Chapter 16
Social dialogue as a form of bottom-up governance for AI: the experience in France

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1. Introduction: the need for a shift in perspective

‘Social dialogue’ refers to all the negotiations, consultations and exchanges that take place between employers and workers in a company or in a sector at local, national, European or international level. As Alain Supiot reminds us (Supiot 2001), this triple right to representation, action and collective bargaining has been the real driving force behind labour law. Yet digital transformation, and especially the development of artificial intelligence systems, raises a host of challenges in terms of the need to adapt social dialogue to take account of the specific features of transformations at work, to reflect on the place of social dialogue in relation to other modes of regulation and to develop exploratory approaches to new dialogue practices.

When we look at social dialogue issues related to the implementation of AI systems, the current period is crucial in several respects due to a combination of several factors.

First, the concept of AI in the workplace is now sufficiently established to consider the necessity to adapt social dialogue to the specific dimensions of AI systems compared to other digital technologies (i.e. taking into account the different steps in AI system value creation and the issues of acceptability, transparency, appropriation, etc.). Essential contributions to this debate have been provided by experts such as Dr Christina Colclough, founder of The Why Not Lab, international organisations such as the Trade Union Advisory Committee (TUAC) to the Organisation for Economic Co-operation and Development (OECD), the European Trade Union Institute (ETUI) and NGOs such as Future of Society, AlgorithmWatch, etc.¹

In the French context, the major trade union organisations have all produced guidelines on the issue: the Ethics & Digital HR charter of Confédération Française de l’Encadrement CGC (CFE-CGC; the French management union) (CFE-CGC 2018); the ‘robolution’ guide of Confédération Générale du Travail des Ingés Cadres Techs (UGICT-CGT; CGT General Union of Engineers, Executives and Technicians) (UGICT-CGT 2020); the guide to AI at work of Confédération française démocratique du travail Cadres (CFDT Cadres; French Democratic Confederation of Labour managerial union) (Salis-Madinier 2022); the report on AI and human resources sponsored by Confédération Générale du Travail – Force Ouvrière (FO; General Confederation of

Labour – Workers’ Power) (Geuze 2022); and most recently, the guide to the AI Act released by Force Ouvrière Cadres (FO Cadres; the Confederal Union of Executives and Engineers – Workers’ Power (FO Cadres 2023).

Second, we are gradually entering a phase where new AI systems, which we can describe as ‘eco-systemic’, are gaining in importance and spreading throughout the economy. These systems differ in many respects from the ‘expert AI systems’ of the previous generation. They modify the relational structure of the economy, displace and even ‘reinvent’ value chains and foster new innovation modalities.

This is taking place in the context of an unprecedented legislative framework being established at European level to impose requirements to tackle the risks associated with AI and to define rules for accessing, sharing and creating value with data. The impacts of these new systems are far from being fully clear and understood. It is not uncommon, for example, to see actors involved in the process of introducing eco-systemic AI systems in their business mentioning that they are ‘gambling’ in relation to their effects. When value creation is complex to anticipate, the economic calculus is difficult to implement, especially on an ex ante basis. Most approaches implemented to assess the potential economic impact of AI systems are in many ways inappropriate as they focus on standard metrics, especially productivity. An illustrative example of this is provided by the AI Act assessment studies. However, when economic calculation becomes uncertain, governance issues become strategic, while defining the rules for sharing value among shareholders becomes a particularly crucial step. Moreover, the latest generations of AI are based on highly assertive learning processes, making it virtually impossible to look inside the machine (a neural network can have, for example, 200 to 280 billion parameters) and raise the crucial questions regarding transparency and explainability.

All these developments encourage us to go beyond the concept stage. Clarifying the impacts and entering the operational phase of social and technological dialogue is essential in implementing more than a ‘proof of concept’ approach. The transition is what is obviously at stake, but the pace of change is far from rapid. This is obvious in the French context. At Pôle Emploi, the French public employment service, for example, it took six months in 2019 for a debate to take place within the framework of the central works council on an AI project (‘Intelligence Emploi’) which aimed to test an algorithm enabling advisers to respond more quickly to emails. Six out of the seven unions refused to take part in the vote. Confédération française démocratique du travail (CFDT; the French Democratic Confederation of Labour) publicly denounced these delays (CFDT 2019a) and demanded to monitor the tests within the framework of the social dialogue in order to measure their impact on working conditions, jobs and the service provided. The union also called for the adoption of an ethical charter and criticised the ability of the management to measure ex ante productivity gains (CFDT 2019a, 2019b).

