Transparency and Comprehensibility of Working Conditions and Automated Decisions: Is It Possible to Open the Black Box?

Loredana Zappalà*

Abstract

The paper proposes a reflection on the possibility for workers and trade unions to know and understand the logics of the functioning of new forms of algorithmic management. In particular, the essay analyses the evolution of the principle of transparency and comprehensibility of automated decision-making systems in labour matters, focusing on the recent discipline with which the Italian legislator has transposed the Directive 2019/1152 on predictable and transparent working conditions. The analysis also looks at the recent judgments of some Italian Courts which, at the request of trade union, have clarified the scope and breadth of information obligations in relation to automated decision-making systems. In the light of the Italian experience, collective bargaining can be considered as the most appropriate regulatory instrument to respond to the new challenges related to the use of technology in the workplace.

I. Algorithmic Boss, Computational Power and Information Asymmetries

The digital revolution brings about many changes in the workplace, presenting law with a complex technological, organizational, relational, and cultural landscape in the production of goods and services.[1] In an era dominated by digitisation and abundant data, a significant shift is occurring where algorithmic automation is replacing human decision-making in the governance of labour relations. Digital technologies can interact with management decision-making processes in various ways. Companies have the option to employ workforce analytics tools, which

* Associate Professor of Labour Law, University of Catania.

[1] See S. Borelli et al, *Dizionario del diritto del lavoro che cambia* (Torino: Giappichelli, 2022). The literature on labour law regarding technology is now extensive. For essential further references in the Italian debate, refer to M. Novella and P. Tullini eds, *Lavoro digitale* (Torino: Giappichelli, 2022); A. Lo Faro eds, *New Technology and Labour Law* (Torino: Giappichelli, 2023); P. Tullini eds, *Web e lavoro. Profili evolutivi e di tutela* (Torino: Giappichelli, 2017); C. Alessi et al eds, *Impresa, lavoro e non lavoro nell'economia digitale* (Bari: Cacucci, 2019); R. Del Punta, 'Un diritto per il lavoro 4.0', in A. Cipriani et al eds, *Il lavoro 4.0. La quarta rivoluzione industriale e le trasformazioni delle attività lavorative* (Firenze: Firenze University Press, 2018); A. Aloisi and V. De Stefano, *Il tuo capo è un algoritmo. Contro il lavoro disumano* (Bari: Laterza, 2020); E. Dagnino, *Dalla fisica all'algoritmo: una prospettiva di analisi giuslavoristica* (Modena: Adapt University Press, 2019); M. Faioli, *Mansioni e macchina intelligente* (Torino: Giappichelli, 2018).

consist of a broad range of advanced instruments and methods for scrutinising data. These tools allow for the measurement and enhancement of workforce performance, as well as the management of company personnel. Alternatively, those workforce analysis tools could be incorporated into decision-making systems that replace human management, leading to concrete instances of algorithmic management.[2]

In the first scenario, technology holds the potential to produce an augmented human manager, who possesses exceptional computational, analytical, and decision-making abilities. Conversely, in the second scenario, software operates as the manager, exhibiting a considerable degree of autonomy, owning responsibility for human resource management based on a predetermined set of variables.

The ways in which businesses hire employees, structure work and schedules, arrange orders, promote and sell products, distribute goods, and handle invoicing and accounting have seen an evident growth in innovative organizational processes. Decision-making tasks are now fully digitisable, reproducible, and programmable following standardised protocols. They possess the capability to manage and integrate with non-human capabilities, handling vast amounts of information within physical and temporal realms without limitations or boundaries. Automated decision-making processes can be easily globalised, modified or replaced on a large scale, bypassing entire chains of middle management. These chains are decreasing in numbers and are increasingly becoming only executors and controllers of a digitalised management system. This system is completely autonomous and possesses a computational and predictive ability that exceeds that of a human. It confers undeniable advantages to employers by facilitating contextualized management of multiple job positions, expediting the identification of the most appropriate candidates during selection procedures, and eliminating irrational biases that humans may exhibit in management, thereby rendering the process more universally applicable.

Algorithmic management fundamentally alters the contractual arrangements stipulated in traditional employment contracts. This is achieved through two means; firstly, by disproportionately enhancing conventional employer powers, and secondly, by establishing new and profound technological-informational subordination of the employee. Through algorithms, management gains a new power over the workforce – computational power. This power derives from enabling technologies that process data, transform input into output, identify statistical patterns, extract

[2] M.K. Lee et al, 'Working with Machines: The Impact of Algorithmic and Data-Driven Management on Human Workers' *Proceedings of CHI*, 1 (2015); K.C. Kellogg et al, 'Algorithms at Work: The New Contested Terrain of Control' 14 *Academy of Management Annals*, 366 (2020); A. Mateescu and A. Nguyen, 'Algorithmic Management in the Workplace' 1 *Data & Society*, 1 (2019); J. Wood, 'Algorithmic management consequences for work organisation and working conditions' *JRC Working Papers Series on Labour, Education and Technology*, WP no 7, 1 (2021); J. Adams-Prassl, 'What if Your Boss Was an Algorithm? Economic Incentives, Legal Challenges, and the Rise of Artificial Intelligence at Work' 41 *Comparative Labor Law & Policy Journal*, 123, 131-132 (2019); M.H. Jarrahi et al, 'Algorithmic Management in a Work Context' 8 *Big Data & Society*, 1, 2 (2021).

correlations, produce inferences, generate forecasts, build profiles, and compare and evaluate through an indirect experience that can be traced back to the 'proxy culture'.

In the context of employment, algorithmic management possesses various new capacities for utilising the workforce. By reducing workers to operational data and machine-processable inputs, their evaluations result from data processing that remains beyond the worker's control. Such data may stem from practices of digital hyper-control and gamification that integrate the worker into the corporate context.

Algorithmic management techniques used in managing human labour can generate new personal data from non-personal data due to the use of big data and the computational power it offers. This results in a digital reflection of workers, which they may not be aware of. In work environments where algorithmic management is used to profile and make decisions on individuals, it makes use of both personal and big data to generate new information about them. It is the outputs produced by big data analytics and algo-created data that can impact the evaluation of worker performance and could result in disciplinary action or negative treatment. This underscores the negative image that algorithmic management creates of the worker. Through the mediation of data analysis, the employer utilises computational power to project their own representation of reality onto the company and, consequently, the workers. This is achieved through an algorithmic procedure that reconstructs a digital identity of the employee, including their productive capacity, competence, reliability, responsibility, and personal opinions. Causal connections between workplace and external data inform this digital identity. It is an analysis that management makes many decisions regarding the employment relationship, which cannot be controlled or known by the service provider.

Computational power has a multiplier effect on 'traditional' employer powers, increasing the power of direction and control, as well as restriction, recommendation, registration, rating, replacement and reward. Organisational literature has demonstrated that chatbot alerts and algorithmic management nudges can restrict workers' thinking capability, leading to significant frustration, as they are often not fully understandable.

The most prevalent application of algorithmic management can be observed in digital work platforms, where algorithms manage resources, direct and shape the performance, working and non-working time of workers through nudges, such as advising Uber drivers to increase their speed. It should be noted that these algorithms are entirely opaque and not comprehensible to the workers. Even if it means risking dangerous situations or accepting rides that prove to be uneconomical for the worker, employers not only create a perception of unfair recommendations among workers but also assign scores based on internal performance evaluations, such as the number of services and efficiency. All aspects of the worker's reliability should be considered, such as punctuality, adherence to shifts, order completion rates, staying within the designated service area during available hours, and order reassignment rates. Additionally, external

parameters, including the number of working hours, efficiency, and user feedback, should be taken into account.

In such situations, the ability of workers to comprehend the information renders their role in communicating their working conditions and managing their relationship with their employer ineffective. This is due to the speed and complexity of the information, which surpasses their legal and/or technological capacity to comprehend the management decisions. As a result, they lack the necessary perspective to understand the implications of these decisions and the strength to request clarifications or oppose choices that directly affect them. In this context, the employee becomes the focus of the employer's communication, which can be too rapid and unpredictable at times. They receive technical and legal jargon that they may not comprehend or even notice. Essentially, the worker is voiceless in a conversation that never takes place. They exist in an informational setting without occupying its core. The technological transformations in social organization create power imbalances and result in a social divide between increasingly open individuals and increasingly obscure and uncontrollable powers.

II. Transparency and Explainability of Contractual Terms and Conditions and the Enabling Dimension of Information: Limits and Potential of the GDPR

The use of automated decision-making has become a critical concern for labour law and beyond. These technological implementations have the potential to significantly impact the lives, dignity of workers and employment relationships of workers. The principle being studied extensively is how ideal algorithmic rationality, which is neutral, objective and therefore always abstractly preferable to the limited cognitive or intentionally corrupt human intervention, can produce nonetheless irrational and sometimes discriminatory decisions. Discrimination is created by irrational, blind, mirror, deterministic, non-deterministic, and machine learning algorithms, undermining therefore both general law and labour law specifically.

