TRADE UNIONS, STRATEGIC LITIGATION AND DIGITAL LABOUR PLATFORMS: A CASE-STUDY OF THE CGIL[*]

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Abstract [It]: I lavoratori tramite piattaforma si trovano spesso ad affrontare un c.d. "*justice gap*" nel far valere i propri diritti, soprattutto a causa dell'ampio uso di pratiche di algorithmic management che sono centrali nel modello di *business* delle piattaforme. Sebbene esistano alcune tecniche che possano fungere da anticorpi normativi per ridurre questo *justice gap*, i lavoratori presi individualmente hanno difficoltà a farli valere in concreto. L'obiettivo di questo articolo è quello di testare l'ipotesi secondo cui i sindacati possano costituire l'anticorpo regolativo finale per colmare il *justice gap* che riguarda lavoratori tramite piattaforma. Per dimostrare questa tesi, l'articolo analizza la strategia adottata dalla CGIL (il più grande sindacato italiano) che, negli ultimi quattro anni, ha intentato numerose cause contro diverse piattaforme nel settore del *food delivery*, vincendole: circostanza che sembra confermare l'ipotesi sopra enunciata. L'articolo conclude evidenziando come il caso di studio della CGIL sembri offrire spunti utili a quei sindacati in Italia, e soprattutto all'estero, interessati a utilizzare il contenzioso come parte delle loro più ampie strategie di mobilitazione sindacale.

Abstract [En]: *Platform workers often face a justice gap in enforcing their rights and this is mainly due to the extensive use of algorithmic management practices that are central to their business model. While there are certain legal techniques that can provide effective regulatory antibodies to reduce this justice gap, individual litigants may struggle to enforce them. The aim of this paper is to test the hypothesis that trade unions may be the ultimate antibody in closing the justice gap for platform workers through litigation. In order to substantiate its main claim, the article then analyses the litigation strategy adopted of CGIL (the largest Italian trade union), which has brought many successful lawsuits against several food delivery platforms over the last four years. The litigation effort of the CGIL seems to confirm the aforementioned hypothesis. The paper concludes by highlighting how the CGIL case study seems to offer many lessons for those unions in Italy, and especially abroad, interested in using litigation as part of their broader mobilisation strategies.*

1. Platform workers and the (algorithmic) justice gap: why it exists and how to reduce it

Over the past decade, the digital economy has transformed the world of work[1]. The most

1[*] *This article is the revised and expanded version of the presentations given by the two Authors, based on their own research (some of the results of which have already been published and cited in this article), during the seminar "Service economy and platform work. Emerging problems", held at Sapienza University of Rome on 29*

distinctive features of these transformations have been represented by digital labour platforms, both online web-based and location-based[2], especially in relation to their use of algorithmic management practices which, according to a very wide definition, can be defined as 'the use of computer-programmed procedures for the coordination of labour input in an organisation'[3].

Although this phenomenon is increasingly spreading (albeit at a slower pace) to conventional or regular workplaces[4], digital labour platforms have been the first companies to make extensive use of algorithmic devices to manage their workforce, and algorithmic management practices have been central to their business model[5]. Undoubtedly, digital labour platforms have monopolized the academic debate in the labour law community over the past decade. While the scholarship initially focused exclusively on the classification of platform workers as employees or independent contractors[6], most recent work has adopted a more holistic approach, focusing on all the issues that may affect platform workers in terms of potential violations of their employment, data protection and anti-discrimination rights, particularly in relation to the use of algorithmic devices[7].

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The debate on the digitalisation of work and platform work is already endless: we therefore consider it sufficient to refer, also for the references to previous literature, to ILO, *The role of digital labour platforms in transforming the world of work*, ILO Flagship Report, 2021.

2 ILO, *op. cit.*, pp. 74-78.

3 S. BAIOCCO-E. FERNANDEZ-MACÍAS-U. RANI-A. PESOLE, *The Algorithmic Management of work and its implications in different contexts*, Background Paper Series of the Joint EU-ILO Project "Building Partnerships on the Future of Work", 2022, n. 9, pp. 5-9, to which we also refer to the now endless international literature on the subject. For the national legal literature in Italian language, see instead, also for the references, L. ZAPPALÀ, *Management algoritmico*, in S. BORELLI et al., *Lavoro e tecnologie. Dizionario del diritto del lavoro che cambia*, Giappichelli, Torino, 2022, p. 150 ff. and, more recently on the wider topic of artificial intelligence at work, M. BIASI (edited by), *Diritto del lavoro e intelligenza artificiale*, Giuffrè, Milano, 2024. For a more interdisciplinary overview on the topic, see R. FALCONE et al., *Prospettive di intelligenza artificiale: mente, lavoro e società nel mondo del machine learning*, in *Giorn. it. psic.*, 2018, n. 1, p. 43 ff.

4 K.C. KELLOGG-M.A. VALENTINE-A. CHRISTIN, *Algorithms at Work: The New Contested Terrain of Control*, in *Acad. Mgmt. Annals*, 2020, vol. 14, n. 1, pp. 372-382; A.J. WOOD, *Algorithmic Management Consequences for Work Organisation and Working Conditions*, in *JRC Working Papers Series on Labour, Education and Technology*, 2021, n. 7; S. BAIOCCO-E. FERNANDEZ-MACÍAS-U. RANI-A. PESOLE, *op. cit.*, pp. 17-24; U. RANI-A. PESOLE-I. GONZÁLEZ VÁZQUEZ, *Algorithmic Management practices in regular workplaces: case studies in logistics and healthcare*, Publications Office of the European Union, Bruxelles, 2024.

5 S. BAIOCCO-E. FERNANDEZ-MACÍAS-U. RANI-A. PESOLE, *op. cit.*, pp. 12-17. Therefore, it is not a coincidence that the first research on algorithmic management focused on platform work as a case-study: see, for example, J. DUGGAN-U. SHERMAN-R. CARBERY-A. MCDONNELL, *Algorithmic Management and App-Work in the Gig Economy: A Research Agenda for Employment Relations and HRM*, in *Hum. Resources Mgmt. J.*, 2019, vol. 30, n. 1, p. 114 ff. and M.H. JARRAHI-W. SUTHERLAND, *Algorithmic Management and Algorithmic Competencies: Understanding and Appropriating Algorithms in Gig Work*, in *iConference*, 2019.

6 See, for example, V. DE STEFANO-A. ALOISI, *European legal framework for "digital labour platforms"*, Report of the JRC of the European Commission, 2018.

7 See, for a summary of the already extensive literature on the topic, V. DE STEFANO-M. WOUTERS, *AI and digital*
tools in workplace management and evaluation. An assessment of the EU's legal framework, Study prepared for Panel for the Future of Science and Technology of the European Parliament, 2022.

These problems are exacerbated by the lack of transparency that characterizes most automated or semi-automated decision-making processes[8], which have increased the already existent information asymmetries between workers and their employers or principals[9]. Algorithmic opacity, which is due to a number of legal and technical reasons[10] and it is more severe as algorithm complexity increases[11], can conceal the violation of platform workers' rights, as the lack of transparency of algorithmic management tools allows platforms to: (a) disguise the exercise of control powers by platforms, thus making it more difficult to assess the true nature of the working relationship of platform workers[12], or the violations of those employment laws that are generally designed to limit managerial prerogatives, especially with respect to monitoring and surveillance powers[13]; (b) cover up those situations where the data of platform workers used to feed algorithmic tools has been processed in violation of applicable data protection laws[14]; and (c) reduce the likelihood that the discrimination will be perceived and subsequently demonstrated by platform workers[15].

As a result, algorithmic opacity has contributed to reducing platform workers' awareness of potential violations of their rights. Moreover, even when they are conscious of them, platform workers face great difficulties in gathering information and evidence about how algorithmic management works, which can irreparably damage their ability to effectively enforce their rights. In this scenario, platform workers often face a justice gap[16], that, for the purposes of this article, will be defined as the gap between the promise of the law and the actual achievement of justice through its (feasible) enforcement[17].

The legal framework already provides a number of regulatory antibodies against algorithmic opacity that can help reducing this justice gap. Before litigation begins,

8 In general, on this issue, see F. PASQUALE, *The Black Box Society. The Secret Algorithms that Control Money and Information*, Harvard University Press, 2015 and J. BURRELL, *How the Machine 'Thinks': Understanding Opacity in Machine Learning Algorithms*, in *Big Data & Soc.*, 2016. For a brief explanation of this issue and a more updated literature review, see J. GERARDS-R. XENIDIS, *Algorithmic Discrimination in Europe: Challenges and Opportunities for Gender Equality and Non-discrimination Law*, Directorate-General for Justice and Consumers of the European Commission, 2020, pp. 45-46.

9 A. ROSENBLAT-L. STARK, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers*, in *Int'l J. Commc'n*, 2016, n. 10, p. 3758 and L. ZAPPALÀ, *Management algoritmico*, cit., p.150 ff.

10 As pointed out by J. BURRELL, *op. cit.*. For an employment law perspective on this issue, see G. GAUDIO, *Algorithmic Bosses Can't Lie! How to Foster Transparency and Limit Abuses of the New Algorithmic Managers*, in *Comp. Lab. L. & Policy Jour.*, 2022, vol. 42, n. 3, pp. 709-711.

11 J. BURRELL, *op. cit.*, pp. 5-10 which specifies that algorithmic opacity is more severe in case of machine learning systems and becomes even more severe in case of complex algorithmic systems such as neural networks.

12 J. ADAMS-PRASSL, *What if Your Boss Was an Algorithm? Economic Incentives, Legal Challenges, and the Rise of Artificial Intelligence at Work*, in *Comp. Lab. L. & Policy Jour.*, 2019, vol. 41, n. 1, pp. 144-145 and J. MOYER-LEE-N. COUNTOURIS, *Taken for a Ride: Litigating the Digital Platform Model*, ILAW Issue Brief, 2021, p. 23.

13 G. GAUDIO, *Algorithmic Bosses Can't Lie!*, cit., pp. 720-725 and 733-741.

14 *Ibidem*.

15 *Ibidem* and J. GERARDS-R. XENIDIS, *op. cit.,* pp. 69 and 74 as well as pp. 87, 112 and 116 where they report the opinion of several national experts that have identified the same issue.

16 As already argued in G. GAUDIO, *Litigating the Algorithmic Boss in the EU: A (Legally) Feasible and (Strategically) Attractive Option for Trade Unions?*, in *Int. Jour. Comp. Lab. L. and Ind. Rel.*, 2024, vol. 40, n. 1, pp. 92-96 more extensively in relation to algorithmic management.