2. An example of serendipity in the effects of AI can be found in the Sopra Steria use case: https://youtu.be/Azz2T251__MY?feature=shared

3. This is notably the case of the impact assessment accompanying the AI Act, produced with the support of consultancy firms.
ethical charter was adopted in April 2022 (Pôle emploi 2022), no fewer than three years after the announcement of the deployment of the AI project within the company.

2. **AI systems in the workplace**

In April 2022, La Poste announced the introduction of its first AI systems. Scheduling management tools based on AI will enable network operation managers to be offered ‘turnkey’ scheduling scenarios which they can then modify or validate. For the time being, however, the presentation of these tools has continued to elude the social dialogue and consultation bodies. In reaction, the trade unions, especially Force Ouvrière (FO; Workers’ Power), asked for the adoption of an ‘agreement on method’ (FO Com 2022) regarding the deployment of AI in the enterprise.

Workers’ representatives are increasingly raising their voice to assert their information and consultation rights in the case of the introduction of AI systems. But they face major difficulties and are very often being left out of the AI decision-making process in terms of the technological aspects, the criteria used, the data collected and, even more so, in the nature and role of the algorithms. This observation is clear from the feedback received by several working groups recently set up in France to consider ways of strengthening ‘technological’ social dialogue in the context of the introduction of AI.5

However, this right to information and consultation has recently been potentially reinforced in the field of artificial intelligence. A recent decision of the Pontoise Court of Justice6 concluded that companies should accept that workers’ representatives (the social and economic committee) must be consulted and have recourse to an expert when new technology (in this case an AI system) is introduced, even if it has no identified impact on working conditions, a provision provided for by Articles L 2312-8 and L2315-94 of the labour code.7

Despite not yet being in wide usage, this right to information is not particularly well adapted to the context of artificial intelligence, largely because it does not take into account the specific temporality of AI systems and that these systems are not ‘finished’ when they are introduced, with the consequence that social dialogue about them has

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4. This agreement was negotiated between an employer or employer representatives and one or more trade union organisations in order to define in advance the method of negotiation.

5. This is notably the case for the DIALIA project launched in 2023, coordinated by Institut de recherches économiques et sociales (IRES) in partnership with four trade unions (CFE-CGC, CFDT, Ugict-CGT and FO Cadres) and co-financed by Agence nationale pour l’amélioration des conditions de travail (ANACT; the French Agency for the Improvement of Working Conditions). This aims to contribute to the deployment of a shared methodological framework giving effect to the 2020 European Framework Agreement on Digitalisation (AI dimension) and which brings together a community of 80 participants, most of them members of trade union organisations.

6. TJ Pontoise, 15 April 2022, no. 22/00134.

7. This provision was introduced by the Ordinance of 2017 reforming the use of expert assistance by employee representative bodies. In the relevant article in the former labour code (Article L. 2323-29), recourse to an expert in the case of the introduction of new technologies was possible only if skills, remuneration, training or working conditions were affected: https://www.legifrance.gouv.fr/loda/id/LEGIA201000035608975/2017-09-24/.
to be ongoing. This is the objective of the European SeCoIa Deal project,\(^8\) launched in 2021 and co-financed by the European Commission. This project brings together around forty participants mainly from France and Italy, coordinated by CFE-CGC,\(^9\) to explore the first avenues to design a ‘new’ social dialogue convening all stakeholders (providers, service providers, customers, companies, platforms) concerned with the transformation induced by the development of AI in order to reflect and promote bottom-up governance, in particular given the forthcoming European AI Act. CFE-CGC decided to initiate this project following the observation that the regulatory models emerging for AI are built mainly on a top-down basis and take little account of the real impacts on jobs and workplace organisations.

### 3. Top-down AI governance

For several years now, we have been experiencing in Europe the implementation of an AI governance system based on three forms of regulation.

The first is strong regulation by law, with the AI Act being the model proposed by Europe to be deployed in a uniform manner in all EU countries, like GDPR.