Recent years have seen a flurry of academic work addressing explainability as a means to achieve accountability in algorithmic decision-making systems.[3]

However, it is apparent that organisations are unlikely to provide comprehensive explanations regarding the process, rationale and precision of algorithmic decision-making voluntarily, unless they are legally required to do so. These systems are frequently intricate, encompass confidential personal data, and employ techniques and models treated as trade secrets. Therefore, expounding on them would generate

[3] F. Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information* (Cambridge, MA: Harvard University Press, 2015); J.A. Kroll et al, 'Accountable Algorithms' 165 *University of Pennsylvania Law Review*, 633 (2017); S. Wachter and B. Mittelstadt, 'A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI' 2 *Columbia Business Law Review*, 1 (2019).

supplementary expenses and jeopardize the organisation's security.

In this context, it is clear that assuming unforced cooperation from organisations that use automated decision-making systems is unrealistic. Implementing mandatory regulations is the only plausible solution to partially reveal the operational methodology of algorithmic systems.

In the framework outlined above, the issue of transparency of algorithmic decision-making has been at the centre of the debate in the European institutions for some time. Transparency that concerns not only the processing of the data itself, but also the way in which the data is processed by automated systems that return a specific identity or characteristics of the person created by artificial intelligence systems. In fact, through an evolutionary interpretation of the European Union's General Data Protection Regulation[4] (GDPR), the perspective of legal protection of the person, the owner of the data, and therefore also of the worker, is guaranteed by the principle of transparency, understood as a fundamental principle that allows one to control the processes of construction and use of personal identity. The power to control one's own identity is at the heart of the protection of the human person in the information society; a necessary tool to preserve one's freedoms (first and foremost self-determination) in the age of so-called global surveillance and of a life increasingly lived in the infosphere.[5] The GDPR provides a single legal framework for the protection of personal data, directly applicable in all Member States of the European Union (EU). In labour matters, the GDPR is obviously applicable to the collection and processing of workers' data, including in the more specific case of automated decision-making by algorithmic management tools.

Under Arts 5, para 2, and 24, para 1, GDPR, the employer, as the data controller, must be able to demonstrate that it has complied with a number of substantive and organisational requirements when processing employee data. It must demonstrate that the data processing complied with all the principles set out in Art 5, para 1, GDPR, namely lawfulness, fairness and transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity and confidentiality. Pursuant to Art 15 GDPR, the data subject has the right to obtain from the controller the confirmation of whether personal data relating to him/her is being processed and, if so, access to such personal data, except for information on the existence of automated decisions, including profiling, referred to in Art 22, paras 1 and 4, and, at least in these instances, relevant information on the logic applied and on the significance and envisaged consequences of such processing for the data subject. In any event, Art 22, para 1, gives the data subject the right not to be subject to a decision based solely on automated processing, including profiling,

[4] European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] OJ L119/1.

[5] L. Floridi, The Fourth Revolution: How the Infosphere is Reshaping Human Reality (Oxford: Oxford University Press, 2014).

which produces legal effects concerning him or her or similarly significantly affects him or her. However, there are exceptions to this general prohibition. For example, automated decision-making is allowed when it is necessary for the conclusion or performance of a contract, as may be the case in relation to an employment contract (Art 22, para 2(a), GDPR). However, even if it falls under this exception, an employer must take appropriate measures to safeguard the rights and freedoms and legitimate interests of the data subject, at least the right to obtain human intervention from the controller, to express his or her point of view and to contest the decision (under Art 22, para 3, GDPR), and to provide the employee, upon specific request, with confirmation of the existence of automated decision-making and, if so, with meaningful information about the logic involved in the decision-making process, including an explanation of the envisaged consequences of such processing for the employee (Arts 13 and 15 GDPR).

This is certainly an important regulation, but its impact depends very much on the interpretation of the notion of fully automated processing: the GDPR's right to an explanation, even if legally binding, would be limited to decisions based solely on automated processing with legal or similarly significant effects. These conditions significantly limit its potential applicability.

In recent years, it has therefore become clear, including in the debate launched by the European institutions, that the use of automated decision-making systems entails many risks that will inevitably affect people's lives and fundamental rights. In this context, the EU has proposed the development of artificial intelligence based on 'trustworthy', transparent, knowledgeable, relevant, human-controlled and accountable technology in order to create an 'ecosystem of trust'. Automated decisions, in order to remain anthropocentric, should be inspired by the Human-in-the-Loop (HITL) approach; ie, a technological and organisational approach that places human knowledge and experience at the centre of decision-making processes governed by algorithms, while ensuring precise human oversight of the functioning of automated decision-making processes. This is to avoid the distorting effects of automation, to interpret outputs correctly and with human criteria and values, and to preserve the possibility for the supervising human to decide, in any given situation, not to use the output itself, to ignore it, to cancel it or to reverse it.

For this reason, the doctrine dealing with the GDPR has long doubted the potential effectiveness of the aforementioned regulation. The same Working Party was set up under Art 29 of Directive 95/46/EC[6] and Art 15 of Directive 2002/58/EC,[7] which issued specific guidance on automated processing, stating that the prohibition of fully automated processing requires a restrictive interpretation,

[6] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1994] OJ L281/31.

[7] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2022] OJ L201/37.

according to which the controller cannot avoid the provisions of Art 22 by fabricating human involvement. To qualify as human involvement, the controller must ensure that any control over the decision is meaningful and not merely a token gesture; it should be exercised by someone who has the authority and competence to change the decision.[8]

Consistent with this broad interpretation, the guidance cited above also emphasizes that the growth and complexity of machine learning may make it difficult to understand how an automated decision-making process or profiling works. Therefore, the controller must find simple ways to explain to the data subject what the underlying logic is, or what criteria were used to make the decision. The GDPR requires the controller to provide useful information about the underlying logic, not necessarily a complicated explanation of the algorithms used or an explanation of the entire algorithm. However, the information provided must be sufficiently complete to enable the data subject to understand the reasons for the decision. The intelligibility of the automated decision-making process is therefore a concept that needs to be defined in relation to the cognitive abilities and skills of the recipient, as well as the purpose of the access to the explanation.[9]

Finally, and very briefly, it is worth recalling the very broad interpretation of Art 22 GDPR given by Advocate General Priit Pikamäe in his Opinion of 16 March 2023 before the Court of Justice in a case concerning the profiling of natural persons by a credit and rating agency.[10] The Advocate General pointed out that Art 22, para 1, of the GDPR has a distinct feature compared with the other restrictions on the processing of data contained in that regulation in that it establishes a 'right' for the data subject not to be subject to a decision based solely on automated processing, including profiling. Despite the terminology used, the application of Art 22, para 1, of the GDPR does not require the data subject to actively invoke the right. An interpretation in the light of recital 71 of that Regulation, taking account of the scheme of that provision, particularly its para 2, which specifies the cases in which such automated processing is exceptionally permitted, suggests instead that provision establishes a general prohibition on decisions of the kind described above. At the same time, Advocate General Priit Pikamäe gives an extensive interpretation of decision that produces 'legal effects' concerning the data subject or 'similarly significantly affects him or her', holding that the notion of legal effect on the person includes the possibility of not benefiting from a contractual

[8] See Art 29 Data Prot. Working Party, Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679, http://tinyurl.com/48dfbcx4 (on file with the *Columbia Business Law Review*).

[9] M. Peruzzi, 'Intelligenza artificiale e tecniche di tutela' *Lavoro e diritto*, 541-559 (2022). On the difficulties of filling the right to explanation with content in the technological habitat, see P. Tullini, 'La questione del potere nell'impresa. Una retrospettiva lunga mezzo secolo' *Lavoro e diritto*, 429-450 (2021).

[10] See Opinion of Advocate General Pikamäe, delivered on 16 March 2023, Case C-634/21, *OQ v Land Hesse, Joined party: SCHUFA Holding AG*, available at www.eur-lex.europa.eu.

relationship with a credit institution, that may certainly affect the economic life of the data subject. This situation justifies the right to obtain meaningful information about the logic involved, even where this may entail a partial sacrifice for the rights or freedoms of others, including trade secrets or intellectual property and in particular the copyright protecting the software.

