Litigating the Algorithmic Boss in the EU: A (Legally) Feasible and (Strategically) Attractive Option for Trade Unions?

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Workers subject to algorithmic management devices, both in platform work and in conventional employment settings, often face a justice gap in enforcing their rights, due to the opacity characterizing most of algorithmic automated decision-making processes. This paper argues that trade unions are in a more favourable position than individual workers to fill this justice gap through litigation, especially when collective redress mechanisms are available. However, this would be possible only when the legal system is conducive to this type of litigation. This article analyses three legal domains at EU level where justiciable rights are more likely to be violated through algorithmic management device, in order to assess whether it is legally feasible for trade unions to promote algorithmic litigation under EU law.

Nevertheless, even when the legal landscape is conducive to this type of litigation, it cannot be automatically expected that trade unions will more frequently recur to it to better enforce the rights of those workers subject to algorithmic management devices. Previous research shows that trade unions are traditionally keen on turning to litigation only when they are able to link it to their broader strategies. This paper claims that this may be the case against employers using algorithmic management devices. For trade unions, recurring to litigation can be strategically instrumental not only to fulfil the legal purpose of alleviating workers' justice gap through a better ex post enforcement of their rights, but also to achieve the meta-legal purpose of mobilizing them and the para-legal purpose of strengthening collective bargaining, especially considering that this would constitute an effective tool to induce stronger ex ante compliance.

Keywords: algorithmic management, platform work, algorithmic transparency, algorithmic discrimination, employment protection, data protection, trade unions, algorithmic litigation, strategic litigation, collective redress, legal mobilization, collective bargaining

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1 INTRODUCTION: ALGORITHMIC MANAGEMENT AND ITS ISSUES FOR WORKERS

Technology is changing the way entrepreneurs make decisions regarding their human resources, that are, always more often, delegated to algorithms. This phenomenon, labelled 'algorithmic management', consists of 'a diverse set of technological tools and techniques to remotely manage workforces, relying on data collection and surveillance of workers to enable automated or semi-automated decision-making'.[1]

These practices have been firstly tracked down in platform work, where algorithms have been widely used to direct, monitor, and discipline workers[2] who, above all when gig economy players started to operate, have been characterized as independent contractors and engaged on an on-demand basis. However, platform work is just the tip of the iceberg of a phenomenon that is by now rooted, although to a lesser degree, in industries different from those where digital platforms operate.[3] From logistics to services, algorithmic devices are always more often used to manage employees hired through standard forms of employment: namely, subordinate, full-time, and open-ended employment relationships.[4]

Employers are increasingly recurring to these devices mostly for two reasons: to make more accurate decisions within their organizations, and to automate processes in ways that produce economic value for them.[5] Notwithstanding these advantages, it has to be considered that delegating the exercise of certain managerial prerogatives to

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1 Alexandra Mateescu & Aiha Nguyen, *Algorithmic Management in the Workplace*, Data & Society - Explainer, 1 (6 February 2019), https://datasociety.net/wp-content/uploads/2019/02/DS_Algorithmic_Management_Explainer.pdf.

2 Mateescu & Nguyen, *supra* n. 1, at 3; Jeremias Adams-Prassl, *What if your boss was an algorithm? Economic incentives, legal challenges, and the rise of artificial intelligence at work*, 41 Comp. Lab. L. & Pol'y J. 123, 131-132 (2019); and Alex J. Wood, *Algorithmic management consequences for work organisation and working conditions*, 11 (JRC Working Papers Series on Labour, Education and Technology, WP No. 7, 2021). This is also confirmed by the fact that management studies have used the gig-economy as a case-study of this trend: *see*, for example, James Duggan et al., *Algorithmic management and app-work in the gig economy: A research agenda for employment relations and HRM*, 30 Hum. Resour. Manag. J. 114 (2020) and Mohammad H. Jarrahi & Will Sutherland, *Algorithmic Management and Algorithmic Competencies: Understanding and Appropriating Algorithms in Gig Work*, iConference 2019, 578 (2019).

3 Mateescu & Nguyen, *supra* n. 1, at 5-12; Katherine C. Kellogg et al., *Algorithms at work: the new contested terrain of control*, 14 Acad. of Mgmt. Annals 366, 372-382 (2020); Wood, *supra* n. 2, at 2-9; Sarah O'Connor, *Never mind Big Tech – 'little tech' can be dangerous at work too*, Financial Times (22 February 2022), https://www.ft.com/content/147bce5d-511c-4862-b820-2d85b736a5f6; J. Adams-Prassl, *Regulating algorithms at work: Lessons for a 'European approach to artificial intelligence'*, 13(1) Eur. Lab. L.J. 30, 34-35 (2022).

4 M.H. Jarrahi et al., *Algorithmic management in a work context*, in Big Data & Soc. 1, 2 (2021).

5 Kellogg et al., *supra* n. 3, at 368-369.

algorithms has augmented them to levels unheard in the past.[6] This has many side-effects for workers,[7] including the following two.

First, the lack of transparency characterizing most part of automated decision-making processes[8] have increased the information asymmetries in the already unbalanced relationship between the parties to an employment contract.[9] Algorithmic opacity allows entrepreneurs to disguise the actual exercise of certain managerial prerogatives, thus making more difficult to ascertain the true nature of certain working relationships, as happened with platform workers,[10] or the violations of those employment laws generally devoted to limit these managerial prerogatives, especially with regard to monitoring powers.[11] In addition, since algorithmic management devices are often fuelled with huge amounts of workers' data, there is also the risk, already materialised, that these are collected and processed in violation of data protection laws.[12] The additional issue here is that, being aware of this, employers may, even voluntarily,[13] decide to use algorithmic management tools to escape responsibilities connected with the compliance to employment and data protection laws.

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6 Valerio De Stefano, *'Negotiating the Algorithm': Automation, Artificial Intelligence and Labour Protection*, 41 Comp. Lab. L. & Pol'y J. 15, 36 (2019).

7 Valerio De Stefano & Simon Taes, *Algorithmic Management and Collective Bargaining*, ETUI – Foresight Brief, 7-8 (May 2021), https://www.etui.org/sites/default/files/2021-05/Algorithmic%20management%20and%20collective%20bargaining-web-2021.pdf.

8 In general, *see* Frank Pasquale, *The Black Box Society. The Secret Algorithms That Control Money And Information* (2015) and Jenna Burrell, *How the machine 'thinks': Understanding opacity in machine learning algorithms*, Big Data & Soc. 1 (2016). For a brief explanation of this issue and a more updated literature review, *see* Janneke Gerards & Raphaële Xenidis, *Algorithmic discrimination in Europe: Challenges and opportunities for gender equality and non-discrimination law* 45-46 (EU Commission, 2020).

9 Marta Otto, *Workforce Analytics v Fundamental Rights Protection in the EU in the Age of Big Data*, 40 Comp. Lab. L. & Pol'y J. 389, 392-393 (2019). With specific regard to platform work, *see* also Alex Rosenblat & Luke Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers* 10 Int'l J. of Commc'n. 3758, 3758 ff. (2016) and Duggan et al., *supra* n. 2, at 120.

10 Adams-Prassl, *supra* n. 2, at 144-145 and Jason Moyer-Lee & Nicola Countouris, *Taken for a Ride: Litigating the Digital Platform Model*, 23 (ILAW Issue Brief: March 2021).

11 Giovanni Gaudio, *Algorithmic Bosses Can't Lie! How to Foster Transparency and Limit Abuses of the New Algorithmic Managers*, forthcoming Comp. Lab. L. & Pol'y J. but already available on SSRN, Sections III.A, IV and V (2022).