17 Defined in terms of law-in-action according to the classification made by Z. RASNAČA, *Special Issue Introduction: Collective Redress for the Enforcement of Labour Law*, in *Eur. Lab. L. Jour.*, 2021, vol. 12, n. 4, p. 408 and, more extensively, Z. RASNAČA, *Enforcing Migrant and Mobile Workers' Rights*, in Z. RASNAČA et al. (edited by), *Effective Enforcement of EU Labour Law*, Bloomsbury Publishing, London, 2022, pp. 269-271.

information and access rights can be extremely useful in providing platform workers with valuable information about the algorithmic devices used to manage them. Once litigation has already begun, those rules that shift the burden of proof to the platform, as well as those that establish presumptions in favour of platform workers, can increase the chances of a favourable judicial outcome by shifting all or part of the risk of losing a case to the platform for failing to prove in court the decision-making process behind the algorithm. Other rules may also be useful in promoting algorithmic transparency, such as those that allow parties to a lawsuit to request the judge (or even better, those that allow the judge to do so directly) to order the platform to disclose evidence of the functioning of the algorithm, which is generally under the platform's exclusive control[18].

However, these regulatory antibodies, even if extensively provided by legal systems, may not be sufficient to effectively reduce the justice gap faced by platform workers who, considered as individuals, still face almost insurmountable difficulties in uncovering the functioning of algorithmic management tools used by platforms to manage their workforce[19]. The aim of this paper is thus to show that trade unions can be the ultimate antibody in filling the justice gap for platform workers through litigation[20]. In order to substantiate this claim, we will analyse the litigation strategy adopted by the CGIL (the largest Italian trade union), which has brought many successful claims against several food delivery platforms over the last four years. In doing so, we will limit our analysis to those cases in which the CGIL has specifically aimed to understand the functioning of the algorithms used by these platforms and has succeeded in doing so, thus reducing the justice gap, specifically due to algorithmic opacity, faced by platform workers.

This paper is structured as follows. Section 2 begins by outlining the reasons why trade unions are better placed than individual workers to spearhead algorithmic litigation to fill platform workers' justice gap, and then identifies the different roles that trade unions can play in legal proceedings. Section 3 analyses, in particular, the first case in Italy in which a platform worker was found to be an employee, initiated by a CGIL trade unionist. Section 4 then looks at two other important cases brought directly by the CGIL against food delivery platforms, where the courts found that their algorithms resulted in discriminating against platform workers. Section 5 completes the case analysis by examining some recent decisions in which the CGIL has enforced information and access rights that the Italian legal system has lately recognized specifically in favour of trade unions (and not just in favour of individual workers). Section 6 shows why this litigation was so successful in filling the justice gap highlighted above and concludes by clarifying the legal and non-legal conditions that have to be in place to expect other trade unions to potentially pursue similar strategies.

2. The role of trade unions: why they are best placed to spearhead algorithmic litigation to close the justice gap for platform workers

There are many reasons why trade unions are better placed than individual workers to engage in algorithmic litigation[21].

First, given the increased information asymmetries between workers and platforms, individual litigants will often be victims of violations of their rights without knowing it, because algorithmic management cases always require very complex factual analysis and

18 As already argued in G. GAUDIO, *Algorithmic Bosses Can't Lie!,* cit., p. 707 ff.

19 As already argued in G. GAUDIO, *Litigating the Algorithmic Boss in the EU*, cit., p. 91 more generally regarding algorithmic management.

20 On this topic, see already I. SENATORI-C. SPINELLI (eds.), *Litigation (Collective) Strategies to Protect Gig Workers' Rights. A Comparative Perspective*, Giappichelli, Torino, 2022.

21 G. GAUDIO, *Litigating the Algorithmic Boss in the EU*, cit., pp. 99-100.

evidence that, when available, tends to be very difficult to understand due to algorithmic opacity. As platforms generally use the same algorithms towards their entire workforce, trade unions are in a better position than individual workers to be aware of violations of their rights, and to gather information and evidence of such violations[22]. In addition, unlike platform workers, trade unions have the organisational and financial resources to invest in training initiatives, which can be crucial to better understanding the technical aspects of algorithmic management in platform work[23]. In any case, where these are insufficient, unions are still in a better position than individuals to hire external experts to better grasp the most complex technical issues behind platforms' algorithms[24]. Internal and external experts are essential both at the pre-trial stage, as they allow lawyers to better understand how algorithms work, and at the trial stage, as they can be called as expert witnesses to examine the algorithm and provide useful evidence on its functioning[25].

Second, platform workers tend to experience the same type of violation of their rights. This increases the overall costs of conducting a preliminary legal assessment and organising discrete legal strategies which, because of their diversity, are more likely to result in different legal outcomes. Due to their institutional position, trade unions will be able to avoid unnecessary costs. They can therefore act as litigation coordinators, aligning the pre-litigation and litigation strategies of workers facing the same violations, thus being in a better position to respond to platforms' litigation counterstrategies[26]. This is highly relevant in cases filed against platforms, as they have shown to be even 'prepared to openly flout the law'[27]. Unions also have a better knowledge of the legal market. As a result, they will be able to select the most appropriate lawyers to handle the claim, as well as technical advisors with a better understanding of the technical aspects of the litigation. Finally, where there are several similar claims, unions will also have a better chance of negotiating lower legal fees on an aggregate basis[28].

Third, individual workers are structurally exposed to the risk of retaliation from their employers or principals when they submit a claim[29]. This is even more true with reference to platform workers, especially if they are classified as independent contractors. It is well known that platforms tend to deactivate workers' accounts, often without providing any explanation[30]. Filing a complaint can thus expose platform workers to retaliation that is likely to go unpunished, as they have no right to obtain an explanation of such decisions and, as independent contractors, do not benefit from the protections against unfair dismissals, including those that require employers to provide them with written notice of the reasons for termination. In addition, individuals, including platform workers, often struggle to keep companies in the spotlight and attract media attention. Unions, unlike individuals, are not at risk of individual retaliation and are also better able to attract press attention[31]. When trade

22 In general, for this argument, see K. LÖRCHER, *Strategic Enforcement of EU Labor Law*, in Z. RASNAČA et al. (edited by), *Effective Enforcement*, cit., p. 151.
23 V. DOELLGAST-I. WAGNER-S. O'BRADY, *Negotiating Limits on Algorithmic Management in Digitalised Services: Cases from Germany and Norway*, in *Transfer: Eur. Rev. Lab. Research.*, 2023, vol. 29, n. 1, p. 105 ff.
24 E. DAGNINO-I. ARMAROLI, *A Seat at the Table: Negotiating Data Processing in the Workplace*, in *Comp. Lab. L. & Policy Jour.*, 2019, vol. 41, n. 1, p. 194.
25 G. GAUDIO, *Algorithmic Bosses Can't Lie*, cit., pp. 732-733 and 737.
26 In general, for this argument, see K. LÖRCHER, *op. cit.*, p. 154.
27 J. MOYER-LEE-N. COUNTOURIS, *op. cit.*, p. 35.
28 G. GAUDIO, *Litigating the Algorithmic Boss in the EU,* cit., pp. 99-100.
29 Z. RASNAČA, *Special Issue Introduction*, cit., p. 409.
30 ILO, *The role of digital labour platforms*, cit., pp. 182-183.
31 See A. BELLAVISTA, *L'unità produttiva digitale*, in *Labour & Law Issues*, 2023, vol. 9, n. 1, pp. 98-100, who stresses how digital tools can be a valuable means for trade unions to mobilize food delivery workers.

unions are able to keep their counterparts in the spotlight, as has been the case in most of the litigation against platforms, they cannot be ignored by the general public. This can be advantageous, as unions can put reputational pressure on platforms, even forcing them to litigate less aggressively[32].

Having outlined the reasons why trade unions are better placed than individual workers to engage in algorithmic litigation, it is necessary to identify the different roles that trade unions can play in legal proceedings. In this respect, at least the following different roles can be distinguished.

First, unions can provide external support to individual workers in preparing and filing a claim to protect their own rights. This happens when unions have a strategic interest in such litigation, but the legal system provides that legal standing (i.e., who can bring a case) is reserved to the holder of the right. As it will be seen in Section 3 below, this is what happens in the case of classification claims in Italy, because Italian law reserves legal standing to individual workers and, consequently, unions have no legal means to play a direct role in these litigation proceedings.

Second, union can directly promote a claim as representative entities of the workers, that happens when the legal system gives legal standing to unions to enforce the individual rights of one or more workers[33]. Unions have a stronger role when they have given the role of representative entities when collective redress is in place[34]: i.e., when there are procedural mechanisms enabling a 'group of claimants (which may be natural or legal persons) who have suffered similar harm, resulting from the same illicit behaviour of a legal or natural person, to get redress as a group'[35], without the necessity to obtain the authorization of the victim to file the relevant claim[36]. A slightly different and conceptually autonomous model is *actio popularis*: i.e., when unions are given legal standing to act on their own behalf in the public interest[37]. As it will be seen in Section 4 below, this can happen in the case of discrimination claims in Italy, where Italian law grants legal standing to trade unions to promote representative actions and/or *actiones popularis* even in the absence of pre-identified or identifiable victims.

Third, trade unions can directly promote a claim to enforce their own rights. In these cases, the union is the right holder because the legal system specifically assigns a specific right to it: e.g., information and consultation rights. When such a right is violated, the trade union is therefore the only entity with legal standing to promote a claim. As it will be seen in Section 5 below, this has happened in Italy in relation to certain information rights, concerning the implementation and use of algorithmic management tools, which the Italian legal system has specifically attributed to trade unions.

32 J. MOYER-LEE-N. COUNTOURIS, *op. cit.*, pp. 33-35 and G. GAUDIO, *Litigating the Algorithmic Boss in the EU*, cit., p. 100.

33 For a general framework regarding legal standing to representative entities, see R. AMARO-M.J. AZAR-BAUD-S. CORNELOUP-B. FAUVARQUE-COSSON-F. JAULT-SESEKE, *Collective Redress in the Member States of the European Union*, Study requested by the JURI committee of the European Parliament, 2018, pp. 27-31.

34 For the reasons why collective redress can be, for trade unions, a better option than individual redress, see in general Z. RASNAČA, *Special Issue Introduction*, cit., p. 405 ff. and, on the topics of this article, G. GAUDIO, *Litigating the Algorithmic Boss in the EU*, cit., pp. 100-103.

35 According to the widely accepted definition provided by R. AMARO-M.J. AZAR-BAUD-S. CORNELOUP-B. FAUVARQUE-COSSON-F. JAULT-SESEKE, *op. cit.*, p. 13.

36 Z. RASNAČA, *Special Issue Introduction*, cit., p. 407.

37 S. BENEDI LAHUERTA, *Enforcing EU Equality Law Through Collective Redress: Lagging Behind?*, in *Common Mkt. L. Rev.*, 2018, vol. 55, n. 3, p. 784 and I. CHOPIN-C. GERMAINE, *A Comparative Analysis of Non-discrimination Law in Europe*, Study requested by the European Commission to the European network of legal experts in gender equality and discrimination, 2021, p. 93.

With these conceptual distinctions in mind, it is thus possible to examine the litigation strategy adopted by the CGIL against food delivery platforms, where the union has specifically aimed to understand the functioning of the algorithms used by these platforms. This analysis will be instrumental to test the hypothesis, put forward in this paragraph, according to which unions are better placed than individuals to fill the justice gap faced by platform workers.

