

MY BOSS THE ALGORITHM

EU prepares legal framework to shape AI in the workplace

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INTRODUCTION

Whether on social media such as LinkedIn, Twitter and Instagram or in the HR department of many companies, algorithms are used in almost all areas of our modern lives. And while the prospect of using a “digital colleague” to boost effectiveness is tempting, we also see various concerns related to the fight against discrimination and data protection in the workplace. The European Union (EU) has recognized these risks, and it has proposed a new legal framework that aims to regulate artificial intelligence (AI) and limit its risks – particularly in an HR context.

This article gives an overview of the current legal situation in Europe and the essential aspects of the new EU legal framework for AI. We will then look at problems connected with data protection and anti-discrimination laws when using AI. We conclude with suggestions for a best practice approach so corpora-

tions can legally and successfully include the use of AI in their HR strategy.

WHAT'S UP FOR AI IN EUROPE?

While AI technology has steadily advanced, the law has so far been trailing behind. However, in recent months, national legislators in the EU, such as Germany, tried to take steps to regulate AI. This includes, for example, the German *Works Council Modernization Act*. This Act contains a new co-determination right for employee representatives in the field of AI and the right of a works council to consult an expert if a company uses AI. Germany is not the only EU-country struggling with how to use AI. Although 20 EU member states have adopted a national strategy on AI (a strategy that provides an overview of national AI policies), there is still disagreement about how AI should be defined and regulated.

ON THE HORIZON: THE NEW EU FRAMEWORK ON AI

This lack of clarification and the insufficiency of existing legislation to address the specific challenges AI systems may bring was closely followed by the Commission of the European Union (the EU’s body to propose new laws). The Commission suggested a legal framework on Artificial Intelligence in April 2021. The EU approach wants to ensure people’s safety and fundamental rights regarding the specific use of AI. The proposal sets out a nuanced regulatory structure that bans some uses of AI, wants to heavily regulate so-called “high-risk uses,” and could lightly regulate less risky AI systems. The legal framework will apply to private actors inside and outside the EU as long as the AI system affects people located in the EU. Thus, it can also concern users of so-called high-risk AI systems, e.g.,

tools when hiring staff. The proposal also calls for brutal penalties, including administrative fines against companies in violation of the framework of up to 6 % of their total worldwide annual turnover. The regulation could enter into force in the second half of 2022 and be applicable later. Although the proposed regulation is still in its early stages, once it is adopted, the AI regulation will be directly applicable for every EU member state, comparable to the [General Data Protection Regulation](#) (GDPR).

AI AND THE FIGHT AGAINST DISCRIMINATION IN THE WORKPLACE

Another crucial aspect is whether or not AI could be biased when performing its tasks and therefore can or cannot discriminate against (potential) employees. In fact, AI poses a significant risk that automated algorithms, like humans, are not immune from bias. But how can a machine/code be biased? The discussion surrounding this issue has been [known in the U.S.](#) for quite some time. An algorithm learns from data it receives and is therefore capable of adopting inherent biases. If this data is unintentionally biased, e.g., a company has in the past hired more employees of a particular ethnic group, and the data is fed to the algorithm, it will automatically sort out more résumés of those members from the same group. In this regard, reliance on computerized decision-making can unknowingly cause employers to make decisions that violate laws enforcing anti-discrimination in the employment relationship, e.g., the German [General Act on Equal Treatment](#).

Regarding anti-discrimination laws, the so-called “black-box” nature of AI can create another challenge in fighting discrimination. It is often impossible to find out why an algorithm has made a decision and reached a certain outcome. Then, it might become difficult to judge whether an employee has been unfairly disadvantaged. As a result, it will be much more difficult for corporations to defend themselves against discrimination claims since it is hard to explain why, for example, a candidate was rejected. However, being able to provide such an explanation is key in fending off a discrimination claim in court. Any successful defense will require the employer to present objective reasons why a certain candidate was favored above another. That AI can be biased has been recognized at the European level and is now being [addressed by the Commission of the EU](#) as well.

AI AND DATA PROTECTION LAWS

The second important field is protection of data while using AI since all businesses in the EU must follow the GDPR as the major legal framework for data privacy. This concerns mainly the following GDPR-provisions:

- Principle of transparency according to [Art. 5 section 1 a\) and Art. 12 GDPR](#), meaning that data must be processed in a transparent manner, which can be difficult because of the “black-box nature” of AI.
- Principle of data minimization according to [Art. 5 section 1 c\) GDPR](#), meaning the amount of data gathered must be limited to what is necessary in relation to the purpose for which they are processed. AI often collects such a volume of data that the original purpose is far exceeded and no longer falls within the scope of what is necessary.
- Processing of special categories of personal data according to [Art. 9 GDPR](#), when entire job interviews are recorded or even a video of the interview is evaluated. The algorithm could thereby identify a speech impediment or other characteristics that fall under Art. 9 GDPR. Unless the candidate has given explicit consent to the processing of such data, this processing of data can be a violation of the GDPR.
- The right not to be subject to a decision based solely on automated processing under [Art. 22 section 1 GDPR](#), in cases where a candidate is rejected solely on the result of an intelligent screening tool.

HOW TO USE AI IN THE WORKPLACE – AND BE COMPLIANT?

Since a digital colleague does not exactly come with an instruction manual, many companies will ask themselves how to stay compliant with European anti-discrimination and data protection laws while using AI. We see two important fields of action where employers should be active to minimize legal liability:

Regarding anti-discrimination

- It should be closely monitored whether and to what extent discrimination can occur. What kind of data is used to “feed the algorithm”? Is the data of previously hired employees used as training data? To prevent legal risks, minorities must be adequately represented in the training data sets. Companies should also monitor the outcome of an algorithm. Does the

outcome adequately represent the various minorities?

- Any employer should be able to explain why a particular candidate was rejected in order to be able to fend off discrimination claims, e.g., based on gender or race or age in court.

Regarding data protection

- Companies also need to comply with GDPR’s data protection requirements, namely the principles of data minimization and transparency. Even though data minimization may, to a certain extent, water down the usefulness of AI (as it must be provided with a large volume of data to learn), this concept should not be ignored. Businesses should therefore implement technical and organizational measures to ensure that the amount of data fed into the algorithm and the gathered data does not exceed the scope of what is necessary.
- All types of data which is processed should be reviewed. Is the algorithm collecting and processing sensitive data in the sense of Art. 9 section 1 GDPR? If yes, has the employee or candidate concerned given her/his explicit consent?
- To stay compliant with Art. 22 GDPR, the final decision should always be made by the human being in charge of the hiring process.

Even though the new EU regulation on AI is still a way off, it is worth looking at the upcoming changes, not least because it will be an absolute novelty. Additionally, regarding the current use of AI, companies should pay particular attention to data protection and anti-discrimination law in order to avoid potential legal threats. As often, being and staying prepared is the ideal way of risk insurance.



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