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AI in the Workplace and Digital Platforms: Opportunities, Risks and Legal Challenges

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1. *Introduction*

AI is becoming more and more widespread in the workplace. Legislators, especially the European legislator, have reacted. Now it is time to apply these rules.

In the following, I would like to provide some food for thought in the form of 10 theses, first discussing some more general issues before focussing on some specific questions of workers protection.

2. *The need for comprehensive international regulation is growing by the day, but progress is slow and the prospects are bleak*

The proliferation of AI, including AI in the workplace, is a fact. And is here to stay. The importance of AI will even grow in the future. International regulation of this issue would therefore be highly desirable. Effective pro-

tection of workers from this technology seems no less necessary than many other things that we consider to be core principles of worker protection.

There are some reasons for hope in this respect: First of all, there is indeed already international regulation in the European context, namely in the form of the Council of Europe Framework Convention on artificial intelligence and human rights, democracy, and the rule of law. This first-ever international legally binding treaty was opened for signature in September 2024 and has so far been signed by 14 states[1] and also by the European Commission on behalf of the EU[2]. The signatories also include countries outside Europe, which were remarkably involved in the negotiation process. At United Nations level, a Pact for the Future was adopted last lear that includes a Global Digital Compact[3]. Currently, consultations are under way on the establishment of an Independent International Scientific Panel on AI and a Global Dialogue on AI Governance within the United Nations[4]. Even more importantly from our perspective is the fact that the International Labour Office recently concluded, based on responses received by Member States as well as employers' and workers' organisations, that the International Labour Conference should adopt standards in the form of a Convention on decent work in the platform economy supplemented by a Recommendation[5]. Apart from this, there are still voices that continue to rely on a "Brussels effect" of the European AI Act. This would mean that companies outside the EU would also be forced to comply with the requirements of the law, either because it is convincing in terms of content or simply because the size of the European single market ultimately requires compliance[6].

Even so, there is little reason for exuberant optimism: the Council of Europe's framework convention shows above all how difficult international

[1] Council of Europe, *Framework Convention on Artificial Intelligence and human rights*, https://www.coe.int/en/web/artificial-intelligence/the-framework-convention-on-artificial-intelligence.

[2] *Ibid*.

[3] Https://www.un.org/digital-emerging-technologies/global-digital-compact.

[4] Https://www.un.org/global-digital-compact/en/ai.

[5] Ilo, *Realizing decent work in the platform economy*, ILC.113/Report V(2), 2025, https://www.ilo.org/sites/default/files/2025-02/ILC113-V%282%29-%5BWORKQ-241129-001%5D-Web-EN.pdf

[6] Cf. Eustace, *The European Union's Forced Labour Regulation: Putting the "Brussels Effect" to work for international labour standards*, in *ELLJ*, 2023, *15*,1, pp. 144-165, https://doi.org/10.1177/20319525231221097.

regulation is. The original draft was thinned out considerably in order to reach an agreement. In particular, though the private sector is not completely exempt, signatory states will be able to decide for themselves how strict they want to be with their companies[7]. This does not bode well for other regulatory efforts. A look across the Atlantic is particularly sobering. Until recently, there seemed to be some convergence on the issue of regulating AI. But this is no longer the case: within hours of taking the oath of office for the second time, the current US-President issued an executive order that revoked an executive order from the prior administration that was committed to a certain degree of employee protection at least. Now, regulation of AI seems to be largely equated, at least at the federal level, with the paralysis of AI[8]. This seems to me to be too short-sighted. For example, Anu Bradword from Columbia University recently argued powerfully that digital regulation and innovation are by no means opposites[9]. However, this does not change the fact that a different wind is currently blowing in the USA. And this wind will blow in the face of international regulatory efforts too.

3. *"Overregulation" should always be avoided, but the necessary protection of employees is not up for discussion*

Not so long ago, representatives of large tech companies made the point that the regulation of AI could safely be left to the companies themselves. These voices did not prevail in Europe. In the US, the picture is completely different. It is therefore not surprising that warning voices are ringing out from there to Europe. For example, two US senators recently warned Europe

[7] CHANG, *The first global AI treaty. Analyzing the Framework Convention on Artificial Intelligence and the EU AI Act*, in *U. Ill. L. Rev Online*, December 20, 2024, https://illinoislawreview.org/online/the-first-global-ai-treaty/.