Classification claims

3.1 Legal framework

Under Italian law, art. 2094 of the Italian Civil Code[38] establishes the notion of employee mainly in terms of control[39], as occurs in most European Union member states[40]. Therefore, the main criterion used to classify a worker as an employee is to prove that he/she received binding unilateral orders and directives from an employer[41].

Over the decades, the Italian legislator decided to extend some of the rights originally reserved to employees also to workers who, although considered self-employed, were considered in need of receiving some protections[42]. First, a very limited set of rights was granted to the so-called coordinated and continuous collaborations, in which the worker's performance is continuous, predominantly personal and the terms of its coordination with the principal's organization are established by mutual agreement between the parties (the so-called "coordinated workers")[43]. Then, as of 2015[44], the legislator has provided that the full set of employment protections, except for the ontologically incompatible provisions (as clarified by case-law)[45], applies to those collaborations in which the terms of performance are organized unilaterally by the principal (the so-called "hetero-organized workers")[46].

38 According to Article 2094 of the Italian Civil Code, an employee is a worker «*who engaged himself to cooperate for remuneration in an enterprise by working manually or intellectually under the direction of the entrepreneur*»: for an overview on the notion of subordination within the Italian legal system, see T. TREU, *Italy, in International Encyclopaedia of Laws: Labor Law and Industrial Relations*, Wolters Kluwer, Alphen aan den Rijn, 2023, p. 41.

39 E. ALES, *The Concept of 'Employee': the Position in Italy*, in B. WAAS-G. HEERMA VAN VOSS (eds)., *Restatement of Labor Law in Europe. Volume I. The Concept of Employee*, Bloomsbury, London, 2017, pp. 352-353 and 364-365.

40 B. WAAS, *Comparative Overview*, in B. WAAS-G. HEERMA VAN VOSS (eds.), *op. cit.*, p. xxvii ff.

41 For an explanation of the main indices of subordination used by Italian judges to classify a working relationship as an employment one, see: E. ALES, *op. cit.*, p. 351 ff. and T. TREU, *op. cit.*, p. 42.

42 On the crisis of subordination as an inadequate criterion for providing protection to subjects still deserving protection see: G. SANTORO-PASSARELLI, *Ricerche trasformazioni socio-economiche e nuove frontiere del diritto del lavoro civiltà giuridica e trasformazioni sociali nel diritto del lavoro*, in *Dir. Rel. Ind.*, 2019, n. 2, p. 417 ff.

43 The notion of coordinated and continuous collaborations is set out in Article 409, n. 3, of the Italian Code of Civil Procedure.

44 The notion of hetero-organized collaborations is set out in Article 2 of the d.lgs. n. 81 of 2015.

45 Cass. 24 January 2020, n. 1663, in *Riv. it. dir. lav,* 2020, n.1, pp. 49-60.

46 For a general overview of these categories of self-employment relationships, see: E. ALES, *op. cit.*, pp. 371-374; N. COUNTOURIS-V. DE STEFANO, *New trade union strategies for new forms of employment*, ETUC, 2019, pp. 25-26; M. PALLINI, *Towards a new notion of subordination in Italian Labour Law*?, in *Ital. Lab. L. e-Jour. Issue*, 2019, vol. 12, n. 1, pp. 1-24; P. DIGENNARO, *Subordination or subjection? A study about the dividing line between subordinate work and self-employment in six European legal systems*, in *Lab. Law Iss.*, 2020, vol. 6, n. 1, pp. 31-36. For an overview of the development of the protection of self-employed workers in the European Union see: F. FERRARO, *The Challenge of Self-Employment Protection in the European Union*, in S. BELLOMO-A.PRETEROTI (eds.), *Recent Labour Law Issues, a Multilevel Perspective*, Giappichelli, Torino, 2019, pp. 69-82.

Having said that, it shall be pointed out that the algorithmic opacity justice gap can be very serious when platform workers decide to go to court to be reclassified from self-employed (or coordinated workers) to employees (or, at least, hetero-organised workers). In fact, in classification claims, the customary burden of proof lies on the claimant worker, who must demonstrate the constitutive elements of subordination pursuant to art. 2094 of the Italian Civil Code[47]. Accordingly, the claimant platform worker faces the risk of losing the case if he/she is unable to gather, before the trial, useful information and evidence to explain the decision-making process behind the algorithm in support of his/her allegations that the platform was exercising control over the worker.

In order to sidestep algorithmic opacity, platform workers can benefit from information and access rights provided by Articles 13-15 of the GDPR[48] that apply to workers as data subjects, regardless of their classification as autonomous or subordinate workers and whenever the algorithm uses their personal data. According to Articles 13 and 14 of the GPDR[49], the worker has the right, when data are collected, to be informed of the «*existence of automated decision-making process*», as well as to obtain «*meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject*». The same information[50] can be obtained at the request of the interested party, when the processing of his/her data is already underway, by exercising their right of access provided by Article 15 of the GDPR[51].

Lastly, it shall be pointed out that, in classification claims, only the claimant worker has legal standing because Italian law does not provide any representative actions and/or *actiones popularis* allowing trade unions to bring such claims. In any case, as already clarified in Section 2, nothing prohibits trade unions to give external support to individual claimants, as it will be shortly seen below.

3.2 Cases

The first Italian rulings regarding the legal status of platform workers rejected riders' claims to be reclassified as employees[52]. These decisions placed much weight on the workers'

47 In relation to reclassification claims, see E. ALES, *op. cit.*, p. 370. More in general on the burden of proof in labour proceedings, see: ILO, *Evidence in Labor Court Proceedings (XXVI Meeting of European Labor Court Judges)*, Sep. 2018, pp. 101-108.

48 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 Apr. 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. On these provisions, see generally C. KUNER-L.A. BYGRAVE-C. DOCKSEY-L. DRECHSLER, *Background and evolution of the EU General Data Protection Regulation (GDPR), in* C. KUNER-L.A. BYGRAVE-C. DOCKSEY (eds.), *The EU General Data Protection Regulation (GDPR): A Commentary 1*, Oxford University Press, Oxford, 2020; and, in relation to algorithmic management, G. GAUDIO, *Algorithmic Bosses Can't Lie!,* cit., pp. 729-736.

49 G. ZANFIR-FORTUNA, *Comment to Article 13*, in C. KUNER-L.A. BYGRAVE-C. DOCKSEY (eds.), *op. cit.*, pp. 413-433.

50 A. ALOISI, *Regulating Algorithmic Management at Work in the European Union: Data Protection, Non-discrimination and Collective Rights*, in *Int. Jour. Comp. Lab. L. and Ind. Rel.*, vol. 40, n. 1, 2023, pp.12-19. In any case, art.15(1)(h) uses exactly the same words as art.13(2)(f).

51 G. ZANFIR-FORTUNA, *Comment to Article 15*, in C. KUNER-L.A. BYGRAVE-C. DOCKSEY (eds.), *op. cit.,* pp. 449-468.

52 A. ALOISI, '*With Great Power Comes Virtual Freedom': A Review of the First Italian Case Holding that (Food-delivery) Platform Workers Are Not Employees*, in *Comp. Lab. L. & Policy Jour.*, 2018, Dispatch n. 13; L. BATTISTA, *I lavoratori delle piattaforme digitali tra diritto, tecnologia e giustizia*, in *Arg. dir. lav*., 2021, n. 6, p. 1455 ff.

(alleged) freedom to choose whether and when to work and classify them initially as coordinated workers[53] and later as hetero-organized workers[54].

In November 2020, for the first time in Italy, the Tribunal of Palermo declared the subordinate nature of the working relationship between a rider and the well-known food delivery platform Glovo[55]. The claimant (a CGIL trade unionist) brought an individual claim demanding to be reclassified as an employee rather than an autonomous worker, after his account was suddenly deactivated by the platform without any explanation.

With the aim of gathering evidence that could have been useful in supporting his claim, the platform worker, with the support of the CGIL, had twice exercised the right to access pursuant to Article 15 of the GDPR before starting the trial[56]. First, the platform worker requested the company to communicate «*the sessions in their database*»[57] so as to reconstruct the hours he had actually worked for Glovo. Second, he requested «*to be informed of the data processing mechanism that determined the decision to disconnect his account and not reconnect it following his request*»[58]. The company had adequately fulfilled the first access request, making the company database available to the applicant. Conversely, according to the defense, he had received a communication regarding his second request that was completely inadequate to protect the rights claimed before the Tribunal[59].

In any case, this strategy was successful as it produced positive results for the claimant. Thanks to the scheme produced by the defendant (in response to the first request for access), the Tribunal ascertained the continuative nature of the performance of the rider, who had been on an average working schedule similar to the one of an employment relationship (close to eight hours a day and forty per week)[60]. This element, along with the fact that the rider's work was managed and organized exclusively by the platform used by Glovo, as «*the*

53 Trib. Turin 7 May 2018, n. 778, in *Arg. dir. lav*., 2018, n. 4-5, pp. 1220-1241, on which see M. BIASI, *Il Tribunale di Torino e la qualificazione dei riders di Foodora*; on the same ruling see also: M. DEL CONTE-O. RAZZOLINI, *La gig economy alla prova del giudice: la difficile reinterpretazione della fattispecie e degli indici denotativi*, in *Giornale dir. lav. e relazioni ind.,* 2018, n. 3, pp. 673-682; P. ICHINO, *Subordinazione, autonomia e protezione del lavoro nella gig-economy*, in *Riv. it. dir. lav.*, 2018, n. 2, pp. 294-303. Trib. Milan 10 September 2018, n. 1853, in *Labor*, 2019, n. 1, pp. 112-120, on which see M. FORLIVESI, *Nuovi lavori, vecchie interpretazioni? Note a margine di una recente sentenza del tribunale di Milano sulla qualificazione giuridica dei c.d. "riders*".

54 Court app. Turin 4 February 2019, n. 26, in *Riv. it. dir. lav*., 2019, n. 2, pp. 340-358, on which see M.T. CARINCI, *Il lavoro eterorganizzato si fa strada…sulle ruote dei riders di Foodora*; on the same ruling see also: R. DEL PUNTA, *Sui riders e non solo: il rebus delle collaborazioni organizzate dal committente*, *in Riv. it. dir. lav*, 2019, n. 2, pp. 358-367; R. DE LUCA TAMAJO, *La sentenza della Corte d'Appello Torino sul caso Foodora. Ai confini tra autonomia e subordinazione*, in *Lav. dir. eu*., 2019, n. 1. Cass. 24 January 2020, n. 1663, in *Riv. it. dir. lav*., 2020, n. 1, pp. 49-60, on which see: M.T. CARINCI, *I contratti in cui è dedotta un'attività di lavoro alla luce di Cass. 1663/2020*; on the same ruling see also: R. ROMEI, *I riders in Cassazione: una sentenza ancora interlocutoria*, in *Riv. it. dir. lav.,* 2020, n. 1, p. 89 ff.