12 See, as a stark example, the decisions of the Italian Data Protection Authority (DPA), that has heavily fined Glovo and Deliveroo for many violations of data protection laws deriving from extensive use of algorithmic management devices: against Glovo, Italian DPA, 10 June 2021, No. 234, an abstract in English of this decision is available at https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9677611, on which *see* Natasha Lomas, *Italy's DPA fines Glovo-owned Foodinho $3M, orders changes to algorithmic management of riders*, TechCrunch (6 July 2021), https://techcrunch.com/2021/07/06/italys-dpa-fines-glovo-owned-foodinho-3m-orders-changes-to-algorithmic-management-of-riders/; and the similar and more recent decision against Deliveroo Italian DPA, 22 July 2021, available at https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9685994.

13 As already claimed in Gaudio, *supra* n. 11, at Section I, entrepreneurs, like workers, may be victim of the opacity issue, installing algorithmic management devices that they would not have installed if they had full information on their possible negative consequences for workers. Therefore, there may be cases where they will implement algorithmic management tools involuntarily escaping responsibilities connected with the compliance to employment and data protection laws.

Second, although recurring to these devices has often been justified, also among employers, by the idea that algorithmic decision-makers are more accurate and objective than humans,[14] there are already empirical evidence that they may be fallible. Research,[15] news,[16] and even judicial decisions[17] report cases where algorithms have revealed themselves as biased or even discriminatory decision-makers, potentially deploying the effects of these decisions at scale.[18] In addition, algorithmic opacity further reduces the likelihood that the bias or the discrimination may be perceived, and then demonstrated, by workers.[19]

In light of this disruptive scenario, labour lawyers have started calling into questions that existing laws may be effectively adequate to address the abovementioned issues.[20] In another paper, I have already tried to show how legal systems, above all those of continental EU countries, seem to already have a series of 'regulatory antibodies' that are instrumental to do so, and that may be thus more widely used by legislators aiming at better facing the challenges posed by the algorithmic revolution.[21]

In this article, I am instead going to try to understand how and why trade unions can play a key role in solving the abovementioned issues,[22] above all by ensuring a more effective enforcement of existing regulatory standards through collective litigation. Paragraph 2 begins by underlining the reasons why trade unions are better placed than individual workers in facing the issues posed by the increasing use of algorithmic management devices in the workplace, even through collective litigation. Paragraph 3, focusing the analysis on EU law, tries to show how this can be done in practice, exploring two collective redress mechanisms offered by the GDPR and by EU anti-discrimination Directives, and another one that may be soon provided if the Proposal for a Directive to improve working conditions in platform work will be implemented. Paragraph 4 concludes, trying to understand if and how algorithmic collective litigation may constitute an attractive option for trade unions.

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14 Kellogg et al., *supra* n. 3, at 368.

15 For general examples of algorithmic discrimination, *see* Philipp Hacker, *Teaching fairness to artificial intelligence: existing and novel strategies against algorithmic discrimination under EU law*, 55 Common Mark. Law Rev. 1143 (2018) and Gerards & Xenidis, *supra* n. 8, at 45-46. For examples specifically relevant for labour lawyers, *see* also Aislinn Kelly-Lyth, *Challenging Biased Hiring Algorithms*, 41 Ox. J. L. Stud. 899 (2021).

16 For example, *see* Jeffrey Dastin, *Amazon scraps secret AI recruiting tool that showed bias against women*, Reuters (11 October 2018), https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G.

17 Tribunal of Bologna 31 December 2020, 2 Rivista Italiana di Diritto del Lavoro 175 (2021) on which Antonio Aloisi & Valerio De Stefano, *"Frankly, my rider, I don't give a damn"*, Rivista Il Mulino (Jan. 7, 2021), https://www.rivistailmuliNo.it/a/frankly-my-rider-i-don-t-give-a-damn-1, where the Tribunal found, even if for procedural purposes only, the existence of a discrimination for trade union reasons of the platform's algorithm against Deliveroo's riders. This case will be discussed in greater details at Paragraph 3.2 below.

18 Otto, *supra* n. 9, at 393 and De Stefano, *supra* n. 6, at 27-29.

19 Gaudio, *supra* n. 11, at Section III.B and Kelly-Lyth, *supra* n. 15.

20 Adams-Prassl, *supra* n. 2, at 124.

21 Gaudio, *supra* n. 11.

22 In general, on this topic, *see* De Stefano & Taes, *supra* n. 7, at 8-10.

2 THE ROLE OF TRADE UNIONS: WHY THEY ARE BETTER PLACED THAN INDIVIDUAL WORKERS TO SOLVE THESE ISSUES, ALSO THROUGH COLLECTIVE LITIGATION

The processes of collecting and processing data through algorithmic management devices affect homogeneously the entire workforce or at least certain groups of workers. Trade unions are thus in a more favourable position than individual workers to foster algorithmic transparency and check whether algorithmic tools are implemented respecting employment and data protection laws.

First, trade unions can achieve economies of scale in studying and understanding how algorithmic management devices actually work, by promoting algorithmic literacy of trade unionists through *ad hoc* trainings, and by hiring external experts when they need to comprehend more complex technical issues that are of interest of trade unions as they homogeneously affect groups of workers.[23]

Second, unions are in a strategic position to act as information gatherer to reduce the information asymmetries between employers and individual workers. Through surveys, even informal, among the workforce, trade unions may be able to grasp and better understand the existence of certain issues that, otherwise, would remain hidden behind algorithmic opacity, such as the violation of employment or data protection laws, as well as the existence of discriminations.

Third, the most powerful weapon in trade unions' hands is any case collective bargaining which has also been identified by scholars,[24] and then by legislators both at EU and at national level,[25] as a key source to regulate the implementation and use of algorithmic devices in the workplace. Collective bargaining agreements represent a flexible regulatory tool that can be used by trade unions, particularly at company level, to negotiate rights tailored to specifically face the issues highlighted in Paragraph 1. For example, they can negotiate information and access rights, or even explanation rights, that may be crucial in enhancing algorithmic transparency, thus limiting the risk of violation of employment and data protection laws; or they can even limit the type and number of

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23 Emanuele Dagnino & Ilaria Armaroli, *A Seat at the Table: Negotiating Data Processing in the Workplace*, 41 Comp. Lab. L. & Pol'y J. 173, 194 (2019). *See* also, as an example of a trade union position on this issue, TUC, *When AI is the Boss. An Introduction for Union Reps* (TUC: 2021), https://www.tuc.org.uk/sites/default/files/2021-12/When_AI_Is_The_Boss_2021_Reps_Guide_AW_Accessible.pdf.

24 De Stefano, *supra* n. 6, at 36.

25 Under EU law, *see* Article 88 of Regulation 2016/679/UE (GDPR), which identifies in collective bargaining agreements an appropriate source to 'provide for more specific rules to ensure the protection of the rights and freedoms in respect of employees' personal data in the employment context', which 'shall include suitable and specific measures safeguard the data subject's human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing.' In addition, within the EU many Member States has traditionally provided that trade unions have to be at least informed and consulted when installing monitoring tools in the workplace: *see*, Antonio Aloisi & Elena Gramano, *Artificial Intelligence is Watching You at Work: Digital Surveillance, Employee Monitoring, and Regulatory Issues in the EU Context*, 41 Comp. Lab. L. & Pol'y J. 95, 108-119 (2019). More recently, *see* also the law introduced in Spain that, among other things, has even provided that platforms will be obliged to 'give worker representatives access to the algorithm affecting working conditions': *see* Ane Aranguiz, *Platforms put a spoke in the wheels of Spain's 'riders' law'*, Social Europe (2 September 2021), https://socialeurope.eu/platforms-put-a-spoke-in-the-wheels-of-spains-riders-law.