[8] Cf. only RAJKUMAR, *The head of US AI safety has stepped down. What now?*, in *ZDNET*, February 19, 2025, https://www.zdnet.com/article/the-head-of-us-ai-safety-has-stepped-down-what-now/?utm_source=substack&utm_medium=email#google_vignette; MEYER, *OpenAI points to China as reason why it should escape copyright rules and state-level AI bills in the U.S.*, in *Fortune*, March 13, 2025, https://fortune.com/2025/03/13/openai-altman-trump-ai-rules-consultation-copyright-state-bills/?utm_source=email&utm_medium=newsletter&utm_campaign=eye-on-ai&utm_content=2025031318pm&tpcc=NL_Marketing.

[9] BRADFORD, *The false choice between digital regulation and innovation, in NULR*, 2024, 118, 2, *Journal*, https://doi.org/10.2139/ssrn.4753107.

against over-regulating AI[10]. Such warnings should not be dismissed lightly. It is always important to avoid over-regulation. Lawyers should, who often suffer from the occupational disease of only seeing problems, take this particularly to heart. How often do we call for the legislator, complain afterwards about the poor quality of the laws, then rely on the courts and are often disappointed again. Instead, the following should apply: it is better not to make a law than to make a bad law. So the presumption rule in the Platform Work Directive, for instance, would have been better left out. How often has this rule been tinkered with in the legislative process! The result of all this in any event is difficult to digest to put it mildly. Inevitably, the German observer is reminded of a quote attributed to Reich Chancellor Bismarck: "Laws are like sausages", he once said, "it is better not to be there when they are made". I am afraid that this observation also applies to laws at Union level.

How the draft directive on liability for AI, which the Commission recently scrapped, should be assessed in this light is a matter for discussion[11]. After all, liability rules are not only about compensating for damage that has occurred, but also about encouraging potential tortfeasors to avoid causing damage and thus liability for damages[12]. In other words, liability rules are a powerful tool to steer people in the right direction. It is true, though that there always were doubts in some quarters about an AI liability directive, which would be added a product liability directive also encompassing AI programmes. Some people thought that this would be killing one bird with two stones[13]. Be that as it may, the Commission's sudden change of course is concerning. And hopefully not to be understood as a swing towards a

[10] Conrad, Chambliss, *Overregulation is undermining Europe in the global tech race and empowering China. U.S. and Chinese investment in AI outpace that of eurozone*, in *Roll Call*, March 13, 2025, https://rollcall.com/2025/03/13/overregulation-is-undermining-europe-in-the-global-tech-tace-and-empowering-china/.

[11] Zenner, *An AI Liability Regulation would complete the EU's AI strategy*, in *CEPS*, February 25, 2025, https://www.ceps.eu/an-ai-liability-regulation-would-complete-the-eus-ai-strategy/.

[12] Cf. in general, for example, Wagner, *Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe?*, in *Archiv für die Civilistische Praxis*, 2006, 206, 2-3, p. 352, https://doi.org/10.1628/000389906782068031; Wagner, *Digitale Ordnungspolitik – Haftung und Verantwortung*, in *List Forum für Wirtschafts- und Finanzpolitik*, 2022, 50, 1-2, pp. 77-105, https://doi.org/10.1007/s41025-022-00237-8.

[13] *Zwei Klappen für eine Fliege*. (o. D.). Aktuell, https://rsw.beck.de/aktuell/daily/-magazin/detail/zwei-klappen-fuer-eine-fliege.

course that is only business-friendly at first glance, because it continues to expose companies to 27 different liability systems.

In any event, it remains the task of the labour lawyer to identify gaps in the protection of workers including loopholes in existing law[14] and to formulate recommendations as to how these can be closed. The purpose of labour law is to protect the weaker party. Regulations that serve this purpose can never be over-regulation. The fact that the legally protected interests of employers must also be taken into account – in the formulation of rules by the legislator and in the application of these rules by the courts – is another matter.

4. *AI Act: The law must now be brought to life*

Looking at the AI Act, there is light and shade. This is especially true from a labour law perspective, where it can be argued that, despite the imposition of certain employer obligations, that the law is still too closely tied to the product liability methodology and therefore cannot take sufficient account of the special features of the employment relationship and its inherent imbalance of power[15].

