft regulation that private individuals should trust AI applications and special attention is paid to the fundamental rights of private individuals, must also be viewed critically. The draft focuses solely on the relationship between user and provider. Those directly affected by the AI applications – in an employment relationship, these are the employees – are not granted any rights of their own.

- **Therefore, the DGB calls for those affected to be given the right to access information and right to lodge complaints, analogous to the rights of data subjects in the GDPR.**

In addition, the draft regulation also lacks claims for damages and injunctive relief regarding the use of AI applications that do not comply with the requirements of the AI Regulation. Furthermore, the draft does not stipulate an option to consent for the persons affected. Although this consent concept is regulated for automated decisions in Art. 22 GDPR, the draft of the AI Act does not provide for a separate possibility.

The exception under Art. 5 (1 d), which corresponds to the general exception under Art. 2 (4) of the Regulation and allows the use of 'real time' remote biometric identification systems in publicly accessible spaces for the purpose of law enforcement, is problematic. This would mean that employees who work in the public sphere – e.g. for the police or emergency services, city cleaning or local public transport – would also be potentially subject to surveillance as part of their employment relationship, which exceeds the surveillance permitted in an employment relationship on the basis of data protection law. This must be ruled out as a matter of principle.

- **The DGB further demands a ban on biometric real-time monitoring, at the very least in the fields of work and employment.**

6. **Regarding the specific details: learning systems**

A key feature of AI as a learning system is the possibility of change in the life cycle. Therefore, transitional issues between risk levels (criticality levels) in learning systems must be defined more clearly. According to the draft regulation, this must – to the extent that it can be predicted – be taken into account (ex ante) for high-risk AI systems in the 'technical documentation' according to Art. 11 (Annex IV, 2 f).

Furthermore, the 'conformity assessment' according to Art. 43 (4) must also be carried out again if there have been 'substantial modifications' to the AI system. This also includes a post-market monitoring obligation under Art. 61 for providers of high-risk AI systems, which may lead to a reassessment of conformity if 'substantial modifications' occur.

According to Art. 3 (23), a 'substantial modification' means a change to the AI system following its placing on the market or putting into service which affects the compliance of the AI system with the requirements for high-risk systems and which cannot be predicted ex ante. According to the draft revision of the EU Machinery Directive, which is being negotiated in parallel and is to be referred to for the purpose of harmonisation, a 'substantial modification' regards the impairment of 'relevant essential health and safety requirements'.

- **The DGB therefore calls for the definition of 'substantial modifications' to AI systems to be expanded to cover health and safety requirements in the AI Regulation and for it to be tied to an external assessment by an independent third party as a matter of principle. This is the only way to ensure an adequate assessment of the risk level.**

7. Regarding conformity and assessment rules

Special requirements apply due to the high-risk classification of 'work, education and employment'[3]. For authorisation in the EU, the extensive transparency regulations are essential in particular, and these are associated with corresponding documentation obligations on the part of the AI providers.

It is laudable that the documentation requirements under Annex IV ('technical documentation') are very extensive and also address, for example, 'what the [AI] system is designed to optimise' (Annex IV, 2 b). In addition, AI system providers must, 'upon request of a national competent authority, demonstrate the conformity of the high-risk AI system with the requirements' of the Regulation (Art. 16 j). Moreover, the obligations of AI providers do not only refer to an ex ante evaluation, but also include a post-marketing monitoring obligation (Art. 61).

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[3] Risk management system (Art. 9), data and data governance (Art. 10), technical documentation (Art. 11), record-keeping (Art. 12), transparency and provision of information to users (Art. 13), human oversight (Art. 14) and accuracy, robustness and cybersecurity (Art. 15)

However, for the 'conformity assessment' (according to Art. 43) as a prerequisite for the approval of high-risk applications in the EU, only 'internal' self-monitoring by the providers is intended for the fields of work, education and employment[4]. Such a 'self-declaration' is quite common in the EU internal market, but in the context of AI, it is an extremely critical procedure for placing products on the market. The declared objectives of the draft regulation on the protection of personal privacy and the prevention of harm are jeopardised if the assessment by independent bodies does not take precedence over the self-assessment of the manufacturers.