55 Trib. Palermo 24 November 2020, n. 3570, in *Riv. it. dir. lav*., 2020, n. 4, p. 802 ff., on which see: A. ALOISI, *Demystifying Flexibility, Exposing the Algorithmic Boss: A Note on the First Italian Case Classifying a (Food Delivery) Platform Worker as an Employee*, in *Comp. Lab. L. & Policy Jour.*, 2021, Dispatch n.35 Italy; M. FALSONE, *Nothing New Under the Digital Platform Revolution? The First Italian Decision Declaring the Employment Status of a Rider*, in *Ital. L. Jour.*, 2021, vol. 7, n. 1, p. 253 ff.

56 See, *supra,* footnote n. 51 .

57 Trib. Palermo 24 November 2020, cit., pt. 51.

58 *Ibidem*, pt. 66.

59 *Ibidem.*

60 In order to verify the presence of the symptomatic elements of subordination, the judge attributed primary importance to the way in which the employment relationship was conducted, expressly referring to Cass. 24 January 2020, n. 1663.

appellant could carry out his work only by accessing it and complying with its rules»[61], led the Tribunal to consider that the platform exercised actual control over the worker, thus reclassifying him as a full-time and permanent employee of the platform[62].

This lawsuit represented the conclusion of a complex process which involved both the worker and the CGIL before and after the trial.

Several months prior to filing the appeal[63], the claimant had received media exposure, participating in a television program focused on the precarious working conditions of the Palermo riders[64]. A CGIL's rep was there to support his complaints and to highlight the need to reclassify riders as employees. This is not the only episode in which the claimant was involved in union activity before submitting the claim. As reported in the text of the decision, he had taken part in two meetings with Glovo's managers concerning the platform's failure to provide riders with personal protection equipment during the Covid-19 crisis. These meetings, among other initiatives carried out by the CGIL to protect platform workers, had been the subject of a specific press release by the CGIL, which was picked up by the local press[65].

The CGIL managed to get media attention especially after the decision of the Tribunal of Palermo was published. The platform worker's judicial victory was reported by all major Italian newspapers[66], which emphasized the key role played by CGIL and its legal team that, having specific experience in managing these types of cases, were able to develop an effective and successful legal strategy. As claimed by one popular Italian newspaper, the decision of the Tribunal of Palermo was «*the best result out of the judicial offensive that the national CGIL has launched in recent months against apps that deliver food to homes*»[67].

The above judgement was not an isolated case. The CGIL followed the same legal strategy in Turin a couple of years after the Palermo ruling. In November 2022[68], a reclassification claim was filed by a rider (again a CGIL trade unionist) against Glovo before the Tribunal of Turin. This claim was successful as the Tribunal of Turin reclassified him as an employee because the platform organized the execution of work and disciplined noncompliance with its directives. Once again, the CGIL, who publicly claimed victory against the platform[69], managed to get media attention in all major Italian newspapers[70].

61 Trib. Palermo 24 November 2020, cit.

62 For a more detailed analysis of the functioning of the algorithm and the judge's motivational process, which are beyond the scope of our contribution, please refer to the contributions listed *supra* footnote n. 55.

63 The appeal was filed on 09/29/2020.

64 The recording of the 'Cronache Siciliane' program of 11 February 2020 is available at cronachedisicilia.it.

65 See: CGIL, *Coronavirus. Riders: in assenza di protezioni, il servizio va sospeso*, 12 marzo 2020, available at nidil.cgil.it, in which the Government was accused of having forgotten this category of weaker workers and Palermo riders were invited to join a social media campaign already underway throughout the country.

66 See, for example: N. AMADORE, *Tribunale di Palermo: rider lavoratore subordinato*, in *Il Sole 24 Ore,* 23 novembre 2020; A. RIBAUDO, *Rider vince la causa contro Glovo: assunto a tempo indeterminato*, in *Il Corriere della Sera*, 23 novembre 2020; V. RICCIARDI, *Rider vince causa contro Glovo, dovrà essere assunto a tempo indeterminato*, in *Domani*, 23 novembre 2020; G. AMATO-G. RUTA, *'Io, rider e dipendente, così ho battuto Glovo*, in *La Repubblica*, 24 novembre 2020.

67 R. ROTUNNO, *"Glovo assuma il fattorino come dipendente". A Palermo la prima sentenza che impone a una app di riconoscere la subordinazione dei rider,* in *Il Fatto Quotidiano*, 23 November 2020.

68 Turin Court 15 November 2022, in *wikilabour.it*.

69 CGIL, *Rider, Sentenza Tribunale di Torino*, 17 novembre 2022, available at nidil.cgil.it.

70 See for example: D. DENINA, *Il rider che è diventato un lavoratore subordinato*, in *rainews.it*, 16 novembre 2022; G. URSO, *Delivery, sentenza storica del tribunale di Torino: i riders sono dipendenti subordinati*, in *torinotoday.it*, 16 novembre 2022.

Given the similarities between the two judicial actions, it can be said that the CGIL adopted and duly executed a precise strategy which proved to be successful, especially if considering that these rulings paved the way to other cases where Italian Courts mostly decided that riders shall be considered employees (or at least hetero-organised workers)[71], thus positively influencing – from the union perspective – the legal landscape regarding the classification of platform workers.

Discrimination claims

4.1 Legal framework

Italian law, through the implementation of a number of EU Directives[72] aimed at harmonizing the anti-discrimination law of the Member States of the European Union[73], prohibits discrimination based on a series of protected grounds: in particular, gender[74], race and ethnic origin[75], religion or belief, disability, age or sexual orientation[76].

In addition, in line with the EU anti-discrimination Directives[77], Italian law provides for a partial shift of the burden of proof in discrimination cases[78]. In particular, when the claimant

71 This is not the only ruling, following that of the Palermo Court, in which judges have ascertained the subordinate nature of the employment relationship of riders. In particular, a distinction must be made: a) judges have found subordination following claims brought directly by workers, see: Trib. Turin 18 November 2021 (on which see C. DE MARCO-A. GARILLI, *La qualificazione del lavoro dei rider: ancora una volta il giudice accerta la subordinazione e individua nella piattaforma imponente il reale datore di lavoro*, in *Labor,* 2022, p. 213 ff.); Trib. Milan 20 April 2022, n. 1018 (on which see A. BELLAVISTA, *Riders e subordinazione: a proposito di una recente sentenza*, in *Lav. dir. eu*., 2022, n. 2); Court app. Turin 25 November 2022, n. 455, in *DeJure*; b) Courts ascertained subordination in cases that followed the exercise of inspection activity by INPS (the national social security institute), see: Trib. Milan 19 October 2023, n. 3237 in *quotidianopiù.it;* c) judges established incidentally the hetero-organised/subordinate nature of the employment relationship of workers, in proceedings brought by CGIL, see: Trib. Florence 9 February 2021; Trib. Milan 20 March 2021; Trib. Bologna 30 June 2021 (on which see A. DONINI, *Condotta antisindacale e collaborazioni autonome: tre decreti a confronto, in Lab. Law Iss.*, 2021, n. 1, p.1 ff.); more recently, see: Trib. Palermo 3 April 2023; Trib. Palermo 20 June 2023, both published in *DeJure;* Trib. Milan 28 September 2023, n. 6979, in *bollettinoadapt.it* . To complete the picture, it should be pointed out that there have been cases in which the courts have excluded subordination, sometimes resorting to the category of so-called hetero-organised work (see Court app. Milan 22 February 2023, n. 132, in *DeJure*), sometimes affirming the genuinely self-employed nature of the riders' employment relationship (see Trib. Rome 22 June 2023, unpublished).

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

73 For an analysis of European anti-discrimination law, its applicability to algorithmic discrimination and the distinction between direct and indirect discrimination, see: A. KELLY-LYTH, *Algorithmic discrimination at work*, in *Europ. Lab. L. Jour.*, 2023, vol. 14, n. 2, pp. 152-171.

74 D.lgs. 11 April 2006, n. 198, the so-called "code of equal opportunities between men and women".

75 D.lgs. 9 July 2003, n. 215, implementation of Directive 2000/43/EC.

76 D.lgs. 9 July 2003, n.216, implementation of Directive 2000/78/EC and Directive 2014/54/EU relating to measures aimed at facilitating the exercise of the rights conferred on workers within the framework of the free movement of workers.

77 Art. 8(1) of Directive 2000/42/EC. Art. 10(1) of Directive 2000/78/EC and Art. 19(1) of Directive 2006/54/EC use exactly the same words as Art. 8(1). In general on the burden of proof in EU anti-discrimination laws, see: L. FARKAS-O. O'FARRELL, *Reversing the Burden of Proof: Practical Dilemmas at the European and National Level*, 2015, Publications Office of the European Union, and I. CHOPIN-C. GERMAINE, *op. cit.*, pp. 97-99.

78 Specifically on the burden of proof in discrimination claims in Italy, see S. DE CASTRO, *Anti-discrimination Law in the Italian Courts: the new frontiers of the topic in the age of algorithms*, in *Working Papers C.S.D.L.E.*

provides factual elements, including statistical data, from which it is possible to presume the existence of discrimination, it is up to the defendant to prove that such discrimination did not occur or to provide a valid explanation that justifies the unequal treatment[79]. This mechanism constitutes an effective regulatory antibody against algorithmic opacity. In case of an alleged algorithmic discrimination against platform workers, if the claimant is able to provide *prima facie* evidence of the discrimination, the employer (or principal) faces the risk of losing the case if he/she is unable to prove that the decision-making process behind the algorithm is not discriminatory or that the unequal treatment is objectively justifiable[80]. As that the claimant does not need to provide full proof of the alleged discrimination in order to win the case, a rational employer (or principal) would be inclined to use only those algorithmic devices whose decision-making logic can be made transparent in court. That is how the mechanism of partial reversal of the burden of proof promotes, albeit indirectly, algorithmic transparency[81].

In discrimination claims, the Italian legal system grants trade unions the legal standing to protect individual rights and interests of one or more workers not to be discriminated against. This right, in accordance with the relevant EU directives[82], is granted to trade unions in two distinct cases. In the first case, they represent the victims of discrimination because they have been granted legal standing to act either on behalf or in support of the complainant (representative action)[83]. In the second case, trade unions can act on their own behalf in the public interest because collective discrimination has occurred and it is not possible to directly and immediately identify the victims of discrimination (*actio popularis*)[84].

4.2 Cases

In December 2020, the Tribunal of Bologna ruled on the claim brought by three union federations affiliated with CGIL to establish the discriminatory nature of the algorithm employed by Deliveroo to manage and book the riders' work shifts[85]. According to the claimants, the work session booking system used by the platform was likely to discriminate against riders who, after having booked a shift, did not show up for work as they went on a strike (or for other legitimate reasons such as illness, disability or needs related to a minor child).

'Massimo D'Antona, 2021, n. 440, pp. 18-24.

