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, both in platform work and in conventional employment settings, often face a justice gap in enforcing their rights, due to the opacity characterizing most automated algorithmic 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 becomes possible only when the legal system is favourable 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 devices, in order to assess whether it is legally feasible for trade unions to promote algorithmic litigation under EU law.

Even when the legal framework is conducive to this type of litigation, it cannot be automatically expected that trade unions will more frequently resort to it to better enforce the rights of 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. For trade unions, resorting to litigation can be strategically instrumental not only to fulfil the legal purpose of alleviating the justice gap faced by workers 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 means to induce stronger ex ante compliance.

Keywords: Algorithmic Management, Platform Work, Algorithmic Transparency, Algorithmic Discrimination, Employment Protection, Data Protection, Trade Unions, Algorithmic Litigation, Collective Redress, Legal Mobilization, Collective Bargaining

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1 ENFORCING THE RIGHTS OF WORKERS SUBJECT TO ALGORITHMIC MANAGEMENT: A 'JUSTICE GAP'

1.1 Algorithmic management: a brief introduction

Technology is changing the way entrepreneurs make decisions about their human resources (HR), that are increasingly 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]

Algorithmic management was adopted first of all in connection with platform work, where algorithms have been widely used to direct, monitor, and discipline workers[2] who, especially when platform 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 sectors other than those in which digital platforms operate.[3] As shown by empirical research on the topic, this trend has already been identified in conventional employment settings, 'most significantly in warehouses but also to a lesser degree in retail, manufacturing, marketing, consultancy, banking, hotels, call centres, and among journalists, lawyers and the police'.[4] In short, algorithmic management is increasingly used even to manage employees hired through more standard forms of employment: namely, subordinate, full-time, and open-ended employment relationships.[5]

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1 Alexandra Mateescu & Aiha Nguyen, *Algorithmic Management in the Workplace*, Data & Society – Explainer 1 (6 Feb. 2019), https://datasociety.net/wp-content/uploads/2019/02/DS_Algorithmic_Management_Explainer.pdf (last accessed on 18 Mar. 2023).

2 *Ibid*., 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*, JRC Working Papers Series on Labour, Education and Technology, WP No. 7, 11 (2021). This is also confirmed by the fact that management studies have used the platform or 'gig' economy as a case-study of this trend: *see* e.g., James Duggan et al., *Algorithmic Management and App-Work in the Gig Economy: A Research Agenda for Employment Relations and HRM*, 30 Hum. Resources Mgmt. J. 114 (2020) and Mohammad H. Jarrahi & Will Sutherland, *Algorithmic Management and Algorithmic Competencies: Understanding and Appropriating Algorithms in Gig Work*, iConference 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. 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 Feb. 2022), https://www.ft.com/content/147bce5d-511c-4862-b820-2d85b736a5f6 (last accessed on 18 Mar. 2023); 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 Wood, *supra* n. 2, at 1 and more specifically at 3–9, where he reports concrete examples of this trend in conventional employment settings outside platform work.

5 M. H. Jarrahi et al., *Algorithmic Management in a Work Context*, 8(2) Big Data & Soc. 1, 2 (2021).

While no large-scale research has been undertaken to map all the types of algorithmic management devices enabling automated or semi-automated decisions over workers, the existing empirical literature in the field of HR management suggests that these systems have been used to reshape 'organizational control', through automation of (1) direction (i.e., 'the specification of what needs to be performed, in what order and time period, and with what degree of accuracy'), (2) evaluation (i.e., 'the review of workers to correct mistakes, assess performance, and identify those who are not performing adequately'), and (3) discipline (i.e., 'the punishment and reward of workers so as to elicit cooperation and enforce compliance with the employer's direction of the labour process').[6] Translating this classification into legal terminology, it can be said that algorithmic management has been used to reshape 'managerial prerogatives', through automation of (1) control power (i.e., 'the power to assign tasks and to give unilateral orders and directives to employees'), (2) monitoring power (i.e., 'the power to monitor both the performance of such tasks and the compliance with these orders and directives'), and (3) disciplinary power (i.e., 'the power to sanction both the improper or negligent performance of the assigned tasks and any disobedience to lawfully-given orders and directives').[7]

1.2 Algorithmic management: the issues for workers

Employers are increasingly resorting to these procedures mostly for two reasons: to make more accurate management decisions, and to automate processes in ways that produce economic value for them.[8] In spite of these advantages, it has to be considered that delegating the exercise of managerial prerogatives to algorithms has 'augmented' them to levels unheard of in the past.[9] Labour lawyers have already pointed out that this has many side-effects for workers,[10] including the following:

(1) the use of algorithmic management devices increases the risk that employers will violate those employment laws generally aimed at limiting (these augmented) managerial prerogatives, especially with regard to monitoring powers[11];

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6 Kellogg et al., *supra* n. 3, at 369. The same categorization has been used by Wood, *supra* n. 2.

7 Valerio De Stefano, *'Negotiating the Algorithm': Automation, Artificial Intelligence and Labour Protection*, 41 Comp. Lab. L. & Pol'y J. 15, 31 (2019).

8 Kellogg et al., *supra* n. 3, at 368–369.

9 De Stefano, *supra* n. 7, at 31–35.

10 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 (last accessed on 18 Mar. 2023).

11 De Stefano, *supra* n. 7, at 31.

(2) since algorithmic management systems often contain huge amounts of workers' data, there is also the risk, already materialized, that these are processed in violation of data protection laws[12]; and

(3) although the use of algorithmic management has often been justified among employers by the idea that algorithmic decision-makers are more accurate and objective than humans,[13] there is empirical evidence that these devices may be fallible. Research,[14] news reports,[15] and even judicial decisions[16] cast light on cases where algorithms have turned out to be biased or even discriminatory decision-makers, potentially deploying the effects of these decisions at scale.[17]

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12 *See*, as a stark example, the decisions of the Italian Data Protection Authority (DPA), that imposed heavy fines on Glovo and Deliveroo for many violations of data protection laws deriving from the extensive use of algorithmic management: against Glovo, Italian DPA, 10 Jun. 2021, No. 234, an abstract in English of this decision is, https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9677611(last accessed on 18 Mar. 2023), on which *see* Natasha Lomas, *Italy's DPA Fines Glovo-Owned Foodinho $3M, Orders Changes to Algorithmic Management of Riders*, TechCrunch (6 Jul. 2021), https://techcrunch.com/2021/07/06/italys-dpa-fines-glovo-owned-foodinho-3m-orders-changes-to-algorithmic-management-of-riders/(last accessed on 18 Mar. 2023); and the similar decision against Deliveroo Italian DPA, 22 Jul. 2021, https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9685994 (last accessed on 18 Mar. 2023).

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

14 For examples of algorithmic discrimination, *see* Philipp Hacker, *Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies Against Algorithmic Discrimination Under EU Law*, 55 Common Mkt. L. Rev. 1143 (2018) and Janneke Gerards & Raphaële Xenidis, *Algorithmic Discrimination in Europe: Challenges and Opportunities for Gender Equality and Non-discrimination Law* 45–46 (EU Commission 2020). For examples specifically relevant for labour lawyers, *see also* Aislinn Kelly-Lyth, *Challenging Biased Hiring Algorithms*, 41 Oxford J. Legal Stud. 899 (2021).

15 For example, Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool that Showed Bias Against Women*, Reuters (11 Oct. 2018), https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G (last accessed on 18 Mar. 2023) and Walé Azeez, *Uber Faces Legal Action in UK Over Racial Discrimination Claims*, CNN Business (7 Oct. 2021), https://edition.cnn.com/2021/10/07/tech/uber-racism-uk-lawsuit-facial-recognition/index.html (last accessed on 18 Mar. 2023).

16 Tribunal of Bologna 31 Dec. 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 (7 Jan. 2021), https://www.rivistailmuliNo.it/a/frankly-my-rider-i-don-t-give-a-damn-1 (last accessed on 18 Mar. 2023), where the Tribunal found, even if for procedural purposes only, the existence of a discrimination for trade union membership of the platform's algorithm against Deliveroo's riders. This case will be discussed in greater details at para. 3.2 below. *See also* the legal action initiated against Uber before Central London Employment Tribunal by individual workers supported by the App Drivers and Couriers Union (ADCU): ADCU, *ADCU Initiates Legal Action Against Uber's Workplace Use of Racially Discriminatory Facial Recognition Systems* (ADCU: 2021), https://www.adcu.org.uk/news-posts/adcu-initiates-legal-action-against-ubers-workplace-use-of-racially-discriminatory-facial-recognition-systems (last accessed on 18 Mar. 2023), which is moving forward: Worker Info Exchange, *Court Rejects Uber's Attempt to Have Facial Recognition Discrimination Claim Struck Out* (Worker Info Exchange: 2022), https://www.workerinfoexchange.org/post/court-rejects-uber-s-attempt-to-have-facial-recognition-discrimination-claim-struck-out#:~:text=The%20East%20London%20Employment%20Tribunal,to%20sign%20in%20to%20work, (last accessed on 18 Mar. 2023).

17 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, 393 (2019) and De Stefano, *supra* n. 7, at 27–29.

1.3 Algorithmic management: A 'justice gap' for workers

These issues have been exacerbated by the lack of transparency characterizing most automated or semi-automated decision-making processes,[18] which have increased the information asymmetries in the already imbalanced relationship between the parties to an employment contract.[19] Algorithmic opacity, due to a number of legal and technical reasons,[20] may conceal the violation of the rights of those workers subject to algorithmic management tools, because their lack of transparency would allow entrepreneurs to:

(1) disguise the exercise of managerial prerogatives, thus making it more difficult to assess the true nature of certain working relatiosnhips, as happened with platform workers,[21] or the violations of those employment laws generally devoted to limit these managerial prerogatives[22];
(2) cover those situations where workers' data used to fuel algorithmic management tools have been processed in violation of applicable data protection regulations[23]; and
(3) reduce the likelihood that the discrimination may be perceived, and then demonstrated, by workers.[24]

As a result, algorithmic opacity contributes to reducing workers' awareness of potential violations of their rights. Moreover, even when they are conscious of them, employees may encounter great difficulties in collecting information and gathering evidence on how algorithmic management works, something that can irreparably prejudice the possibility of effectively enforcing their rights. The

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18 In general, 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* Gerards & Xenidis, *supra* n. 14, at 45–46.

19 Otto, *supra* n. 17, at 392–393. 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. Commc'n 3758, 3758 ff. (2016) and Duggan et al., *supra* n. 2, at 120.

20 As pointed out by Burrell, *supra* n. 18, there are three main obstacles to algorithmic transparency: (1) legal opacity, which refers to the fact that automated decision-making tools are often protected by corporate secrecy, because algorithms are often covered by trade secrets, as well as by statutory or contractual confidentiality duties of the employees that develop and program these devices; (2) coding illiteracy, which refers to the fact that not only code writing but also code reading is a specialized skill i.e., not widespread among the general public; and (3) machine learning opacity, which is distinctive of machine learning algorithms, that are often so complex that are inexplicable or incomprehensible to human understanding. For an employment law perspective on this issue, *see* Giovanni Gaudio, *Algorithmic Bosses Can't Lie! How to Foster Transparency and Limit Abuses of the New Algorithmic Managers*, 42(3) Comp. Lab. L. & Pol'y J. 707, 709–711 (2022).

21 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: Mar. 2021).

22 Gaudio, *supra* n. 20, at 720–725 and 733–741.

23 *Ibid*.

