The EU's AI Regulation is the world's first binding regulation on the use of AI.

Its focus is on product safety and commercial law, but it also has a significant impact on employment law. These will be outlined below.

by Wolfgang Däubler

AI is constantly conquering new fields of application in Germany and throughout the EU. Whether it is medical diagnostics, autonomous driving or process control in production - AI can be used everywhere to speed up and often improve processes. The logistics sector and digital route planning are often mentioned in this context. The work of HR departments in companies and public authorities is also being changed with the help of AI: Applicant documents are sorted and those that do not meet certain formal requirements are eliminated. But the possibilities go much further: AI can also be used to determine suitability for a particular position, and it can also be used in selection processes for redundancies or other forms of staff reduction. Labour Minister Hubertus Heil predicted that by 2035 at the latest, there would no longer be a job that was not characterized by AI applications.

What is AI changing?

There is a uniform effect behind all of these manifestations. The machine of the machine age once relieved working people of some of their heavy physical labor. Today's computers also perform a considerable amount of mental work, especially many routine tasks. For example, calculating with lots of numbers or correcting spelling. AI is now in the process of transferring a much larger proportion of mental work from humans to machines. This was most clearly demonstrated by the example of ChatGPT , whose release in November 2022 triggered a “hype”: millions of people used this system, which was put online by the company OpenAI, to have texts written on the basis of relatively concise specifications that could also have been written by humans. This not only jeopardizes the not badly paid profession of “speechwriter”, but also that of other text producers. “DeepL” stands for quite good translations between many languages, which calls the profession of translator into question in the long term.

But these are not the only consequences. Will AI overtake human intelligence in the near future? Experience with the game of Go, where the Go world champion Lee Sedol was defeated 4:1 by the AlphaGo computer at the beginning of 2016, and similar successes by the chess computer AlphaZero could point in this direction.

There are also other risks that will become apparent in the foreseeable future. Decision-making processes are no longer transparent for those affected and can often no longer be deciphered by experts. If the training material on which the AI is based is flawed, for example if it only includes certain positive characteristics of people, this can lead to a completely unfounded disadvantage for individuals who do not have these characteristics or only have them to a lesser extent. This can become apparent, for example, in an application process or when granting loans. Existing inequalities can thus be exacerbated. There is also the risk of abuse: During an election campaign, for example, words are put into the mouth of an artificially produced “person” on social media who looks like one of the party leaders, making them appear to be a completely contradictory person or a slanderer. These so-called deep fakes are already a reality. They are the subject of a compilation by the German Federal Office for Information Security, which is well worth reading and also provides detailed information on countermeasures.

Legally binding regulations?

Whether and in what way the use of AI needs to be regulated by law is not immediately clear. For a long time, both national and, in particular, international authorities were content with legally non-binding

recommendations. In the USA, the White House published a “Blueprint for an AI Bill of Rights”, a “blueprint” with exemplary character, which committed itself to five principles:

- Safe and effective systems
- Protection against discrimination by algorithms
- data protection
- Transparency of the systems
- Option for decision-making by humans instead of AI

This was intended as draft legislation, but there is no chance of it being implemented. The same applies to President Biden's Executive Order of October 30, 2023.

On 21 April 2021, the European Commission presented a draft “Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union acts”. No further explanation was given as to why a binding regulation was initiated for the first time. The introductory text merely mentions the benefits and risks of AI, which should be brought into a “balanced relationship”. It is in the Union's interest to “strengthen the EU's technological leadership and ensure that Europeans can benefit from new technologies developed and functioning in accordance with the Union's values, fundamental rights and

principles.” The opinions of the European Parliament and the Council of Ministers differed considerably from the Commission's proposal, but it was possible to reach an agreement within the framework of the so-called trialogue. The final version has not yet been published in the Official Journal, but its text is also available in German.

The content of the AI Regulation

The regulation comprises 460 A4 pages, of which 260 pages are legal text, 40 pages are annexes and 160 pages are recitals. Anyone who wants to write a legal commentary on this must have a high level of self-confidence and many willing contributors. This section will primarily deal with the points that are essential for dependent work, which only make up a comparatively small part of the legislation.