79 This rule is established by Art. 28(4) of d.lgs. n.150 of 1 September 2011, applicable to all discrimination claims regardless of the ground for discrimination. Specifically on gender discrimination: Art. 40 of d.lgs. n.198 of 11 April 2006.

80 As first suggested by P. HACKER, *Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies Against Algorithmic Discrimination Under EU Law*, in *Common Mkt. L. Rev.*, 2018, vol. 55, pp. 1169-1160. Among labour law scholars, see G. GAUDIO, *Algorithmic Bosses Can't Lie!*, cit., p. 725-729 and later A. ALOISI, *Regulating Algorithmic Management at Work in the European Union*, cit., pp. 37-70.

81 As already argued in G. GAUDIO, *Algorithmic Bosses Can't Lie!*, cit., p. 740.

82 Art. 7(2) Directive 2000/43/EC. A similar wording is used in: Art. 9(2), Directive 2000/28/EC and Art. 17(2) Directive 2006/54/EC.

83 Art. 5(1) of d.lgs. n.215/2003; Art. 44(10) of d.lgs. n. 286/1998; art. 5(1) of d.lgs. n. 216/2003; Art. 4(1), l. n. 67/2006; Articles 38 (1)(6) and 55-septies (1) of d.lgs. n. 198/2006.

84 Art. 5(3) of d.lgs. n. 215/2003; Art. 44(10) of the d.lgs. n. 286/1998; Art. 5(2) of the d.lgs. n. 216/2003; Art. 55-septies (2) of the d.lgs. n. 198/2006.

85 Trib. Bologna 31 December 2020, n. 2949, in *Riv. it. dir. lav.*, 2021, n. 2, pp. 175-195, with case-note G. GAUDIO, *La CGIL fa breccia nel cuore dell'algoritmo di Deliveroo: è discriminatorio*. On the same ruling see A. ALOISI–V. DE STEFANO, *Frankly, My Rider, I Don't Give a Damn,* in *Rivista Il Mulino*, 7 January 2021 and V. PIETROGIOVANNI, *Deliveroo and Rider's Strikes: Discriminations in the Age of Algorithms*, in *Int. Lab. Rts. Case L.*, 2021, n. 7, pp. 317-321.

The trade unions acted on the basis of Article 5(2) of Legislative Decree 216/2003 because, under Italian case law, discrimination on union grounds is prohibited as the case-law deems that it constitutes discrimination based on belief[86]. This choice proved to be strategic, as it allowed the CGIL to overcome the procedural objection raised by Deliveroo regarding the lack of legal standing of the claimants[87] and to avoid the thorny issue of the legal classification of the riders' working relationship[88].

The claimants were able to provide *prima facie* evidence of the alleged discrimination based on the information posted on the company's website and the testimony of two witnesses[89]. However, the claimants were unable to provide full evidence of the operating mechanism behind the algorithm[90].

Specifically, according to the *prima facie* evidence introduced in the trial, the work session booking system consisted in a score given periodically to each rider based on two parameters: reliability[91] and participation[92]. This score conditioned the riders' ability to book future work shifts, because it gave riders with a higher score access to the booking system several hours in advance of those with lower scores, so the latter could only book the shifts left by the prioritized group. Failure to attend a booked session or late cancellation of the same resulted in lowering of the riders' score, regardless of the reason for their absence from work[93]. According to the Tribunal, the algorithm's discriminatory potential lied in its «*lack of awareness*» or «*blindness*» as «*by treating in the same way those who do not participate in the booked*

86 Articles 1 and 2 of d.lgs. 216/2003, transposing Articles 1 and 2 of Directive 2000/78/EC, prohibit discrimination based on belief. Under Italian case law, discrimination based on belief includes trade union membership: see: Cass. 2 January 2020, n. 1, in *Riv. it. dir. lav*., 2020, n. 2, pp. 377-395., with case-note D. TARDIVO, *Estensione dell'agevolazione probatoria avverso la discriminazione al procedimento ex art. 28 st. Lav.: un chiasmo ragionevole?*.
However, please consider that that ECJ recently held that "religion or belief" is to be distinguished from the ground based on political or any other opinion' and, therefore, it does not cover political or trade union belief: see ECJ, 13 October 2022, C-344/20 (LF v SCRL), available at curia.europea.eu. Regarding the effects of this ruling on the interpretation of domestic law. see: O. BONARDI, *Discrimination on trade union grounds after the L.F. judgement of the EU Court of Justice*, in *ItalianEqualityNetwork.it*, 22 October 2023.
87 In fact, as specified in the previous paragraph, Article 5(2) of d.lgs. n. 216/2003 grants trade union legal standing to act on their own behalf in cases of collective discrimination and the victims of discrimination are not directly and immediately identifiable.
88 In fact, Article 3 of d.lgs. n. 216/2003 in establishing the scope of application of the anti-discrimination rules on «*access to employment and work*» expressly contemplates «*both self-employed and employee' work*». The court reached this conclusion by referring to two other regulations as well: Article 2 of d.lgs. n. 81/2015, which simplified the application of some protective measures pertaining to the employment of certain categories of self-employed workers, and Article 47-quinquies of d.lgs. n. 81/2015, which expressly applies the anti-discrimination laws to certain platform workers classified as self-employed.
89 As seen above, in terms of distribution of the burden of proof, Article 28(4) of d.lgs. n. 150/2011 applies to anti-discrimination judgments regardless of the risk factor.
90 On July 22, 2021 the Italian Data Protection Authority (DPA) issued an injunction against Deliveroo, as it found, following its own inspection, a number of serious irregularities committed by the company, including its failure to disclose the concrete ways in which the algorithm used to manage riders operated: see Italian DPA, 22 July 2021 order; for a commentary on the order see: C. HIEßL, *Jurisprudence of national courts in Europe on algorithmic management at the workplace*, Report prepared for the European Centre of Expertise in the field of labour law, employment and labour market policies (ECE) of the European Commission, sept. 2022 (last update: April 7, 2023), pp. 11-14.
91 According to the Respondent's annex, this parameter is determined by «*the number of occasions on which the rider, despite having booked a session, did not participate, where 'participating' means logging in within the first 15 minutes of the start session*».
92 According to the Respondent's annex, this parameter is determined «*by the number of times you give available for the most relevant slots (8 to 10 p.m. from Friday to Sunday) for home food consumption*».

session for futile reasons and those who do not participate because they are on strike (or because they are ill, have a disability, or assist a disabled person or a sick minor, etc.) (it) *discriminates the latter, possibly marginalizing them from the priority group and thus significantly reducing their future chances of access to work*»[94]. At this point, the burden of proof shifted to Deliveroo. However, the company chose to not shed full light on the functioning of the algorithm and, accordingly, lost the case.

The Bologna decision, which came just a few weeks after the ruling in Palermo that reclassified a rider as an employee[95], hit the pages of all major national newspapers, which highlighted the pioneering role played by the CGIL in promoting a claim where, for the first time in Europe[96], a judge questioned the alleged neutrality of an algorithmic decision maker by ascertaining its discriminatory nature [97].

The CGIL was thus able to use anti-discrimination laws strategically for the purposes of protecting individual workers' rights. This was also evident in a recent ruling of the Tribunal of Palermo that, some years after the Bologna decision, held that an algorithm used by Foodinho had discriminated the riders for grounds not only related to union activity[98]. The CGIL, that managed once again to obtain media attention [99], obtained a second positive ruling ascertaining that the work organization system adopted by Foodinho, that awarded a series of benefits to the most productive riders and those who were most available to work on weekends, indirectly discriminated against workers who presented a risk factor (such as age, disability, the need to care for a family member, religious faith that prevented them from working on weekends).

These rulings represent key precedents in the field as they are the first two decisions regarding algorithmic discrimination at work not only in Italy but, to our best knowledge, in the world. These judicial actions also show that anti-discrimination laws provide useful regulatory antibodies against algorithmic opacity, namely the shift of the burden of proof on the respondent, and can be directly enforced by unions to better guarantee the rights of homogenous group of workers: something very useful when unions are willing to use the law strategically.

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93 As reported in the order, both the concurring witness statements and the information extracted from the defendant's website, confirm that the work session is counted only if the rider logs in within fifteen minutes prior to the start of the shift, otherwise the session is not counted as done.

94 Trib. Bologna 31 December 2020, cit.; the court found that this was indirect discrimination, namely, an apparently neutral provision that nevertheless puts a certain category of workers at a potential disadvantage. On whether algorithmic discrimination can be qualified as direct discrimination see J. ADAMS-PRASSL-R. BINNS-A. KELLY-LYTH, *Directly Discriminatory Algorithms*, in *The Modern L. Rev.*, 2023, vol. 86, n.1, pp. 144-175.

95 Trib. Palermo 24 November 2020, n. 3570, in *Riv. it. dir. lav*., 2020, n. 4, p. 802 ff.

96 This is the first decision in Europe on the problem of algorithmic discrimination, see: CGIL, *RIDERS. Cgil promuove la prima causa in Europa contro una multinazionale di food delivery*, 18 December 2019; C. HIEßL, *Jurisprudence of national courts,* cit. This research clearly highlights the fact that, thus far, Italy has been the only EU member state where the court has established the algorithm's discriminatory nature.

97 See, for example: R. CICCARELLI, *Frank, l'algoritmo anti-sciopero. La Cgil porta in tribunale Deliveroo*, in *Il Manifesto*, 19 December 2019; G. FERRAGLIONI, *Deliveroo, I giudici di Bologna bocciano Frank, l'algoritmo che discriminava i malati e chi scioperava*, in *Open*, 2 January 2021; M.M. BIDETTI-C. DE MARCHIS GOMEZ, *Frank è cieco, ma ci vede benissimo quando punisce chi sciopera*, in *Collettiva*, 2 January 2021.

98 Trib. Palermo 17 November 2023, n. 9590. For a more elaborate analysis of the decision see: I. GIOVANNELLI, *Riders: quando i criteri di valutazione del rendimento sono discriminatori*, in *Il Quotidiano Giuridico*, 4 dicembre 2023.

99 See, for example: G. TRINCHELLA, *Punteggio di eccellenza per i rider è discriminatorio, la sentenza del tribunale del Lavoro di Palermo*, in *Il Fatto Quotidiano*, 20 November 2023; REDAZIONE; *Il sistema di selezione per i rider è discriminatorio: la sentenza del Tribunale di Palermo contro Glovo*, in *Open*, 20 November 2023.

Anti-union behaviour claims

5.1 Legal framework

The Italian legislator, in transposing the European Directive 2019/1152[100], recently amended Legislative Decree n. 152/1997[101] through the enactment of Legislative Decree n. 104/2022 (the so-called "Transparency Decree")[102]. The Transparency Decree is of interest for the purposes of this analysis because, going beyond Dir. 2019/1152 and anticipating certain obligations that will be contained in the Directive on improving working conditions in platform work (the so-called "PWD")[103] that is on the verge of being approved[104], has introduced a new legal provision specifically dedicated to information requirements on fully[105] automated decision-making and monitoring systems[106], like those that are often used by digital labour platforms.