24 *Ibid*., at 725–729, and Kelly-Lyth, *supra* n. 14.

additional problem here is that, as they are conscious of this, employers may, even voluntarily,[25] decide to use algorithmic management to evade responsibilities connected with compliance with employment, data protection and anti-discrimination laws. In this scenario, workers subject to algorithmic management may experience a 'justice gap', that, for the purposes of this paper, will be understood in terms of law-in-action, namely the gap between the promise of law and the actual achievement of justice through its (feasible) enforcement.[26]

1.4 Filling the 'justice gap': Investigating the role of trade unions as enforcement actors in relation to algorithmic management

When examining how this justice gap can be addressed, there is an important development that needs to receive critical attention. Trade unions are increasingly resorting to litigation to enforce the rights of workers prejudiced by the use of algorithmic management in the workplace.[27]

This trend can be divided into two strands of litigation. The first one, which has already reached a more mature stage, concerns the employment status of platform workers and other strictly related issues.[28] The second strand of litigation, which is still at an embryonic stage, directly concerns more innovative issues,[29] such as algorithmic opacity[30] and discrimination.[31] While the second strand of

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[25] As argued in Gaudio, *supra* n. 20, at 711, also entrepreneurs, like workers, may be victim of the opacity issue, adopting algorithmic management devices that they would not have adopted if they had full information about the possible negative consequences for workers. As a result, there may be cases where they will implement algorithmic management tools involuntarily evading responsibilities relating to compliance with employment, data protection and anti-discrimination laws.

[26] Zane Rasnača, *Special Issue Introduction: Collective Redress for the Enforcement of Labour Law*, 12(4) Eur. Lab. L.J. 405, 408 (2021) and, more extensively, Zane Rasnača, *Enforcing Migrant and Mobile Workers' Rights*, in *Effective Enforcement of EU Labour Law* 265, 269–271 (Zane Rasnača et al. eds 2022).

[27] This trend clearly emerges in the case-law reports drafted by Moyer-Lee & Countouris, *supra* n. 21; Valerio De Stefano et al., *Platform Work and the Employment Relationship*, ILO Working Paper No. 27 (Mar. 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: Oct. 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: Sep. 2021). From these reports, the reader may appreciate that, in many cases, there has been the involvement of trade unions.

[28] Hießl (Oct. 2021), *supra* n. 27.

[29] Hießl (Sep. 2021), *supra* n. 27.

[30] Amsterdam District Court 11 Mar. 2021, cases C/13/687315/HARK20-207, C/13/689705/HARK/20-258, and C/13/692003/HARK20-302 against Uber and Ola Cabs. English translation, https://ekker.legal/2021/03/13/dutch-court-rules-on-data-transparency-for-uber-and-ola-drivers/ (last accessed on 18 Mar. 2023). These cases will be discussed in detail in s. 3.1 below.

[31] Tribunal of Bologna 31 Dec. 2020, *supra* n. 16. This case will be discussed in detail in s. 3.2 below. *See also* ADCU, *supra* n. 16.

litigation has so far mainly involved platform companies, trade unions have started targeting an employer that has made extensive use of algorithmic management to make automated decisions in conventional employment settings.[32]

Some of these claims have been brought by individual workers represented by trade unions,[33] or by union members and activists acting as individual claimants.[34] More interestingly, others have been brought directly by trade unions as collective claimants.[35]

This enforcement effort has mainly taken place before judicial bodies. However, there are some interesting pioneering initiatives in which trade unions have promoted complaints before administrative bodies such as Data Protection Authorities (DPAs),[36] even establishing strategic partnerships with non-government organizations (NGOs) and lawyers specializing in this type of non-judicial litigation.[37]

Given this scenario, this paper argues that trade unions can play a key role in filling the justice gap workers may find themselves in when seeking to enforce their rights violated through algorithmic management devices. Section 2 seeks to substantiate this claim, underlining the reasons why trade unions are in a favourable position to spearhead this type of litigation, especially when collective redress mechanisms are available. Section 3, focusing the analysis on EU law and building on the enforcement initiatives promoted by trade unions, shows how this can be

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[32] NOYB, *Amazon Workers Demand Data-Transparency*, noyb.eu (14 Mar. 2022), https://noyb.eu/en/amazon-workers-demand-data-transparency (last accessed on 18 Mar. 2023). These complaints will be discussed in greater detail in s. 3.2 below.

[33] Amsterdam District Court 11 Mar. 2021, *supra* n. 30 brought by individual workers, whose litigation strategy was coordinated by the ADCU: ADCU, *Gig Economy Workers Score Historic Digital Rights Victory Against Uber and Ola Cabs* (ADCU: 2021), https://www.adcu.org.uk/news-posts/gig-economy-workers-score-historic-digital-rights-victory-against-uber-and-ola-cabs (last accessed on 18 Mar. 2023).

[34] For example, Tribunal of Palermo 20 Nov. 2020, 4 Rivista Italiana di Diritto del Lavoro 802 (2020), on which *see* Maurizio Falsone, *Nothing New Under the Digital Platform Revolution? The First Italian Decision Declaring the Employment Status of a Rider*, 7 Italian L.J. 253 (2021), where the individual claim was brought by a trade unionist, member of the Confederazione Generale Italiana del Lavoro (CGIL), the leading Italian trade union.

[35] A leading example of this trend is Tribunal of Bologna 31 Dec. 2020, *supra* n. 16, where the case was brought by the CGIL.

[36] *See* the case brought before a DPA against Amazon by NOYB, *Help! My Recruiter Is an Algorithm!*, noyb.eu (22 Dec. 2021), https://noyb.eu/en/complaint-filed-help-my-recruiter-algorithm (last accessed on 18 Mar. 2023). *See also* Virginia Doellgast et al., *Negotiating Limits on Algorithmic Management in Digitalised Services: Cases from Germany and Norway*, forthcoming Transfer (2023), where they report that the trade unions filed a complaint before the Norwegian DPA, which found that an algorithmic management device violated workers' data protection rights.

[37] As an example of this trend, *see* NOYB, *supra* n. 32, where UNI Global worked together with NOYB, an NGO specializing in data protection strategic litigation. Another example of strategic partnership between trade unions, on the one hand, and NGOs and lawyers specializing in data protection is given by the judicial claims decided by Amsterdam District Court 11 Mar. 2021, *supra* n. 30, where ADCU collaborated with Worker Info Exchange, a NGO focusing on workers' data privacy, and a lawyer specializing in digital rights, privacy and artificial intelligence.

done in practice. Section 4 concludes by clarifying whether, when and why trade unions can be interested in enforcing the rights of workers subject to algorithmic management, using litigation as part of their wider mobilization strategies, also with a view to strengthening collective bargaining.

2 WHY TRADE UNIONS ARE IN A FAVOURABLE POSITION TO SPEARHEAD ALGORITHMIC LITIGATION, ESPECIALLY THROUGH COLLECTIVE REDRESS

There are many reasons why trade unions are in a favourable position to enforce the rights of the workers prejudiced by the use of algorithmic management and alleviating the justice gap identified in section 1.3. While the first set of reasons outlined below in section 2.1 are solely related to the institutional role of trade unions, those reported in section 2.2 are specifically connected to the existence of collective redress mechanisms directly allowing them to bring an action.

2.1 Why trade unions are better placed than individual workers

2.1[a] *Better Awareness and Evidence-Gathering*

Given the structural information asymmetries between workers and the employers adopting these opaque decision-making processes, 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 through opaque algorithms, it might be difficult for workers to obtain judicial remedies, as they will struggle to collect information and gather the evidence necessary to build a case against their employers. In other words, successful claims 'require very complex factual analysis and evidence tends to be inaccessible for individuals',[38] which may limit the effectiveness of this type of litigation.

Since the processing of data through algorithmic management devices affects the entire workforce or at least certain groups of workers, trade unions are in a more favourable position than individual workers to be aware of the violations of their rights, and to collect information and gather the evidence necessary to prove that such violations occurred.[39] Through surveys, even informal, among the workforce, trade unions may be able to grasp and better understand the existence

[38] Sara Benedi Lahuerta, *Enforcing EU Equality Law Through Collective Redress: Lagging Behind?*, 55 Common Mkt. L. Rev. 783, 784 (2018). This is an argument often used in the case of competition and environmental litigation that, *mutatis mutandis*, seems to be applicable also in relation to algorithmic management litigation.

[39] Klaus Lörcher, *Strategic Enforcement of EU Labor Law*, in *Effective Enforcement of EU Labour Law* 143, 151 (Zane Rasnača et al. eds 2022).

of certain violations of workers' rights (and gather evidence of their existence) that would otherwise remain hidden behind algorithmic opacity, such as breaches of employment or data protection laws, as well as the existence of discrimination. In addition, unlike individuals, trade unions can achieve economies of scale in studying and better understanding how algorithmic management works, by promoting algorithmic literacy among trade unionists through ad hoc training,[40] and by hiring external experts in order to comprehend more complex technical issues.[41] External technical experts are fundamental both in the pre-trial phase, as they enable lawyers to have a better understanding of the technical side of the claim, and during the trial, as they can be appointed as expert witnesses to inspect the algorithmic management tool and provide a technical opinion describing its functioning that would constitute precious evidence to cast light on the workings of the algorithm.[42]

2.1[b] *Lower Coordination Costs*

When group of workers are subject to the same violation of rights (as often happens in the case of algorithmic management), each of them may file individual claims without previously liaising with their colleagues. They may thus file multiple claims without coordination, increasing the overall costs of carrying out a preliminary legal assessment and organizing discrete legal strategies that, due to their diversity, are more likely to end up with different judicial outcomes. In addition, it needs to be considered that individual workers may lack information, as well as financial and other resources, to appoint lawyers (who need to have specific skills in handling this kind of claim), and technical consultants (who need to have specific expertise on these complex technical issues).

Due to their institutional positions, trade unions will be able to avoid unnecessary costs, saving resources due to economies of scale. First, they can act as litigation coordinators, aligning the pre-trial and trial strategies of the workers subject to the same violations, thus being in a better position to respond to the employers' litigation counterstrategies.[43] In addition, trade unions have a better

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[40] Doellgast et al., *supra* n. 36, where they note that, in Germany, works councils had 'an important ongoing role in monitoring how managers used employee data, as well as in educating the workforce on the rules so that they could report any abuses'.

[41] 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 (last accessed on 18 Mar. 2023).

[42] Gaudio, *supra* n. 20, at 732–733 and 737.

[43] Lörcher, *supra* n. 39, at 154.

knowledge of the legal market. As a result, they will be able to select the most suitable lawyers to handle the claim, as well as technical consultants with a better understanding of the technical aspects of the litigation. Lastly, when there are multiple similar claims, trade unions will also have a better chance of negotiating lower fees at an aggregate level.

2.1[c] *Lower Risks of Retaliation for Workers and Higher Reputational Risks for Employers*

Individual workers are structurally exposed to the risk of retaliation from their employers when they submit a claim.[44] In addition, they often struggle to keep companies in the spotlight and attract media attention.

Trade unions, unlike individuals, are not exposed to the risk of individual retaliation and are also in a better position to attract the attention of the press. If trade unions are able to keep their counterparties in the spotlight, as has mostly been the case in the litigation against platform economy players, they cannot be ignored by the general public. This can be advantageous, as trade unions may put reputational pressure on companies, even influencing them to litigate less aggressively.[45]

2.2 Why collective redress is generally more appealing to trade unions than individual enforcement

When available, collective redress mechanisms may be more appealing to trade unions than coordinating multiple individual claims, especially in relation to algorithmic management. Before outlining the arguments in support of this claim, it is necessary to clarify the concept of collective redress and its main features.