The task now is to bring this law to life[16]. Breathing life into a law, is never easy. This applies in particular to a law such as the AI Act, which not only breaks completely new ground, but also leaves many things open in order to be flexible and therefore future-proof. It is true that the law was a difficult birth, accompanied to the end by doubts as to whether it would ever see the light of day. However, it is now clear that the real work is just beginning. Of particular importance in this context are the Guidelines

[14] See also Opinion of the European Economic and Social Committee, *Pro-worker AI: levers for harnessing the potential and mitigating the risks of AI in connection with employment and labour market policies* (own-initiative opinion) (C/2025/1185) (sub 5.4.2). See also, for instance, Yusifli, *Labour Rights and the EU Artificial Intelligence Act: How to Get Away with High-Risk AI*, in U. Lux. LRP, No. 2025-01, https://ssrn.com/abstract=5098359.

[15] See also EESC, *cit.*, (sub 5.2.1); also quoting Ponce Del Castillo, *The EU's AI Act: governing through uncertainties and complexity, identifying opportunities for action*, in Global Workplace Law & Policy, June 20, 2024, https://global-workplace-law-and-policy.kluwerlawonline.com/2024/06/20/the-eus-ai-act-governing-through-uncertainty-and-complexity-identifying-opportunities-for-action/.

[16] Skeptical, for instance, Jarovsky, *The AI Governance tornado*, in *Luiza's Newsletter*, February 12, 2025, https://www.luizasnewsletter.com/p/the-ai-governance-tornado.

with which the Commission concretises the content of important provisions of the Regulation and the so-called Codes of Practice, which are currently being developed by the AI Office and a wide range of stakeholders. In February, the Commission published Guidelines on AI system definition as well as Guidelines on prohibited artificial intelligence (AI) practices, as defined by the AI Act[17]. A third draft of a General-Purpose AI (GPAI) Code of Practice has been published just a few days ago (and is already highly controversial)[18].

All these efforts take time. Irrespective of this, three problems await solutions. One of the most important issues to be clarified is the relationship between the AI Act and other laws, in particular the General Data Protection Regulation (GDPR)[19]. As we all know, the EU's digital legislation forms a spider web, with the AI Act and the GDPR as particularly thick knots. At first glance, everything seems quite simple: Art. 2 (7) of the AI Act does not affect the General Data Protection Regulation. However, this does not mean that there are not countless interfaces. To name just one example: According to Art. 6 (1) lit. f GDPR, a comprehensive balancing of interests must be carried when determining the lawfulness of the processing of personal data. The question then is whether and to what extent a violation of the AI influences that balancing of interests[20]. Opinions are divided on this matter. In addition to these overlaps between the two laws, there are also potential frictions between them. For example, under the AI Act, the provider of an AI system bears the main obligations under the AI Act, whereas under the GDPR, the operator of the AI application is generally responsible. This difference in addressing the obligations can lead to uncertainties in the question of liability, for example if an error occurs in a high-risk AI system and the provider is held liable under the AI Act, whereas the GDPR sees the operator as the controller[21].

[17] https://digital-strategy.ec.europa.eu/en/library/commission-publishes-guidelines-ai-system-definition-facilitate-first-ai-acts-rules-application.

[18] https://digital-strategy.ec.europa.eu/en/library/third-draft-general-purpose-ai-code-practice-published-written-independent-experts.

[19] See in this regard also De Luca, Federico, *Algorithmic discrimination under the AI Act and the GDPR*, in *EPRS*, February 2025, https://www.europarl.europa.eu/RegData/etudes/-ATAG/2025/769509/EPRS_ATA(2025)769509_EN.pdf; Hüger, *Die Rechtmäßigkeit von Datenverarbeitungen im Lebenszyklus von KI-Systemen*, in *ZfDR*, 2024, p. 263.

[20] Hacker, Stiftung, Soyda, *Der AI Act im Spannungsfeld von digitaler und sektoraler Regulierung*, Bertelsmann Stiftung, 2024, p. 23.

[21] Hacker, Stiftung, Soyda, *Der AI Act im Spannungsfeld*, cit., p. 24.