In terms of content, the regulation is part of product safety law: it aims to ensure that no one is harmed by AI. It follows a risk-based approach, whereby it differentiates as follows:

Art. 5 of the AI Regulation lists AI systems with an unacceptable, unacceptable risk; their use is prohibited.

Art. 6 and 7 of the AI Regulation concern so-called high-risk systems, which are specifically named there and in Annex III of the Regulation. They must meet certain requirements, which are described in more detail in Articles 8 to 15 of the AI Regulation. Articles 16 to 22 of the AI Regulation set out the obligations of providers of AI systems, which Article 25 of the AI Regulation extends to all companies in the value chain under certain conditions. Art. 26 contains the obligations of the operator, which are much less far-reaching. Before a high-risk system is put into operation, a fundamental rights impact assessment must be carried out in accordance with Art. 27 of the AI Regulation. Articles 28 to 39 of the AI Regulation concern the formation and tasks of the so-called notifying authorities, and Articles 40 to 49 concern conformity checks.

Only a few obligations apply to AI systems with low or minimal risk. The most important is the transparency obligation in Art. 50 of the AI Regulation.

In addition, Articles 51 to 56 contain special provisions on AI models with a general purpose, which can be used for very different tasks. The creation of so-called (state) AI laboratories serves to promote innovation (Art. 57 to 59). Further provisions concern the supervisory authorities. Art. 99 provides for considerable sanctions in the event of violations of

key provisions of the Regulation, which can amount to up to 7% of annual global turnover or up to EUR 35 million.

The regulation enters into force on the 20th day following its publication in the Official Journal of the EU (Art. 113 of the AI Regulation). However, it will not become binding until two years after this date in order to make it easier for the companies concerned to adapt to the new legal framework. However, Chapters I and II (in particular the prohibition of certain AI systems contained in Art. 5 of the AI Regulation) will become binding six months after entry into force.

Relationship to labor law

Article 2(11) of the AI Regulation contains a clear stipulation. It states:

“Nothing in this Regulation shall prevent the Union or the Member States from maintaining or introducing
or Member States from maintaining or introducing laws, regulations or administrative provisions which are
protection of their rights in relation to the use of AI systems by employers, or from

employers' use of AI systems, or from promoting or allowing the application of collective
promote or permit the application of collective agreements that are more favorable to employees."

This means, for example, that collective agreements or works agreements that prohibit an AI system because it is associated with excessive monitoring of employees remain permissible - even if this system would not be subject to any concerns under the AI Regulation. In this respect, the principle of favorability applies.

However, the AI Regulation itself also contains provisions that are of direct importance in employment law. These include a number of systems with "unacceptable risk", but also high-risk systems that must comply with numerous requirements. In addition, there are provisions such as Art. 4 and Art. 50, which apply to any use of AI.

AI systems with unacceptable risk

Art. 5 of the AI Regulation prohibits certain practices in general, without differentiating according to who appears as the acting person. There is therefore no doubt that an employer using AI systems is also covered. It

should also be remembered that these provisions will become binding six months after the Regulation comes into force.

Subliminal influence and exploitation of the need for protection

The prohibition of subliminally influencing the behavior of others pursuant to Art. 5 (1) (a) of the AI Regulation could most likely be violated in the case of incentive systems that “unintentionally” induce the employee to work harder. However, as the AI Regulation expressly requires that this takes place “outside a person's awareness” and that “significant harm” must also have occurred, cases of application in the employment relationship are likely to be rare. The further requirement that the AI exploits a person's weakness or vulnerability due to age, disability or a certain social and economic situation will also only occur in exceptional cases in working life.