According to a widely accepted definition, collective redress refers to a broad 'range of 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'.[46] Genuine collective redress requires that the claim be filed without the authorization of the victim,[47] who will then be affected by the decision through different legal

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[44] Rasnača, *supra* n. 26, at 409.

[45] Moyer-Lee & Countouris, *supra* n. 21, at 33 and 35. This point will be examined in depth in s. 4 below.

[46] 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 (last accessed on 18 Mar. 2023). For an employment perspective on collective redress, *see* Jan Cremers & Martin Bulla, *Collective Redress and Workers' Rights in the EU*, AIAS WP No. 18 (Mar. 2012) and, more recently, *see* Rasnača, *supra* n. 26.

[47] Rasnača, *supra* n. 26, at 407.

mechanisms (i.e., depending on whether the applicable law provides for an opt-in or an opt-out mechanism, or for a mixture of the two).[48]

Another crucial issue is related to legal standing (i.e., who can bring an action). There are two main general models, depending on whether members of the group (i.e., 'group action') or representative entities (i.e., 'representative action') have the right to bring an action.[49] A slightly different and conceptually autonomous model refers to those cases where legal standing is given to organizations acting on their own behalf in the public interest, without a specific victim to support or represent (i.e., '*actio popularis*').[50] In any case, it should be considered that these expressions may have their own meanings in different legal systems.[51] Therefore, it will be necessary to carefully analyse the specific features of each collective redress mechanism to categorize it within one of the models above, irrespective of the label used by each legal system.

When representative actions or *actiones popularis* are allowed, attention should be paid to the criteria chosen to consider an entity as being entitled to bring a claim on behalf of members of the group or in the public interest[52] and, for the purposes of this paper, to whether trade unions can meet the relevant criteria.

Collective redress seems to be theoretically feasible in algorithmic management litigation because, as pointed out above, workers are affected homogenously by the same or analogous decision-making processes. Therefore, when this is in breach of their rights, there will be a similar harm resulting from the same illicit behaviour, which is a precondition for obtaining redress as a group. If *actio popularis* models are in place, trade unions may bring an action even when there are no pre-identified or identifiable victims affected by an algorithmic decision-making process implemented in the workplace.

Representative actions and *actiones popularis* (rather than group actions) will be mainly considered for the purposes of this article, because, as argued in section 2.1, trade unions are better placed than individual workers to spearhead algorithmic litigation. Therefore, if the legal framework at stake includes trade unions among

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48 As explained by Amaro et al., *supra* n. 46, 'The former obliges potential members of the group to expressly join the group: if they do not do so, they will not be able to avail themselves of the decision. On the contrary, under an opt-out system all potential members of the group are considered to have tacitly joined the group and will be able to avail themselves of a positive decision even if they did not ask for it, unless they expressly opted-out of the group'.

49 *Ibid*., at 13 and 27–31.

50 Lahuerta, *supra* n. 38, at 787–788 and Isabelle Chopin & Catharina Germaine, *A Comparative Analysis of Non-discrimination Law in Europe 2021* 93 (Study requested by the European Commission to the European network of legal experts in gender equality and discrimination: 2022), https://www.equalitylaw.eu/downloads/5568-a-comparative-analysis-of-non-discrimination-law-in-europe-2021-1-75-mb (last accessed on 18 Mar. 2023).

51 Amaro et al., *supra* n. 46, at 13.

52 *Ibid*., at 13 and 27–31.

the representative entities entitled to bring an action on behalf of workers or in the public interest, collective redress may be more appealing than individual enforcement for the following reasons.

2.2[a] *More Workers Enabled to Achieve Justice and Greater Compliance*

The effects of a positive outcome in collective redress regard more or less large group of workers and they are not confined to individual litigants. In addition, when there are no pre-identified or identifiable victims, the effects of a favourable decision will broadly affect workers even indirectly concerned by the infringement.

Although this may entail free-riding by non-active members, collective redress is likely to have positive externalities on wider groups of workers,[53] enabling more of them to achieve justice. This is all the more so in those cases where the legal system allows collective redress where there are no pre-identified or identifiable victims (as argued in sections 3.1 and 3.2 respectively) because, in these cases, individual workers may have little (or even none at all) incentives to file a lawsuit.[54] Conversely, trade unions may have a strategic interest in promoting this type of representative action or *actiones popularis* in so far as this makes it possible to prevent a large number of infringements of workers' rights, ensuring higher levels of compliance compared to individual redress. As a result, collective redress allows trade unions to enforce rights that would otherwise have probably remained on paper, at least with reference to non-active workers.

2.2[b] *Lower Coordination and Legal Costs*

It has been already argued, in relation to consumer and data protection litigation, that individual claimants may be unaware of the available redress options and, even when they are aware of them, it tends to be uneconomic for them to 'pay court, lawyer and expert fees that may exceed the compensation' also due to the highly complex nature of this type of claim.[55] This argument can be easily made also in relation to algorithmic litigation, which is highly complex from both a legal and technical perspective.

Therefore, for reasons similar to those pointed out in section 2.1[b], trade unions will be in a position to lower litigation charges and avoid unnecessary

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53 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, 534–535 (2015).

54 Lahuerta, *supra* n. 38, at 799. This point will be further explored in s. 3.2.

55 *Ibid.*, at 784.

coordination costs thanks to economies of scale.[56] This argument applies particularly in the case of group or representative actions, as a substantial part of the legal costs are fixed and are thus not commensurable to the number of the claimants.[57]

In any case, it cannot be excluded that involving many workers in the same proceedings may give rise to dissent within the class and conflicts of interests between trade unions acting as claimants and individual workers.[58] This may make group or representative action less attractive than individual enforcement. As a result, through a cost-benefit analysis, trade unions should carefully assess the feasibility of collective redress when evaluating if turning to litigation.

2.2[c] *Increased Feasibility in Enforcing Small Claims and Higher Deterrent Effect on Employers*

Collective redress is advantageous over individual actions as it makes it possible to enforce small claims where many workers have been affected in the same way by the same or analogous decision-making processes, as is often the case with algorithmic management. In these situations, damages may be small for the individual worker and bringing an individual claim would be pointless.

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 redress, that would make it more efficient to enforce small claims.[59] Moreover, in the case of a positive outcome, the decision will have a higher deterrent effect on employers, thus helping to reduce breaches in future that may negatively impact on groups of workers affected in the same way by similar violations of their rights.[60]

3 ALGORITHMIC LITIGATION IN THE EU: A LEGAL ANALYSIS

It is now time to examine whether algorithmic litigation promoted by trade unions is legally feasible in practice. The analysis will focus on certain redress mechanisms provided in three legal domains at EU level: data protection (section 3.1), anti-discrimination (section 3.2), and classification of platform workers (section 3.3, but note that the analysis is based on a legislative proposal). This is justified by the following arguments.

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56 Trevor Colling, *Court in a Trap? Legal Mobilisation by Trade Unions in the United Kingdom*, Warwick Papers in Industrial Relations, WP No. 91, 13 (2009).

57 Nagy, *supra* n. 53, at 534.

58 Lahuerta, *supra* n. 38, at 785.

59 Guy Davidov, *Compliance With and Enforcement of Labour Laws: An Overview and Some Timely Challenges*, 3 Soziales Recht 111, 116 (2021).

60 Rasnača, *supra* n. 26, at 409, and Nagy, *supra* n. 53, at 534.

First, these redress mechanisms have been provided in legal domains where justiciable rights are more likely to be violated through algorithmic management devices, as noted in sections 1.2 and 1.3.

Second, although collective redress has not been a standard approach in the enforcement toolbox in EU Member States or in the EU legal systems,[61] these legal domains regulated at EU level seem to offer redress opportunities that, at least for certain elements, amount to collective redress, which, as argued in section 2.2, may be more appealing to trade unions than individual enforcement.

Third, an analysis of EU law may be of theoretical and practical interest for a broader audience, as it is fair to assume that, despite variations, the above-mentioned legal domains are uniform or at least harmonized in all Member States.

In light of the above, the analysis of each legal domain will be conducted taking into account the following aspects: (1) scope (i.e., the safeguards provided to workers subject to algorithmic management); (2) type of redress (i.e., whether only individual or also collective redress is provided); (3) rules facilitating algorithmic litigation (i.e., whether the legal landscape is conducive to fill the justice gap identified at section 1.3); and (4) cases (i.e., whether there are cases where trade unions have directly or indirectly spearheaded algorithmic litigation).

3.1 The General Data Protection Regulation (GDPR)

3.1[a] *Scope*

The GDPR[62] is applicable when workers' data are collected and processed to fuel algorithmic management devices, as well as when these tools are used to enable automated decision-making.[63] In addition, it is interesting to note that the protections provided by the GDPR are afforded to workers as data subjects and, as such, they are mostly independent of their legal classification as independent contractors or employees.

The first relevant set of rules provided by the GDPR is substantial in nature and includes the following: (1) the data processing activity has to be carried out in compliance with the principles of lawfulness, fairness and transparency; purpose limitation; data minimization; accuracy; storage limitation; integrity and

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61 *See* the summary of the results of the research published in a special issue of the European Labour Law Journal: Rasnača, *supra* n. 26, at 411–414.

62 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 Apr. 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.

63 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).

confidentiality; accountability[64]; (2) workers have to be provided, both at the time data are collected[65] and upon request of the data subject after they have been collected,[66] with information regarding the processing of the data, including meaningful information about the logic involved and envisaged consequences of automated decision-making when tools capable of this type of decisions are installed and used by an employer or principal, as happens with algorithmic management; and (3) save for certain exceptions, decisions solely based on automated decision-making are prohibited.[67]

The second relevant set of rules provided by the GDPR imposes a series of procedural duties on employers and principals when they decide to install and use algorithmic management devices, as they will have to: (1) implement suitable measures to safeguard workers' rights, freedoms and legitimate interests in those limited cases where automated decision-making is allowed[68]; (2) carry out a data protection impact assessment when the processing deriving from the implementation of algorithmic management devices was likely to result in a high risk to the rights and freedoms of workers[69]; and (3) in those organizations employing at least 250 persons, prepare and maintain a record of processing activities,[70] which can be critical in enabling an effective enforcement of data subjects' access rights.[71]

3.1[b] *Type of Redress*

The GDPR allows individual redress by workers as data subjects who have the right to lodge a complaint before national Courts and/or national DPAs.[72] The GDPR also grants certain representative entities the right to file a complaint before national Courts and/or national DPAs.[73] Specifically, the GDPR introduces two discrete representative actions.

The first action requires data subjects to give a mandate to a representative entity.[74] Therefore, this is not proper collective redress, as the authorization of the injured party is needed to bring an action.

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64 Article 5 GDPR.
65 Articles 13 and 14 GDPR.
66 Article 15 GDPR.
67 Article 22 GDPR.
68 Article 22(3) GDPR.
69 Article 35 GDPR.
70 Article 30 GDPR.
71 Gaudio, *supra* n. 20, at 717.
72 Articles 77, 78 and 79 GDPR.
73 Article 80 GDPR.
74 Article 80(1) GDPR.