But there is not only the task of clarifying the relationship between the AI Act and other laws. A second problem arises from the AI Act itself. As is well known, the legislator has left many questions unanswered in the law, but has instead delegated the task of answering them to the European standardisation organisations as part of the so-called New Approach and the so-called New Legal Framework[22]. This raises fundamental questions, such as the legitimacy of the standardisation system, especially in an area such as working life, but also the ability of harmonised standards to guarantee the protection of fundamental rights whose protection the legislator is concerned about[23]. Irrespective of this, it remains to be seen what the standards will ultimately look like. It seems sensible to take a very close look. In any case, a recently published study by the non-governmental organisation Corporate Europe Observatory entitled "Bias baked in – How Big Tech sets its own AI standards", denounces an excessive influence of tech companies on standardisation[24].

The third problem is the practical implementation of the law and the enforcement of the legal positions it grants. This poses a double challenge: on the one hand, ensuring that players at EU level do not get in each other's way, *e.g.* the AI Office on the one hand and the European Data Protection Board (EDPB) on the other[25] but also, and this seems to be the bigger problem, ensuring that the law is applied uniformly by the national authorities and avoiding divergent interpretations and ultimately "compliance shopping"[26]. There is also the problem that the AI Act requires the national authorities to have permanently available staff with expertise in AI, data protection, cybersecu-

[22] See https://single-market-economy.ec.europa.eu/single-market/goods/new-legislative-framework_en?prefLang=de.

[23] Critical, for instance, VEALE, BORGESIUS. *Demystifying the Draft EU Artificial Intelligence Act*, in *CLRI*, 2021, 22, 4, pp. 97-112. https://doi.org/10.9785/cri-2021-220402; KUSCHE, *Possible harms of artificial intelligence and the EU AI act: fundamental rights and risk*, in *JRR*, 2024, pp. 1-14.

[24] *Bias baked in. How Big Tech sets its own AI standards*, in *Corporate Europe Observatory*, https://corporateeurope.org/en/2025/01/bias-baked. However, the Commission's involvement in the standardisation process, for example, is not uncontroversial either; cf. BITKOM, *Status and challenges in the standardization of high-risk requirements of the AI Act*, *Position Paper*, 2024, p. 4, https://www.bitkom.org/sites/main/files/2025-01/status-and-challenges-in-the-standardization-of-high-risk-requirements-of-the-ai-act-december-2024.pdf.

[25] NOVELLI et al., *A Robust Governance for the AI Act: AI Office, AI Board, Scientific Panel, and National Authorities*, in *EJRR*, 2024, pp. 1-25, p. 12.

[26] NOVELLI et al., *cit.*, p. 18.

rity, fundamental rights, health and safety, and relevant standards and laws[27]. Given the fact that AI experts are rare, this might be easier said than done. However, the decisive factor is ultimately the political will to implement the law. In this respect, it remains to be seen how it is to be understood that the EU's digital chief recently promised a "business-friendly" implementation of the AI Act[28]. As already mentioned above, the term must be well thought out and should in any event not be used lightly against workers' interests.

5. *AI is a factor in the qualification of contracts as an employment relationship*

Countless papers have been written in recent years about whether platform workers are employees or can at least be put in a middle category between employees and the self-employed. The question is of course rightly asked, even though it is also true that the circle of persons who qualify as employees can change over time – especially in the course of technological change. Those who were once employees do not always have to remain employees. It is also true, however, that the requirements for employee status are not set in stone.

The question is therefore: does the use of AI potentially influence the qualification issue? I would like to answer this in the affirmative. The so-called crowdworker decision of the German Federal Labour Court from December 2020 seems illustrative to me here[29]. There, the court affirmed the employee status of a platform worker. The Court acknowledged that the worker was not bound by instructions. However, there was sufficient external control, for which the court found that the incentive system developed by the platform, which relied not least on workers' gambling instincts, was sufficient[30]. There

[27] Novelli et al., *cit.*, p. 17.

[28] Dastin, Howcroft, Loeve, *France and EU promise to cut red tape on artificial intelligence technology*, in *thejapantimes*, February 11, 2025, https://www.japantimes.co.jp/business/2025/02/11/tech/ai-france-eu-red-tape-tech/.

