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Algorithmic transparency, union information rights and strategic litigation.

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Abstract

The paper aims to analyse the new spaces that the introduction of AI opens up for worker participation within the enterprise. In particular, the paper focuses on the information and consultation rights of trade union recently introduced by national and European legal systems, with special reference to the principle of algorithmic transparency introduced by Italian law (Art. 1-bis, Legislative Decree No. 152 of May 26, 1997) and the collective information rights provided for by Regulation (EU) 2024/1689, which establishes harmonized rules on artificial intelligence, and by the Directive of the European Parliament and Council on the improvement of working conditions at work through digital platforms. Finally, the paper contains critical reflections on the aforementioned regulatory interventions and outlines possible future developments of worker participation in the company.

Keywords: Artificial Intelligence; Trade unions; Strategic litigation; Algorithmic transparency; Labour Law.

1. Introductory notes and positioning of the topic.

In recent years, AI has made inroads into all spheres and sectors of our society and, of course, into the world of work as well. While it is not possible here to give an account of all the potential spillovers of AI in the world of work, it is sufficient to point out that AI can have a major impact on the methodologies of production of goods and delivery of services, on occupational levels[1] and on the ways in which traditional employer powers are exercised,

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[1] Some studies have focused on the risk of job loss due to the advent of AI in the world of work (*inter alia*, *see:* Frey C.B., Osborn M.A., *The Future of Employment: How Susceptible are Jobs to Computerization*, Working Paper, Oxford Martin School, Oxford, 2013) while others have emphasized the possibility that AI will lead to an increase in jobs (*inter alia*, *see*: Autor D., *Why Are There Still So Many Jobs? The History and Future of Workplace Automation*, in *Journal of Economic Perspectives*, 3, 2015; OECD, *The Risk of Automation for Jobs in OECD Countries A Comparative Analysis,* OECD Social Employment and Migration Working Papers, 189, 2016; OECD*, Automation,*

paving the way for a possible de-humanization of direction, control and disciplinary powers which can be exercised by a robot, software or algorithm,[2] with all the risks that follow in terms of de-humanization of the employment relationship and protection of the dignity of the worker.

Well, in the face of a phenomenon with such an impact on labor law, both the national and the European Union legal systems, through various regulatory measures of which a brief analysis will be proposed, have assigned to the trade union a function of external control over the use of AI in labor relations. This control is ensured through the provision of specific information obligations placed on employers who intend to introduce or modify AI systems in the management of labor relations.

This is, on closer inspection, not a new legislative choice. In fact, the legislator, when faced with cases of particular concern for the rights and freedoms of workers[3] or for occupational levels and social resilience,[4] has often seen fit to assign such a control function to the union, introducing specific procedures for union information and consultation aimed, on the one hand, at proceduralizing the exercise of certain employer powers and, on the other hand, at implementing the principle of workers' participation in the management of enterprises set forth in Article 46 of the Constitution.

Before turning to an examination of these new obligations, a premise on union information and consultation rights seems a must.

skills use and training, OECD Social Employment and Migration Working Papers, 202, 8, 2018; Kucera D., *New automation technologies and job creation and destruction dynamics*, ILO Employment Policy Brief, 12 May 2017; Estlund C., *What Should We Do After Work? Automation and Employment Law*, in *The Yale Law Journal*, 128, 254, 2018). The *Future of Jobs Report* 2025, released on January 8, 2025 by the World Economic Forum, reveals that the rate of job disruption will be 22 percent by 2030, creating 170 million new roles and displacing 92 million, a net increase of 78 million jobs. Technological advances, demographic shifts, geoeconomic tensions and economic pressures are the key drivers of these changes, reshaping industries and occupations around the world.

[2] The literature on the point is extensive. *Inter alia*, *see*: De Stefano V., "*Negotiating the algorithm": automation, artificial intelligence and labor protection*, in *Comparative Labour Law and Policy Journal*, 41, 2019, 8; Aloisi A., De Stefano V., *Il tuo capo è un algoritmo*, Tempi Nuovi, Bari, 2020; Sartori A., *L'impatto dell'intelligenza artificiale sul controllo e la valutazione della prestazione, e sull'esercizio del potere disciplinare*, in *Lavoro Diritti Europa*, 3, 2024; Peruzzi M., *Intelligenza artificiale e tecniche di tutela*, in *Lavoro e diritto*, 2022, 542; Peruzzi M., *Intelligenza artificiale e lavoro. Uno studio sui poteri datoriali e tecniche di tutela*, G. Giappichelli, Turin, 2023, 9; Ponte F.V., *Intelligenza artificiale e lavoro. Organizzazione algoritmica, profili gestionali, effetti sostitutivi*, G. Giappichelli, Turin, 2024, 54; Gaudio G., *Algorithmic management, poteri datoriali e oneri della prova: alla ricerca della verità materiale che si cela dietro l'algoritmo*, in *Labour & Law Issues*, 6, 2, 2020, 22; Zappalà L., *Informatizzazione dei processi decisionali e diritto del lavoro: algoritmi, poteri datoriali e responsabilità del prestatore nell'era dell'intelligenza artificiale*, in *WP Massimo D'Antona.it*, 446, 2021; Zappalà L., *Management algoritmico (voce)*, in Borelli S., Brino V., Faleri C., Lazzeroni L., Tebano L., Zappalà L., *Lavoro e tecnologie. Dizionario del diritto del lavoro che cambia*, G. Giappichelli, Turin, 2022, 150; Bano F., *Algoritmi al lavoro. Riflessioni sul management algoritmico*, in *Lavoro e diritto*, 2024.

