Opinion

Opinion of the German Confederation of Trade Unions on

European Commission White Paper of 19 February 2020

On Artificial Intelligence – A European approach to excellence and trust

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The German Confederation of Trade Unions (DGB) welcomes the general principles of the EU Commission's White Paper on Artificial Intelligence (AI) of 19 February 2020. The DGB particularly appreciates that, in addition to an "ecosystem of excellence", the EU Commission is planning a regulatory framework for "trust" in the context of AI development and AI applications and that the Commission has, in its White Paper, already presented initial concrete ideas for expanding the legal framework and for law enforcement. The underlying rationale to this, as the Commission has established, is society's lack of trust in AI, which is particularly evident among employees. In this context, the EU Commission rightly points out that AI can assume many functions and that consequently, there is a potential risk that AI may be used, in breach of EU data protection and other rules, by employers to observe how their employees behave.

The DGB also welcomes the EU Commission's assessment that "the involvement of social partners will be a crucial factor in ensuring a human-centred approach to AI at work" (p. 7). The DGB expects that trade union standpoints will be taken into account in the conception phase of the EU strategy on the use of AI in the workplace and is prepared to play a constructive role in the implementation of "Good Work by Design" (DGB 2019). To this end, the DGB submitted a "concept paper" for discussion in March 2020. The involvement of the social partners must not be limited to the conception phase, but must be ensured throughout the life cycle of AI applications. The restriction of the EU Commission's strategy to the workplace is also too short-sighted and does not satisfy the socio-political demands of the DGB and its trade unions.

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On the ecosystem of trust: regulatory framework for AI

The risk-based approach of the EU Commission, according to which AI applications are to be classified according to different hazard potentials, makes sense in principle. The DGB shares the view of the EU Commission that not every AI should be considered high-risk. Nevertheless, even AI systems that are used as assistance systems in the workplace can result in **conflicts of objectives and risks** for employees. This must be a **fundamental consideration** when designing the relevant regulatory framework.

While the EU Commission believes that the risk classification should be related to individual sectors to be defined and, cumulatively, also to the type of AI use within the sector, the Commission also correctly points out areas of AI use that should be considered high-risk in principle.

The DGB expressly applauds the fact that the EU Commission has identified AI applications which particularly "impact [...] workers' rights" (p. 19) as high-risk in principle, and has promised corresponding regulations. An exclusively sectoral regulatory approach would be insufficient for the use of AI in the workplace. Therefore, this classification represents a useful addition.

The DGB also demands:

- that the **high-risk classification** for applications affecting "workers" be extended to **all employed persons**.

- that AI used in the workplace also be classified as a high risk if, in addition to **workers' rights**, the **working conditions and career prospects of employees** are also affected by AI applications.

- that AI systems be considered as high-risk particularly if they involve **personally identifiable data in the employment relationship**. Even if stringent legal demands are placed on the use of personally identifiable data in the employment relationship, the lack of opportunities for participation and co-determination impedes the protective effect of the principle of voluntary consent, especially for externally purchased AI applications in the workplace, and thus the effective protection of employees, which not only concerns control and monitoring, but also options for predictive analytics. The protection of sensitive personal data must be fundamentally guaranteed.

- the introduction of verifiable **transparency obligations for AI providers** as well as **process-related workplace usage requirements**, which include, in particular, a collectively participatory workplace impact assessment and continuous evaluation (preventive work design).

Subordinate to the high-risk legal classification, the DGB proposes that the social partners develop standards for different levels of criticality regarding the type of AI applications in the workplace. In this process, a functional consideration should take precedence over a sectoral separation.

The DGB shares the view of the EU Commission that the desired "regulatory framework must leave room to cater for further developments" (p. 11). This must not, however, restrict or reserve the necessary regulations in advance, but must relate exclusively to future changes in the light of currently unforeseeable developments of the technologies or their applications and associated "clearly identified problems" (p. 11) or future approaches to solving existing challenges.The aim must be to improve working conditions through future AI developments, which means that respect for employee rights must be a basic prerequisite for AI applications.

The DGB appreciates the EU Commission's reference to the guidelines of the "High Level Expert Group" (HLEG) of April 2019 and underlines the need for regulation identified in the White Paper with regard to the "core demands" of the HLEG; in particular "transparency, traceability and human oversight" (p. 10). From the point of view of the DGB, it is also crucial that fundamental rights, non-discrimination, employee protection and product safety are also maintained and effectively enforced when using autonomous software systems. However, AI systems in a company context concern much more than the risk of possible discrimination or product liability.