[29] Federal Labour Court of 1 December 2020-9 AZR 102/20.

[30] Federal Labour Court of 1 December 2020-9 AZR 102/20, para 50: "The defendant used the incentive function of this evaluation system to induce the user to continuously carry out control activities in the district of his usual place of residence. (...) The defendant thus stimulated the 'gambling instinct' of the users by offering the prospect of experience points and the associated the 'play instinct' of the users with the aim of encouraging them to work regularly. thereby encourage them to engage in regular activities".

are studies that show that algorithmic nudging is not necessarily less powerful than issuing instructions[31]. It is therefore time to look beyond the employer's right to issue instructions and also consider other ways in which a sufficient degree of control can ultimately be exerted.

Recently, AI has also been linked to the qualification issue in other respects. Guy Davidov, in particular, has spoken out in favour of establishing a state system so as to require any business engaging with someone to do work to treat that worker as an employee, unless pre-authorisation is granted to consider this worker an independent contractor. Pre-authorisation would be applied for from a government agency via a dedicated website and granted (or denied) immediately by an automated system. The system would rely on AI technology to predict whether the worker would be considered an employee by a court[32]. The proposal promises legal certainty and has the additional charm of utilising AI for law enforcement. Personally, however, I am not convinced, not least because of doubts about the ability of AI to take a holistic view of legal relationships, but also with regard to the underlying assumption that every contract for the provision of services must first be regarded as an employment contract.

6. *Algorithmic management must be legally contained; there is also a blueprint for this*

The OECD recently presented a comprehensive study on "Algorithmic management in the workplace"[33]. What does it say? Let me just quote from the summary: "The findings show that algorithmic management tools are already commonly used in most countries studied. While managers perceive that algorithmic management often improves the quality of their decisions as well as their own job satisfaction, they also perceive certain trustworthiness

[31] Cf. on this in particular Kellogg, Valentine, Christin, *Algorithms at Work: The New Contested Terrain of Control*, in *AMA*, 2019, 14,1, pp. 366-410.

[32] Davidov, *Using AI to Mitigate the Employee Misclassification Problem*, in *MLR*, 2024, https://doi.org/10.1111/1468-2230.12919. See also Cohen et al., *The use of AI in legal systems: determining independent contractor vs. employee status*, in *Artif Intell Law*, *2023*.

[33] Milanez, Lemmens, Ruggiu, *Algorithmic management in the workplace*. OECD Artificial Intelligence Papers, 2025, n. 31, https://www.oecd.org/en/publications/algorithmic-management-in-the-workplace_287c13c4-en.html.

concerns with the use of such tools. They cite concerns of unclear accountability, inability to easily follow the tools' logic, and inadequate protection of workers' health. It is urgent to examine policy gaps to ensure the trustworthy use of algorithmic management tools".

The Directive on platform work contains an unconvincing presumption. At the same time, however, with its provisions on algorithmic management, it represents a pioneering achievement that cannot be overestimated. There are provisions on limitations on the processing of personal data (Art. 7), a data-protection impact assessment (Art. 8), transparency (Art. 9), human oversight (Art. 10), human review (Art. 11), safety and health (Art. 12), information & consultation (Art. 13) and the provision of information to workers (Art. 14). That is quite something.

In light of the OECD study, however, the question arises as to why these regulations are limited to platform work. Algorithmic management certainly plays a particularly prominent role in platform work. But does this justify – also in view of the principle of equality under EU law – leaving algorithmic management outside of platform work unregulated?[34-35].

7. *Discrimination law may need to be reconstructed*

Discrimination law is a particularly hot topic when it comes to AI. There are two reasons for this, one of which lies in the area of substantive law and the other in the area of law enforcement.

As far as the first point is concerned, the main problem is probably that "algorithmic discrimination" threatens to blow up the existing system, which is essentially based on a distinction between direct and indirect discrimination[36]. This has led to proposals to completely redesign discrimination law. Let me just remind you of Sandra Wachter's Theory of Artificial Immutability, according to which so-called "algorithmic groups" should be protected

[34] See also EESC, *cit.*, (sub 5.4.2).

[35] See also Open Letter, *Algorithmic Management and the Future of Work in Europe,* in *Social Europe*, November 4, 2024, https://www.socialeurope.eu/open-letter-algorithmic-management-and-the-future-of-work-in-europe.