The second action on the other hand constitutes genuine collective redress, since the GDPR specifically allows representative entities to file a complaint 'independently of a data subject's mandate'.[75] In addition, it is interesting to note that, as recently held by the Court of Justice of the European Union (CJEU), the representative entity is not required to carry out a prior identification of the person specifically concerned by the alleged violation of the GDPR. As a result, the bringing of this action is not subject to the existence of a specific infringement of the rights of a data subject, as 'it is sufficient to claim that the data processing concerned is liable to affect the rights which identified or identifiable natural persons derive from that regulation'.[76]

One issue with this second mechanism is that it does not require Member States to implement it, but merely offers an opportunity for them to do so. In other words, this provision is just an 'opening clause' that necessitates the adoption of measures of implementation by Member States.[77] However, these measures do not need to be domain-specific, especially when there are pre-existing cross-domain mechanisms allowing representative entities to bring legal proceedings without the authorization of the data subjects.[78] In any case, Member States seem to have a wide margin in deciding the exact type of collective redress to introduce at national level, as the provision is broad enough to allow both opt-in and opt-out mechanisms.[79]

Having clarified the type of redress, the criteria chosen to identify representative entities need to be reviewed, also with a view to understanding whether trade unions can meet these requirements. The GDPR provides that the entity needs: (1) to be not-for-profit; (2) to be constituted in accordance with the law of the Member State; (3) to have statutory objectives which are in the public interest; and (4) to be active in the data protection field.[80]

Especially the last requirement may constitute an obstacle to including trade unions within the scope of this provision, which seems to be prima facie dedicated to privacy NGOs. However, the CJEU, in line with the existing literature,[81] has interpreted this provision broadly, clarifying that Member States must 'legislate in

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75 Article 80(2) GDPR.

76 Case C-319/2020, *Meta*, 28 Apr. 2022, ECLI:EU:C:2022:322, paras 67–76.

77 *Ibid*., paras 57–59.

78 *Ibid*., paras 77–83, where the CJEU held that Art. 80(2) GDPR does not preclude the right of a consumer association to bring a representative action where the infringement of data protection rules has been alleged in the context of an action seeking to review the application of other legal rules intended to ensure consumer protection.

79 Alexia Pato, *The Collective Private Enforcement of Data Protection Rights in the EU*, available on *SSRN* 5 (2019).

80 Article 80 GDPR.

81 Pato, *supra* n. 79, at 4, who claims that consumer associations and trade unions may be included in the scope of Art. 80 GDPR.

such a way as not to undermine the content and objectives' of the GDPR.[82] As a result, the CJEU recently ruled that a consumer protection association could fall within the scope of Article 80 GDPR because 'it pursues a public interest objective consisting in safeguarding the rights and freedoms of data subjects in their capacity as consumers, since the attainment of such an objective is likely to be related to the protection of the personal data of those persons'.[83]

At the current stage, Member States have proceeded in an uncoordinated fashion when deciding if trade unions can be representative entities under Article 80 GDPR. Some Member States, such as France, have included them within its scope,[84] while others, such as Italy, have explicitly excluded trade unions from the entities having legal standing under the same provision.[85] Nevertheless, in light of the position of the CJEU on this matter,[86] these exclusions may be called into question when trade unions file a complaint under the relevant provision of the GDPR to protect the rights and freedoms of the workers in their capacity as data subjects, which may be infringed through algorithmic management devices.

3.1[c] *Rules Facilitating Algorithmic Litigation*

The GDPR provides a rule that may facilitate algorithmic litigation, as it constitutes an effective regulatory response to algorithmic opacity, which, as noted in section 1, contributes to create a justice gap for workers subject to algorithmic management.

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 the processing of that data have been carried out in compliance with the principles set out in Article 5(1) GDPR, a concept later restated in Article 24(1) GDPR. There is a general consensus among scholars that these provisions shift the burden of proof to the data controller.[87]

These rules are particularly useful when algorithmic opacity is at stake, as they indirectly foster transparency. Employers or principals will lose the case if they are

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82 Case C-319/2020, *supra* n. 76, para. 60.

83 *Ibid*., para. 65.

84 Pato, *supra* n. 79, at 7.

85 Giovanni Gaudio, *Algorithmic management, sindacato e tutela giurisdizionale*, 1 Diritto delle Relazioni industriali 30, 52–53 (2022). The Italian legislator has also decided not to implement Art. 80(2) GDPR.

86 *See* C-319/2020, *supra* n. 76.

87 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 argues that the burden of proof shifts to the controller, but only when the data subject has offered prima facie evidence of unlawful processing.

not able to show that an algorithmic management device has been adopted and used in compliance with the GDPR. Therefore, if employers or principals do not want to lose the case, they will have to prove that the applicable GDPR provisions were respected, thus casting at least some light, within the trial, on the functioning of the algorithmic management device at stake.[88]

3.1[d] *Cases*

A number of cases have been filed by trade unions regarding violations of the GDPR suffered by workers subject to algorithmic management devices.

In a series of cases before the Amsterdam District Court,[89] certain drivers, engaged by two different platforms (Uber and Ola), filed claims for judicial enforcement of their GDPR rights.[90] Although trade unions did not act as claimants in these complaints, the litigation was coordinated by them, benefiting from the collaboration with an NGO focused on protecting workers' data privacy, and a lawyer specializing in digital rights, privacy and artificial intelligence.[91]

While not all the claims filed by the claimants were upheld, the Court ordered Uber to provide access to the personal data used as the basis for the decision to deactivate the drivers' accounts, including data used to establish their individual rankings. Most importantly, after recognizing that Ola implemented an automated system of discounts and fines, the Court ordered the company to communicate the main assessment criteria and their role in making automated decisions regarding the workers, in order to understand the criteria on the basis of which the decisions were made and check the correctness and lawfulness of the data processing.[92]

The interest of trade unions in this type of case seems to be confirmed by a series of requests recently made, throughout the EU, against Amazon, to exercise the access rights under the GDPR[93] of employees working in its warehouses.[94] From publicly available information, it appears that, although these access requests were made by the employees individually, the process was in any case supported by an international trade union and an NGO active in the data protection field.

The employees argued that Amazon implemented sophisticated algorithmic management procedures to monitor them, allegedly using their data to track their productivity rates and enabling automated decision-making. According to the

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88 Gaudio, *supra* n. 20, at 723 and 739.
89 Amsterdam District Court 11 Mar. 2021, *supra* n. 30.
90 Especially Arts 15 and 22 GDPR.
91 *See supra* n. 33.
92 These cases have already been discussed in Gaudio, *supra* n. 20, at 734–735. For further insights into these cases, *see* Hießl (Sep. 2021), *supra* n. 27.
93 Article 15 GDPR.
94 NOYB, *supra* n. 32.

international trade union and the NGO, the processing of employees' data could have violated their privacy rights, fostering 'inhumane working conditions' and 'unsafe productivity rates'.[95] At the time of writing, there is no publicly available information on whether Amazon has complied with these access requests.

3.2 The anti-discrimination Directives

3.2[a] *Scope*

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,[96] race and ethnic origin,[97] religion or belief, disability, age, or sexual orientation.[98] In addition, it is interesting to note that at least certain protections against discrimination are afforded not only to employees but also to self-employed workers,[99] although some transposition gaps are to be found in national legislation implementing EU Directives.[100]

Under these Directives, the distinction between direct and indirect discrimination in the context of algorithmic decision-making may be categorized as follows: (1) direct discrimination, which occurs when a person is treated less favourably than another because of a protected ground: i.e., the algorithmic decision-making system penalizes workers with a protected ground because this protected ground is directly entered into the system as a negative variable in the algorithmic model, or because of a proxy that is exclusively correlated to the protected ground; or, more often, (2) 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,

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95 *Ibid*.

96 Directive 2006/54/EC of the European Parliament and of the Council of 5 Jul. 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) and Directive 2010/41/EU of the European Parliament and of the Council of 7 Jul. 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity.

97 Council Directive 2000/43/EC of 29 Jun. 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

98 Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation.

99 Directive 2010/41/EU provides a general framework against discrimination based on sex for self-employed workers. The scope of Directives 2000/43/EC, 2000/78/EC and 2006/54/EC is mainly dedicated to employees, but all of them also apply at least to access to self-employment activities.

100 Chopin & Germaine, *supra* n. 50, at 127.

because of a proxy that is statistically, but not exclusively, correlated to the protected ground.[101]

3.2[b] *Type of Redress*

All EU anti-discrimination Directives provide for individual redress to 'all persons who consider themselves wronged by failure to apply the principle of equal treatment to them'.[102] These Directives also grant certain representative bodies the right to file a complaint before judicial and/or administrative bodies, providing 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 obligations under this Directive.[103]

This provision does not require Member States to introduce proper collective redress mechanisms. First, legal entities may only engage in legal proceedings with the complainant's 'approval', which rules out *actiones popularis* where there are no identifiable victims. Second, the expression 'on behalf or in support of the complainant' does not impose on Member States an obligation to grant legal standing to entities on behalf of the complainant, which would be necessary to enable genuine representative actions.[104]

However, the CJEU has pointed out many times that this provision:

> does not preclude Member States from laying down, in their national legislation, the right for associations with a legitimate interest in ensuring compliance with that directive […] to bring legal or administrative proceedings to enforce the obligations resulting therefrom [even] without acting in the name of a specific complainant or in the absence of an identifiable complainant.[105]

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[101] Gaudio, *supra* n. 20, at 726. This distinction is substantially in line with the one made by Hacker, *supra* n. 14, 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. 14, at 64 and 67–73; Kelly-Lyth, *supra* n. 14, at 905–906. *See also* Jeremias Adams-Prassl et al., *Directly Discriminatory Algorithms*, 00(0) Mod. L. Rev. 1 (2022), who claim that proxy discrimination can constitute direct discrimination in a broader number of cases.

[102] Article 7(1) Directive 2000/43/EC. The same, or similar, wording is used in Art. 9(1) Directive 2000/78/EC; Art. 17(1) Directive 2006/54/EC; Art. 9(1) Directive 2010/41/EU.

[103] Article 7(2) Directive 2000/43/EC. The same, or similar, wording is used in Art. 9(2) Directive 2000/78/EC; Art. 17(2) Directive 2006/54/EC; Art. 9(2) Directive 2010/41/EU.

[104] Lahuerta, *supra* n. 38, at 802.

[105] Case C-54/07, *Feryn*, 10 Jul. 2008, ECLI:EU:C:2008:397, paras 26–27, in line with the Opinion of AG Maduro in the same case, paras 12–13. *See also* Case C-81/12, *Asociaţia Accept*, 25 Apr. 2013,

Therefore, Member States are free to go beyond the minimum requirements provided by the EU anti-discrimination Directives, introducing provisions more favourable to the protection of the principle of equal treatment.[106] Many Member States have decided to do so, explicitly allowing genuine collective redress in the form of *actiones popularis* and/or representative actions.[107] This should be welcomed, also because, in the absence of such provisions, direct and indirect discrimination against no pre-identified or identifiable victims, which are prohibited according to CJEU case-law,[108] could not be enforced in practice.[109]

Having clarified the type of redress allowed under EU law, it is necessary to understand whether trade unions can bring legal actions on behalf of the discriminated workers or in the public interest. In this respect, EU Directives only stipulate that entities must have a 'legitimate interest' in ensuring that anti-discrimination provisions are complied with. However, the criteria for determining which entities have a legitimate interest have to be determined by national laws. As recently clarified by the CJEU, 'when a Member State chooses that option, it is for that Member State to decide under which conditions an association such as that at issue in the main proceedings may bring legal proceedings for a finding of discrimination prohibited […]. It is in particular for the Member State to determine whether the for-profit or non-profit status of the association is to have a bearing on the assessment of its standing to bring such proceedings, and to specify the scope of such an action'.[110]

The legitimate interest requirement may theoretically constitute an obstacle to including trade unions within the scope of this provision. Anti-discrimination activism has often been the appanage of NGOs, that normally set out in their statutes the specific objective of promoting equality rights, to be mainly enforced

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ECLI:EU:C:2013:275, paras 37–39, and Case C-507/18, *NH*, 23 Apr. 2020, ECLI:EU:C:2020:289, paras 59–65.