The challenges regarding transparency, data use and responsibility in particular require extended **regulations for workplace application**. The "key features" for AI requirements (regarding training data, data and record-keeping, information, robustness and accuracy and human oversight, p. 18) set out in the White Paper

a) should be extended to include the need for **workplace impact assessment** and issues relating to the processing of personally identifiable data in the context of employment and responsibility issues in human-machine interaction, and

b) **should be differentiated according to (i) developers, (ii) providers and (iii) users of AI systems.** The regulatory approaches are to be classified in a process-oriented manner and differentiated according to addressees.

At the **level of AI providers**, the DGB demands regulatory approaches with regard to **new transparency obligations** before the AI application is used in the workplace. The DGB supports the EU Commission's approach to transparency regarding training data, data and record-keeping and information to be provided (pp. 18-20) and demands, also in connection with the requirement for human oversight (p. 21), that **AI providers be obligated to demonstrate** to users, codetermination bodies, employee representative bodies and governmental testing agencies the quality of training data, the criteria according to which the AI system learns, the safe use and functioning as well as the assessment of objectives, benefits and consequences and the possibilities for intervention **before placing the system on the market**.

To make the transparency obligation verifiable, an appropriate **documentation obligation** is required with regard to the data basis, methods and procedures. The procedures must be carried out in advance regarding areas classified as high-risk, as well as regarding the issue of robustness, and must be verifiable in the further process or during the entire life cycle (product monitoring obligation).

For AI use in the workplace, sufficient information on human-machine interaction (HMI) must also be provided and linked to a workplace impact assessment. The DGB would welcome an obligation to label AI systems (p. 24).

The responsibility/liability should not lie with the actors "who are best placed to address any potential risks" (p. 22), but with the distributor, whose product liability obligation should be extended to include a product monitoring obligation throughout Europe. Employer obligations remain unaffected by this.

At the **level of workplace users** (companies), the DGB demands process rules and guidelines for a trustworthy use of AI with regard to participation and co-determination by and active involvement of employees and company employee representative bodies (see DGB requirements "AI for Good Work", March 2020 https://www.dgb.de/themen/++co++69b497c4-74ca-11ea-a51f-52540088cada).

The DGB supports the EU Commission's approach to questions of human oversight (p. 21) in principle, as different degrees of system autonomy are conceivable depending on the application. There should always be opportunities for human intervention. However, in the context of employment, particularly in the interaction between human and machine, such a principle falls far short of what is required, as distinctions must be made between different human areas of responsibility (employer responsibility and employee obligations). This is a matter of occupational health and safety and employment security, as well as of the scope of action and thus the degree of autonomy of employees in working with (partially) autonomous (and also embedded) software systems and algorithmic decision-making systems. It is therefore not a matter of "appropriate involvement" (cf. p. 21), but of humanely designed AI deployment, including interaction options and levels of responsibility in line with Good Work. The implementation of AI must be accompanied by binding, forward-looking and comprehensive risk assessment.

This requires **new change impact processes for cooperation in the workplace**, which should be defined in accordance with the principle of "Good Work by Design" on the basis of social partnership. At the same time, there is a need for binding **guidelines on process design in the context of AI for companies without a social partnership orientation** where there is no statutory co-determination.

Trustworthy process guidelines should refer to **procedural cooperation obligations and opportunities** for employees and their representatives **to participate in shaping** the entire cycle in order to ensure the transparent use of AI systems in the workplace. A high degree of transparency and binding agreements on the analytical possibilities and limits are needed.

The involvement of company employee representative bodies should be designed to be more **process- and participation-oriented** for this purpose. This also includes **collective agreements** on (1) company objectives, (2) requirements for the AI system (under the above-mentioned conditions), (3) rules and limits of personally identifiable data processing, (4) workplace impact assessment, in particular regarding qualification, (5) rules on human autonomy (principles of humane work design) and responsibility, and (6) testing, monitoring and evaluation. A guideline for a trustworthy AI deployment in the workplace is both conceivable and useful for this purpose.

Beyond the above-mentioned requirements for AI providers and workplace processes,

- the DGB also issued a regulatory framework that calls for a **tightening of the existing legal regulations**. At the European level, this concerns the handling of data analysis possibilities by AI systems in particular:

  For example, legal regulations should stipulate that the use of personally identifiable data in the context of employment for analysis purposes (profiling, employee development, qualification or health management) not only requires individual consent, but also a collective usage agreement, which contains transparent objectives, rules for access and use as well as their limits, preferably by regulating a national participation framework for company employee representative bodies regarding the use of personal and personally identifiable data and for the protection of the personal rights of employees.

  Analysis procedures in the area of human resources, which turn employees into objects by collecting data that is deliberately not controllable, should be legally excluded.

The DGB supports the proposals of the EU Commission on the compliance with and enforcement of existing regulations and the creation of new regulations (p. 23).

In the view of the DGB, the introduction of a **voluntary labelling system** for AI applications that are not classified as "high-risk" (p. 24) would **not be constructive**. Instead, all AI applications that interact with humans should be subject to mandatory labelling.