[3] Reference is made, *inter alia*, to the provision in Article 4 of Law 300/1970 according to which audiovisual equipment and other instruments from which the possibility of remote control of workers' activities is also derived may be used exclusively for specific purposes indicated by the rule and subject to a collective agreement entered into by the unitary union representation or company union representatives.

[4] The reference goes to the procedures for union information and consultation provided by the law in the event of staff reductions (Articles 4 and 24 of L. 223/1991; Articles 1, paragraphs 224 to 238, of L. 234/2021), transfer of undertaking or part of it (Art. 47 of L. 428/1990), access to social shock absorbers (Legislative Decree 148/2015) as well as disclosure obligations to the union placed on employers who use *non-standard* contract types under Legislative Decree 81/2015.

Among the various instruments of workers' participation in the management of enterprises,[5] which can be adopted in order to implement the constitutional principle set forth in Article 46 of the Constitution,[6] workers' information and consultation rights[7] have often been regarded as "weak" forms of involvement,[8] of lesser intensity than obligations to contract and *veto* rights,[9] due to their nature as purely preventive instruments,[10] aimed at exercising mere power to influence the course of the decision, but not the substance of the decision.

The weakness of employee involvement, in particular, would lie in the fact that information and consultation obligations, yes, force the employer to proceduralize the making of its decisions,[11] taking into account even interests other than its own,[12] but they do not determine any effective compression of its decision-making autonomy, unlike the

[5] On the topic of worker participation in the management of enterprises, the following more recent monographs are worth noting: Pedrazzoli M. (ed.), *Partecipazione dei lavoratori e contrattazione collettiva nell'impresa. Tendenze e mutamenti recenti in Italia, Francia, Germania e Spagna*, Franco Angeli, Milan, 2021; Zoli C. (ed.), *Lavoro e impresa: la partecipazione dei lavoratori e le sue forme nel diritto italiano e comparato*, G. Giappichelli, Turin, 2015; Carrieri M, Nerozzi P., Treu T. (eds.), *La partecipazione incisiva. Idee e proposte per rilanciare la democrazia nelle imprese*, Il Mulino, Bologna, 2015; Durante A., *Il coinvolgimento dei lavoratori nell'impresa tra libertà economica e democrazia industriale*, Universitas Studiorum, Mantua, 2013; Biasi M., *Il nodo della partecipazione dei lavoratori in Italia. Evoluzioni e prospettive nel confronto con il modello tedesco ed europeo*, Egea, Milan, 2013; Pascucci F., *La partecipazione dei lavoratori. Responsabilità sociale e amministrativa d'impresa*, Ipsoa, Milan, 2013; Corti M., *La partecipazione dei lavoratori. La cornice europea e l'esperienza comparata*, Vita e Pensiero, Milan, 2012; Caragnano R., *Il codice della partecipazione. Contributo allo studio della partecipazione dei lavoratori*, Giuffrè, Milan, 2011; Lunardon F., *Informazione, consultazione e partecipazione dei lavoratori*, Ipsoa, Milan, 2008. With reference to "classical" studies on this matter *see*, in particular: Pedrazzoli M., *Democrazia industriale e subordinazione. Poteri e fattispecie nel sistema giuridico del lavoro*, Giuffrè, Milan, 1985. With reference to non-monographic studies *see*, most recently: Esposito M., *La conformazione dello spazio e del tempo nelle relazioni di lavoro: itinerari dell'autonomia collettiva*, Papers of the AIDLaSS Study Days held in Campobasso, May 25-26, 2023, on the theme *'The Spatial and Temporal Dimensions of Work*", 165 – 167; Marino D., *La partecipazione dei lavoratori alla gestione delle imprese nella contrattazione collettiva*, in *Diritto delle Relazioni Industriali*, 4, 2020, 1024; Carrieri M., *Come andare oltre la partecipazione intermittente*, in *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, 162, 2019, 414; Perulli A., *Workers' Participation in the Firm: Between Social Freedom and Non-Domination*, in *W.P. C.S.D.L.E. "Massimo D'Antona".INT*, 149, 2019, 49.

[6] *See*, *inter alia*: Tosi P., *Lavoro, sindacati e partecipazione nella Costituzione italiana*, in *Argomenti di Diritto del Lavoro*, 1, 2021, 30; Apostoli A., *La forza propulsiva dell'art. 46 della Costituzione al di là della sua sostanziale inattuazione*, in Zoli C. (ed.), *Lavoro e impresa: la partecipazione dei lavoratori e le sue forme nel diritto italiano e comparato*, G. Giappichelli Editore, Turin, 2015, 15; Ghezzi G., *Art. 46*, in Branca G. (ed.), *Commentario della Costituzione*, III, *Rapporti economici*, Zanichelli, Bologna-Rome, 1980, 69; D'Antona M., *Partecipazione dei lavoratori alla gestione delle imprese*, in *Enc. Giur. Treccani*, XXI, Rome, 1990, 1.

[7] For a historical reconstruction of workers' information and consultation rights in Italy *see*, for all: Biasi M., nt. (5), 22, who points out that these instruments were first introduced by collective bargaining and only later by law (Legislative Decree No. 25/2007) in implementation of European Directive 2002/14/EC.

[8] Proia G.*, La partecipazione dei lavoratori tra realtà e prospettive*, in *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, 1, 2010, 63.

[9] *Contra:* Roccella M., *Parte obbligatoria del contratto collettivo e diritti sindacali di controllo*, in *Rivista Giuridica del Lavoro e della Previdenza Sociale*, I, 1977, 434.