The second type of regulation is based on standards, with the aim of standardising the tools of the market – the International Organization for Standardization (ISO) at the international level and those of the European standardisation organisations at European level – so as to codify the AI Act in the form of complementary rules.

The last is based on soft law. Self-regulation can be proposed in the form of a charter, manifesto or ethics committee in companies as a complement to legal regulation.

The most important issue in this governance model is that the AI Act integrates these so-called soft law notions in the obligations imposed in respect of AI systems concerning the workplace. Although the text considers these systems as high-risk – which can be considered as a victory – compliance can be self-assessed, and the developers of these systems could, at least in terms of the changes proposed by the Council and the European Parliament, decide themselves if they believe the system to be high-risk (AlgorithmWatch 2023). The audits that can be conducted by the authorities are not particularly explicit: the developers of these AI systems may be asked for substantial evidence, but ‘substantial’ is not specified and so is open to interpretation (Bertuzzi 2023a). There are few or no safeguards for these systems which are having a major impact on the lives of employees, for instance when they are hired or when their performance is evaluated.

Another issue in the AI Act is the lack of obligations on the deployers of these AI systems. Here again there are no safeguards at the level of companies and only the instructions for proper functioning will guarantee the appropriate use of these tools.

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\(^8\) [https://secoiadeal.eu/](https://secoiadeal.eu/)

\(^9\) The project was piloted by CFE-CGC in collaboration with its partners (IRES, Astrées, CIDA and U2P).
More generally, there is also a patent risk concerning the guarantee of respect for our fundamental rights. An assessment of this general guarantee is mandatory, whatever the risk level of an AI system, but this is far from being delivered under a risk-based approach. In the initial Commission proposal, the AI Act defines in detail only the essential requirement. For example, Article 10 on data governance does not define the kind of biases that could be mitigated, leaving the responsibility of definition to the standardisation organisations. An application even identified as low risk, and therefore with few obligations, can affect the mental or physical integrity of employees or be discriminatory. In any case, the EC’ proposal contained no obligation to carry out a fundamental rights and algorithm impact assessment (‘FRAIA’) (OECD 2023) of high-risk applications and to propose corrective measures. Consequently, 118 civil society organisations, including AlgorithmWatch and European Digital Rights (EDRi) put out a joint statement calling for an Artificial Intelligence Act which puts fundamental rights first (AlgorithmWatch 2021). Substantial improvements regarding fundamental rights were introduced by the European Parliament in its position adopted in May 2023, imposing on those deploying a high-risk system in the EU the obligation to carry out a fundamental rights impact assessment, including consultation with the competent authorities and relevant stakeholders (Article 29) (European Parliament 2023). However, the final outcome of the trilogue is far from certain, with the Spanish presidency having proposed to remove the fundamental rights impact assessment obligations and the mandatory consultation with relevant stakeholders (Bertuzzi 2023b).

The standardisation aspects of regulation are covered elsewhere in this volume (see Giorgi) and so, turning attention next to soft law, the third type of AI governance, it is clear that the number of charters in place is far from negligible (for example, 85 were identified by researchers between 2014 and 2019 (Jobin et al. 2019). However, even though they may be useful, they cannot replace the strong regulation proposed by the AI Act. Furthermore, the charters are never discussed with stakeholders such as employees, customers and beneficiaries; they are imposed on them and often remain at the level of broad generalities as to the guarantees provided in practice. Moreover, ethics committees are often opaque because they are not open to the same stakeholders, while they can also serve as a pseudo-scientific guarantee for AI systems that are not particularly transparent.

This lack of upstream discussion with stakeholders leads to the charters having sizable heterogeneity. This is particularly the case in France, where several companies have recently adopted ethical charters on AI, including Crédit Agricole (Crédit Agricole 2017), Thalès in January 2019 (Thalès 2021), Orange in April 2020, MAIF (MAIF 2021), Banque de France (Banque de France 2021) and Pôle Emploi (Pôle emploi 2022). However, it is scarcely possible to compare the charter of Pôle Emploi, which deals with fairness, non-discrimination, transparency, security and environmental impact issues, with that of MAIF, which emphasises the mastery of technology in the service of people, or that of Crédit Agricole, which focuses solely on its customers and their data and on the improvement of the services offered to them.
4. Social dialogue: bottom-up AI governance in companies

What role can social dialogue play in regulating AI? In the following paragraphs, we mainly draw on the conclusions of the European SeCoIa Deal project (SeCoIa Deal 2023), dedicated to sharing knowledge and experience and to the joint building of operational tools regarding this specific issue.