- **The DGB therefore reaffirms its demand that the assessment of high-risk AI in the fields of work, education and employment be stipulated to be carried out by third parties in principle.** Third parties/independent bodies should also be directly involved in the event that risks arise when dealing with AI systems – this should not be regulated solely between 'providers and users'. Art. 65 of the draft regulation must be expanded accordingly.

8. Regarding implementation issues

The third-party assessment of the conformity of AI systems provided for in the draft AI Regulation – as well as the assessment to be expanded (see above) – poses a major challenge for the enforcement of rights. While the planned 'European Artificial Intelligence Board' is laudable, it has no enforcement powers under the draft regulation. The required competences of the 'market surveillance authorities' at a national level mentioned in the draft must be specified. The implementation of the AI Regulation will require technically competent supervisory bodies with adequate resources. These bodies must be provided with sufficient staff and financial resources in a timely manner.

National implementation therefore requires the conceptual design of an architecture at an early stage to ensure adequate control of high-risk AI. The two-year transitional period (Art. 85) for the entry into force of the Regulation should be used for his purpose.

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[4]   Annex VI to the CONFORMITY ASSESSMENT PROCEDURE BASED ON INTERNAL CONTROL

- **The DGB suggests that new 'AI/technology agencies' be developed and promoted for the fields of 'work, education and employment' that comprise technical skills and skills from the areas of data protection, occupational health and safety and anti-discrimination as well as expertise in social partnerships.**

9. **Regarding rules about processes for the use of AI in companies, administrations and organisations**

As described, the EU Commission's proposal does not contain any process requirements for participatory and co-determination options regarding the application of AI systems in the workplace from the point of view of the legal system. Nevertheless, the Commission determined in its White Paper on the proposed regulation (2020) that 'the involvement of social partners [...] will be a crucial factor in ensuring a human-centred approach to AI at work'.

- **The DGB therefore reaffirms its demand above for an escape clause analogous to GDPR (88).**

Annex

Regarding the role and procedures of standardisation

The significance of harmonised European standards (hEs) in the context of the introduction of high-risk AI systems according to the draft regulation must be viewed critically. In accordance with the New Legislative Framework for European product regulation, under Art. 40 (1), high-risk AI systems are presumed to conform to the requirements of Art. 8 ff. if they comply with hEs or parts thereof, insofar as these requirements are covered by the harmonised European standards. This means that, while the EU legislator sets out basic requirements for high-risk AI systems, e.g. regarding risk management, transparency, robustness, IT security and human supervision of the AI, hEs are referred to for the technical concretisation of these requirements. These are developed on behalf of the European Commission by the European standardisation organisations CEN, CENELEC and ETSI, which are organised under private law. According to the basic logic of the NLF, these private association standards have the effect of a 'presumption of conformity' – meaning that, if manufacturers comply with these hEs, they are presumed to be in conformity with the legal requirements of the AI Regulation. However, the application of the hEs remains voluntary, not mandatory. The situation is exacerbated if the use of technical specifications outside the structures of the EU system is additionally being considered and if these specifications are to also have presumption of conformity. Under the NLF, therefore, the principle of 'trust before control' is also applied to high-risk AI systems – despite the fact that this basic principle of the NLF has demonstrably and significantly contributed to the large number of dangerous products circulating on the EU internal market. Against this background, the transfer of the NLF regulatory approach, which relies on voluntary implementation instead of legal obligation and on trust instead of strict control, to high-risk AI systems is completely unacceptable. Instead, we call upon the democratically legitimised European legislator in this matter, and also as regards the technical concretisation of the requirements of the AI Regulation for these systems. In the case of high-risk AI systems, standardisation according to private associations is not an alternative to legally binding specifications determined by statutory regulation, and only design details may be safely described by standards. In addition, the assessment of conformity by independent notified bodies according to objective criteria must be carried out in all cases in order to legitimise the placing on the market.