[10] Zoli C., *La tutela delle posizioni strumentali del lavoratore: dagli interessi legittimi all'uso delle clausole generali*, Giuffrè, Milan, 1988, 164.

[11] It is precisely for this reason that union information and consultation rights have also been referred to as "procedimentalization clauses", i.e. tools for "complicating" the entrepreneur's decision-making process in order to gain influence over decisions. Thus: Liso F.*, Worker mobility in the company: the legal framework*, Franco Angeli, Milan, 1982, 118.

[12] Romagnoli U., *Per una rilettura dell'art. 2086 c.c.*, in *Rivista Trimestrale di Diritto della Procedura Civile*, 1977, 1049-1055.

hypotheses of codetermination characteristic of a "strong" participation model, such as the German one.[13]

This reconstruction, tending to downplay the actual scope of workers' information and consultation rights in comparison with "strong" forms of participation "German-style" was not, in truth, exempt from criticism since authoritative doctrine pointed out that "in a reality that is one of competition between opposing interests...participation can only be dialectical, made up more of confrontations than of meetings, and is realized with the right of information and consultation of workers in the enterprise"[14] and it was also noted that these participatory instruments allowed the Italian union to access a form of involvement that was in some ways greater than that proper to the German system, in which the role of workers' representatives in "economic matters" is exceedingly limited compared to other areas of entrepreneurial choices.[15]

It should be borne in mind that, from a multilevel perspective, workers' rights to information and consultation are grounded not only in Article 46 of the Constitution but also in the European Union system[16] which has, indeed, played a key driving role in the introduction of these rights into our legal system.

With specific reference to the use of AI forms in the management of labor relations, therefore, the question is whether, in fact, the information rights introduced by the multilevel system will lead to effective union control over employer choices or will result in mere bureaucratic steps devoid of real effectiveness, and whether more advanced forms of worker involvement in the design and management of technological systems applied to labor relations can evolve from such obligations.[17]

2. The principle of algorithmic transparency in the new Art. 1-bis of Legislative Decree 152/1997.

The Italian legislator, in a sense anticipating the European Union one, as part of Legislative Decree 104/2022, adopted to transpose Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union, added to Legislative Decree 152/1997 the new Art. 1-bis which provides for a series of information obligations

[13] The debate on the "weak" nature of workers' information and consultation rights is reported by Biasi M., nt. (5), 24-25.
[14] Thus: Santoro-Passarelli F., *Autonomia collettiva e libertà sindacale*, in *Rivista Italiana di Diritto del Lavoro*, I, 1985, 140.
[15] This view was expressed by Amato G., *Non cogestione, ma contropotere*, in AA.VV., *Quattro note sulla democrazia industriale*, in *Politica del Diritto*, I, 1976, 9.
[16] The reference is to Article 27 of the EU Charter of Fundamental Rights and Articles 5, 114, 115, 151 and 153 of the TFEU.
[17] On the role of trade unions in the governance of technological innovation in companies, *see* Esposito M., nt. (5), 170-173.

on the employer in case of "*use of fully*[18] *automated decision-making or monitoring systems*[19] *deputed to provide indications relevant to the recruitment or assignment, management or termination of employment, assignment of tasks or duties as well as indications affecting the supervision, evaluation, performance and fulfilment of contractual obligations of workers*" (para. 1).

Such information, to be made "before the commencement of employment" and in any case during the course of the relationship at least 24 hours before any change incident to the information previously provided (Paragraph 5), concerns:

(a) the aspects of the employment relationship that are affected by the use of the systems referred to in Paragraph 1; (b) the purposes and aims of the systems referred to in Paragraph 1; (c) the logic and operation of the systems referred to in Paragraph 1; (d) the categories of data and the main parameters used to program or train the systems referred to in Paragraph 1, including performance evaluation mechanisms (e) the control measures taken for automated decisions, any correction processes, and the person responsible for the quality management system; (f) the level of accuracy, robustness, and cybersecurity of the systems referred to in subsection 1 and the metrics used to measure these parameters, as well as the potentially *discriminatory impacts of these metrics* (subsection 2).

For the purpose of proper intelligibility of information, the provision specifies that the information obligation is fulfilled by providing information "*in a transparent manner, in a structured, commonly used and machine-readable format*" (para. 6).[20]

What is most important for the purposes of this paper is that the recipients of these information obligations are, in addition to the individual worker concerned, the company

[18] The adverb "integrally" was inserted by Article 26, paragraph 2(a), of Decree Law No. 48 of May 4, 2023, converted with amendments by Law No. 85 of July 3, 2023. According to Court of Turin, decree Aug. 5, 2023, in *Dejure*, "a fully automated decision-making system is one that makes decisions without requiring human intervention" or in which human intervention is merely eventual, incidental and, therefore, irrelevant. Part of the doctrine has pointed out that "the systems dealt with in Article *1-bis* do not make it possible to arrive at a 'decision based solely' on the processing carried out by them [...] insofar as they are 'deputed to provide indications' relevant to or incidental to organizational determinations". According to this reading, the provision would therefore also apply to "systems that do not lead directly to a decision but provide useful elements for management choices". The decree has been confirmed by Court of Turin, ruling no. 231/2024 of March 12, 2024, available at: https://www.futura-editrice.it/sentenze_rgl/tribunale-piemonte-torino-12-03-2024/. Thus: Donini A., *La tutela del diritto di informazione collettiva sui sistemi automatizzati attraverso il procedimento di repressione della condotta antisindacale,* in *Rivista Giuridica del Lavoro e della Previdenza Sociale*, I, 2023, 422.