The DGB supports the proposal for the establishment of a European governance structure with "maximum stakeholder participation" as a forum for exchange and further development (p. 25). To this end, both (a) independent test centres (for testing in advance) and (b) new types of "**AI agencies**" should be established at a national level. However, AI agencies should not only act as a "network of national authorities" with "close links" (p. 25), but should also **pool competences in the fields of research, data protection and occupational health and safety while involving the social partners**. The above-mentioned test centres should integrate preventive work design and involve both work science and the social partners.

On the "ecosystem of excellence"

Against the backdrop of the announcement of an extended legal framework for AI in Europe, the DGB also supports the strengthening of the "ecosystem of excellence" sought by the EU Commission.

The DGB appreciates the intention to adapt the Coordinated Plan to promote investments in AI and to "address societal and environmental well-being as a key principle for AI" (p. 5). EU financial resources should be concentrated in the areas of industrial-ecological value creation and the public sector (services of general interest).

The DGB therefore also welcomes the intended **promotion of AI applications in the public sector** and the dialogues on this subject to be held in the health, administration, public services and services of general interest sectors. However, this process should not put an emphasis on promoting the "procurement of AI systems" (p. 8). The aim of sector-specific dialogues should be to **focus on areas of application depending on need and to examine the legal and (e.g. in the field of care) ethical framework conditions for the use of AI** together with the social partners. In order to reduce the burden on employees and create benefits for citizens, patients and relatives, it is essential to consider the integration of new technologies in work and organisational processes in a timely and adequate manner.

The intended "partnership with the private sector" should also be closely linked to the public sector in addition to focusing on industrial value creation.

The DGB welcomes the intention of the EU Commission to expand and better coordinate **research** on AI. In order for the announced establishment of "excellence and testing centres" to make a real contribution to mobilising investments, integrating AI in sensible applications and producing "global champions", the centres should have a high degree of interdisciplinarity and ensure close links with stakeholders in possible fields of action and application (see "Dialogues"). As a basic principle, this includes the **integration of work research** into the centres, with particular consideration of equal opportunities and non-discrimination. Finally, the question of training new skills plays a crucial role.

The DGB therefore applauds the fact that the EU Commission attaches great importance to "**skills**" (p. 6) and plans to present an updated agenda on this issue. In this context, the DGB refers to the 10-point plan on the National Strategy for Continuing Education (2019 https://www.dgb.de/themen/++co++c5cf5a90-65a2-11e9-9bfd-52540088cada). The DGB particularly appreciates that the promotion of AI-related use, decision-making and responsibility skills as part of upskilling is to be a "priority" in the Coordinated Plan on AI. The fact that ethical guidelines are to be included in the training of AI developers is also encouraging. However, this should be introduced in a binding instead of "indicative" manner.

The DGB unreservedly welcomes the **expansion of vocational guidance**, but this must also be further developed. It must be made significantly easier to access for both school graduates and employees and must provide independent advice on career development opportunities. Instruments such as digital/electronic documents listing skills and qualifications (such as the new Europass) can support individuals and employers, but also vocational guidance agencies and PSAs in their work and lay out transparently which skills and qualifications someone has acquired and which further training is recommended. However, we must bear in mind that the differences between the acquisition of qualifications and of skills must not become blurred. In view of vocational and occupation-related labour markets (not only in Germany), the proof of formal qualification (in the sense of a publicly regulated assessment and certification of competences) and occupationally tested skills is an essential driver for further training and qualification which should not be ignored. Instruments designed to increase the transparency of individual skill profiles (Europass, other forms of digital passports) must take account of this difference between qualifications and skills.

The DGB takes a different view of individual learning and training accounts. Experiences from Sweden or Great Britain show that (a) the participation of disadvantaged groups in particular in continuing education is not increased because (b) these accounts often serve several purposes (often coupled with care, childcare, sabbaticals). As a consequence, continuing education accounts have predominantly promoted those who have already often and frequently participated in continuing education. Moreover, this has not resulted in a steering effect determining which continuing education is promoted for which purpose (target control). In particular, the acquisition of qualifications through longer training courses suffers from this.

The DGB is critical of the use of AI technologies such as predictive analytics in (general and vocational) education. As a prerequisite, the standards of the regulatory framework to be created must at the very least be trustworthy (see above).

The DGB supports the proposal of the EU Commission to promote the **development of the competence of the regulatory authorities** regarding AI. Support should also be extended to companies and employee representative bodies in order to facilitate applications at a company level in line with Good Work. The DGB is in favour of regulatory authorities as a whole making their activities more digital and using the potential of AI to better advise and support citizens. This must also apply to sectoral regulatory bodies (such as chambers in the field of vocational training, employment agencies in the fields of labour market placement and unemployment benefits or accreditation bodies). Greater efforts by the Member States are needed here.