data collected and processed, as well as identify purposes and procedures to use algorithmic tools in the workplace with a view to prevent further risks for employees. Trade unions are already moving in this direction,[26] albeit with some initial difficulties due both to the need of training their members to familiarize with a brand-new phenomenon and to certain unwillingness of their counterparties to come to terms with trade unions, especially with regard to gig economy players.[27]

However, there is another important news, that needs to receive specific attention in this article. Trade unions are always more often recurring to litigation to enforce the rights of those workers that may be prejudiced by the increasing use of algorithmic management devices, and also to possibly set judicial precedents favourable to them.[28]

This trend, that can be so far tracked down only in the context of platform work, can be divided in two litigation streams. The first stream, which has already reached a more mature stage, has concerned employment status litigation of platform workers and other strictly related issues.[29] The second litigation stream, which is still at an embryonic stage, has instead directly regarded other more innovative issues,[30] such as algorithmic opacity[31] and discrimination[32], which, as underlined above, may theoretically involve as counterparties not only platforms, but also other more traditional employers that are

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26 *See* the empirical research conducted by Dagnino & Armaroli, *supra* n. 23, on a series of collective bargaining agreements, showing the type of novel rights that unions are negotiating to face the threats posed by the increasing recourse to algorithmic management devices in the workplace. *See* also, as an example, Patrick Briône, *Algorithmic management – A Trade Union Guide* (UNI Global Union: 2020), https://www.uniglobalunion.org/sites/default/files/imce/uni_pm_algorithmic_management_guide_en.pdf that aims at providing guidance to trade unionists on how to approach negotiations regarding the implementation and use of algorithmic management devices.

27 Hannah Johnston & Chris Land-Kazlauskas, *Organizing on-demand: Representation, voice and collective bargaining in the gig economy*, 24-25 (ILO Working Paper Series on Conditions of Work and Employment, WP No. 94, 2019). In addition, as they have often been characterized as independent contractors, they have also found legal struggles in anti-competition laws: on this topic see, in general, Marco Biasi, *'We will all laugh at gilded butterflies'. The shadow of antitrust law on the collective negotiation of fair fees for self-employed workers*, 9(4) Eur. Lab. L.J. 354 (2018) and Iannis Lianos, Nicola Countouris & Valerio De Stefano, *Re-thinking the competition law/labour law interaction: Promoting a fairer labour market*, 10(3) Eur. Lab. L.J. 291 (2019), and, with specific reference to platform workers, Michael Doherty and Valentina Franca, *Solving the 'Gig-saw'? Collective Rights and Platform Work*, 49(3) Ind. L.J. 352 (2020).

28 This trend clearly emerges also reading the case-law reports prepared by Moyer-Lee & Countouris, *supra* n. 10; Valerio De Stefano et al., *Platform work and the employment relationship* (ILO Working Paper No. 27: March 2021); Christina Hießl, *Case law on the classification of platform workers: Cross-European comparative analysis and tentative conclusions* (Report prepared for the European Commission, Directorate DG Employment, Social Affairs and Inclusion, Unit B.2 – Working Conditions: October 2021) and Christina Hießl, *Case law on algorithmic management at the workplace: Cross-European comparative analysis and tentative conclusions* (Report prepared for the European Commission, Directorate DG Employment, Social Affairs and Inclusion, Unit B.2 – Working Conditions: September 2021), where the reader may appreciate that certain cases have been brought by trade unions.

29 *See* Hießl, *Case law on the classification of platform workers*, *supra* n. 28.

30 *See* Hießl, *Case law on algorithmic management at the workplace*, *supra* n. 28.

31 Amsterdam District Court 11 March 2021, cases C/13/687315/HARK20-207, C/13/689705/HARK/20-258, and C/13/692003/HARK20-302, whose English translation is available at https://ekker.legal/2021/03/13/dutch-court-rules-on-data-transparency-for-uber-and-ola-drivers/. These cases will be discussed in greater details at Paragraph 3.1 below.

32 Tribunal of Bologna 31 December 2020, *supra* n. 17. This case will be discussed in greater details at Paragraph 3.2 below.

always more often deciding to implement algorithmic management devices in their workplaces.

Some of these claims have been brought by individual workers with the support of trade unions, or even by union members and activists, as individual claimants. More interestingly, others have been brought directly by trade unions as collective claimants.[33] It may be not a coincidence that trade unions have directly started to promote this latter type of litigation to solve the issues analyzed in this article. There are many reasons why private 'collective redress mechanisms'[34] triggered by trade unions can be particularly appealing to enforce the rights of those workers subject to algorithmic management devices and set judicial precedents favourable to them, above all when compared to the alternative: namely, individual claims brought by workers.

Given the structural information asymmetries between them and their employers recurring to these opaque devices, individual litigants will often be victims of breaches of their rights without knowing it. In addition, even if they suspect that their rights have been violated by opaque algorithms, it might be very difficult for workers to actually achieve justice, as they will struggle in collecting information and gathering evidence, also because they may lack financial and other resources to appoint both technical consultants (who need to have a specific expertise on these complex technical issues) as well as legal experts and attorneys (who need to have specific skills in handling this kind of claims). As it has been argued above, trade unions are in a better position to reduce these information asymmetries and, therefore, they can more easily fill the potential justice gap where individual workers may find themselves in when dealing with algorithmic management devices.[35]

In addition, collective litigation is advantageous over individual one as it makes possible to enforce small claims where many workers have been affected homogenously by the same or analogous decision-making processes, as often happens with algorithmic management devices. In these situations, damages may be small for each worker and bringing an individual claim would be meaningless for them. However, since the sum of individual damages may be significant if the rights of many workers are infringed, this potential justice gap may be filled through collective litigation, that would allow workers to pay way lower litigation charges and avoid unnecessary coordination costs. Moreover, in case of a positive outcome, the decision will have a higher deterrent effect on employers, thus helping reducing breaches in future that may negatively involve the entire

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33 *See* the case-law analysis in Moyer-Lee & Countouris, *supra* n. 10; Hießl, *Case law on the classification of platform workers*, *supra* n. 28; and Hießl, *Case law on algorithmic management at the workplace*, *supra* n. 28.

34 Namely, those procedural mechanisms enabling a group of claimants (which may be natural or legal persons) who have suffered similar harm, resulting from the same illicit behaviour of a legal or natural person, to get redress as a group: Rafael Amaro et al., *Collective redress in the member states of the European Union* 13 (Study requested by the JURI committee of the European Parliament: 2018), https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608829/IPOL_STU(2018)608829_EN.pdf. For an employment perspective on collective redress, *see* Jan Cremers & Martin Bulla, *Collective redress and workers' rights in the EU* (AIAS WP No. 18: March 2012) and, more recently, *see* Zane Rasnača, *Special Issue Introduction: Collective redress for the enforcement of labour law*, 12(4) Eur. Lab. L.J. 405 (2021).

35 For the general argument, not related to algorithmic litigation, *see* Rasnača, *supra* n. 34, at 409.

workforce or at least certain groups of workers affected homogenously by similar violations of their rights.[36]

Furthermore, the effects of collective lawsuits, unlike individual ones, regard more or less large groups of workers and, since they are not confined to individual litigants, cannot be easily delayed or simply ignored by companies that, at least with regard to platforms, have been even prepared to circumvent the law or unfavourable judicial decisions.[37] If unions manage to keep them under the spotlight, as it has mostly happened in algorithmic management litigation against gig economy players, they cannot be ignored by the public opinion. This can be then advantageous for trade unions, as they may put reputational pressure on companies, even influencing them to litigate less aggressively.[38]

Lastly, it is to be underlined that trade unions have started using collective litigation as a strategic tool to complement more traditional forms of action, as it will be seen more in details at Paragraph 4. Therefore, if we also factor that individual workers, unlike trade unions, are structurally exposed to the risk of potential retaliation from their employers when they submit a claim,[39] it is then understandable why trade unions may be important actors in promoting algorithmic litigation.