[19] For the different meanings of "automation" of systems and so-called algorithmic decisions *see*: Ciucciovino S., *La disciplina nazionale sulla utilizzazione della intelligenza artificiale nel rapporto di lavoro*, in *Lavoro Diritti Europa*, 1, 2024.

[20] On the new information obligations introduced by Article 1-bis *see*, *inter alia:* Ciucciovino S., *La disciplina nazionale sulla utilizzazione della intelligenza artificiale nel rapporto di lavoro*, in *Lavoro Diritti Europa,* 1, 2024; Tursi A., *"Trasparenza" e "diritti minimi" dei lavoratori nel decreto trasparenza*, in *Diritto delle Relazioni Industriali*, 2023, 22; Delfino M., *Lavoro mediante piattaforme digitali, dialogo sociale europeo e partecipazione sindacale*, in *Federalismi.it*, 25, 2023; Garofalo D., Tiraboschi M., Filì V., Trojsi A. (eds.), *Trasparenza e attività di cura nei contratti di lavoro. Commentario ai decreti legislativi n. 104 e n. 105 del 2022*, Adapt Labour Studies e-Book series, Adapt University Press, Bergamo, 2022; Marazza M., D'Aversa F., *Dialoghi sulla fattispecie dei "sistemi decisionali o di monitoraggio automatizzati" nel rapporto di lavoro (a partire dal decreto trasparenza),* in *Giustizia civile.com*, 11, 2022; Faioli M., *Data Analytics, robot intelligenti e regolazione del lavoro*, in *Federalismi.it*, 9, 2022; Faioli M., *Giustizia contrattuale, tecnologia avanzata e reticenza informativa del datore di lavoro. Sull'imbarazzante "truismo" del decreto trasparenza*, in *Diritto delle Relazioni Industriali,* 2023, 57; Carinci M.T., Giudici S., Perri P., *Obblighi di informazione e sistemi decisionali e di monitoraggio automatizzati (art. 1-bis "Decreto Trasparenza"): quali forme di controllo per i poteri datoriali algoritmici?*, in *Labor*, 1, 2023.

works councils (*rsa*) or the unitary trade union representative (*rsu*) and, in the absence of the aforementioned representatives, the territorial branches of the comparatively most representative trade union associations at the national level (paragraph 6).

In addition, according to Paragraph 3, company or territorial trade union representatives also have the opportunity to provide assistance to the worker in exercising the right to access data and to request additional information concerning the obligations under Paragraph 2.

It seems clear, first of all, that the obligation introduced by the legislator only concerns *information* but does not extend to *consultation* with the trade union, which is not given the right to request – as is often the case in the context of information rights – a joint examination with the employer party.

Equally clear is the fact that the right to information recognized to the union is autonomous and not ancillary to that of the worker, so that the fulfilment of the obligation to one of the recipients identified by the rule cannot be sufficient to deem the obligation fulfilled also to the other subject.[21]

The autonomy of the legal position of the trade union, holder of its own right to information, determines an undeniable broadening of the range of instruments of trade union action. In fact, as affirmed by the first Courts' decisions on the subject,[22] any violation of the duty to inform constitutes anti-union conduct and is, therefore, immediately justiciable through the special procedure for the repression of anti-union conduct under Article 28 of Employees' Statute, including through forms of *strategic litigation*.[23] In addition, the right to receive information and the possibility of assisting the worker in requesting the information may represent forms of bringing the union closer to company contexts that have not yet been unionized, thus opening up new prospects for representation and unionization.[24]

In addition to expanding the tools present in the "toolbox" available to the trade unionist, the introduction of such information obligations seems to delineate a new function of the union in the AI era, namely that of "switching the language and logic of machines into a language comprehensible to humans, rationally explicable and, consequently, verifiable in its

[21] According to one of the first decisions on the rule in question, "the provision in question recognizes the right to receive that information both to the worker and to the territorial offices of the comparatively most representative trade union associations (in the absence of RSA/RSUs), without the fulfillment of the obligation towards one of the holders, can make the information obligation be considered fulfilled also towards the other" (*see*: Court of Turin, decree, Aug. 5, 2023, with comment by Scelsi A., *L'informativa sui sistemi automatizzati, se lacunosa, integra gli estremi della condotta antisindacale,* in *Argomenti di Diritto del Lavoro*, 1, 2024, 111).

[22] *See*: Court of Turin, decree August 5, 2023, nt. (20), as well as Court of Palermo, decree April 3, 2023, with comment by Renzi S., *Obblighi di trasparenza in materia di sistemi automatizzati: il Tribunale di Palermo precisa il contenuto dell'informativa ex art. 1*-bis *D.Lgs. n. 152 del 1997,* in *Argomenti di Diritto del Lavoro*, 2023, 5, 1004; Court of Palermo, decree June 20, 2023 with comment by De Petris P., *La repressione della condotta antisindacale come strumento di effettività della trasparenza algoritmica*, in *Argomenti di Diritto del Lavoro*, 6, 1228.

[23] On this point *see*: Spinelli C., *Il contenzioso strategico quale strumento di tutela dei diritti: il caso dei lavoratori delle piattaforme digitali*, in *Diritto del Mercato del Lavoro.*, 1, 2022, 65; Senatori I., Spinelli C. (eds.), *Litigation (Collective) Strategies to Protect Gig Workers' Rights. A Comparative Perspective*, G. Giappichelli, Turin, 2022; Protopapa V., *Uso strategico del diritto e azione sindacale,* Il Mulino, Bologna, 2022.