III. Application of Art 22 GDPR in Employment Context: In Search of a Trustworthy Ecosystem

Although the scope of the GDPR for labour law may not seem obvious at first glance, case law in recent years dealing with the transparency of automated systems has reached important conclusions that are worth mentioning. To give just a few examples of the relevance of the cited provisions of the GDPR, even in very different contexts, it is possible to cite the fundamental 'lesson' of Italian administrative jurisprudence on the subject of the allocation of seats and transfers of public school teachers. The Council of State, section VI, with judgment no 8472 of 13 December 2019,[11] has in fact highlighted what are the 'minimum guarantee elements' of the use of algorithms in the management of labour relations in the public administration; namely a) the full upstream knowability of the module used and the criteria applied; b) the imputability of the decision to the body holding the power, which must be able to carry out the necessary verification of the logic and legitimacy of the choice and the outcomes entrusted to the algorithm. Knowability, therefore, and verifiability from a logical point of view. Where 'knowability' disregards the 'multidisciplinary characterisation' of the algorithm, which requires not only legal expertise, but also technical, computer and statistical, administrative expertise. As the Council of State has made clear, this does not mean that the 'technical formula' which is in fact the algorithm should not be accompanied by explanations which translate it into the underlying 'legal rule' and make it readable and comprehensible. Therefore, also in the case of the transfer of teachers in Italian state schools, the aforementioned jurisprudential orientation has established the applicability of the provisions of the GDPR to the present case: ie, the cognitive guarantees ensured by the information notice and the right of access, as well as the express limitation to fully automated decision-making processes. The right to knowledge of the existence of decisions taken by algorithms and, correlatively, the duty on the part of those who process data in an automated manner, to make the data subject aware of them, must therefore – according to the Council of State cited above – be accompanied by mechanisms capable of deciphering their logic. In this perspective, the principle of knowability is completed with the principle of comprehensibility, ie, the possibility, to borrow the expression of the GDPR, of receiving 'meaningful information on the logic used'.

[11] Consiglio di Stato 13 December 2019 no 8472, *Foro Italiano*, 340 (2020).

Similarly, the principle of non-exclusivity of the algorithmic decision requires, according to the judgment under consideration, that the automated decision-making process must include a human contribution capable of verifying, validating or refuting the automated decision. In the field of mathematics and information technology, the model referred to is precisely the one defined as HITL (human in the loop), in which the machine must interact with the human in order to produce its result.

On the basis of these premises, in the present case, the algorithm used by the Italian public employer did not comply with the above-mentioned principles. Also in view of the fact that it was not clear why the legitimate expectations of some teachers who had been placed in a certain position on the ranking list had been disappointed to the detriment of others. Therefore, according to the Italian Council of State, the fundamental need for protection raised by the use of the algorithmic computer tool is the denial of transparency as an obligation to make the decision comprehensible, in compliance with the principle of reasoning and/or justification of the decision.

The provisions of the GDPR have also found significant application in the area of automated processing through platform work. The Italian Data Protection Authority (DPA), for example, has carried out extensive checks on a number of digital working platforms involved in food delivery, finding numerous breaches of data protection law arising from the extensive use of algorithmic management.[12] With regard to the information to be provided to data subjects, for example, the Italian DPA considered insufficient the information provided in a document entitled 'Privacy policy of the rider for Italy', which is available via a link, included in the standard contract that Deliveroo signs with riders and published on the company's website. It was found that the company had failed to provide 'meaningful information on the logic applied, as well as on the significance and expected consequences of such processing for the data subject'. As such, the company – which carries out automated processing, including profiling, that falls under Art 22 of the GDPR – had breached the 'enhanced' information obligations that the regulation explicitly requires in such cases (see Art 13, para 2 (f), GDPR).

In the same case, the Italian DPA found that the company – which monitored riders with GPS every 12 seconds – also carried out automated processing, including profiling, to assess 'reliability' and 'availability' to accept shifts on peak days, to determine riders' priority in the choice of shifts; and to allocate orders within booked shifts, through an algorithmic system called Frank (also active after 2020).[13] According to the Italian DPA, the company was not able to explain or

[12] Garante per la protezione dei dati personali 22 July 2021 no 285, Injunction Order against Deliveroo Italy srl, available at www.garanteprivacy.it.

[13] This is the algorithm that is used to profile individual drivers, determine their reliability and, consequently, the possibility of granting (or refusing) access to job opportunities at certain pre-established times, thus offering (or refusing) an employment opportunity, on which the Tribunale di Bologna 31 December 2020, *Rivista Italiana di Diritto del Lavoro* 175 (2021) issued against

provide adequate information to workers on the functioning of the Frank algorithm, the FAQs made available on the website not being sufficient in this respect.

Therefore, as the Italian DPA itself noted, the data processing discipline of the GDPR is functional to guarantee platform workers, not only in terms of privacy, but also from a substantive point of view. As provided for in Art 47-*quinques* of decreto legislativo 15 June 2015 no 81 (in the wording introduced by the Italian legislature in 2019), workers on digital platforms 'who carry out activities of delivery of goods on behalf of others, in urban areas and with the help of velocipedes or motor vehicles' are subject to the anti-discrimination rules and the rules protecting the freedom and dignity of workers, including access to the platform. Since, according to the aforementioned provision, the exclusion from the platform and 'the reduction of work opportunities due to the non-acceptance of the service are prohibited', the knowledge of how the Frank algorithm works – for the worker excluded or penalised by the platform – is functional to activate and claim a substantial protection against the loss of work opportunities or the deactivation of the account.[14]

Outside the Italian context, the recent Dutch case law on the automated processing of data of Uber and Ola Cabs drivers is of particular importance: in no less than three decisions, the Amsterdam Court of Appeal has largely ruled in favour of the drivers, finding that Uber and Ola have violated the rights of taxi drivers under the GDPR.[15]

The drivers, in fact, appealed the Amsterdam District Court's decisions to receive further access to their personal data and receive information about the way in which Uber and Ola take automated decisions about their drivers.

In particular, the Amsterdam Court of Appeal, providing a very broad interpretation of the provisions of the GDPR and the notion of personal data,[16] affirmed – with regard to some drivers dismissed by Uber or other employees of Ola Cabs – the right of taxi drivers to know how and why the automated system had 'profiled' them as potential fraudsters, this decision having significant legal effects on the data subjects.

The Amsterdam Court of Appeal, therefore, sanctioned the right to know and understand the rationale behind the decision made on the basis of 'tags', 'reports', 'individual passenger ratings', as well as on the 'batched matching system' (ie the automated system by which Uber connects drivers to passengers, which first groups

Deliveroo Italy srl also expressed its opinion, confirming its discriminatory nature. On this decision, see A. Aloisi and V. De Stefano, 'Frankly, My Rider, I Don't Give a Damn' *Rivista il Mulino*, available at http://tinyurl.com/4jtr66p3 (last visited 10 February 2024).

[14] See also Garante per la protezione dei dati personali 10 June 2021 no 234, Injunction Order against Foodinho srl, available at www.garanteprivacy.it; an abstract in English of this decision is http://tinyurl.com/3t79vnab (last visited 10 February 2024).

[15] See Gerechtshof Amsterdam 4 April 2023 no 200.295.747/01, no 200.295.742/01 and no 200.295.806/01.

[16] In line with ECJ jurisprudence, Case C-434/16 *Peter Nowak* v *Data Protection Commissioner*, Judgment of 20 December 2017 available at www.eur-lex.europa.eu.

the closest Uber drivers and passengers into a batch and then determines the optimal match within this group) or the so-called 'upfront pricing system' (ie the automated system by which Uber calculates the price of a ride in advance on the basis of objective factors such as the length and expected duration of the ride, of the trip requested, the relationship between supply and demand at the time, expected traffic patterns and the date) or, again, on the 'rating history' of Ola Cabs, which had also helped to create a profile of drivers potentially engaged in fraud.

Therefore, when we are dealing with automated processing that significantly affects the individual, preventing workers from knowing how their reliability profile has been constructed by the algorithm, and therefore when we are dealing with a decision that has legal consequences that significantly affect the individual, the individual has the right to access the data and to have useful information about the 'underlying logic', even if there is a commercial interest of the company to maintain business secrecy for competitive purposes.

As clarified by the Amsterdam Court of Appeal, moreover, of relevance here is that the information should be 'useful information', ie such information that enables the data subject to make an informed decision as to whether or not he or she wishes to exercise his or her rights guaranteed by the GDPR, such as the right to rectification or inspection or the right to seek judicial remedy.

According to the Court – citing the European Guidelines on Automated Processing – Art 15, para 1, of the GDPR requires the controller to provide the data subject with general information that is useful for challenging the decision, in particular information on the factors taken into account in the decision-making process and their respective 'weighting' at an aggregate level. The information provided should be sufficiently complete to enable the data subject to understand the reasons for the decision. However, it also follows from this guidance that it does not necessarily have to be a complex explanation of the algorithms used or an exposition of the full algorithm. The explanation cannot even be a simple reference to the company's website, as Uber attempted to do, but rather the platform must explain the factors and the weighting of those factors that it uses to arrive at the ride-sharing decisions, the fare decisions and the average ratings, as well as provide other information necessary to understand the reasons for those decisions.

