AK EUROPA

Open letter to EU-decisionmakers in the trilogue

No lowering of the level of protection for workers, consumers and citizens affected by AI in the EU AI Act

The Austrian Chamber of Labour (AK) is the legal body which represents the interests of around 4 million workers in Austria. AK is particularly committed to ensuring that workers and consumers are protected in the best possible way against the **erosion of their fundamental rights and freedoms, intransparency, discrimination and other risks of harm that AI entails.**

AK therefore takes the trilogue on the AI Act as an opportunity to ask for your support. The position of the EU Parliament of 14 June 2023 is to be preferenced in most areas. The current compromise proposals of the Council under the Spanish Presidency would lower the already incomplete level of protection of the AI Act in an unjustifiable way. In the interest of workers and consumers, we ask the co-legislators in the trilogue to consider the following points:

Biometric identification of persons

The EU Parliament proposes to ban **real-time remote biometric identification** in publicly accessible spaces without exemption. The Council, on the other hand, has further extended the exceptions to the ban originally proposed by the Commission. A possible compromise could be to keep the ban on real-time remote identification, but subject it to narrower exceptions and introduce additional safeguards.

The EU Parliament also wants to ban **biometric categorisation based on sensitive data** as defined by the GDPR and ECHR (including race, ethnic origin, age, gender, sexual orientation, trade union membership, religious or political beliefs, genetic data, health-related data). As a compromise, currently a limited ban is being discussed only for the analysis of political opinions, religious beliefs and sexual orientation (unless these characteristics are directly related to a specific crime or threat, e.g. politically or religiously motivated crimes).

AK concerns: Biometric AI evaluations favour **mass surveillance**, which is **not compatible with the goals of a society based on fundamental rights and freedoms**. Exceptions must be limited to extreme danger situations and contain fundamental rights guarantees (judicial authorisation, parliamentary control, subsequent information of those affected, etc.). AK is also strongly opposed to Member States choosing to entrust sector-specific AI supervision to either Home Affairs Ministers or Data Protection Authorities. Only data protection authorities do not have a conflict of interest and can perform their tasks objectively and independently

Emotion recognition

The EU Parliament wants to ban the detection of emotions in law enforcement, border control, the workplace and educational institutions. The Spanish Presidency proposes as a compromise a limited ban for certain applications (It is suggested that emotion recognition is defined as „aimed at individuals" and therefore screenings of groups/ masses would be unregulated. Permission would be given for medical and security purposes). The current compromise in the trilogue negotiations foresees that for law enforcement and border protection, the Council position is followed and emotion recognition would only be classified as „high risk".

AK concern: Emotion recognition touches and violates human dignity like hardly any other AI application. Due to the enormous imbalance of power, its **use in the areas of workplace, education and homeland security would be completely unjustifiable**. Also in other contexts (such as profiling for advertising and personalised offers), its use should, with a few exceptions (as in the the area of medicine), be fundamentally prohibited.

Classification of AI systems with high risk (Article 6)

Both the EU Parliament and the Council allow considerable discretion in assessing whether an Annex III AI system poses a high risk or not. If the position of the EU Parliament is followed, an Annex III product would not pose a high risk if the operator considers the risk to safety, health or fundamental rights to be low in its impact

assessment. The risk of an incorrect risk assessment is obvious. Also, an exemption from the high-risk area of AI systems that „perform a narrowly defined procedural task of low complexity" leads to massive legal uncertainties. The same applies to exemptions from assessments that „only prepare, confirm or improve, but do not replace, human decisions." Due to the envisaged duty of human supervision, this approach is also inherently contradictory.

AK concerns: The proposals cause unjustifiable legal uncertainties. **For classification as high risk, it should be sufficient (as originally envisaged by the EU Commission) to bring an application falling under Annex III onto the market**

List of high-risk AI systems (Annex III)

AI systems for recognising emotions were added by the EU Parliament in its position to the list of high-risk AI systems. AI used in the context of life and health insurance was also confirmed in the list of high-risk applications. Exemptions are desired for small providers of AI systems to assess consumer creditworthiness.

AK concerns: From the point of view of those affected, the **list of high-risk applications is far too narrow** (for example, „fraud" management, which can lead to excessive monitoring, is missing). High-risk cases should therefore **not be reduced further.**

Impact assessment on fundamental rights

The EU Parliament obliges AI users to carry out an impact assessment on fundamental rights (Art 29a). Many Member States in the Council are currently trying to limit this obligation to public authorities.

AK concern: An **examination of fundamental** rights is essential for all high-risk systems, regardless of the operator.

Data subjects' rights

Member States seem to be inclined to include some of the data subjects' rights requested by the EU Parliament: the right to lodge a complaint with a public authority, the right to make use of the Directive on collective redress and the right to be informed if one is affected by a high-risk AI system. The significant right as a data subject to receive an explanation of the data, factors and outcomes of a decision prepared by AI is still under discussion.

AK concern: A right to a **meaningful explanation of an AI decision is central to a balanced regulation of AI.** Only in this way can legal claims be assessed and enforced at all. In particular, the use of AI applications in the workplace may only take place with adequate transparency and provision of information, also for affected employees.

