Is the EU AI Regulation being rendered ineffective?

In December 2022, the Council of the European Union deliberated on and suggested substantial changes to the EU Commission's draft of an AI regulation dated 2021. This initially represents a clear setback for the necessary transparency in the workplace. The decision is now up to the European Parliament, which has announced that it will publish its position in the spring of 2023. The German Trade Union Confederation (DGB) expects a strong message advocating for more transparency, acceptance and trust in order to reach a viable solution in the coming trialogue.

Effective: An escape clause is still necessary for workplace regulations

The AI Regulation is not a proper "AI law", as it is primarily intended to govern the "placing on the market" of AI applications and stipulates transparency requirements and boundaries for this area in particular. The DGB welcomed the Commission's initiative of 2021. It included the risk-based approach for criticality assessment in particular. In it, the fields of "work and employment" were rightly classified as high risk. Nevertheless, the AI Regulation does not provide for any labor law regulations: This is logically consistent from a legally systematic point of view and must remain this way. However, separate regulations must be created for the use of AI applications in the workplace. For this purpose, the DGB has proposed an escape clause, analogous to the General Data Protection Regulation, according to which the Member States can introduce the corresponding specific regulations. Fortunately, in its opinion dated November 8, 2022, the German Federal Government shares the position in favor of an escape clause and explicitly refers to the fact that "specific national regulations" must be possible in order to "ensure the fundamental rights, health, and safety of workers". However, the Council has not yet accepted this point.

Nevertheless, in a minute statement, the German Federal Government has expressed that it sees "further potential for improvement in individual aspects". This is why the DGB expects the coalition's position to play a central role in the trialogue negotiations between the Commission, Council and Parliament.

Ineffective? EU Council creates new loopholes in the high-risk area

Following the deliberations by the Council of the European Union, the AI Regulation now involves more than just amendments to the escape clause. The Council's proposal for an amended version of the AI Regulation represents a significant weakening of the EU Commission's original draft. From the DGB's point of view, the new proposal is highly questionable, as the definition of high risk is to be diluted and, moreover, regulations are being proposed to weaken this area even further in future. The Council's proposal goes so far as to risk rendering the high-risk area – and thus the transparency rules for the fields of work and employment – largely ineffective.

The DGB therefore calls on the European Parliament and the German Federal Government to make significant improvements, especially regarding the following points:

1. Probably immaterial? Loopholes must be closed.

The Council proposes that the high-risk area, which includes work and employment, be narrowed down significantly based on the "probability" of "material" risks: For example, AI systems should not (or no longer) be considered high-risk if the results of the AI system are "completely immaterial" in relation to the action or decision to be taken. This creates giant loopholes, because what matters are considered "probably immaterial" is open to broad legal

interpretation or almost impossible to define. The DGB rejects such an approach to undermining the high-risk area.

In addition, the application context should be included. For example, the “circumstances” for “immaterial decisions” are to be regulated in implementing acts by the EU Commission. It remains open to what extent “probabilities” can be defined at all. In addition, there is the question of whether and how the necessary democratic control can be ensured in this process.

2. Attacks on labor law? Must be avoided.

At the same time, the proposal to include the “materiality” of results of AI applications represents a systematic break, as this would also involve determinations about the evaluation of results of individual AI applications. Unlike the classification of application areas (such as work and employment), which, according to the Commission’s proposal, should properly be classified in risk classes with different rules by the AI Regulation, the Council’s proposal would also address the specific application context as well as the interaction with AI (evaluation of results).

However, particularly in employment relationships, the application contexts of AI systems are crucial and should lead to different criticality assessments at the company level as part of a Change Impact Assessment. However, it is not possible to define, either in advance or through an EU Regulation, whether “immaterial risks” are involved in the specific context of use. There is thus a risk that the Regulation could inadmissibly spill over into matters of labor law. This must absolutely be ruled out. However, this approach is also problematic because it is linked exclusively to the formulated goal of diluting the high-risk area.

In this context, there is an urgent need for action regarding the upcoming trialogue negotiations:

a) It must be explicitly ensured, not only in the recitals, that matters of labor law are not in any way affected by the AI Regulation.

b) The high-risk area must consistently follow the criterion of criticality. The basic principle should be to regard any technology as high-risk that is fundamentally associated with the risk of harming people in its application. Providers of AI systems cannot possibly know every possible concrete application context. Unverifiable assumptions about the context of the application should therefore not be included in the conformity assessment.

c) The high-risk area must be strengthened. This includes implementing the key requirement that the conformity assessment of AI applications in the high-risk area must be verified by independent bodies. According to the Council's proposal, on the other hand, AI applications in the high-risk area should continue to be subject essentially only to the providers' self-verification. In the opinion of the DGB, this is completely unacceptable in the high-risk area.

3. The benefits outweigh the risks? Impossible to implement.

The Council further proposes adding the scope and "probability of benefit" of AI applications as an additional criterion for restrictions of the high-risk area. Thus, a benefit analysis is to be added, but it is more than questionable whether such an offsetting of "probable benefits" (to society, for example) is compatible with the risk of loss of fundamental rights (of individuals, for example). In the workplace in particular, such an approach is subject to the negotiation processes of the social partners – and must under no circumstances be governed in a binding manner by an EU Regulation.

The proposal of a risk-benefit analysis is also inconsistent with the protection objectives stated in the Regulation. The validity of these objectives must not be weakened by offsetting them against a benefit – particularly when such offsetting is hardly feasible in practice.

4. Canceling high-risk areas? That is going in the wrong direction.

The Council proposes that the Commission be empowered to adopt delegated legal acts amending the high-risk list (Annex III to the AI Regulation) to exempt entire areas. This opens up the possibility of further restrictions of the high-risk area. From the point of view of the DGB, this is neither justified nor justifiable, since it concerns areas of application and thus areas of life such as the workplace.

5. Restrictions in the "work" high-risk area? That's a no go.

According to the EU Commission's original proposal, all AI applications that fundamentally involve "task assignments" in employment relationships are to be considered high-risk. According to the Council's vote, the characteristic of "task assignment" should now be linked to individual behavior or personal characteristics and traits. This specification could cause all other AI applications that affect the area of work organization to be removed from the high-risk area. This would also be entirely unacceptable.

By contrast, the DGB demands that all AI systems used for decisions affecting the initiation, establishment, implementation and cessation of an employment relationship, as well as AI systems that support collective legal and regulatory matters, be considered as high-risk AI systems. This is a fundamental component of the use of AI in the workplace.

6. Is autonomy a matter of definition?

Another fundamental problem is that the Council wants the definition of "AI systems" to be changed in such a way that legal uncertainties arise with regard to the scope of application. Accordingly, an "artificial intelligence system" should be designed to operate with "elements of autonomy". The definition of AI systems is thus significantly restricted, because it is debatable how the concept of "autonomy" is to be (a) defined and (b) legally understood for technical systems. In the worst case, the AI Regulation will not regulate any AI system at all, because these systems always process algorithms and it could therefore be legally argued that the assumed "autonomy" of the systems is only an illusion.

The DGB continues to call for a broad definitional approach that is technologically neutral, not least because of the highly dynamic technology industry. The depth of regulation must be defined on the basis of the risk-based approach.