To
Mrs. Margrethe Vestager
Executive Vice-President of the European Commission
For a Europe fit for the Digital Age
Rue de la Loi / Wetstraat 200
1049 Brussels
Belgium

Concerns: The inclusive **application of Artificial Intelligence on the** European **labour market**

Brussels, 03 February 2021

Dear Mrs. Vestager,

On behalf of World Employment Confederation-Europe (WEC-Europe), I wish to express my concern regarding the development surrounding the legislative ambitions on Artificial Intelligence (AI) in the European Union. As such, this letter supplements the WEC-Europe response[1] to the public consultation on the European Commission White Paper on Artificial intelligence[2]. Recent statements in the European Parliament have prompted us to provide additional inputs in the considerations of shaping regulation on the use of AI technologies in Europe.

1. WEC-Europe represents Private Employment Service Providers. The Services cover Agency Work, Recruitment, Training and Career Management. Through this, they shape more and better employment opportunities for Europeans, shape gateways to employment and improve labour market efficiency and transparency for workers, business, and governments alike. For these purposes - as any European industry - past, present, and future private employment services integrate new (digital) technologies to provide and improve their services. This includes tools that integrate AI technology. Moreover, through this intermediary role the industry plays a key part in preparing workers for a workplace induced by AI and other new technologies.

2. We wish to signal our dedication to ensuring that the provision of private employment services – irrespective of the (digital) tools deployed – contributes to diverse and inclusive labour markets in Europe and beyond. Our track record tells this story. Through private employment services a vast and diverse workforce is recruited and employed. Women, youth, and people with a background of long-term unemployment, disability and/or migration are, among other workers, all extensively represented in the group of workers private employment services engage with, especially in comparison to other sectors. On the European and national level, as complement to governmental initiatives, industry bodies have put in place a vast array of standards, audits, staff training and remedies to fight labour market discrimination through the use of private employment services. Finally, the industry has a vast track record of partnering with public employment services in the EU

---

[1] The full WEC-Europe Response to the European Commission's White Paper is annexed to this letter and can also be accessed on https://www.weceurope.org/uploads/2020/06/WEC-Europe-repsonse-to-EC-White-Paper-on-AI-FINAL.pdf
[2] COM(2020) 65 final

Member States to support the employment and labour market participation of the various labour market target groups that are identified on the national, regional and local level.

3. In this respect, we recognize that the application of AI in certain areas within recruitment may hold potential for high risk for the preservation and maintenance of European citizens' fundamental rights as these technologies might result in potential harm or damage to individuals, such as the biased outcome of automated decision-making. Yet, we emphasize that the other side of the coin is that AI can indeed contribute to the <u>fight on (conscious and unconscious) bias</u> which is present in all human decision making in European labour markets. This benefits workers and society. That is an opportunity that especially Europe should not pass by. This type of AI should be the competitive edge for Europe.

'High Risk'

4. We feel the White Paper as well as the European Parliament Resolution on the Framework of ethical aspects of artificial intelligence, robotics and related technologies[3] approaches this risk in a too broad manner. By classifying *all workers' rights and recruitment related AI* as 'high risk', as well as *employment* and *recruitment* as respectively 'high risk' sector and 'high risk' use or purpose, it stifles innovation for better functioning and more inclusive labour markets resulting from legal uncertainty, untargeted oversight, and a lack of viable business case. This will take away the incentive to develop AI systems that tackle the (un)conscious biases in human decision making and positively contribute to more fair and inclusive employment opportunities.

5. Moreover, this broad classification vastly surpasses the threshold that the European Commission has identified for high risks: "[...] uses of AI applications that produce legal or similarly significant effects for the rights of an individual or a company; that pose risk of injury, death or significant material or immaterial damage; that produce effects that cannot reasonably be avoided by individuals or legal entities [...]". For example, returning results from an online job search would be an employment matter in which AI could be involved as part of the search and match process, but in no way could this produce the effects mentioned by in the Commission's White Paper.

6. As such a case-by-case approach is needed in the high-risk assessment. A more specific degree of granularity is needed to adequately identify any target high-risk use or purpose.

7. For this reason, WEC-Europe – based on its members' expertise of day-to-day labour market matching as well as the digital tools deployed to this purpose - puts forward suggestions to develop a more appropriate guidance for identifying 'high risk' in recruitment. This is grounded in the premise that any job-matching exercise, irrespective of the technologies and/or parties involved, is a funnel that could - or could not(!) - lead to the conclusion of an employment contract. As the funnel tightens, the risks, stakes and cause for precaution in this context increases.

8. We put forward to shape clarity and tailor the classification of 'high risk' to hiring decisions only (including decisions to extend an employment contract). Indeed, this is the decision that impacts the jobseeker/worker the most and aligns with the requirement that there is a legal effect. Thus, the fact that an employer (irrespective of the involvement of a third party supporting the hiring decision

---

[3] P9_TA(2020)0275 (https://www.europarl.europa.eu/doceo/document/TA-9-2020-0275_EN.html)

in some way) will need to meet the requirements[4] when deploying AI capability in its hiring decision.

9. This would exclude applications that are used to optimally prepare candidates as well as businesses with human resource needs. Examples include, but are not limited to, applications to identify the relevant competence and expertise of jobseekers, such as chatbots; systems that analyse vacancies, jobs and tasks to identify relevant (and unexpected) competence matches; job board search and match applications; systems that automatically create job offers/descriptions; automated search & analysis of publicly available information for *potential* candidates, and systems related to training opportunities, coaching and/or career management. Of course, each of the applications would implement the full extent of the 'acquis communautaire', including the GDPR and its provisions on automated decision-making.