In short, Article 1-bis of Legislative Decree 152 of 1997 goes beyond the information and access rights provided by the GDPR as it obliges employers (or principals) to provide a more detailed set of information not only to individual workers but also to trade unions. Therefore, this provision aims to directly overcome the issue of algorithmic opacity, so that

100 European Parliament and Council Directive (EU) 2019/1152 of 20 June 2019 on transparent and predictable working conditions in the European Union. For further information see a: D. GEORGIOU, *The new EU Directive on Transparent and Predictable Working Conditions, in the context of new forms of employmen*t, in *Eur. Jour. Ind. Rel*., 2022, vol. 28, n. 2, p. 193 ff.

101 Specifically, the Transparency Decree amended d.lgs. n. 152 of May 26, 1997, implementing Directive 91/533/EC concerning the employer's obligation to inform the employee of the conditions applicable to the employment contract or relationship.

102 d.lgs. 27 June 2022, n. 104, see among others: M.T. CARINCI-S. GIUDICI-P. PERRI, *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*, 2023, n. 1, p. 7-40; M. PERUZZI, *Intelligenza artificiale e lavoro, uno studio sui poteri datoriali e tecniche di tutela*, Giappichelli, Torino, 2023, pp. 94-106; G.A. RECCHIA, *Condizioni di lavoro trasparenti, prevedibili e giustiziabili: quando il diritto di informazione sui sistemi automatizzati diventa uno strumento di tutela collettiva*, in *Lab. Law Iss.*, 2023, vol. 9, n. 1, p. R.32-R.57; E. DAGNINO, *Il diritto interno: i sistemi decisionali di monitoraggio (integralmente) automatizzati tra trasparenza e coinvolgimento*, in M. BIASI (edited by), *Diritto del lavoro e intelligenza artificiale*, Giuffrè, Milano, 2024, p. 147 ff.. For an English overview on this rulings, see: L. ZAPPALÀ, *Transparency and Comprehensibility of Working Conditions and Automated Decisions: Is it Possible to Open the Black Box?* , in *Ital. L. Jour*., 2023, vol. 9, n.2, pp. 623 ff.

103 As noted by A. ALOISI-N. POTOCKA-SIONEK, *De-gigging the labour market? An analysis of the 'algorithmic management' provisions in the proposed Platform Work Directive'*, in *Ital. Lab. L. e-Jour. Issue*, 2022, vol. 15, n. 1, pp. 29-50.

104 See footnotes 144 and 145.

105 A few months after the 'Transparency Decree''s approval, the so-called "Labor Decree" (d.l. 4 May 2023, n. 48, converted into l. 3 July 2023 n. 85) was issued which, with a view to lighten the burden on companies, limited the employer's obligation to provide information to cases where the systems are fully automated. The "Labor Decree" also amended Paragraph 8, which, as of today, states: «*the information obligations under this article do not apply to systems protected by industrial and commercial secrecy*». For further information on these legislative amendment, which is beyond the scope of this article, see: E. DAGNINO, *Modifiche agli obblighi informative nel caso di utilizzo di sistemi decisionali o di monitoraggio automatizzati (art.26, comma 2, d.l. n.48/2023)*, in E. DAGNINO et al. (eds.), *Commentario al d.l. 4 maggio 2023 n.48 c.d. 'decreto lavoro'*, Adapt University Press, Bergamo, 2023, pp. 56-63.

106 The provision has been sharply criticized by a part of the Italian scholarship in terms of its compatibility with the European source and the interpretative difficulties it has given rise to: see, for example M. FAIOLI, *Giustizia contrattuale, tecnologia avanzata e reticenza informativa del datore di lavoro. Sull'imbarazzante 'truismo' del decreto trasparenza'*, in *Dir. rel. ind*., 2023, n. 1, pp. 45-60). However, another part of the Italian scholarship has welcomed the introduction of this provision mostly because it can constitute an effective antibody against algorithmic opacity: see, for example, G.A. RECCHIA, *op. cit.,* pp. R.32-R.57.

the algorithm's operating mechanism can be more easily understood by workers and unions[107], also with a view of obtaining more information and evidence to better enforce their rights in court.

More specifically, this provision does not merely stipulate that the employer (or principal) must inform workers of the use of such systems (Paragraph 1), prior to the start of their work activities, but also defines an extremely detailed information obligation concerning specific technical qualities such as the logic and operation of the automated systems, control measures adopted for automated decisions, the dataset and the main parameters used to program the systems, as well as the level of accuracy, robustness and cybersecurity related to the same (Paragraph 2). Aiming at guaranteeing dynamic transparency, it also guarantees workers the right to be informed in writing regarding any changes affecting the information provided in the beginning (Paragraph 5), which otherwise would be limited to taking a snapshot of the situation existing before the beginning of the employment relationship[108].

In addition to the above, workers are also given a right of access to the data and to request additional information to those already given prior to the start of the work activities, which can be exercised directly by the worker or through the territorial unions or company works councils (Paragraph 3).

The most significant innovation is that the Transparency Decree has identified as rightsholders not only individual workers but also unions, when providing that all information and data have to be provided also to works councils and, in their absence, to the territorial branches of the comparatively most representative trade union associations at national level (Paragraph 6). In short, the Transparency Decree has multiplied the information channels, thus trying to guarantee algorithmic transparency both at individual and collective level[109].

It is also worth noting that the personal scope of this provision (Paragraph 7) is very broad, including not only employment relationships, but also coordinated and hetero-organized workers[110]. This implies that platform workers can be surely considered as falling into the scope of this provision without any classification issue.

Finally, it is worth understanding who has legal standing to enforce the above rights. If there is no doubt that the individual worker can take legal action to protect his/her individual right to receive the above information, trade unions, as holders of the same rights, also have legal standing to enforce their own rights. In this respect, it should be noted that Italian law provides trade unions, in addition to the ordinary action[111], the special procedure provided by Article 28 of the Law n. 300/1970 (the so-called "Workers' Statute") aimed at suppressing anti-union behaviour. Under this provision, if the employer engages in conduct aimed at preventing or restricting the exercise of trade union freedom and activity, as well as the right to strike, the interested local bodies of national trade unions can demand that the

107 As argued by S. RENZI, *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 *Arg. Dir. Lav*., 2023, n. 1, pp. 1009-1012.

108 On this issue see L. TEBANO, *I diritti di informazione nel d.lgs.104/2022. Un ponte oltre la trasparenza*, in *Lav. dir. eu*., 2024, n. 1, p. 6.

109 G.A. RECCHIA, *op. cit.*, pp. 44-45.

110 On this issue, see: F. FERRARO, *L'estensione degli obblighi informative alle collaborazioni coordinate e continuative e alle collaborazioni organizzate dal committente*, in D. GAROFALO-M. TIRABOSCHI-V. FILÌ-A. TROJSI (eds.), *Trasparenza e attività di cura nei contratti di lavoro. Commentario ai decreti legislativi n.104 e n.105 del 2022*, Adapt University Press, Bergamo, 2023, p.87 ff.

111 Art. 414 of the Italian Civil Procedure Code.

judge order the employer to cease the unlawful conduct and to remove its effects[112]. The anti-union behaviour procedure is particularly effective, especially compared to the ordinary procedure, because it is quick[113], the decision is immediately enforceable and, if the employer does not comply, the conduct constitutes a criminal offence[114].

5.2 Cases

By explicitly recognizing the right of trade unions to access data and request information on automated systems, the provision contained into the Transparency Decree seems to fit in perfectly with the CGIL's strategy of turning to litigation, especially to overcome algorithmic opacity. It is therefore no coincidence that, just over a year after this provision came into force, three distinct rulings[115] have already been handed down. All of them arose from trade union requests to ascertain the anti-union behaviour of some digital platforms, operating in the food delivery sector, which had failed to comply with the information obligations introduced by the Transparency Decree, on the assumption that this conduct restricted union activity.

In all three cases, the judges, before examining the main issue, ruled on the objection of inadmissibility raised by the respondent platforms on the grounds that the special procedure under Article 28 of the Workers' Statute applies only to violations concerning employees[116]. Referring to the now well-established case-law which recognises that riders, if not employees, are at least hetero-organized workers[117], the judges pointed out that, given the statutory extension of the discipline of the employment relationship to hetero-organized collaborations[118], platform workers fall within the scope of Article 28 of the Workers' Statute[119].

In the first case[120], the Tribunal of Palermo ruled that the conduct of Uber Eats, which had refused to provide the CGIL with the requested information on automated decision-making and monitoring systems, restricted and compromised union activity, thereby legitimizing the request for the release of information under Article 28. The heart of the ruling is the part in which the judge, recalling the provisions of Article 1-bis paragraph 6, clarifies that the right

112 For general information on the provision, see: T. TREU, *op. cit.*, pp. 209-211 and A. DE MATTEIS-P. ACCARDO - G. MAMMONE, *National Labour Law Profile: Italy*, in *ilo.org*, accessed 13 March 2024.

113 According to Art. 28 of the Workers' Statute, the judge must summon the parties within two days and acquire summary information. If he/she finds that there is a violation, his/her decision shall be adopted by means of a decree that is immediately enforceable and may be opposed by appealing to the same court but shall remain effective until the court's decision regarding the opposition.

114 According to Art. 28 of the Workers' Statute, the employer who does not obey the order issued by the judge is punished according to Art. 650 of the Italian Penal Code.

115 Trib. Palermo 3 April 2023, n. 14491, in *Arg. Dir. Lav*., 2023, n. 5, pp. 1004-1019, on which see S. RENZI, *op. cit.*; Trib. Palermo 20 June 2023, in *DeJure (IUS Lavoro),* 26 July 2023, on which see P. PATRIZIO, *Il mancato rispetto datoriale degli obblighi informativi costituisce condotta antisindacale*; Trib. Turin 5 August 2023, in *ForoPlus*, on which see A. SCELSI, *L'informativa sui sistemi automatizzati, se lacunosa, integra gli estremi della condotta antisindacale*, in *Arg. Dir. Lav*., 2024, n. 1, pp. 111 ff.

116 See Trib. Florence 9 February 2021, which ruled that ex Article 28 appeal was precluded to trade union representative riders.

117 For a review of rulings that have acknowledged the subordinate/hetero-organized nature of the relationship of riders see, *supra,* footnotes n. 54 and 68.

118 As already highlighted in Section 3, Article 2 of d.lgs. n. 81 of 2015 expressly extends the rules of the employment relationship to collaborations hetero-organized by the principal.

119 See Trib. Bologna 30 June 2021, n. 2170; Trib. Milan 28 March 2021; Trib. Florence 24 November 2021, n. 781; Trib. Bologna 12 January 2023; all available on *Wikilabour.it*.

120 Trib. Palermo 3 April 2023, n. 14491. See, *supra,* footnote n. 112.

to receive information is recognised also to trade unions and, therefore, «*in addition to and not as an alternative to the possible prior disclosure of the same to the worker*»[121].