[36] Cf. in this regard only Adams Prassl, Binns, Kelly Lyth, *Directly discriminatory algorithms*, in *MLR*, 2022, 86, 1, pp. 144-175; Cf. also Mooij, *Adjudicating a discriminatory algorithm*, in *European Law Blog*, 2025, https://doi.org/10.21428/9885764c.459fc812.

under anti-discrimination law[37]. As far as I can see, however, this is extremely controversial[38]. Ultimately, there is no evidence that the algorithmic group as such is worthy of protection or even stable enough to consider its protection. We should not forget that in that case the law would not protect people because of their sexual orientation or their age or their religion, but because they belong to a group that is defined on the basis of a certain click behaviour or individual pixels in a picture. Overall, it seems to me that there are currently more questions than answers in substantive discrimination law with regard to AI.

A bit more clarity exists in the area of law enforcement (if only we knew a little better what exactly we want to enforce). There are those who want to help persons affected by discriminatory AI, for example by reversing the burden of proof to a large extent[39]. At the same time, there are voices advocating for strengthening the rights of associations (including trade unions)[40] and, if necessary, extend the powers of the authorities[41]. The latter proposals are obviously based on the assessment that the judicial protection of individual rights alone is not sufficient to prevent discriminatory AI.

8. *Data protection and AI: There is still a lot to do*

If the AI Act must be brought to life, then the GDPR must be specifically geared towards protection against AI. And this substantiation is taking place. On 27 February, for example, the CJEU issued an important ruling, in which it the Court not only specified the content of the right to infor-

[37] Wachter, *The Theory of Artificial Immutability: Protecting Algorithmic Groups under Anti-Discrimination Law*, in *Tulane* LR, 2022, 97.

[38] Cf. Thomsen, *Three Lessons for and from Algorithmic Discrimination*, in *Res Publica*, 2023, 29, 2, pp. 213-235; Zeiser, *Emergent discrimination: Should we protect algorithmic groups?*, in *J App. Phil*, 2025.

[39] Grünberger, *Reformbedarf im AGG: Beweislastverteilung beim Einsatz von KI*, in *ZRP*, 2021, p. 234.

[40] Cf. Herberger, *Verbandsklageverfahren für diskriminierungsrechtliche Ansprüche*, in *RdA*, 2022, p. 228.

[41] Spiecker Gen. Döhmann, Towfigh, *Coded bias. The General Equal Treatment Act and protection against discrimination by algorithmic decision-making systems*, Federal Anti-Discrimination Agency, 2023, pp. 4-5, https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/EN/publikationen/ki_study.pdf?__blob=publicationFile&v=2.

mation of a person affected by automated decision-making, but also decided how to proceed if the controller is of the opinion that the information to be transmitted includes protected data of third parties or business secrets[42]. The concretization of the provisions of the GDPR is not limited to the CJEU, though. The role of the European Data Protection Board, which late last year issued an Opinion on certain data protection aspects related to the processing of personal data in the context of AI models[43], deserves particular mention. However, there is still a lot to be done, particularly in terms of employee protection. The European Economic and Social Committee recently presented a list of demands, not least to enable the enforcement of Article 88 of the General Data Protection Regulation (GDPR) and give explicit guidance on consent and legitimate interest[44].

There are also proposals that go well beyond the concretisation of existing regulations. This applies in particular to claims aimed at granting collective rights to the data generated by the employees themselves. Such ideas come in all shapes and colours. One proposal, recently put forward by Ifeoma Ajunwa, is particularly far-reaching. In her view, data gathered from workers should be treated as capital in the automation of their workplaces such that a portion of the gains from automation should be returned to the worker[45]. These and other proposals deserve serious consideration, although perhaps two comments are in order. Firstly, that data protection is closely interwoven with the protection of privacy, which sets certain limits to its "collectivisation" (even if these do not appear insurmountable). And secondly, and perhaps more importantly, that the collective protection of employees – for example in the form of information and consultation – does not presuppose the recognition of property-like rights (and the associated argumentative effort to justify them).

[42] CJEU of 27 February 2025, C-638/23, Amt der Tiroler Landesregierung.