Although collective litigation can be an appealing tool in this type of claims, this strategy can only be implemented if trade unions are given *locus standi* in collective claims: something that cannot be taken for granted, especially in employment law claims. As it has been underlined in a recent research on the topic focusing on the EU area, collective redress in employment law, unlike other areas such as competition and consumer protection laws, has not been a standard device in the enforcement toolbox neither in EU Member States nor in the EU legal systems. Therefore, it is fair to say that, on a very general basis, employment law systems, at least in the EU area, seemed to have been geared more towards individual than collective litigation.[40]

However, even in this scenario, there are two collective redress mechanisms provided under EU law and another one that is likely to be soon implemented at the EU level that, for two discrete reasons, may represent feasible enforcement tools for trade unions willing to turn to litigation to protect workers victim of breaches of their rights related to the use of algorithmic management devices. First, collective actors as trade unions have been given *locus standi* to promote collective claims before national Courts. Second, these mechanisms have been provided in legal domains where justiciable rights are more likely to be violated through algorithmic management devices, and where there are other procedural rules that can constitute strong regulatory antibodies when dealing with algorithmic opacity.

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36 For the general argument, not related to algorithmic litigation, *see* again Rasnača, *supra* n. 34, at 409 and also Csongor István Nagy, *The European collective redress debate after the European Commission's recommendation. One step forward, two steps back*?, 22(4) Maastricht J. Eur. & Comp. L. 530, 534 (2015).

37 Moyer-Lee & Countouris, *supra* n. 10, at 35.

38 Moyer-Lee & Countouris, *supra* n. 10, at 33 and 35. This point will be deepened at Paragraph 4 below.

39 Rasnača, *supra* n. 34, at 409.

40 *See* the research published in a special issue of the European Labour Law Journal and, in particular, the summary of its results: Rasnača, *supra* n. 34, at 411-414.

3 TRADE UNIONS AND COLLECTIVE ALGORITHMIC LITIGATION IN THE EU: A LEGAL ANALYSIS

3.1 THE GDPR

The first collective redress mechanism, that may allow trade unions to promote algorithmic litigation, has been provided by the EU legislator in the legal domain of data protection.

This possibility has been admitted by Article 80 of the so-called 'GDPR'[41], which provides that 'a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data' can lodge a complaint in representation of data subjects, before national Courts or data protection authorities (DPAs), when the data subject's rights under GDPR have been allegedly violated. It is possible to distinguish two discrete cases where collective actors, among which it is possible to include trade unions,[42] have been given *locus standi* before national Courts or DPAs, as they can lodge a complaint: a) on behalf of the data subject;[43] or, when the Member State is willing to provide so, even b) independently of a data subject's mandate.[44]

Preliminarily, it shall be underlined that the GDPR is obviously applicable when employees' data are collected and processed to fuel algorithmic management devices.[45] Therefore, it is fair to say that this collective redress mechanism can be used every time algorithmic management devices are used towards workers.

First, collective actors, such as trade unions, can theoretically file a complaint before national Courts or DPAs in all the cases when an employer or principal recurring to algorithmic management devices has collected and processed workers' data in violation of substantial rules contained in the GDPR. For example, a collective claim may be filed when: principles of processing – *i.e.*, lawfulness, fairness and transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity and confidentiality, and accountability (Article 5 GDPR) – have been violated in collecting or processing workers' data; or a worker has been subject to a decision based solely on automated processing of his/her data, which is forbidden by the GDPR (Article 22 GDPR).

In addition, a claim under Article 80 GDPR may also be filed when an employer or principal, in installing and using an algorithmic management device, has not complied

41 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

42 *See* Alexia Pato, *The Collective Private Enforcement of Data Protection Rights in the EU*, available on *SSRN* (2019), 4, where she notes that 'trade unions may be included in the scope of this provision', and 6-7, where she acknowledges that this has been expressly provided at national level, for example, by French legislation.

43 Art. 80(1) GDPR.

44 Art. 80(2) GDPR.

45 Frank Hendrickx, *From Digits to Robots: The Privacy Autonomy Nexus in New Labor Law Machinery*, 40 Comp. Lab. L. & Pol'y J. 365, 383-385 (2019).

with certain procedural duties provided under the GDPR. For example, a complaint may be lodged when an employer or principal failed to: carry out a data protection impact assessment when the processing deriving from the implementation of an algorithmic management device was likely to result in a high risk to the rights and freedoms of workers (Article 35 GDPR); implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests when automated individual decision-making is allowed (Article 22(3) GDPR); or, in those organisations employing fewer than 250 persons, prepare and maintain a record of processing activities (Article 30 GDPR).

Furthermore, trade unions may find strategically useful to use the collective redress mechanisms under Article 80 GDPR to enforce information and access rights provided by the GDPR (Article 13 and 15 GDPR). These rights are critical to guarantee algorithmic transparency, because, both at the time data are collected (Article 13 GDPR) and upon request of the data subject after they have already been collected (Article 15 GDPR), employers or principals have to provide workers with a series of information regarding the processing of their data.[46] If an employer or principal has not complied with these duties, trade unions may thus decide to file a claim under Article 80 GDPR to obtain useful information on the algorithmic management devices at stake, which would shed some light on the truth hidden behind algorithmic opacity. In addition, enforcing these rights may be also instrumental to strengthen workers' position in other incoming litigations related to algorithmic management devices, when claimant workers may otherwise struggle to collect information and gather evidence to prove a breach of their rights. This can be the case, for example, in classification claims, or in those judicial proceedings when workers need to prove the existence of a discrimination, or a violation of those employment laws generally devoted to limit these managerial prerogatives, especially with regard to monitoring powers.

Lastly, it shall be noted that the GDPR provides a rule that may facilitate this type of litigation, as it constitutes an effective regulatory antibody against algorithmic opacity, that may reduce the likelihood that a violation of the GDPR is perceived, and then demonstrated, by workers, as already seen in Paragraph 1 above. The reference is to Article 5(2) GDPR, which provides that the employer or principal, as a data controller, must be able to demonstrate that the collection of data and their processing have been carried out in compliance with the principles set out at Article 5(1) GDPR, a concept later restated by Article 24(1) GDPR. There is already a general consensus, among commentators, that these provisions shift the burden of proof to the data controller.[47] Such provisions are extremely useful when algorithmic opacity is at stake, as they indirectly foster transparency. An employer or principal will lose the case if it is not able to show that algorithmic management devices have been installed and used in compliance with the GDPR. Therefore, if such an employer or principal does not want to lose the dispute, it will have to prove that the applicable provisions contained in the GDPR were

46 This point has been already made in Gaudio, *supra* n. 11, at Section IV.

47 Paul Voigt & Axel Von Dem Bussche, *The EU General Data Protection Regulation (GDPR). A Practical Guide* 31-32 (2017) and Christopher Docksey, *Comment to Article 24*, in *The EU General Data Protection Regulation (GDPR): A Commentary* 555 (Christopher Kuner Et Al. Eds., 2020), who says that the burden of proof shifts to the controller, but only when the data subject has offered prima facie evidence of an unlawful processing activity.

respected, thus shedding at least some light on the functioning of the algorithmic tool at stake within the trial.[48]

No judicial cases initiated by trade unions under Article 80 GDPR has been tracked down so far. However, there have been a series of important rulings in the Netherlands showing how the GDPR may incentivise individual and even collective litigants to turn to litigation to solve the issues deriving from the always more massive use of algorithmic management devices.[49]