Social scoring

In contrast, the facts of “social scoring”, i.e. the assessment of behavior, can certainly gain significance. For example, the literature reports on the practice of a US bank that collected a wide variety of data on the behavior of its employees. This included telephone calls, emails,

participation and non-participation in compliance courses and personal comments about the bank. The AI was then used to determine the likelihood of future misconduct. Those who belonged to the “risk persons” identified in this way could expect to be transferred to a worse job or fall victim to the next staff reduction. In the same way, (major or minor) breaches of employment contract obligations can be systematically recorded and evaluated by an AI, which determines when a warning and when a dismissal for conduct-related reasons should be considered. In both cases, there is an assessment of social behavior, which, according to Art. 5 para. 1 lit. c of the AI Regulation, however, is only prohibited if the sanction imposed proves to be “unjustified or disproportionate”. This is a question of the individual case. The limit of what is permissible would be exceeded if a time recording system operated with AI were to show a delay of a quarter of an hour and this were to lead to a salary reduction of 10%.

The recording of social behavior for the purpose of rewarding particularly commendable behavior with a company bonus is unproblematic. However, it must be ensured that the same data cannot be used for other purposes. This cannot be achieved by the principle of purpose limitation alone; rather, further measures such as separation from other data sets must be taken.

Determining the risk of an employee committing a crime

Not only the police and the public prosecutor's office, but also the employer could be interested in whether an employee is likely to commit a criminal offense. The prohibition in Art. 5 para. 1 lit. d of the AI Regulation therefore also applies here. However, the exception made there can also be transferred to employment law, according to which a corresponding investigation is permissible if objective and verifiable facts are already established that are directly linked to criminal activity.

Creation of databases for facial recognition

Art. 5 para. 1 letter e of the AI Regulation also prohibits an employer from creating a database by “untargeted reading” of facial images from the internet or by analyzing surveillance footage. However, there is no “untargeted reading” if employees are filmed entering and leaving the company premises and facial recognition software is used on this basis. Unlike in the other two cases, there is no access to an extremely large amount of information here. However, this does not rule out the possibility of prohibiting such behavior by means of a company agreement.

Determination of emotions

The prohibition on identifying emotions contained in Art. 5 para. 1 lit. f of the AI Regulation is of great practical importance. This means that a technique frequently used in call centers that analyzes the voice of the employees there is no longer permitted, which often leads to requests by the group leader to curb emotions and adopt a more friendly tone. In future, the analysis of job interviews will also be prohibited if it relates to emotions that are recognizable from the way people speak. The AI Regulation provides for an exception for security reasons, among others, so that emotion analysis would be possible for police candidates or police officers. However, this is precluded by German employment law, which takes precedence under Art. 2 para. 11 of the AI Regulation and does not permit such far-reaching interference with personal privacy.

Biometric categorization

The prohibition in Art. 5(1)(g) of the AI Regulation is not immediately obvious. According to this provision, people may not be categorized on the basis of their biometric data in order to deduce their race, political views, trade union membership, religious or philosophical beliefs, sex life

or sexual orientation. How should body size and eye color allow conclusions to be drawn about political views or sexual orientation? What is probably meant is a situation in which the biometric data, together with so-called additional information, allows conclusions to be drawn about the aforementioned characteristics: X attends a meeting of a trade union or religious association that is recorded on video. The AI system then uses facial recognition to determine which specific people were involved and whether X was one of them. This would fulfill the prohibition.

Real-time remote identification procedure

According to its wording, the prohibition in Art. 5(1)(h) of the AI Regulation only applies to public spaces and to procedures for the purposes of criminal prosecution. Whether the state or private companies may use such systems for purposes other than law enforcement is not addressed in the text of the Regulation or in the recitals. The conclusion suggests itself that an approach that is only permitted to a limited extent, even in the case of criminal prosecution, cannot be permitted for the prosecution of less far-reaching infringements or even for the mere observation of the work process. This has practical significance for large operating areas, for example in seaports or at airports. However, a definitive statement on the

interpretation of EU law is only possible once the ECJ has clarified the matter. In German employment law, such a form of monitoring would only be permitted if it is absolutely necessary for operational purposes, because otherwise there would be considerable disruption to the workflow, and if there is no other means of ensuring a smooth workflow without identifying those involved.