[24] According to authoritative doctrine, the provision in comment determines the "imposition of union interlocution [...] even to non-unionized companies" (thus: Tursi A., nt. (19), 22).

potential harmfulness"[25] through new forms of proceduralization of employer powers[26] aimed at balancing, in the wake of Art. 41, paragraph 2, Const., the employer's right to organize the enterprise using the technological innovations available with the need to prevent this from causing harm to the dignity of workers. Balancing sought through information obligations capable of balancing the information asymmetry between employer and worker as well as through the control and assistance function of the union, which is called upon to verify that the use of AI does not result in an undue injury to the dignity of workers and to provide workers with accessible keys to interpreting information that is inherently technical and difficult to understand.

As we will see better below, the limitation of this provision is in the weakness of the involvement of the union, which has, yes, the right to be informed but not to be consulted and therefore cannot claim to sit at the table with the employer to negotiate the use of AI in the employment relationship.

3. Trade union information in the new Regulation (EU) 2024/1689.

Generally speaking, it can be said that the role of trade unions in Regulation (EU) 2024/1689 of the European Parliament and of the Council of June 13, 2024, published in the *OJEU* on July 12, 2024[27] appears marginal. A first mention can be found in recital 92 where it states that the regulation is without prejudice to employers' obligations to inform and consult workers or their representatives under Union or national law and practice and expresses the need to ensure that workers and their representatives are informed about the planned deployment of high-risk AI systems in the workplace. Another mention of the union is found in recital no. 165, where it is stated that

Providers and, where appropriate, deployers of all AI systems, whether high-risk or not, and AI models should also be encouraged to implement on a voluntary basis additional requirements relating to, for example [...] to stakeholder participation, involving, where appropriate, relevant stakeholders such as business and civil society organizations, academia, research organizations, labor unions, and consumer protection organizations in the design and development of AI systems, and to the diversity of development groups, including gender balance

[25] Zappalà L., *Appunti su linguaggio, complessità e comprensibilità del lavoro 4.0: verso una nuova procedimentalizzazione dei poteri datoriali*, in *WP C.S.D.L.E. "Massimo D'Antona".IT*, 462, 2022, 28.
[26] *See*: De Stefano V., *'Negotiating the algorithm': automation, artificial intelligence and labor protection*, in *Comparative Labour Law & Policy Journal*, 41, 2019, 1 ff.
[27] The purpose of the regulation is "to improve the functioning of the internal market and to promote the deployment of human-centered and reliable artificial intelligence (AI), while ensuring a high level of protection of health, safety and fundamental rights enshrined in the Charter of Fundamental Rights of the European Union, including democracy, the rule of law and the protection of the environment, against the harmful effects of AI systems in the Union, and promoting innovation" (see Art. 1).

and calls for the adoption of voluntary codes of conduct "developed in an inclusive manner, where appropriate, with the involvement of relevant stakeholders such as business and civil society organizations, academia, research organizations, and trade unions".

The dispositive part of the regulation stipulates in Article 26, paragraph 7, that before deploying or using a high-risk AI system[28] in the workplace, deployers who are employers must inform the representatives of the workers and affected workers who will be subject to the use of the high-risk AI system.

In the writer's opinion, in the case of the Italian legal system, this obligation must be considered absorbed by the duty to inform introduced by Article 1-bis of Legislative Decree No. 152/1997. This is for several reasons. First of all, it should be noted that the duty introduced by the regulation has a more limited scope of application, from an objective point of view, than Art. 1-bis in that it only concerns high-risk AI systems while Art. 1-bis applies in any case of use of *fully automated decision-making or monitoring systems* deputed to provide indications relevant to the recruitment or assignment, management or termination of employment, assignment of tasks or duties as well as indications incident to the supervision, evaluation, performance and fulfilment of contractual obligations of employees. Well, the "automated system" is not always an AI system since:

The concept of automated system simply refers back to data processing systems that make use of machines (Recital 12), but it is a broader notion than AI and, as such, apt to encompass even more traditional digital and software systems that are not endowed with autonomous reasoning with respect to human intervention.[29]

Second, within AI systems, the disclosure requirement introduced by the regulation covers only high-risk systems. Finally, because the regulation specifies that the information subject to the information obligation shall be provided "in accordance with the rules and procedures laid down in Union and national law and practice regarding the information of

[28] AI systems are high risk when the conditions specified in Article 6 of the regulation are met. Interestingly, according to Recital No. 57, even AI systems used in the area of employment, management of workers and access to self-employment, in particular for recruitment and selection of persons, for making decisions regarding the conditions of the employment relationship the promotion and termination of contractual employment relationships, for assigning tasks on the basis of individual behaviours, traits or personal characteristics, and for monitoring or evaluating people in employment-related contractual relationships, should be classified as high-risk systems, as such systems may have a significant impact on the future of such people in terms of career and livelihood prospects and workers' rights. Annex III of the Regulation, which contains a list of high-risk AI systems referred to in Article 6(2), mentions the following high-risk AI systems in the area of employment, worker management, and access to self-employment: (a) AI systems intended to be used for recruitment or selection of individuals, in particular for posting targeted job advertisements, analyzing or filtering applications, and evaluating candidates; (b) AI systems intended to be used for making decisions regarding the conditions of employment relationships, promotion or termination of contractual employment relationships, assigning tasks on the basis of individual behaviour or personal traits and characteristics, or monitoring and evaluating the performance and behaviour of individuals in the context of such employment relationships.