In these cases, decided by the Amsterdam District Court, certain drivers, engaged by two different platforms (Uber and Ola), judicially enforced their rights under Article 15 and 22 GDPR, with the support of certain trade unions. While not all the requests made by the claimants were granted, the Amsterdam District Court ordered Uber to provide access to the personal data used as the basis for the decision to deactivate certain drivers' account, including data used to establish their individual ranking. Most importantly, after having recognized that Ola implemented an automated systems of discounts and fines, the Amsterdam District Court ordered the company to communicate the main assessment criteria and their role in making automated decisions regarding the workers, so that they could be able to understand the criteria on the basis of which the decisions were made, and check the correctness and lawfulness of the data processing.[50]

These rulings show not only that the GDPR is critical in providing valuable legal protections to workers subject to algorithmic management devices, but also that trade unions may be keen on enforcing them. This interest is also confirmed by recent news, reporting that trade unions' increasing activism in trying to protect workers subject to algorithmic management devices by promoting the enforcement of their rights under the GDPR.[51] Therefore, in this scenario, it may be expected that trade unions will also try to use Article 80 GDPR to pursue similar goals, above all when considering that the GDPR's toolbox also provides certain rules that may facilitate algorithmic litigation. As already seen above, the switch of burden of proof, as well as information and access rights, constitute effective regulatory antibodies against algorithmic opacity. In addition, it shall be considered that data protection rights apply, in general, to both subordinate and autonomous workers. Companies have thus no room to try avoiding the application of the GDPR by classifying workers as independent contractors, a strategy often implemented by platforms to escape the application of employment protective legislation by disguising the actual existence of an employment relationship through opaque

48 This point has been already made in Gaudio, *supra* n. 11, at Sections II and IV.

49 Amsterdam District Court 11 March 2021, *supra* n. 31.

50 I have already discussed these cases in Gaudio, *supra* n. 11, at Section IV. For further insights on these cases, *see* Hießl, *Case law on algorithmic management at the workplace*, *supra* n. 28.

51 For example, *see* the complaint filed by a NGO against Amazon before the Luxembourg DPA in relation to possible violation of the GDPR related to the use of an algorithmic management device implemented to automate the hiring process, NOYB, *Help! My recruiter is an algorithm!*, noyb.eu (22 December 2021), https://noyb.eu/en/complaint-filed-help-my-recruiter-algorithm and, more recently, NOYB, *Amazon Workers demand Data-Transparency*, noyb.eu (14 March 2022), https://noyb.eu/en/amazon-workers-demand-data-transparency reporting that 'in cooperation between the worker's union "UNI Global" and privacy NGO "noyb.eu", Amazon warehouse workers from Germany, UK, Italy, Poland and Slovakia filed access requests under Article 15 GDPR today'.

algorithmic devices. Therefore, trade unions may generally enforce even the rights of those workers classified as independent contractors.[52]

In conclusion, Article 80 GDPR, which explicitly gives *locus standi* to collective actors to promote judicial claims, may represent a powerful enforcement tool for trade unions willing to turn to litigation to protect workers victim of breaches of GDPR rights related to the use of algorithmic management devices. However, there are two elements that need to be further considered, as they may constitute significant constraints for trade unions in recurring to Article 80 GDPR as an effective judicial enforcement tool. First, Member States have ample discretion in transposing this provision at national level and, in doing so, they may: a) substantially limit, or even deny, the possibility for trade unions to bring collective claims under Article 80 GDPR; or b) rule out the possibility, envisaged by Article 80(2) GDPR, to give *locus standi* to collective actors independently of a data subject's mandate,[53] which would be the most effective tool in the hand of trade unions willing to turn to litigation to protect groups of workers. Second, the collective redress mechanism provided by the GDPR is not framed as a purely judicial remedy, as collective actors can also lodge complaints before national DPAs. Filing a complaint before a DPA may be more effective than filing a judicial claim because, as public administrative bodies, DPAs are given broad powers to impose administrative fines and to collect evidence that are not generally granted to judicial bodies.[54] Therefore, the existence of this regulatory competing forum may induce collective actors, including trade unions, to file complaints before national DPAs instead of national Courts.

3.2 THE ANTI-DISCRIMINATION DIRECTIVES

The second set of collective redress mechanisms, that may allow trade unions to promote algorithmic litigation, has been provided by the EU legislator in the legal domain of anti-discrimination laws.

This possibility has been admitted by EU anti-discrimination Directives, which have provided that 'Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of

52 Adams-Prassl, *supra* n. 3, at 38.

53 *See* for example the Italian case, where the legislator has decided to not implement the possibility, envisaged by Article 80(2) GDPR, to give collective actors *locus standi* independently of a data subject's mandate, and has also excluded trade unions from the list of organisations that are given *locus standi* pursuant to Article 80(1) GDPR: see, Giovanni Gaudio, *Algorithmic management, sindacato e tutela giurisdizionale*, 1 Diritto delle Relazioni industriali 30, 52-53 (2022).

54 This is already happening: *see* the complaint filed by an NGO against Amazon before the Luxembourg DPA in relation to possible violation of the GDPR related to the use of algorithmic management device implemented to automate the hiring process, NOYB, *supra* n. 51. In this respect, it shall also be considered that DPAs around the EU have been extremely active in investigating and fining companies for breaching the GDPR through algorithmic management devices, mostly *ex officio*: *see* the cases mentioned by Hießl, *Case law on algorithmic management at the workplace*, *supra* n. 28.

obligations under this Directive'.[55] These provisions would then allow collective actors, among which it is generally possible to include trade unions, to have *locus standi* before national Courts and/or administrative bodies to lodge complaints, either on behalf or in support of the discriminated worker or workers, to enforce the anti-discrimination duties provided by the anti-discrimination Directives.

Preliminarily, it shall be underlined that algorithmic discrimination falls within the scope of EU anti-discrimination Directives, which prohibit both direct and indirect discrimination based on a series of protected grounds: namely, gender,[56] race and ethnic origin,[57] religion or belief, disability, age, or sexual orientation.[58]

Under these Directives, the distinction between direct and indirect discrimination in the context of algorithmic decision-making may be categorized as follows: a) direct discrimination, which occurs when a certain person is treated less favourably than another because of a protected ground: *i.e.*, the algorithmic decision-making system penalizes workers with a certain protected ground because having this protected ground is directly inputted as a negative variable in the algorithmic model, or because of a proxy that is exclusively connected to the protected ground; or, more often, b) indirect discrimination, which occurs when an apparently neutral provision, criterion or practice would put a person of one protected group at particular disadvantage, unless this can be objectively justified: *i.e.*, the algorithmic decision-making system penalizes workers, irrespective of whether they have a specific protected ground, because of a proxy that is statistically, but not exclusively, correlated to the protected ground at stake.[59]

Therefore, it is fair to say that the collective redress mechanism provided by EU anti-discrimination Directives can be used every time algorithmic management devices directly or, most often, indirectly discriminate against workers.