In short, as one seems to read between the lines of the Dutch Court of Appeal's decision, it is not the technical/commercial explanation of how the algorithm works that is important, but the explanation of the logic of the weighting of the data obtained, because it is precisely on this weighting – or on the error or lack thereof – that the employee will ultimately be able to assert his rights. From this point of view, the provisions and application of the GDPR in the field of employment can be seen as playing the role of a pioneer: of a 'window' on the automated management models that, until now, have acted as a veritable curtain concealing the real working conditions.

A role as an information trailblazer, therefore, which beyond the world of

digital work platforms mentioned above, can also be played in more traditional spheres of the world of production and services, such as in the logistics sector, as shown by the recent trade union initiatives launched at Amazon, where – recently – in a cooperation between the worker's union 'UNI Global' and privacy NGO 'noyb.eu', Amazon warehouse workers from Germany, UK, Italy, Poland and Slovakia filed access requests under Art 15 GDPR. The goal is to find out how Amazon treats workers' personal data under the EU's GDPR, since workers are so far left in the dark about the use of their data, despite Amazon using sophisticated systems to monitor workflows and workers.[17]

IV. EU Labour Law: From Transparency and Predictability of Working Conditions to Comprehensibility and Beyond

Given the profound changes in production contexts, the European Pillar of Social Rights, proclaimed in Gothenburg on 17 November 2017,[18] has focused labour attention on the importance of transparency. It established that workers have the right to be informed in writing, at the beginning of the employment relationship, of the rights and obligations arising from the employment relationship and of the conditions of the probationary period; furthermore before any dismissal, they have the right to be informed of the reasons and to be given a reasonable period of notice; and they also have the right of access to effective and impartial dispute resolution and, in the event of unfair dismissal, the right to a remedy, including adequate compensation.

Therefore, in the wake of the aforementioned social pillar, Directive 2019/1152[19] on transparency and predictability of working conditions was adopted, establishing a general principle of transparency applicable to a wide range of workers, who should be guaranteed the right to obtain correct information on the working conditions applicable to them. Recognising the 'inadequacy' of the previous Directive 91/533/EEC[20] to regulate the profound changes in labour markets as a result of digitalisation processes, and knowing that some new forms of work are far removed from traditional employment relationships in terms of predictability, creating uncertainty for the workers concerned in terms of social protection and

[17] NOYB, Amazon Workers Demand Data-Transparency, noyb.eu (14 March 2022), available at http://tinyurl.com/45c2n88z (last visited 10 February 2024).

[18] F. Hendrickx, 'European Labour Law and the Millennium Shift: From Post to (Social) Pillar', in F. Hendrickx and V. De Stefano eds, *Game Changers in Labour Law*, *Bulletin of Comparative Labour Relations*, 49 (2018); K. Kilpatrick, 'Social Europe via EMU: Sovereign Debt, the European Semester and the European Pillar of Social Rights' *Diritto del Lavoro e Relazioni Industriali*, 737 (2018).

[19] European Parliament and Council Directive (EU) 2019/1152 of 20 June 2019 on transparent and predictable working conditions in the European Union [2019] OJ L186/105.

[20] Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ L288/32.

applicable rights, the EU has indeed seen the need for a new regulation.

This was done in order to guarantee workers, including platform workers and 'false self-employed', the right to full and prompt written information on working conditions. A genuine transversal principle of transparency and predictability of working conditions has thus been introduced (planning and organisation of work, time slots, pay, but also the right to parallel employment with other employers, the right to a minimum of predictability of work and the right to refuse work if this is lacking, the obligation to provide training, etc), which should be widely applied in both traditional and digitalised workplaces.

If, from the perspective of Directive 91/533/EEC, information had the task of ensuring a full understanding of the rights and obligations to which the employee is entitled by virtue of the conclusion of the contract, the information rights contained in the new Directive 2019/1152 are 'third-generation' information rights, as they focus on the dynamic aspect of the information itself. In fact, the principle of transparency and predictability of contractual conditions is based on a right to information that is not just a 'snapshot' of what exists, but rather a dynamic one that must guarantee not only knowledge and understanding of the contractual conditions applied, but also the predictability of possible changes that, in a 'high-speed' world of work, run the risk of making the worker's life unprogrammable, with an obvious increase in the porosity of working time that potentially prevents any capacity for self-determination of the person and his or her living spaces.

The above-mentioned new Directive, with its hard law content, is a candidate as a source of not only procedural but also substantive rights that can be asserted before the courts by workers who are insufficiently informed about the aspects provided for by the Directive. On the one hand, the transparency and predictability of the contractual conditions and the detailed written information on all the elements mentioned in the Directive recall the tendency to increase legal formalism and the proceduralisation of conduct and management acts as a counterbalance to the increasing liberalisation and proliferation of flexible employment models. On the other hand, they take on the connotation of new enabling tools for the capacities of the workers concerned, the planning and predictability of their living and working space and time, of remuneration and its elements, of the possibility of accepting other jobs. In short, information as an enabling tool for the planning and predictability of one's own living conditions, even before that of work, as the last generational right that increases the possibility of workers acquiring a greater space of substantial freedom in the employment relationship and in professional trajectories. On the other hand, they are configured as potentially enabling instruments of investigation (if not also of spaces of unquestionability) of the methods of exercising the employer's powers, especially those managed by automated decision-making mechanisms.

The same perspective of increasing transparency also inspires the proposal

for a directive COM (2021) 762 of 9 December 2021,[21] which aims to improve the working conditions and increase the level of protection of platform workers.

In particular, the latter directive aims to: ensure that persons working through digital platforms have or can obtain correct information on the employment situation in the light of their actual relationship with the digital work platform and have access to applicable labour and social protection rights; ensure fairness, transparency and accountability in algorithmic management in the context of work through digital platforms; and increase transparency, traceability and awareness of developments in work through digital platforms and improve the application of relevant rules for all persons working through digital platforms, including those operating across borders. In the European Commission's logic, therefore, the proposed Directive aims to achieve the specific objective of ensuring fairness, transparency and accountability in algorithmic management by introducing new substantive rights for persons who work through digital platforms.

This includes the right to transparency about the use and functioning of automated decision-making[22] and monitoring systems, which specifies and complements existing rights in relation to the protection of personal data.

Transparency and traceability of work through digital platforms is also – according to the Commission's approach – an important tool to support competent authorities in enforcing existing rights and obligations in terms of working conditions and social protection.

In particular, the European Commission's proposal on work through digital platforms considers the 'opacity' of the algorithms that govern the employment relationship in platforms as the real new element of weakness that could and should act as a watershed between autonomy and subordination. This is based on the assumption that the lack of transparency and clear information on how the algorithm works in the platform actually prevents workers (even those who would like to work autonomously) from making informed and responsible decisions that affect them. It is therefore precisely in platforms, which are the most emblematic example of management by algorithmic management, that the Commission has envisaged the introduction of a so-called rebuttable presumption of an employment relationship, with a reversal of the burden of proof of the autonomous nature of the relationship. The rebuttable presumption of the subordination of the relationship, therefore, as a bulwark against the computational power of the platforms, which would oblige – once again – the algorithmic management to prove the 'algorithmic counterfactuals'; that is, to prove how and why the relationship of the platform worker should be considered truly autonomous, despite the 'technological-informational subordination' that characterises the relationship itself.

[21] COM(2021) 762 final of 9 December 2021, Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work.

[22] A. Aloisi and N. Potocka-Sionek, 'De-gigging the labour market? An analysis of the 'algorithmic management' provisions in the proposed Platform Work Directive' 15 *Italian Labour Law E-Journal*, 29 (2022).

Thus, in order to address the risks of opacity and inscrutability of algorithmic management, the above-mentioned proposal of directive provides for a number of information/explanatory obligations for digital work platforms (see Arts 6, 7 and 8), which go beyond the simple and general right to be 'fully and promptly informed in writing' about working conditions already provided for in Directive 2019/1152 and already applicable to platform workers; such as the obligation to inform workers about automated monitoring systems that are used to monitor, supervise or evaluate the performance of digital platform workers by electronic means; as well as the obligation to inform these workers about automated decision-making systems that are used to make or support decisions that significantly affect their working conditions, such as access to tasks, earnings, health and safety at work, working hours, promotions, possible suspension or termination of their account, etc.