10. On the opposite, 'high risk' classification would explicitly *include* AI that is applied in individual background checks, deciding on offering of an employment contract, rating systems of employees, and contract conditions (incl. wages). Of course, in addition, the automated analysis of biometric and video data used throughout any stage of the recruitment and hiring process should be deemed as high-risk.

11. Finally, to the point of high risk, we put forward that even though a lot of focus is put on fighting bias through regulatory requirements, only limited attention is paid to operationalising the technical potential for actually doing so. The regulatory approach creates unsurmountable risk and costs for players to test and train AI applications, especially on bias. There are (technological) solutions for minimizing data biases. These need to be grounded on real datasets and relevant personal data to enable the measurement of bias in the first place. A platform and regulatory framework are needed to do so. Such a regulatory framework to test, train and validate to minimize bias is addressed passingly, neither do the Commission or Parliament identify this as a venue for pro-active EU follow-up. This is a missed opportunity in light of the ambition for the fight against labour market discrimination and other forms of unequal treatment. Taking AI bias seriously requires a dedicated and tailored framework for developers to collect relevant information and datasets, and test safely and compliantly (including compliance with GDPR) for bias; and continually monitor for and mitigate bias over time. WEC proposes to shape a dedicated platform to empower technical solutions for identifying and minimizing bias in artificial intelligence systems (for recruitment purposes and beyond).

Audit and Enforcement

12. We believe that the requirements put forward by the Commission are adequate and necessary to secure safe deployment of high-risk AI applications. We do have strong concerns on the European Parliament's proposal for a third-party certification by new national public authority, as it does not align with the current status and development of conformity assessments in the field of ICT products and business services in general. A more incremental approach will be needed for all actors, including those currently mandated to enforce labour market discrimination, to acquaint with the supervision of AI technology and identify specific applications within and beyond the current 'high risk' domains for additional scrutiny.

---

[4] As mentioned under pt. D of the European Commission White Paper

13. Moreover, shaping a new separate structure to audit AI application would go against the overall notion that the introduction of (AI) technology is a horizontal cross-sectoral development that will impact and benefit different parts of society and markets in different ways. Although a national body on AI would most certainly be of significant value to inform these parts of society and markets (as well as the existing oversight infrastructures in them) on the (potential) functioning and impacts of AI technology, such a body would not be adequately positioned to rule upon the risks and benefits in an isolated way. Indeed, AI is not an isolated application. It is and will be applied broadly, and as such should it be audited in an integrated way rather than an isolated one. Thus, aligning to the 'Conformity Assessment' methodology, be sure to ensure the integration of AI oversight into existing labour market oversight mechanisms.

14. Indeed, where it concerns the fight on (labour market) discrimination, EU Member States already have authorities dedicated to enforcement. These should be empowered to optimally perform their duties in a space that is increasingly induced by new technologies and AI. In this respect it is important to note that all EU Member States have bodies which tasks include the oversight of employment agencies; in fact, this is mandated by article 10 of Directive on Temporary Agency Work (2008/104/EC). Again, other than setting up new auditing mechanisms and agencies, it'd be better to empower existing bodies (and social partners) to adequately address if new technologies impact their mandate for audit, enforcement and remedy, including through the introduction of AI. In this context it is also important to remind that automated decision-making is very much covered by the GDPR and would indiscriminately cover automated decision-making on recruitment as it inherently includes personal data.

15. Finally, which respect to ex-ante oversight, there needs to be acknowledgement that one of the key features of AI is the fact that its application changes over time. This includes situations in which a low-risk application might turn high-risk, a high-risk application could turn into a low risk one, and/or various low-risk applications are connected in such a way that they might enter the high-risk description. This turns any third-party certification, licence or other ex-ante into a rubber stamp rather than a meaningful oversight tool. This further underpins the value add of ensuring the AI dimension is integrated into existing (sectoral) oversight mechanisms existing on the national level for the compliant provision of (public *and* private) employment services and/or the mitigation of labour market discrimination in these services and the labour market as a whole.

Concluding, we advise the European Commission, the European Parliament and the EU Council to integrate the following elements in shaping regulation on AI:

- Adopt a case-by-case approach based on specific and targeted uses and purposes and shape guidance to specify where in applications related to 'workers' rights' and recruitment processes would be 'high risk'. And thus, when these applications would be covered under *"uses of AI applications that produce legal or similarly significant effects for the rights of an individual or a company; that pose risk of injury, death or significant material or immaterial damage; that produce effects that cannot reasonably be avoided by individuals or legal entities"*. WEC recommends this to be when they effectively impact a hiring or firing decision, including an automated rating or background check.

- Rather than setting up a new isolated body on AI, ensure existing oversight bodies that oversee the labour markets are adequately empowered to do so on a labour market that will see the increased use of Artificial Intelligence and other technological applications. This

includes bodies that oversee labour market discrimination, private *and* public employment services, as well as social partner organisations involved in labour market governance. These institutions would need to be able to tailor the requirements for 'high risk' applications to their specific field of expertise. As such, an isolated 'European Certificate' in this respect will not deliver added value. Finally, irrespective of the body overseeing or the audit-methodology deployed, there need to be assurances that social partners involvement is guaranteed in their governance and decision-making.

I finish by reiterating our dedication to fight labour market discrimination. We believe the various applications of Artificial Intelligence can support better, more inclusive, and sustainable labour market matches. As such, it stands to support the role private employment services seek to play on the European labour market.

We hope to connect with you to further discuss these urgent matters,

Yours Sincerely,

Bettina Schaller

President WEC-Europe

CC.

Mr. N. Schmit - European Commissioner - Jobs & Social Rights

Mr. T. Breton - European Commissioner – Internal Market