Use of AI in the application process

Insofar as AI is used in the application process, the problem arises as to whether this constitutes a high-risk system within the meaning of Annex III No. 4 to the AI Regulation. According to No. 4(a), this is the case if the AI system is used “for the recruitment or selection” of applicants, whereby the placement of targeted job advertisements, the screening and filtering of applications and the evaluation of applicants are mentioned as examples. If these conditions are met, the employer is generally the “operator” of the high-risk system and must fulfill the obligations associated with this role.
According to Art. 26 para. 1 of the AI Regulation, the operator is primarily obliged to observe the instructions for use drawn up by the provider when handling the AI system. Furthermore, in accordance with Art. 14 of the AI Regulation, the operator must appoint a competent person to

supervise the system. In addition, there is the general obligation under Art. 4 of the AI Regulation to provide all persons involved in the use of the AI system with the necessary knowledge and experience. In addition, prior to the commissioning of a high-risk system, the affected employees and employee representatives must be informed that they will be "subject" to the use of the high-risk system in accordance with Art. 26 para. 7 of the AI Regulation. It is conceivable that they will work with the AI system or that they will be monitored by this system. According to Art. 26 para. 11, data subjects must also be informed that the decisions made about them will be made by an AI system or with its support. Furthermore, the operator is obliged to inform the provider and other bodies of newly emerging risks and "serious incidents" (Art. 26 para. 5). However, Art. 22 para. 1 GDPR remains unaffected, according to which a decision may not be based solely on automated processing of data.

The exceptions in Art. 6 para. 3 GDPR are important in practice. According to this, there is no high-risk system if the AI system is only intended to fulfill a "narrowly defined procedural task". This would be the case, for example, if the applications submitted in digital form were to be checked for completeness of the requested documents. It is also possible to carry out a traditional selection procedure with the exclusive involvement of human decision-makers and then have the result checked

by an AI system; this would not be a high-risk system either. Finally, the completion of a preparatory task for an assessment of the applicants is also not covered, whereby in these cases either only the factual basis is prepared or assessments can be included, but these are fully checked by a human decision-maker; otherwise one could no longer speak of “preparation”.

If the requirements for a high-risk system are not met, the use of AI must nevertheless be indicated in accordance with Art. 50 of the AI Regulation. This is the case, for example, when a chatbot is used to answer questions from applicants or new hires. The same applies to speech analysis that is applied to applicants without the unauthorized recording of emotions.

The provisions of national employment law that provide more protection for the applicant remain unaffected, i.e. continue to apply in accordance with Art. 2 (11) of the AI Regulation. This also includes the co-determination rights of the works council. The general data protection regulations, in particular Art. 22 GDPR, remain unaffected in accordance with Art. 2 para. 7 AI Regulation.

Use of AI vis-à-vis employees

If AI is used in the HR department, the same questions arise in principle as in the application process. A high-risk system would exist in particular if the AI were used for certain purposes listed in Annex III No. 3 letter b of the AI Regulation. These include decisions that “influence” working conditions, promotions and dismissals. Of course, this also includes the case that the AI makes the decisions itself. It also includes a conceivable selection decision between different employees, as provided for in Section 1 (3) KSchG. In addition, the assignment of tasks is to be considered insofar as it is based on individual behavior or personal characteristics and qualities. This does not include instructions generated in this way with the help of AI, which are not based on the individual but only on operational necessities. The third possible purpose is the observation and evaluation of employee performance and behavior.

Just as in relation to job applicants, Art. 50 of the AI Regulation also applies to systems other than high-risk systems if AI is used. Provisions that are more favorable to employees remain unaffected, which is particularly important with regard to the works council's right of co-determination pursuant to Section 87 (1) No. 6 BetrVG. Furthermore, the

question must always be asked as to whether the limit of Art. 22 GDPR has been exceeded.

Working with AI

Art. 4 GDPR contains the obligation of the operator of an AI system to ensure that employees have appropriate AI skills. If he is also the employer, he must offer free training measures at his own expense in accordance with Art. 13 of the Transparency Directive. These are counted towards working hours and should take place during working hours if possible. In German law, this requirement has been implemented by § 111 GewO.