The above-mentioned proposal of directive, if adopted, will therefore impose a real obligation on workplaces to provide the required information to workers quickly, in a concise, transparent, comprehensible and easily accessible form, using simple and clear language. The subject matter of the information partly overlaps with that of the GDPR rules, which are already widely applied thanks to a broad jurisprudential interpretation (such as that of the Amsterdam Court of Appeal) of the information to be provided on fully automated processing: the information concerns both the introduction and the use of automated decision-making and monitoring systems, the categories of actions monitored, supervised or evaluated, including by means of rating procedures, the categories of decisions and the main parameters used by the systems to take them. At the same time, the above-mentioned proposal of directive provides for an obligation of human supervision of the automated systems, as well as an obligation to provide a written explanation of the decision and a reasoned review of the decision, which could be followed by an obligation to immediately rectify the decision taken by the algorithmic management or, if this is not possible, an obligation to pay appropriate compensation, if the automated decision is found to violate the worker's rights.

Unlike Art 22 of the GDPR, the proposal for a directive on work through platforms therefore enriches the content of the obligation of human supervision of the automated process on a stable basis: whereas Art 22 of the GDPR provides that, where fully automated processing is allowed for the performance of a contract, the data subject has the right to obtain human intervention by the data controller, to express his or her opinion and to contest the decision; in other words, an on-demand human intervention by the data subject. The proposal for a Directive on work through platforms, on the other hand, provides for a stable obligation of human supervision of automated systems: an obligation that Member States will be able to impose on platforms also by verifying that the platforms themselves employ sufficient human resources (with the necessary competence and authority) to supervise decisions. A monitoring obligation to which is then added the right of the data subject to obtain explanations of the decisions taken, to request a review, etc.

The proposed directive on platform work represents a particularly significant 'curvature' of Art 22 GDPR, as it opens up spaces for control over the algorithmic decision that go far beyond the purpose of transparency. Indeed, human monitoring and human review of significant decisions (Arts 7 and 8 of the proposal) seem to open up spaces for control over the rationality and reasonableness of the algorithmic decision (which must not 'put undue pressure on workers' or endanger their physical and mental health), as well as its non-discriminatory nature. In short, a form of control that is no longer limited – as in the GDPR – to the use of data and processing that affects the construction of the person's identity (or his or her potential to access services, as is the case in the area of creditworthiness processing), but extends to the protection of the worker's material positions in the online or onlife workplace. A labour declination of the obligations of information and human control that, of course, will have to be built and filled with content in the near future.

This is a perspective that also seems to be reflected in the proposed Artificial Intelligence Regulation (also known as the AI Act proposal),[23] especially in the version approved by the European Parliament,[24] which introduced several amendments to the Commission's draft, inspired by a more anthropocentric vision of AI. Of particular importance is the provision in the new Art 29, para 1-*bis*, which also imposes an obligation on the operator to establish human supervision of the system, ensuring that the persons in charge of such supervision are competent, suitably qualified and trained, and have the necessary resources to ensure effective supervision of the system. Another important innovation concerns the strengthening of the collective dimension of information obligations: the new para 5-*bis* of Art 29 introduces specific obligations for the operator/employer with regard to (a) consultation of workers' representatives and (b) information of workers *uti singuli*. According to the wording of the new paragraph, prior to the operation or use of a high-risk IA system in the workplace, the operator shall consult the workers' representatives with a view to reaching an agreement in accordance with Directive 2002/14/EC and shall inform the workers concerned that they will be subject to the system. This wording expresses a precise regulatory choice that should lead Member States to face up to the need not only to inform, but also to promote real negotiation with trade unions, thus stimulating, at least in this area, the development of participatory practices and institutions that allow us to look at the world of artificial intelligence with a greater dose of optimism.

[23] COM (2021) 206 of 21 March 2021, Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts.

[24] Following the approval of the position of the European Parliament in plenary session on 14 June 2023 (with 499 votes in favour, 28 against and 93 abstentions), inter-institutional negotiations began in July 2023 under the Spanish Presidency of the Council. On this last version see the extensive considerations of A. Alaimo, 'Il Regolamento sull'Intelligenza Artificiale: dalla proposta della Commissione al testo approvato dal Parlamento. Ha ancora senso il pensiero pessimistico?' *federalismi.it*, 18 October 2023, 25.

V. The Transposition of Directive 2019/1152 into the Italian System: The So-Called 'Transparency Decree' Between Stop-and-Go

Last year, the Italian legislature adopted decreto legislativo 27 June 2022 no 104, the so-called 'Transparency Decree'[25], which transposed Directive 2019/1152 on transparent and predictable working conditions. This is a very complex regulation that rewrites decreto legislativo 26 May 1997 no 152, and with it the right to information on the essential elements of the employment relationship and working conditions, and the related protection of personnel working in private companies and public administrations. Various types of information must be communicated by the employer to each employee in a clear and transparent manner, in paper or electronic form, and must be kept and made accessible to the employee, with proof of transmission or receipt being kept for a period of five years from the end of the employment relationship.

Of particular interest in relation to the subject matter of this paper is the provision (Art 4, para 8) that introduces into the aforementioned decreto legislativo 26 May 1997 no 152 a new Art 1-*bis* entitled 'Further information obligations in the case of the use of automated decision-making or monitoring systems'. It provides – extending the wording of Directive 2019/1152 and partly anticipating the content of the proposed directive on platform work – that the public and private employer is obliged to inform the employee of the use of automated decision-making or monitoring systems designed to provide information relevant to the recruitment or assignment, management or termination of the employment relationship, the assignment of tasks or duties, as well as information relating to the monitoring, evaluation, performance and fulfilment of the contractual obligations of employees.

Unlike the proposal for a directive on platform work itself, however, the scope of the 'Transparency Decree' is much broader from the point of view of scope, as it concerns not only platform workers, but also all forms of smart working, collaboration, as well as 'traditional' subordinate work directed or monitored by computer systems.

It has been rightly pointed out that the notion of 'automated decision-making or control system' is so broad as to cover both systems based on a 'traditional'

[25] M.T. Carinci et al, 'Obblighi di informazione e sistemi decisionali e di monitoraggio automatizzati (Art 1-*bis* "Decreto Trasparenza"): quali forme di controllo per i poteri datoriali algoritmici?' *Labor*, 7 (2023); G.A. Recchia, 'Condizioni di lavoro trasparenti, prevedibili e giustiziabili: quando il diritto di informazione sui sistemi automatizzati diventa uno strumento di tutela collettiva' 9 *Labour & Law Issues*, 1 (2023); A. Tursi, 'Decreto trasparenza: prime riflessioni – 'Trasparenza' e 'diritti minimi' dei lavoratori nel decreto trasparenza' *Diritto delle Relazioni Industriali*, 1 (2023); A. Viscomi, 'Noto analogico e ignoto digitale. Brevi note su alcuni aspetti del 'Decreto Trasparenza' *ilforovibonese.it*, 7 December 2022; F. D'Aversa and M. Marazza, 'Dialoghi sulla fattispecie dei «sistemi decisionali o di monitoraggio automatizzati» nel rapporto di lavoro (a partire dal decreto trasparenza)' *giustiziacivile.com*, 11 (2022); A. Allamprese and S. Borelli, 'L'obbligo di trasparenza senza la prevedibilità del lavoro. Osservazioni sul decreto legislativo n. 104/2022' *Rivista giuridica del lavoro*, 671 (2022); G. Proia, 'Trasparenza, prevedibilità e poteri dell'impresa' *Labor*, 641 (2022).

algorithm – understood as a finite sequence of instructions defined in such a way as to be executed mechanically and to produce a given result – and artificial intelligence systems that operate through an automatic learning process; this is because the aforementioned Art 1-*bis* expressly refers not only to 'categories of data and the main parameters used for programming', but also to 'training' the automated system.

In addition to the general clarification of the areas covered by the information, para 2 of the new Art 1-*bis* provides that, in order to comply with the above-mentioned obligations, the employer must provide the employee, before the start of the employment relationship, with the following additional information (b) the purposes and objectives of such systems; (c) the logic and operation of such systems; (d) the categories of data and the main parameters used to program or train them, including performance assessment mechanisms; (e) the control measures adopted for automated decisions, any correction processes and the quality management system manager; (f) the level of accuracy, robustness and cybersecurity and the metrics used to measure these parameters, as well as the potentially discriminatory impact of these metrics. In addition to these information obligations, para 3 of the aforementioned Art 1-*bis* also provides for a broad right of access to such information: in fact, it is provided that the employee, directly or through the company or territorial trade union representatives, has the right to access the data and to request further information on the aforementioned information obligations at any time. Decreto legislativo 27 June 2022 no 104, in turn, provides in its commentary that the employer or the client is obliged to provide the requested data and to reply in writing within thirty days of the request.

