IndustriAll Europe's contribution to the public consultation on the

Proposal for an Artificial Intelligence Act

Brussels, 03 August 2021

On 21 April 2021, the European Commission presented its Proposal For A Regulation Of The European Parliament And Of The Council Laying Down Harmonised Rules On Artificial Intelligence (Artificial Intelligence Act) And Amending Certain Union Legislative Acts. IndustriAll Europe welcomes the European Commission's initiative, as it is the first proposal of its kind and will set new standards when it comes to addressing the challenges of high-end technology and human rights implications. We appreciate the opportunity to provide feedback on the draft regulation.

Although we share doubts, with other trade unions and civil rights organisations, that the risk-based approach is fit for purpose, and although we think that a rights-based approach to the Regulation would have been preferable, we acknowledge that the risk-based approach is thoroughly applied in the proposal. In that sense, we welcome that "AI systems used in education or vocational training, notably for determining access or assigning persons to educational and vocational training institutions, or to evaluate persons on tests as part of or as a precondition for their education should be considered high-risk (...)" (35). We further welcome that "AI systems used in employment, workers management and access to self-employment, notably for the recruitment and selection of persons, for making decisions on promotion and termination and for task allocation, monitoring or evaluation of persons in work-related contractual relationships, should also be classified as high-risk (...)" (36).

The current proposal, however, does not take into consideration the impact of AI on workers rights and the need to anticipate change. Human rights considerations in the wider sense are also neglected. The potential adverse impact of Artificial Intelligence and Machine Learning systems on the environment is missing altogether. The current proposal should therefore be complemented by additional and tailored Regulations that can address the gaps that pose risks to those who are subjected to AI/ML systems.

What we like about the proposal

IndustriAll Europe appreciates that the draft Regulation is more 'hands-on' than the White Paper and follows a horizontal approach. This is more applicable than specific sectoral legislations, which would open the door to inconsistencies and loopholes, and which would probably cause controversies that can now be prevented. The European Union rightfully aims at leading the global race for AI, for technological development and for its regulation. But this must under any circumstances be accompanied by a strong industrial base which keeps pace with the technological developments. This requires a reliable

commitment to high-skilled labour and high value-added industries as the core of the European economic model.

IndustriAll Europe further welcomes that the underlying message of the draft Regulation is clear: that European values should be at the core of this Regulation and that not everything that is technically feasible should be allowed. We therefore specifically welcome the prohibition of certain AI practices and applications, as well as the introduction of mandatory transparency measures. We further welcome the proposed EU database on stand-alone, high-risk AI systems, which should be publicly accessible. This will contribute to foster trust in AI technologies and make the technology more transparent and reliable.

What we criticise about the proposal

IndustriAll Europe believes that, even though the draft Regulation is quite comprehensive, there are still a number of points that should be made more precise, corrected, or added altogether.

- First of all, we are of the opinion that the proposal is full of loopholes and exceptions that should be closed. Too many vague formulations and definitions leave too much room for interpretation. Relevant categories when discussing data are not addressed at all, namely that of 'inclusivity', 'non-discrimination' and 'fairness'. An ambitious landmark legislation, such as the current proposal, should deal with all relevant categories that the subject it regulates touches upon.
- Secondly, we think that the definition of 'high-risk' AI is too narrow and ignores too many use cases which affect workers and citizens in their everyday life. Annex III, which lists high-risk applications, reads "AI systems **intended** to be used for..." which, again, leaves too much room for interpretation. In addition to the used wording, the different risk categories are too broad. A fully differentiated risk pyramid with more risk layers would be helpful to regulate the different types of applications in question in a more application-oriented manner. One example for a more granular approach has been cited already in the EU Commission's White Paper on AI (COM(2020) 65 final) when referring to the five-level risk-based system as proposed by the German Data Ethics Commission. We would like to underline, however, that the risk-based approach is not fit for purpose and that a rights-based approach to the Regulation would have been preferable as this would allow for tailored regulations for AI/ML applications.
- Thirdly, it is highly problematic that the definition of 'unacceptable' AI seems to be final, with no mechanism in place to introduce new kinds of 'unacceptable' AI to the list. This would, in the worst case, lead to a situation in which new types of harmful AI are being developed without an adequate legal mechanism in place to prohibit its use or it being put on the market. There is also no provision in place to prevent AI/ML applications from developing features that would be considered 'unacceptable', and it is not clear how those applications should be dealt with. This adds to our observation that the language used is often insufficient. Terms such as "disproportionate" or "unjustified" to describe "detrimental treatment" in the context of social scoring are not fit to contribute to a robust regulatory framework. Instead, legal terms that clearly indicate scope and intention of the prohibition should be introduced.
- We criticise the fact that the ban on remote biometric identification systems is only halfhearted, and only for law enforcement purposes. And even this already narrow ban contains a number of problematic loopholes, as it leaves wide discretionary power to the authorities, i.e. by including