106 Csilla Kollonay-Lehoczky, *Enforcing Non-discrimination*, in *Effective Enforcement of EU Labour Law* 213, 238 (Zane Rasnača et al. eds 2022).

107 As reported in the comparative analysis by Chopin & Germaine, *supra* n. 50, at 88–95, from which it emerges that, despite variations, most Member States have introduced representative actions and/or *actiones popularis*.

108 Case C-54/07, *supra* n. 105; Case C-81/12, *supra* n. 105; Case C-507/18, *supra* n. 105. *See also* Lahuerta, *supra* n. 38, at 799–802.

109 As noted by Filip Dorssemont, *Collective Actors Enforcing EU Labour Law*, in *Effective Enforcement of EU Labour Law* 363, 375 (Zane Rasnača et al. eds 2022), 'if no employee can be identified, it is essential that organisations can step in. Otherwise, practices could be deemed directly discriminatory and prohibited, but such a prohibition could not be enforced at all in view of the lack of an employee interest and of an organisation empowered to step in. […] the leeway that the CJEU still leaves to Member States is problematic. It gives rise to a situation in which no enforcement of a prohibition of direct discrimination is possible at all'.

110 Case C-507/18, *supra* n. 105, paras 64–65, where the CJEU held that an association of lawyers, whose objective was to protect persons having in particular a certain sexual orientation, could have a legitimate interest in bringing legal proceedings to enforce the rights under Directive 2000/78/EC as long as the Member State allowed it to do so.

through litigation, while trade unions traditionally pursue the more general aim of protecting the (even non-legal) interests of their members, that are normally enforced through more traditional forms of industrial action such as strikes, rather than through litigation.[111] In line with this rationale, trade unions, unlike NGOs, could have not been recognized at national level as entities having a specific legitimate interest in enforcing anti-discrimination rights. However, Member States have mostly taken a different view. Comparative research shows that the majority have explicitly included trade unions among the entities having legal standing to promote representative actions and/or *actiones popularis* in the field of anti-discrimination,[112] and, in some national cases, they have allowed trade unions to do so without the need to demonstrate in Court that they have a specific legitimate interest in bringing a particular claim, as this can be legally presumed due to their institutional role.[113]

As a result, it can be concluded that, in the absence of any requirement to introduce collective redress mechanisms available to trade unions at EU level, many Member States, although in an uncoordinated fashion, have allowed them to bring legal actions to enforce anti-discrimination rights.

3.2[c] *Rules Facilitating Algorithmic Litigation*

EU anti-discrimination Directives provide a rule that may facilitate algorithmic litigation, as it constitutes an effective regulatory response to algorithmic opacity. The reference is to the provision stating that:

> Member States shall take such measures as are necessary […] 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 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.[114]

This mechanism, which has been generally transposed in line with the EU Directives in all Member States,[115] can be read as a partial shifting of the burden

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111 This point will be further explored at s. 4 *infra*.

112 This starkly emerges from the analysis carried out by Chopin & Germaine, *supra* n. 50, at 82–95.

113 *See* e.g., *infra* n. 121 on Italian legislation.

114 Article 8(1) Directive 2000/43/EC. The same wording is used in Art. 10(1) Directive 2000/78/EC and Art. 19(1) of Directive 2006/54/EC. Note that this rule is not provided under Directive 2010/41/EU.

115 Chopin & Germaine, *supra* n. 50, at 88–95, who show how only a minority of Member States have failed to introduce burden of proof provisions fully in line with the EU requirement. In this respect, it should also be taken into account that, 'the power of this provision in the Directives consequently depends on the concrete national rules and the attitude of Courts and other adjudicating body, as well as on the access of interest representatives or other civil organisations to the procedure', as pointed out by Kollonay-Lehoczky, *supra* n. 106, at 227.

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 the case of indirect discrimination, there was an objective justification for the unequal treatment.

This is extremely useful when algorithmic opacity is at stake, especially considering that the CJEU held that, when the decision-making process it totally lacking in transparency, this assumes evidential relevance in shifting the burden of proof to the employer or principal.[116] If this happens, the employer or principal risks losing the case for the failure of demonstrating that the decision-making process behind the algorithm was not discriminatory. Therefore, if the employer or principal does not want to lose the case, during the trial they will have to shed at least some light on the functioning of the algorithmic management device at stake.[117]

3.2[d] *Cases*

The rule that trade unions can successfully file anti-discrimination claims to combat algorithmic discrimination, as well as the effectiveness of the rules partially shifting the burden of proof to the respondent, has been 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 ruled that Deliveroo's algorithm was indirectly discriminatory for reasons of trade union membership,[118] as it penalized workers classified as independent contractors who, after booking in a shift, decided not to work during that shift and went on strike instead.[119] This ruling is interesting for the following reasons.

First, the Tribunal, building on a broad national provision granting trade unions legal standing to promote representative actions and *actiones popularis* even in the absence of pre-identified or identifiable victims,[120] confirmed that the

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116 Case C-109/88, *Danfoss*, 17 Oct. 1989, ECLI:EU:C:1989:383, paras 11–16. In addition, if the workers exercise information and access rights as those provided by the GDPR described in s. 3.1, the 'refusal to grant any access to information may be [another factor] to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination', as held by the CJEU in Case C-415/10, *Meister*, 19 Apr. 2012, ECLI:EU:C:2012:217, para. 47.

117 Gaudio, *supra* n. 20, at 727 and 738–739.

118 More specifically, the Tribunal of Bologna found that Deliveroo violated the prohibition of indirect discrimination based on belief provided by Arts 1 and 2 of Legislative Decree no. 216/2003 transposing Arts 1 and 2 of Directive 2000/78/EC, which is considered to include trade union membership according to Italian case-law.

119 Tribunal of Bologna 31 Dec. 2020, *supra* n. 16. Specifically on the burden of proof, *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 (Sep. 2021), *supra* n. 27, at 23.

120 Article 5 of Legislative Decree no. 216/2003 implementing Art. 9(2) Directive 2000/78/EC.

claimant trade unions could be considered organizations with a legitimate interest in ensuring compliance with anti-discrimination provisions.[121]

Second, the Tribunal held that the anti-discrimination right at stake was within the scope of the Italian provision implementing the relevant EU Directive, which explicitly covered self-employment in relation to access to work.[122] As a result, although the pre-identified or identifiable victims of the alleged discrimination were classified by the parties as independent contractors, anti-discrimination laws still applied to them.[123]

Third, the partial shifting of the burden of proof was critical to ruling that indirect discrimination actually occurred. In this respect, it should 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 the algorithm was indirectly discriminatory against workers intending to go on strike instead of working during the pre-booked shifts. Nevertheless, once the burden of proof was shifted to 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 functioning of the algorithm was not disclosed during the trial, Deliveroo lost the case against the claimant trade unions.[124]

This decision shows not only that EU anti-discrimination Directives are effective in combating algorithmic discrimination, but also that trade unions may be keen to enforce them before national Courts if they are given legal standing: indeed, they can also be better placed than individual workers to do so, for the reasons set out in section 2 above.

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[121] 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 (Sep. 2021), *supra* n. 27, at 23. However, proving the existence of a legitimate interests would not have been necessary under Italian law, as the letter of Art. 5 of Legislative Decree no. 216/2003 seems to consider trade unions as entities always having legal standing irrespective of any legitimate interest in the specific claim: therefore, they could have been considered as having legal standing even in cases of discrimination other than those based on trade union membership.

[122] Article 3(1)(a) of Legislative Decree no. 216/2003 implementing Art. 3(1)(a) Directive 2000/78/EC.

[123] The Tribunal reached this conclusion relying on other two provisions: Art. 2 of Legislative Decree no. 81/2015, which has facilitated the application of employment protective statutes to certain types of independent contractors, and Art. 47-*quinquies* of Legislative Decree no. 81/2015, which expressly extended anti-discrimination laws to certain platform workers classified as independent contractors. On this point, *see* Carla Spinelli, *Strengthening Platform Workers' Rights Through Strategic Litigation: The Italian (Paradigmatic) Experience*, in *Litigation (Collective) Strategies to Protect Gig Workers' Rights* 3, 7 (Iacopo Senatori & Carla Spinelli eds 2022).

[124] Gaudio, *supra* n. 20, at 738–739.

3.3 The proposal for a directive on improving working conditions in platform work

3.3[a] *Scope*

The third legal instrument to be analysed is the European Commission's Proposal for a Directive of the European Parliament and the Council on improving working conditions in platform work (the 'Proposal').[125] The Proposal, if and when approved, and then transposed at national level, will afford several additional protections to persons performing platform work.[126]

With reference to the scope of the Proposal, it should first of all be underlined that the rights provided therein are granted only to persons performing platform work. This substantially limits the scope of the Proposal as it does not cover those workers operating in workplaces outside the platform economy where algorithmic management has been implemented in a similar fashion.[127]

The Proposal addresses two discrete but interconnected issues, through two distinct sets of rules. The first one specifically concerns the misclassification problem and aims at ensuring a correct determination of the status of persons performing platform work.[128] This purpose is fulfilled through two main provisions: (1) 'the

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

[126] For initial comments on the Proposal, *see* Nicola Countouris, *Regulating Digital Work: From Laisser-Faire to Fairness*, Social Europe (8 Dec. 2021), https://socialeurope.eu/regulating-digital-work-from-laisser-faire-to-fairness (last accessed on 18 Mar. 2023); Valerio De Stefano & Antonio Aloisi, *European Commission Takes the Lead in Regulating Platform Work*, Social Europe (9 Dec. 2021), https://socialeurope.eu/european-commission-takes-the-lead-in-regulating-platform-work (last accessed on 18 Mar. 2023); Aislinn Kelly-Lyth & Jeremias Adams-Prassl, *The EU's Proposed Platform Work Directive. A Promising Step*, Verfassungsblog (14 Dec. 2021), https://verfassungsblog.de/work-directive/ (last accessed on 18 Mar. 2023); Caroline Cauffman, *Towards Better Working Conditions for Persons Performing Services Through Digital Labour Platforms*, 29(1) Maastricht J. Eur. & Comp. L. 3 (2022). For a more recent and general overview on the Proposal, *see* the special issue of the Italian Labour Law e-Journal: Emanuele Menegatti, *Editorial*, 15(2) Italian Lab. L. e-J. 1 (2022); Valerio De Stefano, *The EU Commission's Proposal for a Directive on Platform Work: An overview*, 15(2) Italian Lab. L. e-J. 1 (2022); Christina Hießl, *The Legal Status of Platform Workers: Regulatory Approaches and Prospects of a European Solution*, 15(2) Italian Lab. L. e-J. 13 (2022); Antonio Aloisi & Nastazja Potocka-Sionek, *Degigging the Labour Market? An Analysis of the 'Algorithmic Management' Provisions in the Proposed Platform Work Directive*, 15(2) Italian Lab. L. e-J. 29 (2022); Marta Otto, *A Step Towards Digital Self- & Co-determination in the Context of Algorithmic Management Systems*, 15(2) Italian Lab. L. e-J. 51 (2022); Maria Giovannone, *Proposal for a Directive on Platform Workers: Enforcement Mechanisms and the Potential of the (Italian) Certification Procedure for Self-Employment*, 15(2) Italian Lab. L. e-J. 65 (2022); William B. Gould IV & Marco Biasi, *The Rebuttable Presumption of Employment Subordination in the US ABC-Test and in the EU Platform Work Directive Proposal: A Comparative Overview*, 15(2) Italian Lab. L. e-J. 85 (2022); Maurizio Falsone, *What Impact Will the Proposed EU Directive on Platform Work Have on the Italian System?*, 15(2) Italian Lab. L. e-J. 99 (2022). On the proposed amendments of the Parliamentary Committee on Employment and Social Affairs, *see* Alberto Pizzoferrato, *Automated Decision-Making in HRM*, 11 Il Lavoro nella Giurisprudenza 1030 (2022).