In this respect, it shall be noted that EU anti-discrimination Directives provides a rule that may facilitate this type of litigation, as it constitutes an effective regulatory antibody against algorithmic opacity: an issue that, as seen in Paragraph 1 above, may further reduce the likelihood that the discrimination may be perceived, and then demonstrated, by workers. The reference is to the provision, contained in all the EU anti-discrimination Directives, providing that 'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from

55 Art. 7(2) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Art. 9(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Art. 17(2) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

56 Directive 2006/54/EC.

57 Directive 2000/43/EC.

58 Directive 2000/78/EC.

59 *See* already Gaudio, *supra* n. 11, at Section III.B. This distinction is substantially in line with the one made by Hacker, *supra* n. 15, at 1151-1154; Raphaële Xenidis & Linda Senden, *EU non-discrimination law in the era of artificial intelligence: Mapping the challenges of algorithmic discrimination*, *in* General Principles of EU law and the EU Digital Order 151 (Ulf Bernitz et al. eds., 2020); Gerards & Xenidis, *supra* n. 8, at 64 and 67-73; Kelly-Lyth, *supra* n. 15, at 905-906.

which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment'.[60] This mechanism can be read as a partial switch of the burden of proof. This means that, if the claimant manages to offer *prima facie* evidence of the alleged discrimination, the risk of losing the case shifts to the respondent, unless this can prove that the discrimination did not occur or that, in case of indirect discrimination, there was an objective justification for the unequal treatment. This provision is extremely useful when algorithmic opacity is at stake, because, when the burden of proof is partially shifted to the employer, this bears the risk of losing the case for the failure of demonstrating that the decision-making process behind the algorithm was not discriminatory. Therefore, if it does not want to lose the case, such an employer will have to shed at least some light on the functioning of the algorithmic tool at stake within the trial.[61]

The fact that trade unions may successfully promote this type of claims to tackle combat algorithmic discrimination, as well as the effectiveness of the rules partially switching the burden of proof to the respondent, has been already tested in an algorithmic discrimination claim brought in Italy by certain trade unions against the food-delivery company Deliveroo. In this case, the Tribunal of Bologna found that Deliveroo's algorithm was indirectly discriminatory for trade union reasons,[62] because it penalized workers that, after having booked a shift, decided not to work during that shift and went on strike instead.[63]

This ruling is interesting for many reasons. First, the Tribunal confirmed that the claimant trade unions could be considered organizations with 'a legitimate interest in ensuring that the provisions of this Directive are complied with' within the meaning of Article 9(2) of Directive 2000/78/EC.[64] Second, the partial switch of the burden of proof was critical in founding that an indirect discrimination actually occurred. In this respect, it shall be noted that the claimant trade unions were not able, before and even during the trial, to gather evidence that shed full light on the functioning of Deliveroo's algorithm. Rather, through documents and witness testimonies, they only managed to prove facts from which it was possible to presume that Deliveroo's algorithm was indirectly discriminatory against those workers that would have wanted to go on strike instead of working during the pre-booked shift. Nevertheless, once the burden of proof switched to

60 Art. 8(1) of Directive 2000/43/EC; Art. 10(1) of Directive 2000/78/EC; Art. 19(1) of Directive 2006/54/EC.

61 This point has been already made in Gaudio, *supra* n. 11, at Sections II, III.B and IV.

62 More specifically, the Tribunal of Bologna found that Deliveroo violated the prohibition of indirect discrimination based on belief provided by Art. 1 of Directive 2000/78/EC, which is considered to include trade union membership according to Italian case-law.

63 Tribunal of Bologna 31 December 2020, *supra* n. 17. Specifically on the burden of proof issue, *see* Giovanni Gaudio, *La Cgil fa breccia nel cuore dell'algoritmo di Deliveroo: è discriminatorio*, 2 Rivista Italiana di Diritto del Lavoro 188 (2021) and Hießl, *Case law on algorithmic management at the workplace*, *supra* n. 28, at 23.

64 More specifically, 'this was based both on the express reference to combating discrimination in the statutes of the claimant organisation and the inherent interest of a trade union to protect workers wishing to exercise their right to strike. Since the latter was considered an identifiable group sharing a certain belief as protected by Directive 2000/78, the trade union could claim on its behalf without needing to prove that any of the union's members was concretely affected by the discriminatory effects of the algorithm', as reported by Hießl, *Case law on algorithmic management at the workplace*, *supra* n. 28, at 23.

Deliveroo, the company was unable to prove that this mechanism was not discriminatory or that the potential differential treatment could have been objectively justified. As a result, although the concrete functioning of the algorithm was not actually revealed within the trial, Deliveroo lost the case against the claimant trade unions.[65]

This decision shows not only that EU anti-discrimination Directives are effective in combating algorithmic discrimination, but also that trade unions may be keen on enforcing them before national Courts if they are given *locus standi*: indeed, they may also be better placed than individual workers to do so, for all the reasons set out at Paragraph 2 above. Therefore, in this scenario, it may be expected that trade unions will again try to enforce anti-discrimination rights contained in the relevant EU Directives, also considering that they provide certain rules that may facilitate algorithmic litigation: namely, those partially switching the burden of proof to the respondent employer.

In conclusion, the provisions of the EU anti-discrimination Directives, which are open to give trade unions *locus standi* to collective actors to promote judicial claims, may represent a powerful enforcement tool for trade unions willing to turn to litigation to combat algorithmic discrimination against workers. However, these Directives give Member States wide discretion on how to transpose these rules at national level. This may limit the actual possibility for trade unions to use this procedural tool to effectively protect workers against algorithmic discrimination before national Courts. First, the criteria for determining which organizations have a legitimate interest are provided by national laws, which may limit, or even deny, trade unions to have *locus standi* in this type of claims.[66] Second, if national laws do not go beyond the minimum requirements provided by these Directives, trade unions may engage in these proceedings only with the victim's approval, which rules out the possibility to file a claim in cases with no identifiable victims.[67] Third, the Directives do not require Member State to give collective actors, as trade unions, *locus standi* before national Courts, but leave them the choice to set out judicial and/or administrative procedures. Therefore, if only the latter option is implemented at national level, it will not be possible for trade unions to file a collective claim before national Courts.

3.3 THE PROPOSAL FOR A DIRECTIVE ON IMPROVING WORKING CONDITIONS IN PLATFORM WORK

The third collective redress mechanism has been envisaged by the European Commission's Proposal for a Directive of the European Parliament and the Council on improving working conditions in platform work (hereinafter, the 'Proposal').[68] If the proposal is approved as it is, or with slight amendments, and it is then transposed at national level,

65 As already noted in Gaudio, *supra* n. 11, at Section IV.

66 Sara Benedi Lahuerta, *Enforcing EU Equality law through collective redress: lagging behind?*, 55 Comm. Market L. Rev. 783, 802 (2018).

67 Lahuerta, *supra* n. 66, at 808.

68 Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work COM/2021/762 final.

it may allow trade unions to promote collective algorithmic litigation in relation to those persons performing platform work.[69]

This possibility is envisaged by Article 14 of the Proposal, which provides that 'Member States shall ensure that representatives of persons performing platform work […] may engage in any judicial or administrative procedure to enforce any of the rights or obligations arising from this Directive'. The representatives, as defined by Article 2 of the Proposal and that will be referred as trade unions in this article, will be entitled to 'act on behalf or in support of a person', or even 'several persons', 'performing platform work in the case of an infringement of any right or obligation arising from this Directive', but they will need their approval.

Preliminarily, it shall be underlined that the rights provided under the Proposal are guaranteed only to platform workers. Therefore, the Proposal does not cover those workers, outside the platform economy, who are subject to algorithmic management devices. This choice substantially limits the scope of the Proposal because it does not cover those workers operating in workplaces outside the platform economy where these devices have been implemented in a similar fashion.[70] Having said that, the Proposal sets out at least two groups of rights that may be enforced by trade unions through the collective redress mechanism provided under Article 14 of the Proposal.

Chapter II of the Proposal deals with the classification issue, that has concerned many platform workers in the past years, aimed at ensuring a correct determination of their status. This purpose is fulfilled through two main provisions: a) 'the determination of existence of an employment relationship' must be guided 'by the facts relating to the actual performance of work', also taking into account 'the use of algorithms in the organisation of platform work' (Article 3 of the Proposal); and, above all, b) a rebuttable legal presumption of employment status for platform workers when a digital labour platform 'controls […] the performance of work',[71] which occurs when at least two of a series of conditions indicated by the Proposal[72] are met (Article 4 of the Proposal).