The subsequent paras of the new Art 1-*bis* then provide for coordination measures with the GDPR,[26] as well as a very strict timeframe for the communication of changes in contractual conditions, providing for the right of workers to be informed in writing, at least 24 hours in advance, of any change affecting the information previously provided and entailing a change in the conditions of performance of the work. Finally, para 6 of the aforementioned Art 1-*bis* reiterates the 'linguistic' and structural requirements of the information, stipulating that this information must be provided by the employer or client to the workers in a transparent manner, in a structured, commonly used and machine-readable format. This is, as we have said, a 'third generation' right to information, based on the obligation of the employer to transform and convert the language and logic of the machines into a language that can be understood by human beings, rationally explained and, consequently, verifiable in terms of its potential impact on all the rights established by labour legislation for the protection of the person

[26] On coordination with the provisions of the GDPR, see also the explanatory note provided by the Garante per la protezione dei dati personali, 'Questioni interpretative e applicative in materia di protezione dei dati connesse all'entrata in vigore del d. lgs. 27 giugno 2022, n. 104 in materia di condizioni di lavoro trasparenti e prevedibili (c.d. "Decreto trasparenza")', 24 January 2023, available at https://tinyurl.com/5f9h8phm (last visited 10 February 2024).

involved in the employment relationship.

The same information and data must also be sent to the trade union representatives in the company or to the single trade union representation and, in the absence of such representatives, to the territorial branches of the trade union confederations that are relatively more representative at national level. The Ministry of Labour and Social Policy and the National Labour Inspectorate may request the communication of and access to the same information and data.

It is clear that the above-mentioned provisions represents a real race forwards by the Italian legislator, which has tried to define an information obligation that goes as far as requiring an explanation of the logic and operation of automated systems, the control measures adopted for automated decisions, the possible correction processes and the 'human' manager of the quality management system, the metrics and impact assessments of possible discriminatory effects.

The right of access, information and clarification of the logic and operation of automated systems is granted to the individual, but also to the company or local trade union representatives, who can then play an active role in verifying the comprehensibility of the information provided. In order to provide workers with the necessary information, the employer must analyse in detail the automated systems in use, describing, for example, their logic and operation, data and programming parameters, potential discriminatory effects, etc. The employer must therefore take the necessary steps to ensure that the information provided is comprehensible to the individual. The employer must furthermore draw up a list of the automated decision-making or automated monitoring tools used and, for each tool, make legible and explain the purpose of use, the personal data processed, the profiles of the employment relationship concerned and the measures envisaged to ensure the security and reliability of the system. In the case of particularly invasive tools, the employer must also define the logic of the system, the data and parameters used to program it, the evaluation mechanisms and control measures, the parameters for evaluating the system and its potentially discriminatory effects: all these elements must therefore be made explicit in a preventive logic. Once the relevant information has been identified, it must be 'linguistically translated' into a structured and commonly used format and made usable by automated tools. As mentioned above, the information burden is further proceduralised, as the decree also provides for the obligation to share information with third parties (company trade union representatives and, upon request, the Ministry of Labour and the National Labour Inspectorate, which has control and sanctioning powers).

These are new and undoubtedly disruptive provisions, which perhaps should have been drafted more precisely, especially as their application could be a precursor to litigation, due in particular to certain terminological uncertainties contained in the provision itself. In fact, the reporting obligations referred to concern – by express legislative provision – the decision-making or monitoring systems, which are not precisely defined, which may provide, on the one hand, 'relevant'

information for cases of recruitment, assignment, management or termination of employment contracts, assignment of tasks or duties, and, on the other hand, information 'affecting' the monitoring, assessment, performance and fulfilment of the contractual obligations of workers. This is therefore a much broader scope than that of the proposal for a directive on platform work: in this case, the disclosure obligation also concerns highly digitalised 'traditional' companies that in fact use real forms of algorithmic management to manage their workforce.

In an attempt to avoid possible problems of interpretation, the Ministry of Labour itself tried to clarify the scope of application of the aforementioned Art 1-*bis* by issuing circolare 20 September 2022 no 19, in which it states that, on the basis of the knowledge and experience currently available, it can be considered that automated decision-making or monitoring systems are those instruments which, through the activity of collecting and processing data, carried out by means of an algorithm, artificial intelligence, etc, are capable of generating automated decisions. In the hypothesis described, according to the Circular, the obligation to provide information would also exist in the case of merely incidental human intervention. For example, according to the Circular, the obligation to provide information would exist in the following cases: recruitment or assignment through the use of chatbots during the interview, automated profiling of candidates, screening of curricula, use of software for emotional recognition and psycho-aptitude tests, etc; management or termination of the employment relationship. Management or termination of the employment relationship with automated assignment or cancellation of tasks, duties or shifts, definition of working hours, productivity analysis, determination of remuneration, promotions, etc., through statistical analysis, data analysis or machine learning tools, neural networks, deep learning, etc; use of tablets, digital devices and wearables, GPS geolocalisation, facial recognition systems, rating and ranking systems, etc.

The Italian legislator's rush forward has provoked some very harsh criticism from Italian doctrine, which has not failed to point out how this legislation, precisely because of its broad wording, is structurally open to the risk of being translated into practices of mere 'informational mannerism',[27] that is to say, forms of bureaucratisation of information developed by consultants, which will do little to help workers or their representatives understand how automated decisions were made, ie to forms of bureaucratisation of information developed by consultants, which will be of little or no help to workers or their representatives in understanding how automated decisions are made. But above all, it is unreasonable, and as such to be repealed, as it is considered that the legislator has attempted to solve complex phenomena with a simple (even too simple, so much so as to be incomprehensible and unworkable), but mistaken rule, and with an excessive sanctioning approach,

[27] M. Faioli, 'Giustizia contrattuale, tecnologia avanzata e reticenza informativa del datore di lavoro. Sull'imbarazzante 'truismo' del decreto trasparenza' *Diritto delle Relazioni Industriali*, 45 (2023).

without taking into account the changing European framework of regulation of artificial intelligence, data governance, digital platforms and digital markets/services.

The excessively ungenerous criticism levelled against Art 1-*bis* of the 'Transparency Decree' was such, evidently, that it led to a partial about-face a few months after the decree's approval: the so-called 'Labour Decree' (decreto legge 4 May 2023 no 48, converted into legge 3 July 2023 no 85), with a view to easing the burden on companies, has in fact also intervened on the 'Transparency Decree' by limiting the employer's obligation to provide information to cases where the systems in question are 'fully' automated. With the addition of this adverb, which limits the disclosure obligations to 'fully' automated systems, the intention was therefore to intervene in an attempt to lighten the burden on companies.

Although the legislator's intention to take a step back on this point is clear, it does not appear that the transparency machine can be completely rewound.[28] In the face of an obligation to provide information, and therefore a right of the employee or trade union to know the logic of the operation of automated systems, it does not seem that the employer can escape the obligation to provide information simply by claiming that it is not a fully automated system, but rather must endeavour to prove (to the individual or trade union organisation) where and how the element of human control or decision-making intervenes.

In effect, therefore, the employer's duty to provide information may result in a partial reversal of the burden of proof on the employer, who will have to show, in the event of litigation, where the human element intervenes and how it is able to influence the automated decision-making process. In part, this means that the employer will also have to demonstrate and make clear to the judge in any dispute how the automated decision-making or monitoring process actually works.

In other words, either the employer proves the human intervention (to those who request it: the employee concerned, the trade union or the supervisory bodies), of course also explaining its effects and thus partially revealing the logic of its operation, thus evading both the information obligations of Art 1-*bis* of the 'Transparency Decree' and the obligations of Art 22 of the GDPR. Or where the employer fails to provide such evidence – the verification of which is drawn under the jurisdiction of the Employment Tribunal – the door is opened to a finding of a violation of the 'Transparency Decree', but also to a possible violation of Art 22 GDPR.

Moreover, in the Italian system, the labour judge's control could also extend to the possible violation of Art 4 of the Workers' Statute,[29] which allows the use of information collected through tools used by the worker to perform work and

[28] It also underestimates the scope of the attempted downsizing of obligations implemented with the 'Decreto lavoro' also E. Dagnino, 'Modifiche agli obblighi informativi nel caso di utilizzo di sistemi decisionali o di monitoraggio automatizzati (art. 26, comma 2, d.l. n. 48/2003)', in Id et al eds, *Commentario al d.l. 4 maggio 2023, n. 48 c.d. "decreto lavoro"* (Modena: Adapt University Press, 2023).

[29] Legge 20 May 1970 no 300.

tools for recording access and attendance for all purposes related to the employment relationship, provided that the worker is given adequate information on how to use the tools and carry out the checks and in compliance with the provisions of the GDPR.

If the employer could not prove that a particular automated processing was not fully automated (because it was integrated with human supervision), it could not even use the information obtained against the employee for disciplinary purposes.

Thus, far from being an unnecessary or unreasonable provision, the provision of the 'Transparency Decree', even in the wording corrected by the so-called 'Labour Decree' (which, as mentioned above, limits the obligation to provide information to fully automated systems), opens the door to a new form of potential control over the exercise of employer powers managed by and with the help of intelligent machines; but, above all, it may lead to a partial reversal of the burden of proof of the not fully automated nature of the decision-making process or, in any case, of the not merely 'fictitious' nature of human control.