[127] Kelly-Lyth & Adams-Prassl, *supra* n. 126.

[128] Chapter II of the Proposal.

determination of existence of an employment relationship' must be guided 'by the facts relating to the actual performance of work' (the so-called principle of 'primacy of facts'), also taking into account 'the use of algorithms in the organisation of platform work'[129]; and, above all, (2) a rebuttable presumption of employment status for platform workers when a digital labour platform 'controls […] the performance of work',[130] which occurs when at least two of a series of conditions indicated by the Proposal[131] are met.[132] It goes without saying that these protections are afforded to (bogus) self-employed workers, facilitating their reclassification as employees.

The second set of rules set out by the Proposal regards, more generally, the issues connected with the use of algorithmic management devices in the workplace and aims at promoting algorithmic transparency, fairness and accountability.[133] This purpose is fulfilled through a series of provisions mainly strengthening and complementing certain protections provided under the GDPR.[134] In particular, the Proposal provides that platforms shall: (1) not process any personal data concerning platform workers that are not intrinsically connected to and strictly necessary for the performance of the contract[135]; (2) evaluate the impact on workers of automated decisions made by algorithms, carrying out risk-assessment and mitigation measures[136]; (3) give platform workers, at the beginning of the working relationship and upon request, detailed information regarding the automated monitoring and decision-making systems affecting them[137]; (4) provide platform workers with an explanation for any automated decision that has significantly affected their working conditions[138]; and (5) inform and consult platform workers' representatives on decisions regarding the introduction of or substantial changes in the use of automated monitoring and decision-making systems.[139]

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129 Article 3 of the Proposal.

130 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).

131 The conditions triggering the presumption characterize most types of platform work as pointed out by De Stefano & Aloisi, *supra* n. 126. However, the current formulation of this presumption may result in certain shortcomings, to be addressed by means of amendments to the Proposal as pointed out by De Stefano, *supra* n. 126, at 3–5.

132 Article 4 of the Proposal.

133 Chapter III of the Proposal.

134 As pointed out, with reference to each provision of the Proposal, by Otto, *supra* n. 126, at 51.

135 Article 6(4) of the Proposal, which strengthens the principles of data processing provided under Art. 5(1) GDPR.

136 Article 7(2) of the Proposal, which supplements and strengthens the duty to implement suitable measures to safeguard workers' rights and the duty to carry out a data protection impact assessment provided under Arts 22(3) and 35 GDPR.

137 Article 6 of the Proposal, which strengthens the information and access rights provided under Arts 13, 14 and 15 GDPR.

138 Article 8 of the Proposal, which supplements Art. 22 GDPR where it did not lay down the duty to provide an explanation in case of automated decision-making.

139 Article 9 of the Proposal, which supplements Arts 13 and 14 GDPR where it did not provide any collective information rights.

While most of these rights are granted to workers performing platform work even when they are genuinely self-employed, the information and consultation rights of their representatives are limited to those who represent employees.[140]

3.3[b] *Type of Redress*

The Proposal allows individual redress to all persons performing platform work in the case of infringements of their rights arising from the Proposal.[141]

The Proposal also recognizes in favour of 'representatives of persons performing platform work or other legal entities which have, in accordance with the criteria laid down by national law or practice, a legitimate interest in defending the rights of persons performing platform work' the right to 'engage in any judicial or administrative procedure to enforce any of the rights or obligations arising from this Directive. They may 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.[142] The rationale behind this provision, as clarified in the recitals, consists in 'facilitat[ing] proceedings that would not have been brought otherwise because of procedural and financial barriers or a fear of reprisals'.[143]

This provision, the formulation of which is similar to the one used in the EU anti-discrimination Directives analysed in section 3.2, does not require Member States to introduce proper collective redress for two reasons. First, entities may engage in legal proceedings only with the approval of persons performing platform work. In addition, the expression 'on behalf or in support' does not impose on Member States an obligation to grant legal standing to entities on behalf of the complainant.

However, as already observed in relation to EU anti-discrimination Directives, it can be claimed that also the Proposal allows Member States to go beyond the minimum requirements provided by the same Proposal.[144] Therefore, it can be argued that Member States are not precluded from laying down, in their national legislation, provisions establishing proper collective redress mechanisms.

Compared to the data protection and anti-discrimination domains analysed in sections 3.1 and 3.2, there are no doubts that trade unions will be entitled to bring legal actions to enforce the rights provided under the Proposal, as this is expressly provided therein. In addition, since they are expressly mentioned in the relevant

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[140] On the shortcomings of this exclusion, *see* De Stefano, *supra* n. 126, at 7–8.
[141] Article 13 of the Proposal.
[142] Article 14 of the Proposal.
[143] Recital 44 of the Proposal.
[144] In light of the non-regression clause provided by Art. 20 of the Proposal.

provision, this can be considered a presumption that trade unions have a legitimate interest in defending the rights granted to platform workers under the Proposal.

3.3[c] *Rules Facilitating Algorithmic Litigation*

The Proposal lays down several rules that can facilitate algorithmic litigation, as they all constitute effective regulatory responses to algorithmic opacity.

First, the rule laying down a presumption of existence of an employment relationship[145] substantially relieves the platform worker from the burden of demonstrating facts that may be difficult to prove due to algorithmic opacity: namely, the exercise of certain managerial prerogatives, such as control, that can 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,[146] something that is in any case provided by the Proposal.[147] As noted above, these rules indirectly foster algorithmic transparency because, if the platform does not intend to lose the case once the burden of proof has been shifted, they will have to prove that the relationship at stake was not an employment one, thus shedding at least some light on the functioning of the algorithmic management devices.

Second, the Proposal sets out a rule facilitating access to evidence, as it provides that 'national courts […] are able to order the digital labour platform to disclose any relevant evidence which lies in their control'.[148] This provision directly promotes algorithmic transparency, as judges will be able to supplement the evidence offered by the claimant worker or trade union, ordering the platform to disclose evidence that would have otherwise remained hidden behind algorithmic opacity.[149] However, this provision has a limited scope, as it applies to classification claims only.[150]

3.3[d] *Cases*

Clearly, no cases have been brought under the Proposal. However, if and when it is approved and transposed by the Member States, it is likely that national trade unions will be interested in enforcing the rights provided by the Proposal. With reference to classification rights, this expectation is based on the fact that there are already cases in which trade unions have directly, or at least indirectly through

145 Article 4 of the Proposal.
146 Gaudio, *supra* n. 20, at 737.
147 Article 5(2) of the Proposal.
148 Article 16 of the Proposal.
149 Gaudio, *supra* n. 20, at 737.
150 Giovannone, *supra* n. 126, at 70.

their members, promoted actions aimed at classifying platform workers as employees.[151]

With reference to the other rights laid down by the Proposal, which strengthens and complements certain protections already provided under the GDPR, there is the same expectation because, as argued in section 3.1, trade unions have already tried to enforce these rights as provided under the GDPR.

3.4 Algorithmic litigation in the Eu: An assessment of the legal framework

At the end of this legal analysis, it seems useful to assess whether the EU legal framework makes algorithmic litigation promoted by trade unions legally feasible in practice, considering the aspects examined above.

3.4[a] *Scope*

The EU legal framework grants meaningful safeguards to workers who are subject to algorithmic management, because they have been provided in legal domains where justiciable rights are more likely to be violated through algorithmic management devices.

In addition, it is critical that, depending on the domain at stake, all or at least certain protections are granted not only to employees, but also to self-employed workers. Consequently, companies have no room to avoid the application of substantial safeguards by classifying workers as independent contractors, a strategy often implemented by platforms to escape the application of employment protective legislation by disguising the existence of an employment relationship through opaque algorithmic management devices. While self-employed workers can undoubtedly take steps to enforce their rights individually, it is more controversial whether trade unions are in a position to do so on their behalf, especially considering that a positive answer to this question also depends on whether they are allowed, under national laws, to represent them.[152]

With reference to the type of rights safeguarded under EU law, it is interesting that the GDPR and the Proposal requires employers and principals to provide workers, both in advance and upon request, with information regarding the use of algorithmic management devices. More interestingly, the Proposal goes even

[151] *See supra* nn. 28 and 34.

[152] This cannot be taken for granted, as shown by the comparative research carried out by Nicola Countouris & Valerio De Stefano, *New Trade Union Strategies for New Forms of Employment* 37–42 (ETUC: 2019). *See infra* n. 181.

further by providing a right to receive an explanation in the case of automated decision-making, that was not set out under the GDPR,[153] and by granting information and consultation rights to trade unions. These provisions can be critical in alleviating the justice gap in which workers may find themselves due to algorithmic opacity. If an employer or principal has not complied with these duties, individual workers and trade unions, as already happened,[154] can enforce them to obtain useful information on the algorithmic management device at stake (and even an explanation of the automated decision-making process behind it), which would shed light on the procedures hidden behind algorithmic opacity. This can then be instrumental to strengthening the workers' position in other incoming litigations related to algorithmic management, when claimant workers may otherwise struggle to gather evidence of a breach of their rights. This can be the case, for example, in classification claims, or in those judicial proceedings in which workers need to prove the existence of discrimination, or a violation of those employment laws generally devoted to limiting these managerial prerogatives, especially with regard to monitoring powers.

3.4[b] *Type of Redress*

In all the legal domains analysed, EU law allows individual redress and provides certain mechanisms enabling trade unions to have legal standing before judicial and non-judicial bodies. However, only the GDPR provides a mechanism amounting to genuine collective redress and, in any case, Member States are free to not implement it at national level. From this perspective, the EU legal landscape can be deemed to be unsatisfactory considering that, as argued in section 2.2, collective redress is generally more appealing to trade unions than individual enforcement. Nevertheless, it should be borne in mind that Member States are free to go beyond the minimum requirements provided under EU law, allowing entities to engage in genuine collective redress (i.e., without the need to obtain the workers' consent to promote these claims and acting on their behalf or in the public interest), as has often happened at national level in anti-discrimination cases. In addition, under national laws, Member States may grant legal standing to trade unions in class actions or similar instruments with a more wide-ranging scope.