Chapter III of the Proposal deals with a series of more general issues deriving from the use of algorithmic management devices, aimed at promoting algorithmic transparency, fairness and accountability. This purpose is fulfilled through a series of provisions that complement and strengthen some of the rights, provided under the GDPR, already analyzed under Paragraph 3.1. In particular, Chapter III of the Proposal provides that platforms shall: a) give detailed information to workers and their representatives

69 For the first comments to the Proposal, see: Nicola Countouris, *Regulating digital work: from laisser-faire to fairness*, Social Europe (8 December 2021), https://socialeurope.eu/regulating-digital-work-from-laisser-faire-to-fairness; Valerio De Stefano & Antonio Aloisi, *European Commission takes the lead in regulating platform work*, Social Europe (9 December 2021), https://socialeurope.eu/european-commission-takes-the-lead-in-regulating-platform-work; Aislinn Kelly-Lyth & Jeremias Adams-Prassl, *The EU's Proposed Platform Work Directive. A Promising Step*, Verfassungsblog (14 December 2021), https://verfassungsblog.de/work-directive/; Caroline Cauffman, *Towards better working conditions for persons performing services through digital labour platforms*, 29(1) Maas. J. Eur. & Comp. L. 3 (2022).

70 Kelly-Lyth & Adams-Prassl, *supra* n. 69.

71 On this legal technique, *see* Miriam Kullman, *'Platformisation' of work: An EU perspective on Introducing a legal presumption*, 13(1) Eur. Lab. L.J. 66 (2022).

72 The conditions triggering the presumption characterize most types of platform work as pointed out by De Stefano & Aloisi, *supra* n. 69.

regarding the automated monitoring and decision-making systems affecting platform workers (Article 6 of the Proposal); b) monitor and evaluate the impact on workers of automated decisions taken by algorithms, carrying out risk-assessment and mitigation measures (Article 7 of the Proposal); and c) provide platform workers with an explanation for any automated decision that has significantly affected their working conditions (Article 8 of the Proposal).

In addition, it shall be noted that the Proposal provides several rules that may facilitate algorithmic litigation as they all constitute effective regulatory antibodies against algorithmic opacity. First, the rule setting a presumption of existence of an employment relationship (Article 4 of the Proposal) substantially relieves the platform worker from the burden of demonstrating certain facts that may be very difficult to prove due to algorithmic opacity: namely, the actual exercise of certain managerial prerogatives, such as control, that may be critical in assessing the existence of an employment relationship. This provision has the same practical effects of a shift of the burden of proof to the employer, something that is in any case provided by the Proposal (Article 5(2) of the Proposal). As already said before, these rules indirectly foster algorithmic transparency because, if the platform does not want to lose the case once the burden of proof has been shifted, it will have to prove that the relationship at stake was not an employment one, thus shedding at least some light on the functioning of its algorithmic tool within the trial. Second, the Proposal sets out a rule that facilitates access to evidence in claims concerning the correct determination of the employment status of platform workers, as it provides that 'national courts […] are able to order the digital labour platform to disclose any relevant evidence which lies in their control' (Article 16 of the Proposal). This provision directly promotes algorithmic transparency as judges will be able to supplement the evidence offered by the claimant worker or trade union, ordering to the platform the disclosure of those evidence that would have otherwise remained hidden behind algorithmic opacity.[73]

The European Commission specifically recognizes not only that the Proposal will be critical in providing valuable legal protection to platform workers subject to algorithmic management devices, but also that giving *locus standi* to trade unions 'is a way to facilitate proceedings that would not have been brought otherwise because of procedural and financial barriers of a fear of reprisals' (Recital 44 of the Proposal). Therefore, also considering that trade unions have already shown great interest in the litigation regarding platform workers' status,[74] it may be expected that they will also try to recur to Article 14 of the Proposal to enforce the rights provided by this Proposal. This also because, if implemented as it is, the Proposal sets out many rules that may facilitate algorithmic litigation: namely, those setting presumptions in favour of platform workers and switching the burden of proof to the platform, as well as those granting judges with broad powers to obtain evidence.

In conclusion, Article 14 of the Proposal, which explicitly gives trade unions *locus standi* to promote judicial claims, may represent a powerful enforcement tool for unions willing to overcome two of the most salient problems arising from the use of algorithmic

73 This point has been already made in Gaudio, *supra* n. 11, at Section IV.

74 *See supra* n. 28.

management devices: the classification issue and, more generally, the algorithmic opacity issue. However, if approved as it is, the Proposal gives Member States certain discretion on how to transpose these rules at national level and this may limit the actual possibility for trade unions to use this procedural tool to effectively protect platform workers before national Courts. In particular, if national laws do not go beyond the minimum requirements provided by the Proposal, trade unions may engage in these proceedings only with the platform worker's approval and this may constitute a significant barrier to file proper collective claims.

4 CONCLUSION: COLLECTIVE ALGORITHMIC LITIGATION AS AN ATTRACTIVE STRATEGY FOR TRADE UNIONS

The analysis carried out in this article has tried to understand which role trade unions may play in fostering algorithmic transparency and checking whether algorithmic tools have been implemented respecting employment and data protection laws.

After having identified in Paragraph 1 the issues for workers deriving from the always more massive recourse to algorithmic management devices, Paragraph 2 has set out the reasons why trade unions are better placed than individual workers in facing these issues, even when enforcing their rights through collective litigation. Paragraph 3 has then shown how the EU legislator has implemented two collective redress mechanisms that give collective actors, such as trade unions, *locus standi* before national Courts in certain legal domains where workers' justiciable rights are more likely to be violated through algorithmic tools, and it is ready to implement a third one specifically dedicated to the issues analyzed in this paper, despite being limited in scope to platform work. Furthermore, it shall be noted that certain EU Member States provide, under their national laws, general or domain-specific collective redress mechanisms that may be also used by trade unions to promote claims aimed at enforcing the rights of those workers that may be prejudiced by the use of algorithmic management devices in the workplace.

In light of this legal framework and of the fact that, as explained at Paragraph 2 above, trade unions seem to be better placed than individual workers to effectively bring this type of claims, shall we then expect that unions will more often use collective litigation as a tool to protect the rights of those workers prejudiced by the use of algorithmic management devices?

Not necessarily. Existing research on the wider topic of trade union litigation suggests that the answer to this question depends on two main variables, that need to be analyzed in general before turning again to the more specific topic of collective algorithmic litigation.[75]

The first variable is legal and refers to the actual existence of rules allowing and then facilitating collective disputes brought by trade unions. Even when there are harmonized rules within the EU that contemplate giving *locus standi* to unions as collective actors, it shall be noted that collective redress mechanisms have to be enabled at national level to actually allow trade unions to bring collective claims before national Courts.[76]

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75 Rasnača, *supra* n. 34.

76 Zane Rasnača, *Collective redress in labour and social disputes: An (attractive) option for the EU*, 12(4) Eur. Lab. L.J. 415, 422 (2021).