Social dialogue, as a form of social regulation, must of course be considered in conjunction with other levels of regulation.

As far as data is concerned, it is essential to rely on standards and labels, to have the opportunity to approve ‘ethical’ charters and to integrate the need to respect fundamental rights into the AI regulation (and therefore into the obligations that will fall on the developers of AI systems). The French experience with ethical AI charters (see above) suggests that there is a need to harmonise these in order to put forward the interests of employees but also those of customers. The doctrine proposed for public administration in August 2022 by Conseil d’État (French Council of State) (Conseil d’État 2022) provides concrete leads for all actors in this direction.

Levers can also be pulled where the potential offered by Article 88 GDPR can be seized, opening the way for collective bargaining on adjustments to data protection regimes in workplace relationships. Union representatives have the possibility, via GDPR, to check that there is no fully automated profiling (Article 22), i.e. that there is no processing of an employee’s personal data to analyse and predict his or her behaviour, such as determining his or her performance at work.

Nevertheless, only via negotiation in companies will it be possible to initiate discussions on all the important issues related to the implementation of these systems: acceptability, transparency, explainability, appropriation, bias, robustness and organisational risks. Raising awareness of data processing and developing a ‘data’ culture is, in this regard, essential.

In the context of an AI Act at European level that will essentially proceed via self-regulation (by developers) and via the responsibilities that fall on deployers, employee representatives could be the ‘first-level regulators’\(^\text{10}\) capable of ensuring that the obligations set out in the future regulation of AI system providers and users (employers) will be met.

In the context of the SeCoIa Deal project, several operational tools have been co-elaborated in order to enable representatives to exert this role at company level:

- AI register system. Under the draft AI Act, where high-risk AI systems are used for business purposes, deployers have obligations in terms of using notices, keeping a log and carrying out data protection impact analysis. These obligations do not apply to systems that are not considered high-risk. Introducing a tool to

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10. An expression developed by participants in the SeCoIa Deal project in order to insist on the importance of worker representatives with regard to the development of AI in a work context.
track AI systems installed in the company would be of use. Based on the principle of GDPR and its record of processing activities, a register would be set up to monitor the AI systems used in a company.

- Review clause in the framework of the cycle of use of AI-based tools at work. In order to ensure relevance and guarantee confidence in the tool and in the purpose of its use, it seems useful to imagine ‘permanent’, ‘long-term’ social dialogue on the AI-based tools used within a company. This dialogue would be based, among other things, on support for a review clause allowing the formalisation of a series of meetings between the actors, known to all in advance in principle and purpose, which will be held when the predetermined conditions are met. This clause may be included in a contract, in a collective agreement or in a declaration by the head of a company, or in a charter, resulting in a legally binding commitment on its part.

- Corporate AI ethics committee. The work of the SeCoIA Deal project has highlighted the need for ‘first level control’ in the workplace where AI systems are introduced and used. The creation of an ethics committee involving employee representatives, in conjunction with the creation of an AI ethics officer and record-keeping, is likely to strengthen deployers’ obligations and the consideration of the evolving nature of AI systems.

Each of these three ‘innovative’ proposals elaborated in the framework of the SeCoIA Deal project have been integrated in the final roadmap of Conseil National de la Refondation Numérique, an initiative launched at the end of 2022 by the French government which brings together citizens, social partners and representatives from associations, businesses, research and government in order to identify solutions to contemporary issues, including digital transitions at work (Conseil national du numérique 2023).

5. Conclusion

In conclusion, bottom-up governance of AI, as exemplified in the French context, is the only way of deploying ‘trustworthy AI’ benefiting all stakeholders and, above all, employees. As the latest ILO study shows (Gmyrek et al. 2023), the impact on managerial jobs is going to be significant and it is therefore up to the unions to write the rules for tomorrow’s technological social dialogue.

References


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