Except for the Proposal, the other EU law instruments do not expressly mention workers' representative[155] among the entities having legal standing to

[153] As argued by Aloisi & Potocka-Sionek, *supra* n. 126, at 39–40.
[154] *See* the cases discussed in s. 3.1.
[155] The use in the Proposal of the expression 'workers' representatives' provides a role not only for trade unions, but also other non-institutional actors, allowing them to play an important role in representing platform workers classified as independent contractors: Aloisi & Potocka-Sionek, *supra* n. 126, at 41.

bring an action. Therefore, in order to allow trade unions to enforce as claimants the rights provided under the GDPR and the EU anti-discrimination Directives, it is necessary for Member States to expressly provide so at national level and/or that trade unions clarify in their statutes that, among their objectives, they also aim at enforcing workers' rights, including those laid down under data protection and anti-discrimination laws. However, even when trade unions are expressly excluded at national level from the entities entitled to bring a claim, they may in practice try to circumvent their exclusion by establishing strategic partnerships with NGOs, when only such NGOs have been explicitly recognized as having legal standing. This is already happening in algorithmic management litigation and may benefit both trade unions (that, unlike NGOs, may not have specific expertise and experience in highly specialized fields, such as data protection and anti-discrimination) and NGOs (that, unlike trade unions, may not have direct connections with the workers).[156]

On a related note, trade unions may also find useful, when the legal landscape allows it, to bring legal proceedings before administrative authorities, which are highly specialized bodies in the relevant legal domain and are often given broad powers to impose administrative fines and to collect evidence, that are not generally granted to judicial bodies.[157] This is already happening in a series of pioneering initiatives in algorithmic management litigation, where trade unions, in partnership with data privacy NGOs, have made the strategic choice to submit the workers' complaints to DPAs.[158]

3.4[c] *Rules Facilitating Algorithmic Litigation*

EU law also provides rules facilitating algorithmic litigation as they constitute effective regulatory responses to algorithmic opacity, which is one of the main factors that contributes to create a justice gap for workers who are subject to algorithmic management devices.

It has already been underlined how all legal domains examined above provide for rules shifting the burden of proof to the respondent employer or principal. In this overall assessment, it is worth mentioning that the Proposal has explicitly allowed the Courts and competent authorities to order the respondent employer or principal to disclose any relevant evidence which lies in their control, expressly recognizing that algorithmic management increases the information asymmetries

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156 *See supra* n. 37.

157 Empirical research on collective redress suggests that, where both mechanisms are provided, regulatory redress outperforms litigation before Courts: Christopher Hodges & Stefaan Voet, *Delivering Collective Redress: New Technologies* 298 (Hart Publishing: 2018).

158 *See supra* n. 36.

between them and the workers, as critical information and evidence is not 'easily accessible' to workers or adjudicative bodies.[159] If implemented at national level with a more far-reaching scope than the limited one envisaged in the Proposal, rules of this kind, especially if combined with information, access, and explanation rights, can become game-changers in filling the justice gap in which workers may find themselves due to the opacity of algorithmic management devices.[160]

3.4[d] *Cases*

Trade unions have shown an interest in enforcing the rights of workers subject to algorithmic management devices in each of the above analysed legal domains, through both individual and collective redress, and benefiting from the rules facilitating algorithmic litigation.

4 WHY TRADE UNIONS CAN BE INTERESTED IN STRATEGIC LITIGATION IN RESPONSE TO ALGORITHMIC MANAGEMENT

In section 2, it was argued that trade unions are in a favourable position to spearhead algorithmic litigation, especially when collective redress mechanisms are available. Section 3 showed how the EU legal landscape, when adequately supplemented by national laws, may be supportive of trade union litigation in response to algorithmic management. In light of the above, it may be expected that trade unions will more frequently recur to litigation to enforce the rights of workers prejudiced by the use of algorithmic management devices.

However, this cannot be taken for granted. Research on the general topic of trade union litigation has shown that, even where the legal landscape is favourable, trade unions may not be keen on resorting to litigation for a number of structural, ideological and strategic reasons.[161]

Trade unions pursue the general aim of protecting the interests of their members mainly through collective bargaining and industrial action. In the case of disputes with employers and their representative associations, these are mainly conflicts over non-legal interests (e.g., negotiating better pay arrangements) rather than conflicts over rights, and only rights can be enforced before Courts and/or administrative bodies.[162] In addition, even when there is a dispute over rights against their counterparties, trade unions have traditionally viewed litigation with a

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[159] Recital 46 of the Proposal.
[160] Gaudio, *supra* n. 20, at 733–739.
[161] Rasnača, *supra* n. 26, at 413–414.
[162] Rosario Flammia, *Contributo all'analisi dei sindacati di fatto. Autotutela degli interessi di lavoro* 64 ff. (Giuffrè 1963).

degree of suspicion and generally preferred to enforce rights in the industrial arena rather than in the judicial one.

Trade unions have often considered litigation expensive, time-consuming and inefficient[163] compared to other forms of industrial action. Moreover, litigation may seriously backfire. First, a positive judicial outcome cannot be taken for granted even when, before filing the claim, there was a fair chance of winning the case.[164] Second, employers will often implement legal and even political counterstrategies, perhaps unseen or unforeseeable before filing the claim, that may have a negative impact on trade union strategies,[165] perhaps unseen or unforeseeable before filing the claim.[166] Especially in these cases, trade unions' members may even end up considering unsuccessful judicial initiatives outside the trade unions' mandate, thus weakening the position of the unions vis-à-vis the members. For all these reasons, trade unions have traditionally been cautious about systematically recurring to litigation to improve workers' conditions and power, especially in those historical junctures, industries and/or situations characterized by high union density and mature collective bargaining, where trade unions have no particular difficulties in mobilizing workers through more traditional forms of action.[167]

On the contrary, where union density and collective bargaining declines, and mobilizing workers becomes more difficult, trade unions tend to be more open to resorting to litigate in favour of their own and individual workers' rights, especially when they are able to link it with other more traditional forms of action that may otherwise be more difficult to implement.[168] Nevertheless, even in these cases, trade union litigation cannot be expected to replace enforcement initiatives promoted by workers individually, also when litigation is more effective than industrial action, and it is not possible to envisage trade unions turning into enforcement actors, considering litigation as a substitute for collective action.[169] Rather, trade unions are likely to rely on litigation when they adopt a strategic approach to enforcement, where this is just 'one tool in the box, and not the end-all'[170] used within a broader strategy of industrial and

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163 Lörcher, *supra* n. 39, at 153–154.

164 Lord John Hendy, *Reflections on the Role of the Trade Union Lawyer*, 38(2) Int'l J. Comp. Lab. L. & Indus. Rel. 91, 97 (2022); Alan Bogg, *Can We Trust the Courts in Labour Law? Stranded Between Frivolity and Despair*, 38(2) Int'l J. Comp. Lab. L. & Indus. Rel. 103, 131 (2022).

165 Lörcher, *supra* n. 39, at 154.

166 Hendy, *supra* n. 164, at 100.

167 Colling, *supra* n. 56, at 4; Andrea Lassandari, *L'azione giudiziale come forma di autotutela collettiva*, 2/3 Lavoro e diritto 309, 327–328 (2014); Cécile Guillaume, *When trade unions turn to litigation: 'getting all the ducks in a row'*, 49(3) Ind. Rel. J. 227, 239 (2018).

168 Colling, *supra* n. 56; *see also* Guillaume, *supra* n. 167, at 235–239, who underlines how larger trade unions have a much more developed capacity to do so.

169 Bogg, *supra* n. 164, at 132.

170 Moyer-Lee & Countouris, *supra* n. 21, at 33.

political activism.[171] In other words, trade unions can effectively consider turning to litigation only when this is used as a complementary tool that can serve purposes other than the purely legal ones of ensuring better enforcement, remedying a situation that is already in violation of workers' rights (*ex post*), and compliance, preventing a breach of these rights (*ex ante*).[172]

First, trade unions can strategically decide to resort to litigation to improve enforcement of workers' rights, when this can also serve meta-legal purposes, such as mobilization and campaigning. Trade unions can thus use litigation as a form of 'legal mobilization'[173] to bridge the gap between the lack of representativeness and their ability to protect workers, especially those who are not union members, and can then decide to join the cause.[174] This can also be instrumental in raising social awareness and encouraging public debate on workers' protection issues,[175] also with a view to inducing political change[176] and possibly influencing lawmakers.[177]

Second, trade unions can use litigation to fulfil the para-legal purpose of strengthening collective bargaining. Even the mere threat of costly, sensitive and reputationally damaging claims, especially if they are collective ones,[178] may put pressure on employers to open new bargaining channels, reopen those that appeared to have dried up,[179] and, more generally, bolster the position of trade unions at the bargaining table in contexts where there are already more mature collective bargaining relationships.[180]

4.1 Trade union litigation in response to algorithmic management as a strategy to fulfil the meta-legal purposes of mobilizing workers, raising social awareness and influencing lawmakers

The analysis carried out above seeks to explain why, as pointed out at section 1.4 above, trade unions have started to develop a strategic use of litigation in algorithmic management claims, especially against platform economy players, not only

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171 Hendy, *supra* n. 164, at 101; Bogg, *supra* n. 164, at 108; Eleanor Kirk, *The Worker and the Law Revisited: Conceptualizing Legal Participation, Mobilization and Consciousness at Work*, 38(2) Int'l J. Comp. Lab. L. & Indus. Rel. 157, 171 (2022).

172 Davidov, *supra* n. 59, at 112–113 and 126; Lörcher, *supra* n. 39, at 143.

173 Colling, *supra* n. 56; Kirk, *supra* n. 171, at 170–171.

174 Rasnača, *supra* n. 26, at 414–417.

175 Lörcher, *supra* n. 39, at 145.

176 Jack Meakin, *Labour Movements and the Effectiveness of Legal Strategy: Three Tenets*, 38(2) Int'l J. Comp. Lab. L. & Indus. Rel. 187 (2022).

177 Simon Deakin, *Failing to Succeed? The Cambridge School and the Economic Case for Minimum Wage*, 38(2) Int'l J. Comp. Lab. L. & Indus. Rel. 211 (2022).

178 Davidov, *supra* n. 59, at 117, claims that when employers see consider collective redress to be a realistic possibility, this will improve compliance *ex ante*.

179 Moyer-Lee & Countouris, *supra* n. 21, at 33.

180 Colling, *supra* n. 56, at 8.

to fulfil the legal purpose of guaranteeing a better enforcement of workers' rights, but also to fulfil a wide range of meta-legal purposes.

It is well known that trade unions initially struggled to keep pace with the corporate strategies used by platforms to avoid obligations towards workers who, mostly classified as independent contractors, have generally been neither covered by collective bargaining nor entitled to union representation.[181]

Resorting to litigation has been a fundamental strategy, for new independent or 'indie' unions[182] and traditional trade unions,[183] to better enforce the rights of platform workers, especially in classification claims against platform economy players. This litigation strategy has proven to be fairly successful in pursuing the legal purposes of addressing the justice gap faced by platform workers. In addition, it seems fair to assume that setting favourable legal precedents may have had a positive spillover effect on other cases. Although the Courts in the EU are still classifying platform workers in different ways, there is now a prevailing trend in considering them as employees, especially in ride-hailing and food delivery services, where litigation efforts have been stronger.[184]

However, within the platform economy, resorting to litigation has been part of a broader strategy, aimed at fulfilling meta-legal purposes, such as: mobilization of trade unionists; galvanizing others to join the cause, especially in scarcely unionized sectors such as those in which platforms operate; campaigning to raise social awareness and encouraging public debate on the risks connected to the increasing use of algorithmic management in platform work; and finally lobbying to influence lawmakers to adopt policies aiming at mitigating them.[185]

In this respect, litigation has been used as a successful tool within a broader trade union strategy of industrial and political activism that has been a driver of social and legal change, both at national and EU level. This is proven by the fact that there have been many legislative interventions at national level to provide

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[181] Hannah Johnston & Chris Land-Kazlauskas, *Organizing On-demand: Representation, Voice and Collective Bargaining in the Gig Economy*, ILO Working Paper Series on Conditions of Work and Employment, WP No. 94, 24–30 (2019). In addition, workers characterized as independent contractors also faced legal struggles in anti-competition laws: in general, *see* 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 et al., *Re-thinking the Competition Law/Labour Law Interaction: Promoting a Fairer Labour Market*, 10(3) Eur. Lab. L.J. 291 (2019); with specific reference to platform workers, *see* Michael Doherty & Valentina Franca, *Solving the 'Gig-Saw'? Collective Rights and Platform Work*, 49(3) Indus. L.J. 352 (2020).