As a result, in the event of a dispute, the failure to provide the information referred to in Art 1-*bis* of the 'Transparency Decree' will have to be expressly proven by the employer, who, in the event of a request by the employee or the trade unions, will not be able to limit itself to invoking the inapplicability of the aforementioned article, but will have to prove the real and effective existence and occurrence of human intervention.

These are provisions that undoubtedly confirm how, in the near future, the prospects for the control of automated employer powers will also and above all pass through transparency, information and explanation, in short, through a procedural-explanatory logic that will oblige employers to equip themselves with real figures of explainers, transparency analysts, explainability strategists. Figures who can explain the functioning of automated decision-making processes, machine learning, the underlying logic and the management implications will therefore be increasingly necessary. All of this through a re-humanisation of language that makes it possible to understand the generative process of the decision and that will inevitably open up spaces of control over what the algorithms decide and the repercussions in terms of compression of the 'traditional' rights of the working person. The right to information – and the transparency that goes with it – will thus increasingly take on the role of a precondition (necessary, but obviously not sufficient) for the effectiveness of the rules laid down by the system to protect workers. It goes without saying that this unravelling process could also be very complicated: for example, in the case where the supplier is actually the reseller of a solution produced by others, so it may not be in possession of the details necessary to fulfil the information obligation required by law. The disclosure process could also be very complicated in the case where the employer is a small company, where the value of the contract and the bargaining power of the company would not allow it to easily obtain the information necessary to reduce the information

asymmetries between employer and employee, thus making the employer's disclosure obligations an impossible obligation to comply with, if not at an unacceptable cost.

VI. The Italian 'Transparency Decree' 'Taken Seriously': The Driving Role of Trade Unions and the First Jurisprudential Applications

Despite of the harsh criticism of the 'Transparency Decree' one thing is certain: trade unions have 'taken it seriously' and have therefore launched a series of legal initiatives aimed at obtaining the effectiveness of the information that employers must provide on fully automated decision-making systems.

In addition to recourse to the judicial remedy aimed at the recognition of the employment status of platform workers, or the ascertainment of actual discriminatory practices implemented by automated decision-making systems, trade unions have in fact initiated a litigation strategy aimed at countering the opacity of the algorithm.

This represents a partial novelty in the Italian system, on which a brief introduction should be made. Art 80 GDPR provides for two forms of representation of data subjects: the first according to which the data subject shall have the right to mandate a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf, to exercise the rights referred to in Arts 77, 78 and 79 GDPR on his or her behalf, and to exercise the right to receive compensation; the second provides the possibility that Member States may provide that anybody, organisation or association, independently of a data subject's mandate, has the right to lodge a complaint with the supervisory authority and to exercise the rights referred to in Arts 78 and 79 if it considers that the rights of a data subject under the GDPR have been infringed as a result of the processing.

Unlike other countries, however, the Italian legislature has only transposed the hypothesis sub a) provided for in the GDPR, admitting that collective subjects can act as representatives of the victims of the regulatory violation. However, the same legislator has not transposed the hypothesis sub b) provided for in the GDPR, which would have allowed collective subjects to act in court even in the absence of a specific mandate from the victims of the violation. The national legislation,[30] moreover, with an implementation regulation that is perhaps too restrictive compared to the broad provision of the GDPR, admits the legitimacy to act only of 'third sector entities' among which, by express legal provision, trade unions are

[30] See decreto legislativo 1 September 2011 no 150, art 10, para 5.

not included. Although, therefore, the GDPR could have offered Italian trade unions the possibility of intervention to protect workers' data, the Italian regulation has, from this point of view, mortified this expectation.[31]

The adoption of the 'Transparency Decree', which, as mentioned above, in a decisive 'labour' shift on the issue of transparency (in Art 1-*bis*), explicitly grants Italian trade unions the right to access data and request information on the functioning of fully automated decision-making systems. It is therefore a broader provision than that foreseen in the Italian provisions implementing the GDPR, but also much broader than that foreseen in the proposed Directive on platforms, since it applies precisely to all employers. By 'duplicating' the information channels, such discipline places in the hands of the trade union organisation a conspicuous dowry of information that can be used, for the benefit of the individual worker, to verify the legitimacy of a subsequent act of management of the employment relationship, but also to protect the collective interest of the entire group of workers concerned, as a basis for negotiation. This provision therefore opened the way for the union to take direct legal action to enforce its right to information. This is a path that the Italian trade unions have taken with great determination and which, in the course of a year since the new rules came into force, has produced a first jurisprudential orientation that seems to have 'taken seriously' the obligations of transparency and the rights of trade unions to understand how automated decision-making systems work.

The three cases[32] so far have been brought under Art 28 of the Workers' Statute, which provides special protection for trade unions complaining about anti-union conduct by the employer. In the three cases dealt with, therefore, the dispute arose from specific requests by the union to obtain information from some digital work platforms operating in the food delivery sector about the operation of the automated systems used by the employer, which remained unanswered.

The cases cited arise as 'occasions' within a broader litigation strategy aimed at obtaining a ruling, first and foremost, on the contractual status of Italian riders; unlike other litigation initiatives already undertaken, on these occasions the 'gateway' to protections is the violation of the 'Transparency Decree' and thus the failure to inform the union on how the automated systems used by the platforms operate.

In particular, according to the first judgment of the Court of Palermo of 31 March 2023, Uber Eats had in fact refused to provide the information requested by Filcams-CGIL, considering that the latter trade union organisation did not have the right to request the information provided for in Art 1-*bis* of the 'Transparency Decree'. The labour judge confined himself to verifying, on the one hand, the

[31] G. Gaudio, 'Algorithmic management, sindacato e tutela giurisdizionale' *Diritto delle Relazioni Industriali*, 30 (2022).

[32] Tribunale di Palermo 31 March 2023; Tribunale di Palermo 20 June 2023; Tribunale di Torino 5 August 2023, all available at https://www.wikilabour.it/segnalazioni/sindacale/.

applicability of the aforementioned discipline to platform workers who enjoy certain protections 'typical' of subordinate employment; on the other hand, the representativeness of the trade union requesting the information; and, on the other hand, the existence of anti-union behaviour on the part of the platform that had refused to provide the information. In this case, therefore, Art 1-*bis* served as a 'picklock' to confirm the discipline applicable to riders and, consequently, the role of the union subject to it in protecting the demands of the workers concerned.

On the contrary, the case dealt with by the Court of Palermo, which ended with the judgment of 20 June 2023, was more explicit, coming after the amendment of the 'Work Decree', which, as mentioned above, limited the information obligations under Art 1-*bis* only to cases of 'fully' automated systems. In this case, the platform Foodinho Srl, a company that manages the home delivery services of the international brand Glovo in Italy, although it also contested the legitimacy of the requesting trade union, had in any case fulfilled its information obligations, in compliance with commercial secrecy. However, the information provided was not considered exhaustive by the trade union, which asked for much more detailed information 'on the algorithmic impact assessment', including the implementation plans for the various elements and parameters used, their interaction and weighting, etc.

This was information that, according to the platform, could not be provided because it was covered by business secrecy; at most, the information that the platform was willing to provide consisted of 'further clarifications on the cases in which the behaviour would lead to the presumption of a lack of interest in the platform' and therefore to the disconnection of the employee; the development of a criterion that would be 'subsidiary' to those already used by the system in use to match orders with employees; and further general clarifications on the security of the system, without however compromising 'the security of the entire IT architecture'. In the above-mentioned judgment, the Court of Palermo was confronted with a number of delicate issues, also in relation to the new text of the Regulation as amended in 2023. In this respect, the Court of Palermo first raised the problem of clarifying what is meant by 'fully automated systems', specifying that they

> 'must be understood as systems that do not provide for human intervention in the final stage of decision or control, regardless of any human intervention in the preceding stages, such as mere data entry, however processed'.

In the present case, the platform had not demonstrated human intervention (it had only alleged it, but had not proved it) and, in any case, it had not demonstrated that human intervention was involved in the final phase of the decision, with human intervention being limited to the mere input of data and the activation of the system, which was then entirely managed by 'algorithmic or computerised automatisms'. In particular, the platform had limited itself to depositing a document

entitled 'Transparency Disclosure Pursuant to Legislative Decree no 104/2022', which did not reveal the weights, scores, parameters and priority criteria used to profile the worker and subsequently allocate the slots. All of this should have been disclosed, with the sole exception of the 'source codes and mathematical formulae used', which are covered by industrial and commercial secrecy. In the absence of effective information, the judge found that the platform's behaviour was anti-union.