[43] Https://www.edpb.europa.eu/system/files/2024-12/edpb_opinion_202428_ai-models_en.pdf. Cf. also Stalla-Bourdillon, *EDPB Opinion 28/2024 on Personal Data Processing in the Context of AI Models A Step Toward Long-Awaited Guidelines on Anonymisation?*, in *ELB*, January 2025, https://doi.org/10.21428/9885764c.3518cb2b.

[44] EESC, *cit.* (sub 1.8).

[45] Ajunwa, *AI and Captured Capital*, in *YLJF*, January 31, 2025, https://www.law.columbia.edu/sites/default/files/2025-03/AI%20and%20Captured%20Capital%20-%20Ifeoma%20Ajunwa.pdf.

9. *Workers' participation must be strengthened (also in the interest of employers)*

As is well known, the AI Act contains a provision on employee participation, which was slipped into the law at the very end as a treat for employees. Pursuant to Art. 26 (7), "before putting into service or using a high-risk AI system at the workplace, deployers who are employers shall inform workers' representatives and the affected workers that they will be subject to the use of the high-risk AI system". According to recital (92), this provision is without prejudice to obligations for employers to inform or to inform and consult workers or their representatives under Union or national law and practice, including Directive 2002/14/EC.

In fact, German law, for instance, goes much further. For example, under Section 87 (1) No. 6 of the Works Constitution Act (*Betriebsverfassungsgesetz*), the works council has a right of co-determination when it comes to the introduction and use of technical equipment intended to monitor the behaviour or performance of employees". What is more, the Courts interpret this provision extensively. According to the Federal Labour Court, technical equipment is intended to monitor the conduct or performance of employees within the meaning of the law if the device is objectively and directly suitable for monitoring, regardless of whether the employer pursues this objective and also evaluates the data obtained through the monitoring". An individual monitoring intention is therefore not required[46]. Accordingly, the introduction of a headset system, for example, which enables employees in the retail sector to communicate wirelessly by means of a so-called conference mode, is subject to co-determination even if the conversations can neither be recorded nor saved[47]. German law therefore has a lot to offer in terms of co-determination and could be expanded even further under a new government. However, the reference to German law must contain a double caveat: according to a recently published study, in 2023 only 7 per cent of companies still have employee representation based on the Works Constitution Act[48].

[46] This has been the established case law of the court since the decision of the Federal Labour Court of 9 September 1975-1 ABR 20/74. However, a recent decision by the Federal Administrative Court (of 4 May 2023-5 P 16/21), which set sthe emphasis slightly differently, has raised certain doubts about the Federal Labour Court s case law.

[47] Federal Labour Court of 16 July 2024-1 ABR 16/23.

[48] Stettes, *Eine Analyse auf Basis der IW-Beschäftigtenbefragung 2024*, in *IW-Report*, 2025, 1, https://www.iwkoeln.de/fileadmin/user_upload/Studien/Report/PDF/2025/IW-Report_2025-Betriebsraete-und-Interessenvertretung.pdf.

And co-determination in the introduction of AI does not always work out in practice as the legislator had envisioned[49].

But this is not at all about preaching the virtues of German law[50]. The aim is rather to focus on something else, namely to shed light on the advantages of employee participation in general. It is important to realise that AI systems are socio-technical systems whose real effects are not only dependent on the underlying technology[51]. At least as important are the specific objectives pursued with the application and the embedding of the system within an organisation, i.e. the context in which the application is used. For example, ensuring sufficient transparency requires not only technical explainability, but also "active communication and explanation of the algorithmic decision-making processes in organisations that use the AI system"[52]. And the people who work with a system and are affected by it are the ones who can "provide context". There is something else to add: it is now generally agreed that trust is an important success factor in the use of AI. But what better way to strengthen employees' trust in AI than to involve their representatives in a timely and comprehensive manner?