Other issues relating to working with AI are not directly addressed in the regulation. The AI Regulation does not change anything with regard to the recently much-discussed problems surrounding ChatGPT.
The problem left out: effects on the labor market

There is no consideration in the recitals as to what should happen if entire professions such as journalists or translators are effectively eliminated, i.e. reduced to just a few people. It is reasonable to assume that the remaining employees will only have the task of checking the

products of ChatGPT or a comparable AI system for occasional (and increasingly rare) errors. Although many other professions, such as cab drivers, will be affected in the same way, this is not mentioned as a problem in the regulation, or even mentioned at all. It is not known whether this was different in the trilogue negotiations, as they were held in camera as usual and no minutes are available. There are no indications that such consequences were made an issue.

Instead, the recitals (which are part of the official text of the regulation) emphasize the “multiple benefits for the economy, the environment and society” that AI will bring and state that it serves people “in accordance with the values of the Union” (recitals 4 and 6). Particular attention is paid to the protection of fundamental rights “including democracy, the rule of law and environmental protection” (recital 8). According to recital 9, the regulation does not intend to change the social policy provisions of the Union or national labor law in any way; this also applies to collective bargaining autonomy and the right to strike.

The current labor law of the EU and the member states does not have any effective means of cushioning a slump in employment in the event of widespread use of AI. The (universally recognized) fundamental right to free choice of occupation is limited to existing jobs. Collective bargaining

autonomy and the right to strike can mitigate problems on the labor market to some extent, but cannot really solve them. In view of these circumstances, a responsible legislator should have faced up to the problems on the labor market.

The threats to the labor market are often countered with the argument that AI will also create new jobs. A number of EU member states (including Germany) are also in a situation where demographic trends are making skilled workers increasingly rare, meaning that replacing some of today's active workforce with AI could help to balance the labor market. Neither can be dismissed out of hand, but a sufficient quantitative assessment is lacking. What is the scale of the new jobs created by AI? How great is the remaining demand for skilled workers if the possibilities of AI are fully exploited? Are there any plans to distribute the remaining workload evenly among the existing workforce? Instead of addressing these questions, the recitals invoke “high values” such as fundamental rights, democracy and the rule of law. One cannot help but get the impression that this is a kind of tranquillizer pill designed to give employees the impression that everything is in order.

The question arises as to why the interests of employees played such a minor role in the preparation of the AI regulation. There are various explanations for this.

Firstly, the Union does not have comprehensive competence to regulate the labor markets in the Member States. However, this should not prevent the Union institutions from considering the consequences of their actions in this area. If they have refrained from doing so, this may be due to political expediency: an overly clear statement of the problems might have delayed the adoption of the regulation by the Council of Ministers, perhaps even made it impossible. This was to be avoided because the elections to the European Parliament were imminent and the aim was therefore to complete a project that would place the Union at the forefront of global developments.

Of more fundamental importance is the rather modest position of dependent workers and their representatives in the political system of the European Union. Trade unions are represented in the Economic and Social Committee and are consulted by the Union institutions in many contexts. However, they are only exceptionally in a position to exert effective influence there because opposing business interests in particular are much more strongly represented. In addition, the trade

unions in the individual member states are characterized by the representation of interests within the national framework and therefore (wrongly) regard the Brussels “arena” as rather secondary. The trade union associations at European level are equipped with rather limited resources. They are therefore much less able to bring the concepts they may have developed to the attention of decision-makers than the representatives of employers and companies. For decades, European social policy has been based much more on the independent realization of decision-makers that the “European project” will only be successful if the benefits of European unity become visible to broad sections of the population, particularly through social policy measures. In formulaic terms, European social policy can be seen as a means of gaining acceptance. At the same time, this means that there is no need for decision-makers to pay attention to social policy at every opportunity and without exception.

Under these circumstances, national governments and trade unions in particular are left with the task of dealing with foreseeable problems on the labor market.

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