the possibility to seek authorisation for the use of such systems ex-post. The exception to deploy remote biometric identification to prevent 'terrorist attacks' will most certainly be misused by authoritarian member states, i.e. to supress strikes and protests, and to control social movements. As a minimum requirement, remote biometric identification systems should therefore be prohibited for all public authorities and private actors working on behalf of public authorities. Yet, together with numerous other organisations "we call for an outright ban on uses of facial recognition and remote biometric recognition technologies that enable mass surveillance and discriminatory targeted surveillance" and have signed the open letter initiated by AccessNow.[1]

- We think that the challenges of bias are not adequately addressed. High quality data sets alone cannot prevent discriminatory bias and unfair outcomes of algorithmic decision making. Technological solutions will not be enough to guarantee bias-free AI, but it will need robust socio-technical processes to help to tackle discriminatory practices. In that sense, Article 10, which states that "training validation and testing data sets shall be relevant, representative, free of errors and complete. They shall have the appropriate statistical properties, including, where applicable, as regards the persons or groups of persons on which the high-risk AI system is intended to be used" should be made more precise and amended by a definition of what "representative", "free of errors" and "complete" actually mean. The mere referral to the "appropriate statistical properties" is obviously insufficient. The general rule - especially for data sets used at the workplace and in the context of HR - could be defined by the Regulation, but the concrete design could be agreed upon by the management and the works council, or the trade union. The same is true for provision (45). Trade unions should be considered as 'certain actors' and "should be able to access and use high quality datasets within their respective fields of activities which are related to this Regulation." Works councils should be provided with the means to hire software engineers to support them in their analyses of the AI/ML systems and to support them in the analysis of the algorithms and the inherent biases.
- From a trade union perspective, one of the most pressing issue is that the draft Regulation only touches on the deployment of AI at the workplace. It is certainly most welcome that AI systems used for recruiting and to determine access to social benefits, among others, are considered to be of 'high-risk'. The Regulation, however, does not entail a comprehensive section on employment which would be able to cope with this important field. The current proposal risks leaving many areas unregulated and opens too many doors to proliferation and malpractice. In that sense, it is also highly regrettable that the proposal does not address the questions of liability and redress, especially since the definition of relevant categories, such as 'adverse impact' and 'harm' remains vague. The reference to the revision of the Product Liability Directive, which is due later this year, is admittedly justified, but it would still make sense to set a number of fundamental principles already in the Regulation on AI, as too many questions on liability in the context of AI have been open for too long. In the same way, it is regrettable that there is no mechanism addressed through which the decisions of algorithms, at least at the workplace, could be contested. In that sense, the issues of collective bargaining and the important role it plays upon addressing technological change, a safe and trustworthy work environment and quality employment, should be included in the Regulation – in the absence of a stand-alone Regulation on AI at the workplace.