In addition, even when trade unions have been given *locus standi*, collective litigation may actually work as an effective enforcement tool only when there are other procedural devices aimed at facilitating this type of claims. The first useful set of rules are those providing that trade unions are entitled to bring a collective claim independently of the mandate of the workers whose rights have been breached.[77] If unions have to collect the worker's approval to file a lawsuit, this can practically hinder many of the advantages of bringing a collective employment claim: for instance, it will not be easy to significantly lower litigation and coordination costs, and a favourable decision for the claimants will have lower deterrent effects on defendant employers. The second set of rules, that make collective litigation more appealing over individual one, are those easing access to evidence, such as judges' power to gather evidence from either the opponent or third parties, as well as those partially or totally switching the burden of proving certain facts to the respondent (as well as those setting presumptions in favour of the claimants, which have the same practical effect).[78] Lastly, it shall be considered that trade unions may be refrained from turning to litigation when there are remedies that may be functionally more effective than judicial ones, as regulatory redress mechanisms before administrative bodies, which are normally given broad power to impose administrative fines and to collect evidence that are not generally granted to judicial bodies.[79]

Nevertheless, even when the legal landscape is conducive and the abovementioned rules are designed to favour trade unions to promote collective claims, it cannot be automatically expected that unions will turn to litigation to enforce workers' rights. As shown by a recent research on this topic, even where national laws establish effective private collective redress mechanisms, trade unions may not be keen on bringing collective claims for a number of cultural and strategical reasons.[80]

This leads the analysis to consider a second variable, which is not a legal one, as it is related to the willingness of trade unions to turn to litigation. Research shows that trade unions have been traditionally cautious to systematically recur to litigation to improve workers' conditions and power, especially in those historical junctures, industries and/or situations characterized by strong membership density and mature collective bargaining relationships, where unions have no particular difficulties in mobilizing workers through more traditional forms of industrial action such as strikes.[81]

However, where union density and collective bargaining declines, and mobilizing workers becomes more difficult, trade unions tend to be more open to turn to litigation, especially when this is used as a strategic complement to other forms of actions. It has been observed that unions may be keen on recurring to litigation when this is functional

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77 Rasnača, *supra* n. 76, at 419-423 and 429-431.

78 Rasnača, *supra* n. 76, at 422-425.

79 Empirical research on collective redress also suggests that, where both mechanisms are provided, regulatory redress outperforms collective litigation: Christopher Hodges and Stefaan Voet, *Delivering Collective Redress: New Technologies* (Hart Publishing: 2018).

80 Rasnača, *supra* n. 34, at 413-414.

81 Trevor Colling, *Court in a trap? Legal Mobilisation by Trade Unions in the United Kingdom*, 4 (Warwick Papers in Industrial Relations, WP No. 91, 2009); Andrea Lassandari, *L'azione giudiziale come forma di autotutela collettiva*, 2/3 Lavoro e diritto 309, 327-328 (2014); and Cécile Guillaume, *When trade unions turn to litigation: 'getting all the ducks in a row'*, 49(3) Ind. Rel. J. 227, 239 (2018).

to fulfil broader strategies and not only purely legal purposes, such as setting favourable legal precedents or guaranteeing a more effective enforcement of existing regulatory standards. Litigation is thus a tool likely to be used when it can serve not only legal but also meta-legal purposes, such as campaigning and mobilization, and even para-legal purposes, such as pressurising employers to open bargaining channels and bolster unions' position at the negotiating table. To put it simply, trade unions seem to be keener on recurring more systematically to litigation when they are able to link it with other more traditional forms of action that, otherwise, may be more difficult to implement above all where union density and collective bargaining are weak.[82]

This seems to explain why trade unions have started to broadly develop a strategic use of litigation in algorithmic management claims, especially against gig economy players. Unions initially struggled to keep pace with the corporate strategies used by platforms to avoid obligations towards workers who, mostly being classified as independent contractors, have generally been neither covered by collective bargaining nor entitled to union representation.[83] Turning to litigation has been a fundamental strategy to enforce their rights and set favourable legal precedents, especially in classification claims against gig economy players. However, within the platform economy, this has been part of a broader strategy, aimed at fulfilling mostly meta-legal purposes, such as: mobilization of trade unionists; galvanization of others to join the cause, especially in scarcely unionised industries as those where platforms operate; campaigning to raise social awareness and encourage public debate on the risks connected to the increasing use of algorithmic management devices in platform work; lobbying activity to influence lawmakers to adopt policies aiming at mitigating them.[84]

These strategies, which have proven to be successful, have predominantly concerned gig economy players so far. However, it seems that trade unions may be also interested in implementing them more broadly against companies in industries different from those where platforms operate. There are several elements supporting this claim. First, protecting workers subject to algorithmic management devices is already at the centre of the agenda of many unions, which are extensively analysing this topic, even outside the gig economy, to understand how to reduce their potential negative impacts on the workers.[85] Second, this union agenda is also explicitly considering how to use litigation as one of the tools in a broader context of union mobilization against the threats posed by the rise of algorithmic bosses.[86] Third and even more interestingly, there are already early signs of this type of innovative legal mobilization at least against a company which, outside the platform economy, has been one of the corporate players that

82 Guillaume, *supra* n. 81.

83 Johnston & Land-Kazlauskas, *supra* n. 27, at 24-30.

84 Moyer-Lee & Countouris, *supra* n. 10, at 32-33.

85 See, among many examples, Patrick Briône, *supra* n. 26, and TUC, *supra* n. 23.

86 *See* above all the work recently done by the European Trade Union Institute: *Rethinking labour law in the digitalisation era*, 7-10 (ETUI Conference Report: 2020); Aude Cefaliello & Nicola Countouris, *Gig workers' rights and their strategic litigation*, Social Europe (22 December 2020), https://socialeurope.eu/gig-workers-rights-and-their-strategic-litigation; *Strategic aspects of occupational safety and health litigation* (ETUI Conference: 24-25 February 2021); *Labour rights & the digital transition* (ETUI Conference: 28-29 October 2021).

has more extensively relied on algorithmic management devices: Amazon.[87] Targeting this company is understandable from a union perspective, above all when considering that Amazon has implemented a worldwide strategy aimed at limiting unionization.[88] Therefore, it is likely that unions will decide to go down the same path observed with regard to gig economy players at least against companies like Amazon, thus deciding to systematically complement more traditional grassroots organizing activities with collective strategic litigation on more innovative issues such as algorithmic opacity, as these may be functional to shed light on the actual functioning of their algorithmic management devices, thus unveiling potential violation of employment and data protection laws.

If trade unions are willing to implement such a strategy on a wider scale, they may find useful to consider that collective litigation may be extremely helpful not only to achieve the legal and meta-legal purposes described above, but also to fulfil the para-legal purpose of strengthening collective bargaining. Involving employers in highly costly, sensitive, and reputationally damaging collective employment claims may constitute a powerful strategy to counterbalance the augmentation of managerial prerogatives driven by the increasing use of algorithmic management devices. Through strategic collective litigation, unions may gain a better position to negotiate in advance how algorithmic management devices may be implemented and used within the workplace, as employers will be more likely to sit at the negotiating table under the threat of massive litigation promoted by combative unions, especially when they are able to obtain media coverage and gain the attention of the public.

In conclusion, this analysis has shown that the always more massive recourse to algorithmic management devices poses several threats to workers' rights, and that trade unions are better placed than individual workers to solve these issues. On the one hand, collective bargaining is the most powerful tool for trade unions to limit *ex ante* the risks of violation of employment and data protection rights. On the other, collective litigation may be an efficient *ex post* procedural device to be used by trade unions to guarantee an effective enforcement of these rights after they have been violated. Although these strategies seem to serve opposite purposes, this article has tried to claim that this may not be the always the case, as they can be effectively implemented in an integrated manner. Legal mobilization via Courts may be used as an effective tool to pressure employers to open bargaining channels and allow unions to participate *ex ante* in the decisions regarding how technological devices are to be implemented and used in the workplace, thus limiting the negative consequences for workers. From this perspective, collective litigation may be functional to strengthen collective bargaining and thus allow trade unions to better negotiate rules aimed at fostering transparency of algorithmic management devices and ensuring that the decisions they make are actually compliant with employment and data protection laws.

87 *See supra* n. 51.

88 As it emerges reading the collection of papers in Jake Alimahomed-Wilson & Ellen Reese ed., *The Cost of Free Shipping. Amazon in the Global Economy* (Pluto Press 2020).