10. *Never underestimate the value of social dialogue and collective bargaining*

The fact that we could learn something about the power of collective bargaining on AI from the US of all places may have surprised many of us. Nevertheless, an important lesson on collective bargaining and AI came from there. I'm talking about the dispute over AI in Hollywood. Collective bargaining between the film studios and the unions representing screenwriters,

[49] Krzywdzinski, *Zwei Welten der KI in der Arbeitswelt*, Weizenbaum discussion paper, 2024, 39, https://www.weizenbaum-institut.de/media/Publikationen/Weizenbaum_Discussion_Paper/Weizenbaum_Series_39.pdf

[50] See also: OECD, *OECD-Bericht zu Künstlicher Intelligenz in Deutschland*, OECD Publishing, 2024, https://www.oecd.org/de/publications/oecd-bericht-zu-kunstlicher-intelligenz-in-deutschland_8fd1bd9d-de.html.

[51] Cf. only Selbst et al., *Fairness and Abstraction in Sociotechnical Systems*, August 23, 2018.

[52] AI Ethics Group led by VDE, *From Principles to Practice. An inter-disciplinary framework to operationalise AI ethics*, Bertelsmann Stiftung, https://www.bertelsmann-stiftung.de/-fileadmin/files/BSt/Publikationen/GrauePublikationen/WKIO_2020_final.pdf, S. 10. Cf. also Sloane et al., *Participation is not a design fix for machine learning*, in *EAAMO*, 2022, https://arxiv.org/abs/2007.02423.

actors and radio producers was tough. The collective agreement was preceded by a lengthy strike. And the Californian legislature had to provide a little help in the final stages. In the end, however, a collective agreement was reached that addressed the specific problems in the industry and prevented studios, for example, from simply cloning actors digitally and thus depriving them of their livelihood. So you could say that the negotiations between the actors ended the way a Hollywood movie should: With a happy ending. Is it a coincidence that a collective agreement on the use of AI was recently concluded in Germany in the very same sector, namely the film industry?[53]

It takes little thought to recognise the value of collective bargaining on AI. It is quite simply the value that collective bargaining has in general: The social partners are much closer to the subject matter than the distant legislator. And they can react to changes much more quickly than the mills of legislation would allow. The German collective labour agreement illustrates both points: It stipulates, for example, that digital replicas of actors may only be used with their consent. Do we seriously need the legislator for such a regulation? And the agreement provides that its content will be reviewed every six months. That's what I call speed. Legislative procedures take longer.

Does that mean everything is fine? Is "negotiating the algorithm"[54] the magic formula? Unfortunately, no. Because as plausible as it is to rely on the strengths of collective bargaining when regulating AI, it is also true that collective bargaining systems in many countries are no longer as well-functioning as they were just a few decades ago. Collective bargaining on AI thus inevitably becomes part of a general problem, namely that autonomy is a wonderful thing, but that it only really works if enough people join in.

11. *In the end, it's about people*

When looking at AI from a legal perspective, it is worth occasionally venturing a look beyond the boundaries of your own profession. There are important questions in connection with AI that should also interest lawyers.

[53] Eckstein, *Erster KI-Tarifvertrag für die Film- und Fernsehbranche in Kraft*, in *Mebucom*, February 10,2025, https://mebucom.de/business/erster-ki-tarifvertrag-fuer-die-film-und-fernsehbranche-in-kraft/.

[54] Cf. De Stefano, *Negotiating the Algorithmm: Automation, Artificial Intelligence and Labour Protection*, in *CLL&PJ*, 2019, 41,1.

For instance: What impact does the use of AI have on our relationships with others (in a labour law context: the employer and colleagues)? Can we "trust" machines? Should we and can we really quantify everything? How great is the risk that we will lose cognitive skills and the ability to think critically in the long term if we rely too much on AI? What significance does it have that we as humans are inclined to ascribe human characteristics to machines? Only if we ask ourselves such questions can we as lawyers meaningfully contribute to human-centred AI.

Let me come to the end: AI presents us with numerous questions that must be addressed. And we won't be running out of problems any time soon. Quite the opposite. The increasing use of AI agents alone is associated with numerous new legal issue[55]. We need to embrace the challenge of AI, recognise the opportunities of AI and help minimise the risks that come with AI. And we should realise that we will only be able to master AI if we look beyond the boundaries of our profession and cooperate with other sciences. To do this, we must first listen and then contribute our specific knowledge in a way that others can understand and benefit from. Let's try.

[55] Cf. only Kolt, *Governing AI Agents*, in *Notre Dame L. Rev.*, 2025, https://arxiv.org/abs/2501.07913.