Generative AI

It is not yet clear how generative AI (general purpose AI, gpAI) should be regulated. Some Member States demand regulation only for generative AI systems with high risk, others want to regulate only the systemic risks of generative AI systems (analogous to the EU Digital Services Act). AK supports the EU Parliament's approach of subjecting all generative AI systems to regulation regardless of their risk or size. A recent proposal, which envisages basic models, very capable basic models and gpAI systems on a large scale, is rejected by AK because of its complexity, which would make it difficult to enforce. Following a scandal in Spain, the Spanish Presidency has called for individuals to be liable for up to €15,000 if they fail to disclose that content was created by generative AI.

AK concern: The **obligations for product safety of AI** should affect the users of the concrete applications in which risks materialise. There should be **transparency requirements** so that they do not claim to have no insight into the data and models underlying the gpAI vis-à-vis supervisory authorities and in the event of damage. If users bring damaging incidents to the attention of the gpAI **provider, the provider must take remedial action in its area of influence** (corrective measures, user warnings, etc.).

Due to the universal application possibilities of gpAI, it is to be expected that they will also carry out unintended and prohibited tasks (generation of malware, disinforming content, etc.). According to the General Approach, it would be possible for gpAI providers to contractually exclude high-risk uses and thus completely evade regulation. From AK's point of view, this should not be possible. **AK agrees with Germany's proposals according to which gpAI providers should absolutely meet the following requirements:**

- Meeting risk assessment, data governance and transparency requirements;

- Publicly available information on the data basis, training and data governance, including handling of dataprotection and copyright with regard to the training data, the functionality of the AI model and energy consumption;
- Labelling obligations (analogous to Art 52 AI Regulation for deep fakes etc., watermarks);
- Warnings about risks when used in high-risk areas (e.g. medical issues);
- Erasure rights for data subjects under the GDPR, regardless of whether it is false information.

Real labs and AI tests in the real world

All drafts provide for exemptions from compliance with the GDPR or e-Privacy Directive in the case of test. However, with regard to research, statistics and science, the GDPR stipulates that the core of data protection law must be upheld. In the case of real-world tests, the consent of data subjects is only to be obtained insofar as it does not serve internal security. Accordingly, testers should only analyze why the test has no negative consequences for the test persons (Art 54 (2f), point i). If the position of the Council is followed, the AI tests would only have to be registered in a non-disclosable EU database – even in the case of a large number of unsuspecting persons who are affected without any reason (Art 54 (2f), point c).

AK concern: Citizens must be protected from violations of fundamental rights even before an AI system is placed on the market. Therefore, the applicable legal framework must also be observed without exception in tests. AK considers a general departure from data protection and the protection of privacy in tests and research projects to be disproportionate and contrary to fundamental rights.

Use of AI in the workplace

If AI is used in the context of employment, in addition to fulfilling and ensuring the (technical) requirements for AI systems as provided for in the AI Act proposed by the EU Commission, national labour law protection mechanisms for employees and co-determination by their (supra-)company representation of interests are still required – this is the only way to effectively balance the imbalance of power between employer and employees inherent in the employment relationship. **The AI Act will not be suitable to ensure the effective protection of workers in the employment context.**

In addition, AK demands an **exclusion of certain systems in the workplace which have a particularly drastic effect on the rights and working conditions of workers.** In any case, profiling, scoring and behavioral forecasts as well as automated decision-making with the help of algorithms, machine learning and AI can massively endanger employees' interests due to the dependence in the employment relationship. Such practices are to be prohibited in the employment relationship to protect employees.

Last but not least, it is important to ensure conformity assessment by independent third parties in the use of AI in the workplace - ex-ante conformity assessment based on internal controls is not sufficient to limit the risks arising from the multiple AI applications in the employment relationship and the power imbalance.

AK concern:

- The AI Act must allow Member States to **maintain existing (constitutional) national labour laws and to experiment with national regulations (collective agreements)** on artificial intelligence in the workplace (and thus create new ones). A **clarification** in this regard is absolutely necessary (see Art 2 (5c) new as well as recital 2d of the position of the European Parliament).

- The **strong co-determination** of the (supra-)workplace representation of interests must therefore be safeguarded (Art 29 (5), second subparagraph, point (a) of the position of the European Parliament).

- **Intrusive applications should be banned** in the context of work (e.g. profiling, automated decisions in individual cases, biometric real-time monitoring, emotion recognition systems, systems which are not transparent. A clarification in this regard should be made in Art 5.

- There needs to be **independent third-party monitoring** of the use of AI in the workplace and in education and training – self-certification by providers should be rejected. A clarification in this regard should be made in Art 19 and Art 43, Annex III.

In the interest of workers, consumers and citizens, we call on all decisionmakers in the current trilogue on the AI Act to aim for a high level of protection for those affected and are happy to provide further information.

If you have any further questions, please do not hesitate to contact **Daniela Zimmer** (daniela.zimmer@akwien.at), **Martina Chlestil** (martina.chlestil@akwien.at), or **Alice Wagner** (in our Brussels office, alice.wagner@akeuropa.eu).

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