The second decision[122], issued by the Tribunal of Palermo against the company Foodinho, contains some interesting new elements. In particular, the Tribunal had to determine the meaning of fully automated systems, in order to be able to verify the existence of the disclosure violation[123]. In determining the defendant's anti-union behaviour, the Tribunal defined "fully" automated only those systems that «*do not involve human intervention at the decision-making or monitoring stage, regardless of any intervention at the previous stages*»[124]. Another peculiarity of the Uber Eats case is that, during the trial, Foodinho disclosed the information to the claimant's trade union, which in turn questioned its completeness. In this case, the Tribunal examined the content of the disclosed information and found that it was completely general and insufficient to meet the legal obligations, as it did not contain any indication of the parameters used to book slots, nor of the weight and criteria used to profile riders and allocate order proposals.

The same position is more clearly expressed in the reasoning of the third case[125], again against the Foodinho platform, in which the Tribunal of Turin found that not only the refusal to provide information, but also disclosure of incomplete and generic information, could be considered as anti-union behaviour. Following in the Palermo rulings' footsteps[126], the Tribunal of Turin went a step further. After a detailed comparison between the information requested by the unions and the information provided by the company [127], the Tribunal painstakingly listed the shortcomings of the latter, distinguishing between information that was completely omitted[128] and information that was incomplete[129]. The Tribunal concluded that the deficiencies in the information provided prevented the CGIL from truly understanding the rationale behind the operation of the automated systems, thus hindering union activity[130].

121 Trib. Palermo 3 April 2023, n. 14491, cit.

122 Trib. Palermo, 20 June 2023. See, *supra*, footnote n. 112.

123 As already argued, the d.l. 4 May 2023, n. 48, limited the disclosure obligations provided for in Article 1-bis only to cases where fully automated systems are used; see, *supra*, footnote n. 101.

124 For a more in-depth analysis of the court's reasoning with reference to the changes introduced by the d.l. 4 May 2023, n. 48, that amended the original provision introduced by the Transparency Decree, see G. PELUSO, *Obbligo informativo e sistemi integralmente automatizzati,* in *Lab. Law Iss.*, 2023, vol. 9, n. 2, pp.99-118; G.A. RECCHIA, *op. cit.*, pp. 53-54, in the part that argues that by outlining the objective field of application of the discipline that way, it would be very difficult to find systems that are not 'fully automated' and for which there is no disclosure requirement.

125 Trib. Torino, 5 August 2023. See, *supra,* footnote n. 112.

126 Both in terms of the ownership of the right to receive the information, and with reference to the anti-union nature of the employer's refusal to disclose the information stipulated in Article 1-bis of the Transparency Decree.

127 Again, similarly to what happened in Palermo, the company initially refused to disclose the information to the union and then fulfilled its information obligation in the course of the court case.

128 For example, the court notes how no information was provided both on the aspects of the employment relationship that are affected by the use of the systems (Art. 1-bis, para. 2(a)), and on the level of accuracy, robustness and cybersecurity of those systems (Art. 1-bis, para. 2(f)).

129 For example, the judge points out the failure to render explicit the specific calculation functions used by the platform to quantify the riders' excellence score.

130 For further information on the ruling see: L. TEBANO, *Obblighi di informazione collettiva e sistemi integralmente automatizzati: antisindacalità della condotta omissiva e della comunicazione insufficiente*, in *DeJure (IUS Lavoro)*, 13 novembre 2023 and A. SCELSI, *L'informativa sui sistemi automatizzati, se lacunosa, integra gli estremi della condotta antisindacale*, in *Arg. Dir. Lav*., 2024, n. 1, pp. 111 ff.

The three decisions, which were made public both through CGIL press releases[131] as well as local and national newspapers[132], show that, while there is a risk that disclosure obligations may become a mere bureaucratic requirement, this risk does not materialise if trade unions are involved, especially as the relevant rights holders, as they can better enforce information and access rights to fully promote algorithmic transparency.

6. Why the case study of the CGIL can be of interest of those trade unions open to resort to strategic litigation to reduce the justice gap of platform workers (and beyond)

Our analysis began with the following hypothesis: trade unions are better placed than individuals to fill the justice gap faced by platform workers. After highlighting the theoretical reasons for this claim in Section 2, we sought, in Sections 3, 4 and 5, to test the above hypothesis by examining the litigation strategy pursued by the CGIL against platforms over the last four years.

We believe that the cases discussed above confirm the above hypothesis.

In relation to classification claims, the one brought by a CGIL trade unionist before the Tribunal of Palermo was the first one in Italy to find that a platform worker was an employee[133]. This decision followed several cases, brought by individual workers, in which courts had ruled that platform workers were independent contractors or hetero-organised workers[134]. The decision of the Tribunal of Palermo was a turning point in Italy and may also have had a positive spill-over effect for platform workers, because, in the majority of the subsequent cases on the classification issue, also when not orchestrated by the CGIL, Italian courts found that platform workers were employees (or at least hetero-organised workers)[135].

In relation to discrimination claims, the two cases brought by the CGIL before the Tribunal of Bologna[136] and the Tribunal of Palermo[137] are, to our best knowledge, the only cases in the world in which courts found an algorithm to be discriminatory[138]. Considering that individual litigants also often have many difficulties in proving human discrimination[139] and that algorithmic opacity creates additional obstacles in gathering information and evidence about the alleged discrimination[140], it seems fair to conclude that the CGIL has done a tremendous job in preparing and conducting these litigations.

131 CGIL, *RIDER. Nuova sentenza a Palermo obbliga piattaforma a svelare logica algoritmo*, 21 giugno 2023, available at nidil.cgil.it; CGIL, *RIDER. A Torino, nuova condanna per piattaforme food delivery*, 9 agosto 2023, available at nidil.cgil.it.

132 For example, see: F.Q., *Uber Eats condannata per 'condotta antisindacale': dovrà svelare l'algoritmo che organizza il lavoro dei rider*, in *Il Fatto Quotidiano*, 6 aprile 2023; A. DE LUCA-L. PICCIARELLI, *Rider, la violazione del decreto Trasparenza sugli strumenti automatizzati è condotta antisindacale*, in *Il Sole 24 Ore*, 5 May 2023; REDAZIONE, *Rider, sindacati vincono a Palermo ricorso contro Glovo*, in *Palermo Today*, 22 giugno 2023.

133 Trib. Palermo 24 November 2020, cit.; see, *supra*, footnote n. 55.

134 See footnotes n. 53 and 54, *supra,* in Section 3.2 listing the rulings concerning the status of platform workers before the decision of the Tribunal of Palermo.

135 See footnote n. 68, *supra*, in Section 3.2 listing the rulings concerning the status of platform workers after the decision of the Tribunal of Palermo.

136 Trib. Bologna 31 December 2020, cit.; see*, supra,* footnote n. 85.

137 Trib. Palermo 17 November 2023, cit.; see, *supra,* footnote n.98 .

138 Except for one claim filed in the UK that has not reached the decision stage yet, as reported by C. HIEßL, *Jurisprudence of national courts,* cit.

139 O. LOBEL, *The Equality Machine. Harnessing Digital Technology for a Brighter, More Inclusive Future*, Public Affairs, 2022, p. 48 and A. KELLY-LYTH, *Algorithmic discrimination at work*, cit., p. 160.

140 G. GAUDIO, *Algorithmic Bosses Can't Lie!*, cit., pp. 725-729 and J. GERARDS-R. XENIDIS, *op. cit.*, pp. 69 and 74.

In relation to information and access rights claims, the CGIL has been successful in enforcing them as soon as Italian law has explicitly granted them to trade unions[141] (and not just to individual workers, as happened since the enactment of the GDPR). Individual information and access rights are certainly important regulatory antibodies against algorithmic opacity[142]. However, the only cases where they have been used strategically by individual workers have been those where trade unions, both in Italy and abroad, have been the mastermind behind the individual claimants[143]. In other words, without trade unions, these rights would have been in danger of remaining on paper. The cases discussed above further shows that trade unions are more effective in enforcing them when they are recognised by the legal system as the right holder of information and access rights.

In light of the above, it is therefore possible to confirm the hypothesis that trade unions are better actors than individuals in reducing the justice gap suffered by platform workers. Nevertheless, it cannot always be taken for granted that trade unions will adopt strategies similar to those of the CGIL, as a number of legal and non-legal conditions must be in place for others to do the same.

The first condition to be met is that the legal system must provide a set of rules that are conducive to algorithmic litigation. The first set of rules are those that provide regulatory antibodies against algorithmic opacity, such as information and access rights, rules that shift the burden of proof and those that establish presumptions, as well as those that allow judges to disclose evidence that are under the platform's control. The second set of rules are those that confer legal standing on trade unions to enforce individual rights, through representative actions or *actiones popularis*, or those that explicitly confer certain rights directly on trade unions, which thus have legal standing to enforce them, as has recently happened in Italy. All these provisions were included in the PWD proposal[144] and are now contained, albeit in slightly amended form, in its latest version, which is now close to final adoption[145].

The second condition to be met is not a legal one and concerns the actual willingness of unions to resort to litigation. This cannot be taken for granted for two reasons[146]. First, unions aim to protect the interests of their members through collective bargaining and industrial action. In carrying out these functions, unions tend to have conflicts with employers or their associations over non-legal interests (e.g., negotiating better pay arrangements) rather than over rights, the latter being the only ones that can be legally enforced[147]. Second, even when they do have a dispute with their counterparts over rights (particularly when this relates to

141 Trib. Palermo 3 April 2023, cit.; Trib. Palermo 20 June 2023, cit.; Trib. Torino 5 August 2023, cit.; see, *supra,* footnote n. 112.

142 G. GAUDIO, *Algorithmic Bosses Can't Lie!*, cit., pp. 734-736.

143 In Italy, see Trib. Palermo 24 November 2020, cit., discussed in Section 3 above and, in the Netherlands, see the claims brought by individual workers, whose litigation strategy was coordinated by App Drivers & Couriers Union, who successfully enforced information and access rights provided by the GDPR: ADCU, *Uber ordered to pay €584,000 in penalties for failure to comply with court order for algorithmic transparency in robo-firing case brought by Worker Info Exchange & ADCU*, 2023, and WIE, *Historic digital rights win for WIE and the ADCU over Uber and Ola at Amsterdam Court of Appeal*, 2023, where it is possible to find the English translation of the decisions of the Amsterdam District Court against the platforms Uber and Ola.

144 Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work COM/2021/762 final: for the reference to the provisions useful to trade union algorithmic litigation, see G. GAUDIO, *Litigating the Algorithmic Boss in the EU,* cit., pp. 115-119.