[29] Thus: Ciucciovino S., *Risorse umane e intelligenza artificiale alla luce del regolamento (UE) 2024/1689, tra norme legali, etica e codici di condotta,* in *Diritto delle Relazioni Industriali,* 3, 2024, 575, who points out that the inferential capacity, autonomy, and self-learning capability (i.e., the ability to adapt progressively and change autonomously during use) of AI systems are also the most technologically disruptive features that raise concerns in terms of protecting the rights of people implicated or impacted by the use of AI systems.

workers and their representatives", and from this an implicit reference to Article 1-bis may be derived.

With reference to union involvement in AI systems the regulation appears, therefore, timid in introducing innovative[30] preceptive rules but, nevertheless, endowed with a potential expansive *vis* due to the programmatic scope of some of its recitals.

We refer to a number of passages that portend the possibility of effective involvement of workers and their representatives in the virtuous design and implementation of an anthropocentric and socially sustainable AI and the possibility of ushering in a new season of worker participation in the enterprise on this very ground.[31] Indeed, Article 95 of the Regulation stipulates that Member States shall encourage and facilitate the development of codes of conduct, including related governance mechanisms, designed to promote the voluntary application to AI systems, other than high-risk AI systems, of some or all of the requirements of the Regulation, taking into account available technical solutions and industry best practices that enable the application of these requirements. Codes of conduct can be developed by individual providers or deployers of IA systems or by organizations representing them or both, including with the participation of any stakeholder, including, as highlighted by recital 165, trade unions that could thus be involved in the development of such codes of conduct and, therefore, in the *by design* phase of IA systems, "evolving from the classical model of information and consultation, to a new model of an organizationally based active participation".[32] We currently don't know how the domestic legal system will encourage and facilitate such codes of conduct but we can say that, in the absence of a preceptive legislative provision mandating such union involvement, new spaces in the construction, design and negotiation of AI systems used in human resources could be "conquered" by unions in the area of collective autonomy. This is not an entirely new activity given that trade unions have already been able to experiment for decades with the negotiation of agreements pursuant to art. 4, L. 300/1970 with which they have negotiated, together with employers, the use of audiovisual systems and other technological instruments from which remote control of workers can result and have, at times, introduced technical or legal expedients capable of avoiding that from such instruments the lesion of workers' fundamental interests and rights could result.[33]

[30] This judgment is shared by Aloisi A., De Stefano V., *Il nuovo Regolamento Ue sull'intelligenza artificiale e i lavoratori*, 2021, available at: https://www.rivistailmulino.it/a/regolamento-ue-sull-intelligenza-artificiale-una-minaccia-alla-protezione-dei-lavoratori, who argue that although classifying AI systems used at work as "high-risk" is more than appropriate, the proposed regulation is wholly insufficient to ensure effective protection for workers.

[31] *See*, on this point: Ciucciovino S., nt. (28), 606; Imberti L., *Intelligenza artificiale e sindacato. Chi controlla i controllori artificiali?*, in *Federalismi.it*, 29, 2023; Corti M., *Innovazione tecnologica e partecipazione dei lavoratori: un confronto fra Italia e Germania*, in *Federalismi.it*, 17, 2022; Corti M., *L'intelligenza artificiale nel decreto trasparenza e nella legge tedesca sull'ordinamento aziendale*, in *Federalismi.it*, 29, 2023.

[32] Ciucciovino S., *ibidem*.

[33] Consider, for example, agreements that exclude the usability for disciplinary purposes of information obtained from the use of such tools. On this point *see*: Ingrao A., *Il controllo a distanza sui lavoratori e la nuova disciplina privacy: una lettura integrata*, Cacucci, Bari, 2018, 203-205.

4. Trade union information in the new Directive (EU) 2024/2831: *de iure condito* and *de iure condendo*.

If, as mentioned, the role of trade union in the regulation appears marginal, far more important appears, on the other hand, in the context of Directive (EU) 2024/2831.[34] This difference is justified in light of the different legal basis of the two measures:[35] the Regulation, in fact, is based primarily on Article 114 TFEU, which provides for the adoption of measures designed to ensure the establishment and functioning of the internal market. The Directive, on the other hand, is based, although not exclusively,[36] on Article 153(1)(b) TFEU, which gives the Union the power to support and complement the action of Member States with the aim of improving working conditions. This diversity of approach emerges clearly in recital no. 52, stating that the information and consultation of workers' representatives, regulated at the Union level under Directive 2002/14/EC, are fundamental to promoting effective social dialogue, and given that the introduction or substantial changes in the use of automated monitoring or decision-making systems by digital work platforms have a direct impact on the organization of work and individual working conditions of digital work platform workers, it is necessary to ensure that digital work platforms inform and consult digital work platform workers' representatives before such decisions are made. The recital also points out that, given the technical complexity of algorithmic management systems, information should be provided in sufficient time to allow digital platform workers' representatives to prepare for the consultation, with the assistance of an expert chosen in consultation by digital platform workers or their representatives where necessary.

Turning to the content of the information rights introduced by the directive, it is necessary, first of all, to point out that the text never refers to trade union representatives, but rather to "employees representatives" who are defined as "the representatives of the employees of digital platforms, such as trade unions and representatives freely elected by the employees of digital platforms in accordance with national law and practice" (Art. 2, para. 1(h)). Thus, there is no doubt that this includes company works councils (*rsa*) and unitary trade union representatives (*rsu*) as well as trade unions.