[1] https://www.accessnow.org/cms/assets/uploads/2021/06/BanBS-Statement-English.pdf

- The proposal is built around an overly large reliance on industry self-assessment, which is clearly an inadequate approach in the context of high-risk uses of AI technology. A mandatory third-party assessment subject to harmonised assessment procedures for all high-risk AI applications, and certainly all AI applications dealing with sensitive personal data, should instead be installed to guarantee full compliance of the technology with fundamental and privacy rights. The current proposal risks that dangerous applications that are initially classified as 'low-risk' are not subject to proper oversight as the combination of an industry self-assessment and a weak mechanism to retroactively add applications to the 'high-risk' list is error-prone. A mandatory human rights impact assessment for every AI application would be the more feasible approach to guarantee trustworthy and reliable AI.
- The definition of 'low-risk' AI is too broad and does not allow for increments. AI applications, such as chatbots, biometric categorisation systems and emotional recognition systems, are all treated alike, although they have dramatically different impacts on the individual, and the latter ones are especially highly unreliable. They should therefore be subject to a fully differentiated legal framework. A fully differentiated risk pyramid with more risk layers would, again, be helpful to regulate the different types of AI/ML applications in a more application-oriented manner.
- We doubt that the proposed enforcement mechanism is fit to contribute to a sound and harmonised deployment of AI across the member states. It is highly unlikely that all member states will have the sufficient resources and competences at their command to contribute to a consistent implementation of the Regulation at national level. As the draft Regulation foresees "1 to 25 full-time positions" for the 'national supvervisory authority', it is obvious that the quality of the implementation of the Regulation will be subject to the priorities that are given to it by the national governments. This puts a harmonised regulation at risk. It is also likely that the competencies of the 'national supervisory authority' will overlap with those of other authorities, such as the national data protection authorities. The role and competency of the 'national supervisory authority', as well as the appointment procedures, should therefore be further clarified.
- We welcome the proposed creation of a new European Artificial Intelligence Board (EAIB), yet, we think that it is highly problematic that there is no clear nomination procedure for the national authorities in place which will represent the member states on the Board. This might, again, lead to a situation where the national data protection authorities are dislodged. We further recommend that social partners should be full members of the EAIB, especially since the workplace is very much neglected in the proposed Regulation.
- We would like to emphasise that such an ambitious proposal can only be a success if it is properly funded. Artificial Intelligence and Machine Learning become more and more common, and it is no longer only a few large companies which heavily invest in AI/ML development, but often SMEs and start-ups, which develop new fields and technologies. These smaller companies will very likely lack the means to ensure that their business model and technologies play by the rules that are included in the draft Regulation. To prevent companies from having to drop out, the EU should provide SMEs especially with significant resources to help them develop sound and trustworthy AI which complies with the rules. Regulatory sandboxes are obviously an important step in that direction, but it should be made sure that companies have area-wide and easy access to ensure that technological development is not hampered.

What we would propose to change in the draft Regulation

In the light of the above-mentioned points, industriAll Europe suggests the inclusion of the following points in the AI Regulation:

- A comprehensive chapter on AI at the workplace in the Regulation, or a stand-alone Regulation on AI at the workplace, which should be drafted upon consulting cross industry social partners as well as sectoral social partners;
- Any chapter on AI at the workplace must include the roles of trade unions and works councils, as well as that of collective bargaining. In the absence of a stand-alone Regulation on AI at the workplace, or of a dedicated chapter, we suggest the inclusion of at least the following provisions:
    - Article 14 “Human oversight”: The Article rightfully refers to a set of capabilities that the person to whom ”human oversight” is assigned should have at their command. Trade unions and/or works councils must be involved in the selection of the people who have to perform the “human oversight”, as well as in the definition of the criteria that his person has to fulfill. The persons who shall be responsible to perform the human oversight should receive the necessary training and they should be protected from negative consequences when they carry out their duty.
    - Article 69 “Codes of conduct”: Trade unions should be involved in the drafting of those “Codes of conduct”, and they should be mandated by collective bargaining where applicable.
    - Article 61 “Post-market monitoring by providers and post-market monitoring plan for high-risk AI systems” and Article 62 “Reporting of serious incidents and of malfunctioning”: Trade unions and works councils should be involved in the monitoring and reporting procedures and also have a comprehensive overview of those processes. Workers should under all circumstances be involved in the processes of introducing new technology to the workplace and to conduct impact assessments. Shop stewards should be provided with the necessary training and competences to engage in these processes. This could be included in Article 13 “Transparency and provision of information to users”.
    - It should be clarified that trade unions and/or works councils must be involved in the introduction of Artificial Intelligence/Machine Learning applications at the workplace, and collective agreements, at least for high-risk applications, should be mandatory. If the company wishes to introduce a high-risk AI/ML system, the management should approach the competent public authority and explain their intention. In the absence of a works council and/or trade union, both parties (the management and competent public authority) would need to sign an agreement that acts in place of the collective agreement. This formal agreement can be replaced by a collective agreement at a later stage, if a works council or a trade union is established later on;
    - Algorithmic Decision Making systems which have the capability to end a work contract or to conduct other types of human resource management which negativley affect the employment relationship should be prohibited;
    - Performance control systems should only be allowed under a collective agreement. In the absence of a works council and/or a trade union which could sign such a collective