[182] Specifically on the mobilizing strategies of indie unions, *see* Manoj Dias-Abey, *Mobilizing for Recognition: Indie Unions, Migrant Workers, and Strategic Equality Act Litigation*, 38(2) Int'l J. Comp. Lab. L. & Indus. Rel. 137 (2022).

[183] Moyer-Lee & Countouris, *supra* n. 21, at 32–33; Orsola Razzolini, *Riders, Condotta antisindacale e ruolo del sindacato: il processo come strumento di rilancio dell'azione sindacale nella gig economy*, Giustizia Civile (2021); Spinelli, *supra* n. 123, at 7; Bogg, *supra* n. 164, at 131; Kirk, *supra* n. 171, at 178.

[184] Hießl (Oct. 2021), *supra* n. 27.

[185] Moyer-Lee & Countouris, *supra* n. 21, at 32–33; Kirk, *supra* n. 171, at 178.

better legal protection for platform workers.[186] In certain cases, such as the Spanish one, legislators were influenced to enact more protective laws by a successful public campaign promoted by the trade unions after an important judicial ruling classifying platform workers as employees.[187] Likewise, both the Proposal and the Guidelines on the application of EU competition law to collective agreements of solo self-employed workers[188] seem to be, at the EU level, other legislative products of the public debate on the working conditions of platform workers, that was strongly encouraged and influenced by the trade union movement.[189]

Although these strategies have so far predominantly concerned platform economy players, trade unions have also been interested in implementing them more broadly against companies in sectors other than those in which platforms operate.

There are several elements supporting this claim. First, protecting workers subject to algorithmic management devices in conventional employment settings is already at the centre of the agenda of many trade unions, that are extensively analysing this topic, even outside the platform economy, to understand how to reduce the potential negative impact on employees.[190] Second, this trade union agenda is 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 management.[191] Third, and even more interestingly, there are already early signs of this type of innovative legal mobilization at least against a company

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[186] De Stefano et al., *supra* n. 27, at 18–29.

[187] Ane Aranguiz, *Platforms Put a Spoke in the Wheels of Spain's 'Riders' Law*, Social Europe (2 Sep. 2021), https://socialeurope.eu/platforms-put-a-spoke-in-the-wheels-of-spains-riders-law.

[188] Communication from the commission Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons 2022/C 374/02.

[189] On the role of trade unions in relation to the Proposal, *see* Virginia Doellgast, *Strengthening Social Regulation in the Digital Economy: Comparative Findings from the ICT Industry*, Lab. & Indus. 10–11 (2022). On the role of TUs in relation to collective bargaining and competition law issue, *see* Silvia Rainone & Nicola Countouris, *Collective Bargaining and Self-Employed Workers. The Need for a Paradigm Shift*, ETUI Policy Brief (2021), https://www.etui.org/sites/default/files/2021-07/Collective%20bargaining%20and%20self-employed%20workers_2021.pdf (last accessed on 18 Mar. 2023) and Isabelle Schömann, *Collective Bargaining and the Limits of Competition Law. Protecting the Fundamental Labour Rights of Self-Employed Workers*, ETUI Policy Brief (2022), https://www.etui.org/sites/default/files/2022-02/Collective%20bargaining%20and%20the%20limits%20of%20competition%20law_2022.pdf (last accessed on 18 Mar. 2023).

[190] *See* among many examples, 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 (last accessed on 18 Mar. 2023), and TUC, *supra* n. 41.

[191] *See* above all the work recently done by the ETUI, *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 Dec. 2020), https://socialeurope.eu/gig-workers-rights-and-their-strategic-litigation (last accessed on 18 Mar. 2023); *Strategic Aspects of Occupational Safety and Health Litigation* (ETUI Conference: 24–25 Feb. 2021); *Labour Rights & the Digital Transition* (ETUI Conference: 28–29 Oct. 2021).

which, outside the platform economy, has been one of the corporate players that has more extensively relied on algorithmic management: Amazon.[192] Targeting this type of company is understandable from a trade union perspective, above all considering that Amazon has implemented a worldwide strategy aimed at limiting unionization.[193] Therefore, it is likely that trade unions will decide to go down the same route observed with regard to platform economy players at least against companies like Amazon, thus deciding to systematically complement more traditional grassroots organizing activities with strategic litigation on more innovative issues such as the opacity of algorithmic management devices. This may be functional to shed light on the functioning of algorithmic management tools, thus unveiling potential violation of employment, data protection and anti-discrimination laws and enabling a better enforcement of workers' rights, that would then alleviate the justice gap of workers subject to algorithmic management devices.

In this respect, litigation may be promoted against companies outside the platform economy to put under the spotlight the more general issues of protecting workers subject to algorithmic management devices, using these enforcement initiatives as one of the tools to raise social awareness and encourage public debate on these problems. This can be further instrumental to gain a better position when trying to influence regulatory policies applicable to the use of algorithmic management tools, such as the proposed EU Regulation on Artificial Intelligence,[194] about which trade unions have already expressed criticisms, calling for a better consideration of trade unions and workers' interests.[195]

4.2 Trade union litigation in response to algorithmic management as a strategy to fulfil the para-legal purpose of strengthening collective bargaining

In addition, trade unions may further consider using litigation as a strategic tool to push employers to sit at the table and negotiate if and how algorithmic management devices can be installed and used within the workplace, with a view to fostering algorithmic transparency and ensuring that automated decisions made through algorithmic management tools are compliant with employment, data-protection and anti-discrimination laws. In other words, strategic litigation by

[192] *See supra* n. 36.
[193] *See* the collection of papers in *The Cost of Free Shipping. Amazon in the Global Economy* (Jake Alimahomed-Wilson & Ellen Reese ed., Pluto Press 2020).
[194] Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) COM(2021) 206 final 2021/0106 (COD).
[195] Doellgast, *supra* n. 189, at 9–10.

trade unions would be instrumental not only to alleviating the justice gap described in section 1.3 above through a better *ex post* enforcement of workers' rights, but also to inducing stronger *ex ante* compliance.

Collective bargaining has been identified by scholars,[196] as well as by legislators both at the EU and at national level,[197] as a key source to regulate the implementation and use of algorithmic management devices in the workplace. Collective agreements represent a flexible regulatory tool that can be used by trade unions, particularly at workplace- and firm-level, to negotiate innovative rights tailored to specifically address the issues highlighted in section 1.2 above.

Trade unions are already moving in this direction.[198] Nevertheless, outcomes have been mixed as existing studies have found significant barriers to negotiating innovative rights of this type in collective agreements. Although trade unions are better placed than individuals to understand how algorithmic management works, they still face difficulties in training their members to familiarize themselves with this brand-new phenomenon and effectively negotiating over complicated technology-enabled decisions.[199] In addition, a certain unwillingness of their counterparties to come to terms with the trade unions is evident, especially with regard to platform economy players[200] and in other scarcely unionized sectors where algorithmic management has been used to manage workers in conventional employment settings.[201] However, litigation can be used by trade unions as a strategic tool

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196 De Stefano, *supra* n. 7, at 36.

197 Under EU law, *see* Art. 88 GDPR, which identifies in collective 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 equipment 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, a Spanish law has even provided that platforms will be obliged to 'give worker representatives access to the algorithm affecting working conditions': *see* Aranguiz, *supra* n. 187. In the same direction, the German Works Constitution Act was amended in 2021 'to explicitly give works councils the right to be informed about and consult over plants to adopt AI; and it extends co-determination rights over selection guidelines for hiring, transfers, and terminations to include situations where AI is used': *see* Doellgast, *supra* n. 189, at 12.

198 *See* the empirical research conducted by Dagnino & Armaroli, *supra* n. 41, and more recently Doellgast, *supra* n. 189, at 12–14, on a series of collective agreements, showing the type of novel rights that trade unions are negotiating to face the threats posed by the increasing recourse to algorithmic management in the workplace; *see* also Briône, *supra* n. 190, that aims at providing guidance to trade union representatives on how to approach negotiations regarding the implementation and use of algorithmic management.

199 Doellgast et al., *supra* n. 36.

200 Johnston & Land-Kazlauskas, *supra* n. 181, at 24–25.

201 Doellgast et al., *supra* n. 36.

to overcome these barriers and effectively strengthen worker protection through collective bargaining.

Trade unions can use litigation to put pressure on employers to open new bargaining channels, aimed at regulating the implementation and use of algorithmic management devices in the workplace. To a certain extent, this strategy has already been experimented against platform economy players. Although industrial relations in the platform economy are still at an embryonic stage, research shows that there is an increased number of cases where trade unions have been able to force platforms to sit down at the table to conclude collective agreements.[202] It is significant that this mostly happened in the food-delivery industry, where trade unions have mainly focused their litigation initiatives, which have mostly been successful. At this stage, the regulatory scope of these collective agreements has been mainly linked to traditional issues, such as pay, working time, holidays, and sick leave.[203] Limited space has been given to most innovative rights specifically dedicated to addressing the issues related to the use of algorithmic management devices in platform work, such as enhancing transparency and regulating automated ranking systems.[204] However, it has been claimed that this happened because the most urgent issues for platform workers were employment status, pay, working conditions, and union recognition and representation.[205] Therefore, it is understandable that trade union representatives have prioritized these issues over the more innovative ones arising from the use of algorithmic management devices in platform work.

The situation has been different when trade unions have tried to negotiate collective agreements regulating algorithmic management tools with firms employing workers in conventional employment settings.[206] Especially in contexts characterized by high union density and mature collective bargaining, trade unions have been able to negotiate innovative rights specifically tailored to overcoming the risks connected to the use of algorithmic management devices in the workplace.[207] These include provisions restricting the possibility to use algorithmic management tools especially when they enable automated decision-making without human oversight, limiting the type and quantity of data processed, prohibiting their use to monitor performance and behaviour, also with a view to adopting disciplinary measures.[208] Other provisions are aimed at enhancing algorithmic

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202 Mariagrazia Lamannis, *Collective Bargaining in the Platform Economy: A Mapping Exercise of Existing Initiatives* (ETUI Working Paper: Feb. 2023).
203 *Ibid*.
204 *Ibid*.
205 *Ibid*.
206 Doellgast, *supra* n. 189, at 12–14.
207 *Ibid*.
208 *Ibid*.

transparency and, more interestingly, at establishing expert committees at firm level to provide trade union representatives with a more complete understanding of the algorithmic management devices used in the workplace, as well as to correct mistakes and make recommendations for changes.[209]

In these more traditional contexts, litigation can be used to bolster the position of trade unions at the bargaining table and to gain bargaining power when negotiating in advance how algorithmic management devices should be implemented and used in the workplace, as employers will be more likely to come to terms with trade unions under the threat of claims promoted by combative unions. In addition, litigation can be used to sidestep a negotiating impasse when traditional union-management relations could not reach a solution. This has already happened in Norway, where the conflict regarding the use of a video monitoring system was escalated before the national DPA and this strategy was successful in re-establishing a more consensual social dialogue between the employer and the trade unions.[210]

Therefore, litigation can be strategically used to strengthen collective bargaining and better deal with the risks connected to the use of algorithmic management in the workplace. This would increase *ex ante* compliance with employment, data protection and anti-discrimination laws, thus reducing the chances that workers subject to algorithmic management devices will face a justice gap.

[209] *Ibid*.
[210] Doellgast et al., *supra* n. 36.