[34] There are numerous contributions on the draft directive, first, and on the directive, later. *See*, *inter alia*: Rosin A., *Towards a European Employment Status: The EU Proposal for a Directive on Improving Working Conditions in Platform Work*, in *Industrial Law Journal*, 51, 2, 2022, 478; Barbieri M., *Prime osservazioni sulla proposta di direttiva per il miglioramento delle condizioni di lavoro nel lavoro con piattaforma*, in *Labour & Law Issues*, 7, 2, 2021, 1; Treu T., *La digitalizzazione del lavoro: proposte europee e piste di ricerca*, in *Federalismi*, 9, 2022, 196-197; Bellomo S., Mezzacapo D., Ferraro F., Calderara D., *Improving working conditions in platform work in the light of the recent proposal for a directive*, Collana Convegni, Sapienza, 2023; Alaimo A., *Lavoro e piattaforme tra subordinazione e autonomia: la modulazione delle tutele nella proposta della Commissione europea*, in *Diritto delle Relazioni Industriali*, 2, 2022, 652; Marasco F., *Per una collocazione sistematica del "diritto alla trasparenza digitale" nella dimensione collettiva dei rapporti di lavoro,* in *Diritto delle Relazioni Industriali*, 4, 2024, 955;

[35] This view is shared by Tebano L., *La digitalizzazione del lavoro tra intelligenza artificiale e gestione algoritmica*, in *Ianus*, 24, 2021, 45, as well as by Delfino M., *Lavoro mediante piattaforme digitali, dialogo sociale europeo e partecipazione sindacale*, in *Federalismi*, 2023, 5.

[36] Careful legal doctrine has pointed out that the directive is also based on Article 16(2) TFEU insofar as it addresses the situation individuals who perform work through digital platforms in relation to the protection of their personal data processed through automated decision-making and monitoring systems. *See*: Barbieri M., *Prime osservazioni sulla proposta di direttiva per il miglioramento delle condizioni di lavoro nel lavoro con piattaforma*, in *Labour & Law Issues*, 2, 2021.

First of all, Article 8 of the directive burdens digital platforms, pursuant to Article 35(1) of Regulation (EU) 2016/679, to conduct the impact assessment of the processing of personal data by automated monitoring or decision-making systems on the protection of workers' personal data and to seek the opinion of workers and their representatives. In addition, the impact assessment must be provided to workers' representatives. This is, no doubt, a first information right in the hands of trade unions.

In addition, the directive introduces the principle of algorithmic transparency (anticipated, in our system, by the aforementioned Article 1-bis), according to which digital platforms must provide workers' representatives in a comprehensive and detailed manner with a range of information on automated monitoring systems[37] and automated decision-making systems.[38] The information must, in addition, cover all categories of decisions made or supported by automated systems that affect workers in any way. Such information must be provided: a) prior to the use of such systems; b) prior to the introduction of changes affecting working conditions, work organization or monitoring of work performance; c) at any time at the request of workers' representatives.

Again, it must be considered that these disclosure requirements are absorbed by Article 1-bis which, indeed, has a broader scope than the directive since it applies not only to employers who organize work through digital platforms but to all public and private employers and principals[39] who intend to proceed with the use of fully automated decision-making or monitoring systems. From this point of view, we can, therefore, say that with Article 1-bis the legislator has anticipated the principle of algorithmic transparency contained in the directive, generalizing its application beyond the scope of digital platforms. However, it should be noted that the directive's provision also stops at the logic of mere union information, without introducing either an obligation to consult or a principle of algorithmic negotiation.

Instead, the provision of Article 10(1) of the directive could open to a true form of organizational participation. As a matter of fact, such provision states that member states must ensure that digital work platforms supervise and, with the participation of workers' representatives, carry out regularly, and in any case every two years, an assessment of the impact of individual decisions made or supported by automated monitoring or decision-making systems on workers, including, where applicable, on their working conditions and equal treatment at work. This would include genuine participation of workers'

[37] This information is (a) whether such systems are in use or being introduced; (b) the categories of data and actions monitored, supervised, or evaluated by such systems, including evaluation by the service recipient; and (c) the objective of the monitoring and how the system is to carry it out.

[38] The information to be provided is as follows: (a) the fact that such systems are in use or are being introduced; (b) the categories of decisions that are made or supported by such systems; (c) the categories of data and the main parameters that such systems take into account and the relative importance of these main parameters in the automated decision-making process, including how the personal data or behaviour of the person performing work through digital platforms affect the decisions (d) the reasons behind decisions to limit, suspend or terminate the account of the person performing work through digital platforms or not to remunerate the work performed by him or her, as well as decisions regarding his or her contractual situation or any decision with equivalent or detrimental effect.

[39] Including principals within the scope of labour relations referred to in Article 409, No. 3 of the Italian Civil Code (i.e. coordinated and continuous collaborations) and Article 2, Paragraph 1 of Legislative Decree No. 81 of June 15, 2015 (i.e. collaborations hetero-organized by the principal).

representatives, jointly with the employer, in the process of assessing the impact that the AI system has had on business decisions affecting workers.

In the transposing legislation, the legislator could establish e.g. joint committees, composed of employer and union representatives, to jointly analyze data on decisions made on the basis of AI systems and assess their impact. This would enable the union to emancipate itself from the passive position of mere information and gain more space in the negotiation of the algorithm. Indeed, it is not difficult to imagine that the union, based on the results of the impact assessment, could ask the employer to make corrections to the decision-making or monitoring systems and mobilize workers where such changes are not accepted. Requests for changes, moreover, are already grounded in the directive, which provides, where a high risk of employment discrimination emerges in the use of automated monitoring or decision-making systems or it is found that individual decisions made or supported by such systems have violated a worker's rights, an obligation on the digital work platform to take the necessary steps, including, where appropriate, modifying the system or ceasing its use, in order to avoid such decisions in the future. Well, the union, actively involved in the evaluation process, could prod the employer on the need to modify the system or cease its use.