agreement, a competent public authority should, again, be the contracting party. Part of such an agreement should be:

- (a) the nature of the data being collected on workers, the frequency of its collection and the duration of its storage;
- (b) the explicit algorithms or the machine-learning system used to process this data;
- (c) the metrics used to evaluate work and the performance values required from workers;
- (d) the teaching data, its biases and the means implemented to overcome them;
- (e) the reliability and accuracy statistics of any implemented machine learning system;
- (f) the acceptable means to supervise work and to detect, store and process circumstances of non-compliance with work prescriptions;
- (g) the procedeures for workers or their representatives to detect errors or unfair treatment in this automated processing, report them and obtain redress.

  - Every worker should be aware of the exact nature of such a system monitoring their performance, and of the parameters used to evaluate them;
  - Works councils should be provided with the means to hire software engineers to support them in their analyses of the AI/ML systems;
  - Explainability must be guaranteed by using a language that is understood by those subjected to AI/ML systems;
  - Consent to the processing of worker-related data should only be given collectively; individual consent should not be considered sufficient in a situation of employment or of dependent work;
  - It should be clarified that platform workers should also be covered by the relevant collective agreements.

- Introduce a provision to include new types of 'unacceptable' AI to the list included under Title II of the draft Regulation;
- Clearly define how AI applications that have been falsely labelled as 'low-risk' can be re-classified;
- Clearly define the questions of liability and redress in accidents and incidents involving AI systems. The current general rule, whereby the employer is by default liable for any accident in the workplace (in the absence of any wrongdoing by the worker) should remain;
- Ban all types of emotional recognition software, as they are highly unreliable and their outcomes have the potential to be more harmful than helpful;
- Any AI application dealing with personal data, with workers' data and/or which affects working conditions should be classified as 'high-risk' and subject to a third-party conformity assessment. Collective agreements should be fostered to further regulate the processing of personal data in the employment context (similar to Article 88 of the GDPR);
- Mandate third-party assessment for all high-risk AI applications, instead of self-assessment procedures;
- Provide for independent and competent notified bodies at national level assigned with conducting the third-party assessment; these should be capable to advise the user, to test and examine the AI/ML application and to accept complaints. Those notified bodies should be equipped with

sufficient means to timely and thoroughly meet their responsibilities (similar to the provisions discussed in the proposal for a Regulation on Machinery Products, Article 28);

- Address clearly the fact that regulatory sandboxes (Article 53) are a tool to help develop technical solutions in the narrow sense. AI systems operating in the employment context should not be allowed to run in regulatory sandboxes, as their development needs a broad and interdisciplinary approach in which social and racial, as well as gender aspects, are taken into account. Regulatory sandboxes will not be fit for such a purpose;
- Address 'bias' in more detail, and clearly define categories such as 'representative' or 'complete' when discussing data sets;
- Address the challenges of AI literacy and how the necessary digital skills can be acquired;
- Clearly define "intended use" when discussing high-risk AI applications, e.g. in Annex III, or find a more suitable wording, i.e. when discussing "AI systems intended to be used for...", as the current formulation creates too many loopholes; this revised wording should also take into account that the "intended" use may evolve over time and that the initially "intended" use does not prevent data from being used for other purposes. The nature of the data (potentially) being collected should therefore be taken into account as well, and any impact assessment should take the potential further development of the system into account;
- Include a provision that makes sure that the right of workers to information, consultation and participation is respected on the introduction of any kind of AI at the workplace: there must be 'nothing about us, without us';
- Clearly define and strengthen the role of the European Artificial Intelligence Board, and invite social partners to join the Board as full members.