The same condemnation was finally pronounced by the Court of Turin on 5 August 2023, again against Foodinho Srl: in this case, too, the Court of Turin dealt with the concept of 'fully automated system' as a decision-making system that operates without human intervention. Human intervention which, in this case, according to the judge, was not only not proven, but – as can be read in the folds of the reasoning – not even demonstrable, given that these are often very complex operations (the allocation of orders) that the system carries out every ten seconds, in other words in a 'time lapse that objectively excludes any possibility of human intervention in the decision'.

The fully automated nature of the decision-making mechanism is also established – with the same logic – for the attribution of the excellence score, for facial recognition, for the cancellation of the work shift upon the occurrence of certain events, etc. Of particular interest in the above-mentioned judgment is the passage in which the labour judge questions the accuracy of the information provided to the workers, which, for the purposes of assigning the score of excellence, assigns relevance to the actual willingness of the couriers to use the platform, recognising priority access to the calendar for those with the best score; in fact, according to the judge, this system is 'presented' to the workers as if the platform played the role of a mere intermediary between demand and supply of services between the three users of the platform: customers, companies and couriers.

This is an incorrect reconstruction and presentation of the information, since in reality the platform is an employer that carries out the profiling of personal data in order to analyse, evaluate and predict the performance of the riders and their reliability, and therefore, on the basis of the profiling, activates a fully automated decision-making process. Despite the fact that the platform had explained how the scores worked, the Court of Turin considered that the information notice itself was not exhaustive with regard to a number of profiles (the specific measure of the increase/decrease of the score following negative or positive feedback, the absence of measures to parameterise the criteria for the score of excellence, excluding possible discrimination, etc).

VII. Is It Possible to Open the Black Box? Probably Not, but It Is Useful to Take a Look Inside and Possibly Bargain for Its Contents

The European regulation and the Italian case of the transposition of the directive on predictable and transparent conditions, with the extension of the

transparency rules to automated systems, allow some reflections.

In labour law, however, transparency, and with it language and communication, play an enabling role, allowing the worker not only to check how his or her work identity is constructed (whether he or she is an unproductive worker, potentially negligent, etc), but also to open up spaces for a subjective and subjective assessment of the work identity. It also opens up spaces for a conscious regulatory subjectivation that moves in spaces of determination of contractual conditions that can be foreseen; and, not least, such as to act as a gateway to a potential control of the employer's powers and the legitimacy of acts of management of the labour relationship that are 'dehumanised', but above all based on logics that are not always comprehensible to human beings.

As can be seen from a reading of the decisions of the Italian courts analysed above (of Palermo and Turin), transparency in the exercise of employer powers is not an end in itself. It has the function of 'revealing' the real nature of the relationship (whether subordinate or not), as well as the potential discriminatory effects in the exercise of employer powers. This is a need that goes beyond the complex world of platforms: understanding how an automated decision-making system works is, in fact, functional to ensuring the effectiveness of a range of 'typical' labour regulations. Just think how important it can be for the worker to understand how he is being monitored by the machine or instrument he is using, ie by the tools needed to perform the work: just to give a brief example, it may be useful to recall that in Italy, Art 4 of the Workers' Statute provides that the data obtained by the employer through the tools used to perform the work may be used for all the effects of the employment relationship (promotions, disciplinary sanctions, etc), provided that the worker is given the opportunity to understand how the data is being used; provided that the employee is duly informed about the use of the tools and the controls to be carried out, and in compliance with the provisions of the GDPR. An information notice which, in the light of article 1-*bis* of the 'Transparency Decree', must be very detailed at this point, on pain of jeopardising the legitimacy of any disciplinary power exercised and/or dismissal ordered against the worker for facts revealed as a result of the fully automated monitoring.

Although the regulation on the transparency obligations of automated systems seems to have a limited impact on the rights of the individual workers involved, it is possible to consider that the real effect of transparency is to reinforce a whole series of already existing labour regulations, especially since, as mentioned above, the Italian legislator (unlike the proposal for a directive currently being approved at European level) has dictated a regulation that applies not only to work platforms but to all private and public employers.

To take another example, it is also possible to recall how the issue of automated decisions has recently been used to identify the 'real' employer in labour contracts:

according to a recent strand of Italian jurisprudence,33 where management power is entirely entrusted to automated systems that tell the worker what to move, where to move it and where to take it, the 'real' employer is presumed to be the client. Even in these cases, therefore, transparency and the 'unveiling' of the automated decision-making process can serve to protect workers employed under a fictitious service contract, which in all likelihood conceals a real agency relationship. In addition to this function of 'unveiling' the real dynamics of the employment relationship, the issue of transparency opens up a space for reflection on the potential scope for reviewing the employer's powers in terms of rationality, reasonableness, non-arbitrariness and non-discrimination.

The more complex the digitalised work contexts become, the more transparency, communication, information and language become tools for creating an 'environment of trust', for reducing opportunistic behaviour, based on the awareness of the worker's difficulties in getting to know the management data concerning him and its rapid processing, for facilitating predictable work management, but also tools for enabling potential forms of control over the employer's actions and their intrinsic rationality, obscured by the black box. A black box that perhaps cannot really be opened, but which at least – even at the cost of forcing it – one can try to glimpse, in a glimmer of light, the content to be scrutinised in terms of rationality, the reasonableness of the exercise of power, the mystification of reality, and so on.

From this point of view, the information obligations on fully automated systems would perhaps have deserved to be included in a specific and more organic regulation on the use of such systems. A regulation that goes beyond mere transparency to become a real 'system' regulation, of at least the same dignity as that contained in Art 4 of the Workers' Statute, which originally provided for audiovisual controls in the workplace.

On the other hand, as the Italian DPA itself points out in the note 'First indications on Legislative Decree no 104 of 27 June 2022, the so-called "Transparency Decree" ' of 24 January 2023, the links between the use of automated systems and the limits already provided for in the Workers' Statute are obvious: even in the case of automated systems, the existence of the conditions of lawfulness established by Art 4 of the Workers' Statute must always be verified. In fact, even in the case of automated systems, the existence of the conditions of legality set out in Art 4 of the Workers' Statute must always be verified, as well as compliance with the provisions of Art 8 of the same statute, which prohibits the employer from acquiring and, in any case, processing information and facts that are not relevant to the assessment of the employee's professional aptitude or, in any case, that relate to the employee's private sphere. Given the already significant points of contact between the new information obligations and Art 4 of the Workers' Statute,

33 See Tribunale di Padova 16 July 2019 no 550 and Tribunale di Bologna 3 marzo 2023 no 126 available at www.dejure.it.

precisely in order to avoid the difficulties of translating the language of machines into a language understandable by humans, it would be desirable for employers to proceed to very detailed information of the trade unions, if not to real forms of prior negotiation of the algorithmic system with the trade unions themselves (for example, precisely through the authorisation agreements referred to in Art 4 of the Workers' Statute). In other words, the negotiation of the algorithm, far from remaining a mere hypothesis, can serve as a real instrument capable of guaranteeing the same employer party against any future litigation on the matter.

In fact, we can only briefly recall the positive experience of negotiations between the trade unions and Afiniti LTD, an American multinational data and software company founded in 2005 that focuses on the development of artificial intelligence for use in call centres. This company has developed an algorithm that, by combining artificial intelligence and big data, predicts in real time the behaviour of the person calling a company's call centre. The system searches for the most appropriate agent to interact with that call. Not the first available operator, as is the case with more traditional inbound queue management systems, but the person who is most 'likeable', closest to the caller's expectations and who expects a comprehensive response. In other words, the software manages the operator by directing him to answer the call, 'selecting' him on the basis of personal characteristics that make him 'preferable' to other operators. It is well known that in Italy the dissemination of such software by companies such as Enel, Tim and Wind was preceded by an agreement between some of these companies and the trade unions, in accordance with Art 4 of the Workers' Statute. The main aim of this agreement was to ensure that the information 'captured' by the algorithm would remain anonymous in any case, and therefore not usable for all purposes of the employment relationship.

Collective bargaining and trade union initiatives can be the most effective means of implementing legal safeguards against the risks associated with algorithmic management.[34] Collective agreements can offer solutions for particular challenges in this regard, also at the sectoral and company level. They can cope with these challenges fairly flexibly by taking into account the interests of workers and employers. Collective agreements can also tailor the general principles laid down in legislation and apply them in specific contexts. Prior negotiation of automated systems, their logic and operation, could therefore contribute to a prior disclosure, in accordance with the principle of good faith, of the problems of opacity of the algorithm. Upstream bargaining, which could therefore have the effect of reducing downstream information obligations prior to use, since the operating logic could be considered to have already been partly explained, negotiated and therefore made comprehensible by the 'words' and explanation of the union agreement itself.

[34] See V. De Stefano and S. Taes, 'Algorithmic management and collective bargaining' 29 *Transfer: European Review of Labour and Research*, 1, 21-36 (2023).