145 EU PARLIAMENT, *Parliament adopts Platform Work Directive*, 24 April 2024.

146 G. GAUDIO, *Litigating the Algorithmic Boss in the EU*, cit., pp. 122-123.

147 R. FLAMMIA, *Contributo all'analisi dei sindacati di fatto. Autotutela degli interessi di lavoro*, Giuffrè, Milano, 1963, p. 64 ff.

individual rights rather than union rights), unions have traditionally been suspicious of litigation, which is seen as expensive, time-consuming and inefficient compared to more traditional forms of action such as strikes, not least because it can seriously backfire[148]. For all these reasons, unions have traditionally been reluctant to systematically resort to litigation especially in those historical junctures, industries and/or situations characterised by high union density and mature collective bargaining relationships, where unions have no particular difficulty in mobilising workers through more traditional forms of action[149].

On the contrary, where union density and collective bargaining decline, unions tend to be more open to litigation[150]. This may be a way of re-intermediating the dis-intermediation that has broadly characterised the modern labour market and, in particular, the market segment related to digital labour platforms[151], where unions, especially at first, had particular difficulty organising platform workers who did not even share the same physical workplace[152].

However, this strategic approach to enforcement is only effective if unions are able to integrate it into their broader strategies to serve two different purposes[153]. First, the meta-legal purpose of mobilising workers[154], especially those who are not union members[155], also to raise public awareness[156], induce societal change[157] and possibly influence policymakers[158]. Second, litigation can be a strategic tool to achieve the para-legal purpose of strengthening collective bargaining because trade unions can use even the threat of litigation to put pressure on employers and possibly open up new bargaining channels or reopen those that appeared to have dried up[159].

148 K. LÖRCHER, *op. cit.*, pp. 153-154.

149 T. COLLING, *Court in a Trap? Legal Mobilisation by Trade Unions in the United Kingdom*, in *Warwick Papers in Industrial Relations*, WP n. 91, 2009, p. 4; A. LASSANDARI, *L'azione giudiziale come forma di autotutela collettiva*, in *Lav. Dir.*, 2013, n. 2/3, pp. 327-328; C. GUILLAUME, *When trade unions turn to litigation: 'getting all the ducks in a row'*, in *Ind. Rel. Jour.*, 2018, vol. 49, n. 3, p. 239.

150 T. COLLING, *op. cit.*, p. 4 and C. GUILLAUME, *op. cit.*, pp. 235-239.

151 I. ARMAROLI, *Organising disintermediation. A strategy for unions to survive*, in *Adapt International Bulletin*, 26 July 2017, also for the references to the international literature.
In the Italian literature, on the same topic, see B. CARUSO, *La rappresentanza delle organizzazioni di interessi tra disintermediazione e reintermediazione*, in *WP C.S.D.L.E. "Massimo D'Antona"*, n. 326, 2017; G. SANTORO-PASSARELLI, *op.cit.,* p. 417 ff.; V. FILÌ, *I diritti sindacali nella dimensione transnazionale del lavoro (alla prova della sfida tecnologica e delle transizioni occupazionali)*, in *Var. Temi Dir. Lav.*, 2021, n. 3, p. 625 ff.

152 See A. BELLAVISTA, *L'unità produttiva digitale*, *cit*., p. 97 ff. who also stresses the importance of readapting and reinterpreting certain union rights to better face the challenges posed by the digital revolution.

153 A. BOGG, *Can We Trust the Courts in Labour Law? Stranded Between Frivolity and Despair*, in *Int. Jour. Comp. Lab. L. & Ind. Rel.*, 2022, vol. 38, n. 2, p. 131 and E. KIRK, *The Worker and the Law Revisited: Conceptualizing Legal Participation, Mobilization and Consciousness at Work*, in *Int. Jour. Comp. Lab. L. & Ind. Rel.*, 2022, vol. 38, n. 2, p. 171. Specifically on platform workers, see J. MOYER-LEE-N. COUNTOURIS, *op. cit.*, p. 33.

154 T. COLLING, *op. cit.*, and, more recently, E. KIRK, *The Worker and the Law Revisited: Conceptualizing Legal Participation, Mobilization and Consciousness at Work*, in *Int. Jour. Comp. Lab. L. & Ind. Rel.*, 2022, vol. 38, n. 2, pp. 170-171.

155 Z. RASNAČA, *Special Issue Introduction*, cit., pp. 414-417.

156 K. LÖRCHER, *op. cit.*, p. 145.

157 J. MEAKIN, *Labour Movements and the Effectiveness of Legal Strategy: Three Tenets*, in *Int. Jour. Comp. Lab. L. & Ind. Rel.*, 2022, vol. 38, n. 2, p. 187.

158 S. DEAKIN, *Failing to Succeed? The Cambridge School and the Economic Case for Minimum Wage*, in *Int. Jour. Comp. Lab. L. & Ind. Rel.*, 2022, vol. 38, n. 2, p. 211.

159 T. COLLING, *op. cit.*, p. 8 and, in relation to the issues analysed in this article, J. MOYER-LEE-N. COUNTOURIS, *op. cit.*, p. 33 and G. GAUDIO, *'Litigating the Algorithmic Boss in the EU*, cit., p. 124.

These conditions seem to have been met in the platform workers' saga. Initially, trade unions struggled to mobilise platform workers, mainly because, being mostly classified as independent contractors, they were generally neither covered by collective bargaining nor entitled to union representation[160]. The use of litigation has been a fundamental strategy, not only in Italy but also in other European countries, to better enforce the rights of platform workers, especially in classification claims, as part of a broader strategy to mobilise them. This strategy has been quite successful, given that the judicial trend across Europe is generally moving from considering platform workers as independent contractors and towards classifying them as employees (or at least in other mixed status)[161], and that, thanks also to the trade union movement, the social and political debate on their working conditions has been at the centre of the agenda of many lawmakers in Europe, including the EU[162].

Compared with other similar situations in Europe, the Italian situation has certain particular features that makes it a successful example, also from a comparative perspective. First, this litigation was not conducted by independent unions, as has happened in other countries[163], but by a traditional union such as the CGIL. As previous research has noted, this may have been a factor, as traditional unions, compared to independent ones, generally have greater skills and resources to better strategize the litigation in order to achieve broader positive outcomes[164]. Secondly, the number of lawsuits initiated before Italian courts, the fact that almost all of them have been successful, and the media attention that these initiatives have received do not seem to find comparison abroad. In addition, despite the general reluctance of the platforms to come to terms with the trade unions[165], the CGIL has been able to conclude some collective agreements covering platform workers, both at company and national level[166]. In other words, the strategy developed by the CGIL seems to have been

160 H. JOHNSTON-C. LAND-KAZLAUSKAS, *Organizing On-demand: Representation, Voice and Collective Bargaining in the Gig Economy*, ILO Working Paper Series on Conditions of Work and Employment, WP n. 94, 2019, pp. 24-30. In this respect, it shall be noted that workers characterized as independent contractors, including platform workers, also faced legal struggles in anti-competition laws: in general, see M. BIASI, *'We Will All Laugh at Gilded Butterflies'. The Shadow of Antitrust Law on the Collective Negotiation of Fair Fees for Self-Employed Workers*, in *Eur. Lab. L. Jour.*, 2018, vol. 9, n. 4, p. 354 ff. and I. LIANOS-N. COUNTOURIS-V. DE STEFANO, *Re-thinking the Competition Law/Labour Law Interaction: Promoting a Fairer Labour Market*, in *Eur. Lab. L. Jour.*, 2019, vol. 10, n. 3, p. 291 ff. With specific reference to platform workers, see also M. DOHERTY-V. FRANCA, *Solving the 'Gig-Saw'? Collective Rights and Platform Work*, in *Ind. L. Jour.*, 2020, vol. 49, n. 3, p. 352 ff.

161 As it emerges from the case analysis carried out by C. HIEßL, *Jurisprudence of national Courts confronted with cases of alleged misclassification of platform workers: comparative analysis and tentative conclusions (Updated to 31 August 2022)*, Report prepared for the European Centre of Expertise in the field of labour law, employment and labour market policies (ECE) of the European Commission, 2022.

162 G. GAUDIO, *Litigating the Algorithmic Boss in the EU,* cit., pp. 125-126.

163 See, for example, the UK case, recently analyzed from two different perspectives by R. DUKES-E. KIRK, *Legal Change and Legal Mobilisation: What Does Strategic Litigation Mean for Workers and Trade Unions?*, in *Soc. & Leg. Studies*, 2023, advanced publication online, and Z. ADAMS, *Legal Mobilisations, Trade Unions and Radical Social Change: A Case Study of the IWGB*, in *Ind. L. Jour.*, 2023, vol. 52, n. 3, p. 560 ff.

164 C. GUILLAUME, *op. cit.*, pp. 237-238.

165 H. JOHNSTON-C. LAND-KAZLAUSKAS, *op. cit.*, p. 23.

166 In the food-delivery industry, the reference is especially to the company collective bargaining agreement signed by JustEat with the CGIL and other major Italian unions, that has been defined as the CGIL Confederal Secretariat as a mobilization success: see T. SACCHETTI, *Un successo della mobilitazione*, in *Lab. Law Iss.*, 2021, vol. 7, n. 1, p. R.82 ff. More recently, see also the national collective bargaining agreement signed by Assogrocery (the employers' association of those companies offering online shopping services via digital platforms) with the CGIL and other major Italian unions: CGIL, *Shopper, primo accordo tra sindacati e Assogrocery*, 2024, available at nidil.cgil.it. For a comparative overview, that shows how the number of union

successful because the union managed to structurally link a pervasive litigation effort with other initiatives that have efficaciously pursued the meta-legal objective of mobilising workers and the para-legal one of strengthening collective bargaining.

In light of the above, the CGIL case study seems to offer many lessons for those unions in Italy, and especially abroad, interested in using litigation as part of their broader mobilisation strategies. This case study shows how (especially traditional) unions can be powerful enforcement actors to reduce the justice gap suffered by platform workers, and this can be instrumental in pursuing their broader strategies. Moreover, similar strategies can be effective when dealing with employers using algorithmic management devices in conventional or regular workplaces, as their workers may experience similar justice gaps. There are already early signs of innovative legal mobilisation strategies against one of these companies[167], which has made extensive use of algorithmic management practices and, at the same time, has pursued a global strategy to limit union organising[168]. In this respect, the CGIL case study can thus offer other unions, especially after the enactment and transposition in the Member States of the PWD that provides useful legal tools to do so, valuable insights into how litigation in the field of algorithmic management can be used strategically as a means to achieve broader union goals, both against platforms and even beyond.

initiatives (especially with regard to collective bargaining agreements) were higher in Italy especially thanks to the role played by traditional trade unions, see M. LAMANNIS, *Collective bargaining in the platform economy: a mapping exercise of existing initiatives*, ETUI Report, 2023.

167 The reference is to the legal mobilization strategies implemented by UNI Global Union against Amazon with the assistance of NOYB, an NGO of lawyers specialising in data protection: see the requests made by warehouse workers throughout the EU to exercise their access rights under the GDPR: NOYB, *Amazon Workers Demand Data-Transparency*, noyb.eu, 2022, available at noby.eu.

168 For a broader analysis, see G. GAUDIO, *Litigating the Algorithmic Boss in the EU*, cit., pp. 122-130.