Finally, Article 13 of the directive, under the heading "Information and Consultation" requires member states to ensure that information and consultation, as defined in Art. 2(f) and (g) of Directive 2002/14/EC, of employee representatives by digital work platforms also cover decisions that may involve the introduction of automated monitoring or decision-making systems or substantial changes to their use, specifying that the information and consultation of employee representatives shall be carried out in the same manner regarding the exercise of information and consultation rights as provided for in Directive 2002/14/EC. Now, as is well known, Legislative Decree 25/2007, which transposed Directive 2002/14/EC into Italian law, stipulated that information and consultation shall concern (a) the recent and foreseeable development of the undertaking's activities, as well as its economic situation; (b) the situation, structure and foreseeable development of employment in the undertaking, as well as, in the event of a risk to employment levels, the relevant countermeasures; and (c) decisions of the undertaking that are likely to entail significant changes in the organization of work, labor contracts. It is not, therefore, peregrine to speculate that the Italian legislator, in transposing the directive, will amend Legislative Decree 25/2007 by adding to the aforementioned hypotheses also the information and consultation of workers' representatives by digital work platforms on the introduction of automated monitoring or decision-making systems or substantial changes in their use. This would result in a leap forward from Article 1-bis because it would move from mere information to consultation, granting the union new room for negotiation with the employer. It is true that, if this were to be done, it would then have to be the collective agreements to provide for the extension of information and consultation rights to this matter as well considering that, pursuant to Article 4, paragraph 1, Legislative Decree 25/2007, it is the collective agreements that define the venues, times, subjects, modalities and contents of the information and consultation rights granted to workers. However, this also has advantages because collective agreements could decide, within the scope of bargaining autonomy, to place the obligation

to inform and consult on the use of automated monitoring or decision-making systems not only on digital platforms but on the generality of employers or could, in any case, introduce broader information rights than those provided for in the directive and the law.

The directive also provides that, as part of the information and consultation procedures, employee representatives of digital platforms may be assisted by an expert of their choice, the cost of which is borne by the employer if the platform has more than 250 employees in the member state concerned.

5. Concluding remarks.

It emerges from the brief examination of the collective information rights introduced by the European Union and Italian legal system regarding automated decision-making or monitoring systems that, at present, the trade union is not recognized as having true organizational participation in the construction and use of AI systems applied to labor relations. In fact, these rights remain tied to a logic of mere information without even providing for union consultation. It emerges, however, that the provisions of the regulation could open the way for a new protagonism of trade unions in the drafting of voluntary codes of conduct by which employers decide to implement a use of AI in labor relations based on the centrality of man and the protection of workers' dignity. In addition, the directive could pave the way for an amendment to Legislative Decree 25/2007 from which a new protagonism of collective bargaining could result in the introduction of union information and consultation obligations in all cases of use or modification of automated decision-making or monitoring tools.

The union could also gain more centrality in this matter if the idea were to gain ground that all automated decision-making or monitoring systems fall within the scope of Article 4(1), Employees' Statute.[40] Following such reasoning, in fact, employers could introduce such systems only upon collective agreement entered into by the RSU or RSA, thus moving from a mere right to information to a real obligation to agree.

Finally, even apart from the novelties contained in the aforementioned regulatory measures, a new trade union protagonism in this matter could come from a revival of participatory practices within collective bargaining, noting that digitization has such an

[40] Opinion shared by Imberti L., nt. (30), 200, according to which "all AI systems [...] fall - always and necessarily - within the scope of paragraph 1 of the 'new' Article 4, l. no. 300/197013, never being able to constitute mere work tools within the meaning of the paragraph." In the same sense, *see*: Alvino I., *I nuovi limiti al controllo a distanza dell'attività dei lavoratori nell'intersezione fra le regole dello Statuto dei lavoratori e quelle del Codice della privacy*, in *Labour Law & Issues*, 1, 2016, 24: "it is easy to include in the category of work tools the computer, e-mail, internet access. A different discussion must be made for any applications that are installed on the same computer and that, for example, allow moment-by-moment monitoring of the activity carried out, but that do not require the worker's intervention or that in any case are not necessary for the service to be useful to the employer. In such a case, if the computer installation does not require prior authorization, this becomes necessary for *software* that is installed on the computer to meet one of the needs enucleated by the first paragraph of Article 4 S.L."

impact on labor relations that it must necessarily be at the center of the agenda of a modern system of industrial relations.[41]

Certainly, all this also represents a challenge for the union, which will have to invest heavily in the training of its representatives who, in order to best perform the function of control, assistance or actual negotiation, will have to have the necessary skills, since they deal with information that is extremely technical and often difficult to understand and interpret. The effectiveness of these rights, therefore, also passes through the training of union representatives.

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[41] Eloquent in this sense is the fact that, in June 2020, the European social parties - Ces (European Trade Union Confederation), Businesseurope (Confederation of European Enterprises), SMEunited (European Association of Crafts, Small and Medium-sized Enterprises), CEEP (Association of Enterprises or Organizations with Public Participation) signed a framework agreement on digitalization. *See*: Rota A.*, Sull'Accordo quadro europeo in tema di digitalizzazione del lavoro*, in *Labour & Law Issues*, 2, 2020.

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