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The right of information of workers' representatives regarding the use of algorithmic management. A comparison between the Spanish and Italian legal approach

1. *Introduction*

During the last years, the introduction and expansion of algorithms and artificial intelligence is tensioning our societies[1]. These technologies are part of the industrial and human evolution, and they are every day much more present in our life.

As part of today's society, artificial intelligence and algorithms in the workplace are also being introduced in the management of the workforce. Under the justification of a more efficient management[2], companies are already able to use these technologies for almost all decisions related to the managerial attributes regarding workers[3].

[1] Being an example of it the use of ChatGPT whose use was even momentarily banned by the Data Protection Authority in Italy due to an unjustified obtention of personal data. Garante per la Protezione dei Dati Personali, *Intelligenza artificiale: il Garante blocca ChatGPT. Raccolta illecita di dati personali. Assenza di sistemi per la verifica dell'età dei minori*, 2023 (Available in: https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9870847; consulted: 30.6.2023).

[2] Dagnino, *Dalla fisica all'algoritmo: una prospettiva di analisi giuslavoralistica*, ADAPT University press, 2019, p. 188.

[3] Adams-Prassl, *What if your boss was an algorithm? Economic incentives, legal challenges, and the rise of artificial intelligence at work*, in *CLLPJ*, 2019, Vol. 41, 1, p. 13.

Consequently, humans are being supported or, even, replaced in the managerial decision-making process, in a phenomenon that is known as "algorithmic management", that can entail data collection and surveillance, real-time responsiveness to data informing management decisions, automated or semiautomated decision-making, rating systems based on metrics, and the use of "nudges" and penalties to influence worker behaviours[4].

Nevertheless, algorithmic management comes at a price for workers' fundamental rights. In that regard, the use of these data-gathering technologies poses new challenges for workers, such as increased surveillance and control, bias and discrimination, and a loss of privacy, transparency, and accountability[5]. Also, as algorithmic management implies the obtention of huge amounts of workers personal information, it is said that boosts managerial powers and prerogatives in unseen levels before[6].

Having these feeble points in mind there have been advocations for a major involvement of workers in the deployment and use of these technologies. The European Social Partners[7], the European Commission[8] and the European Economic and Social Committee[9] have endorsed this possibility. Nevertheless, these positions are not completely new, since back in 1997 the ILO already stated that "(t)he protection of workers against risks arising from the processing of their personal data and the ability to defend their interests successfully depend to a decisive extent on collective rights".

The problem is that the current regulation on personal data protection – the GDPR – has been criticised since it does not enable workers' represen-

[4] Mateescu, Nguyen, *Algorithmic management in the workplace*, in *D&S*, 2019, p. 3.

[5] Nguyen, *The constant boss, work under digital surveillance*, in *D&S*, 2021, p. 3.

[6] De Stefano, Taes, *Algorithmic management and collective bargaining*, European Trade Union Institute (ETUI), 2021, p. 7.

[7] European Framework Agreement on Digitalisation. Where it can be read: "(i)t is critical that digital technology is introduced in timely consultation with the workforce, and their representatives, in the framework of industrial relation systems, so that trust in the process can be built".

[8] "White Paper on Artificial Intelligence - A European approach to excellence and trust", Brussels, 19.2.2020 COM(2020) 65 final. It is stated that: "*workers and employers are directly affected by the design and use of AI systems in the workplace. The involvement of social partners will be a crucial factor in ensuring a human-centred approach to AI at work*".

[9] Opinion of the European Economic and Social Committee on "Artificial intelligence: anticipating its impact on work to ensure a fair transition" (2018/C 440/01). Point 1.7 specifies that "(t)he EESC recommends applying and reinforcing the principles, commitments and obligations set out in the existing texts adopted by the European institutions and the social partners on informing and consulting workers, particularly when deploying new technologies, including AI and robotics".

tatives to monitor the use of data at work[10], guaranteeing only individual rights to workers – as data subjects –. One of those rights being the right to receive information on the logic of the fully automated systems used to make decisions on them, as per articles 13.2.f), 14.2.g), and 15.1.h) in relation to article 22 GDPR.

Considering the previous, some European countries have passed laws acknowledging collective rights that might help workers to control the employer's algorithmic management. In Germany the Works Council Modernisation Act (*Betriebsrätemodernisierungsgesetz*) passed in 2021 allows Works Councils to appoint an artificial intelligence expert to assist them when negotiating the implementation of such technologies[11]. Also, Spain and Italy have entrusted their workers' representatives with the right to obtain information related to the algorithms used by the employer to influence working conditions. The existence of these new regulations acknowledging a collective right of information has raised the opportunity to study both and compare how these countries have currently approached the need of collective rights protecting employees when they are affected by algorithmic management.

2. *A compared perspective of the recent right of information introduced by Italy and Spain*

2.1. The origins of each regulation

Spain was the first country in the European Union to establish the right of workers' representatives to obtain information related to algorithms at work through Law 12/2021, of September 28th, modifying the refunded text of the Workers Statute Law, approved by Royal Decree Law 2/2015, of October 23rd, guaranteeing the labour rights of people rendering delivery services in the context of digital platforms (Law 12/2021). This law, known as

[10] Todolí Signes, *Algorithms, artificial intelligence and automated decisions concerning workers and the risk of discrimination: the necessary collective governance of data protection*, in *Transfer*, 2019,Vol. 25, 4, p. 11.

[11] Becher, *Germany s Works Constitution Act: Important Changes to the Law Effective June 2021*, in *NLReview*, 2021 (available in: https://www.natlawreview.com/article/germany-s-works-constitution-act-important-changes-to-law-effective-june-2021; consulted: 30.6.2023).

"Rider Law", was the result of a negotiation period in the merit of a social dialogue table between the Government and the most representative trade unions and business associations. Therefore, the wording of the Law was agreed between all the parties involved.

Specifically, Law 12/2021 clarifies the competences of the Work Council by adding a d) paragraph to article 64.4 of the Workers' Statute (WS). Concretely, it introduces its right to obtain information regarding the "parameters, rules, and instructions" in which the algorithms and artificial intelligence systems used in decision-making processes at work are based. The parties introduced this right of information because, as stated in the memorandum of the law, they considered that it could no longer be ignored "the incidence of new technologies in the employment context and the necessity that the employment legislation considers this repercussion both in the workers' collective and individual rights and in the competences of the employers".

In Italy, considering the previous Spanish regulation and the debates ongoing at EU level, the Legislative Decree of June 27th, 2022, n. 104, known as Transparency Decree (*Decreto Trasparenza*), on the actualisation of Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, introduced article 1-bis in the Legislative Decree of May 26th, 1997, n. 152. (LD n. 152/1997), on the actualisation of Directive 91/533/EEC on an employer s obligation to inform employees of the conditions applicable to the contract or employment relationship.

The Italian law stablishes that the employer or contractor must provide workers together with workers' representatives with certain information regarding automated decision-making or monitoring systems when they are used in an employment context.

In Italy, unlike Spain, the Transparency Decree is a transposition of a Directive. More specifically, Directive 2019/1152. Nevertheless, it needs to be highlighted that this Directive does not contemplate any regulation regarding algorithmic management of employees. Therefore, the Italian regulation goes beyond the European regulation on employment transparency.

Nonetheless, although this has been severely criticised[12], it has also been said that the Italian regulation tries in fact to grant utmost transparency in

[12] Faioli, *Trasparenza e monitoraggio digitale. Perché abbiamo smesso di capire la norma sociale europea*, in *Federalismi.it*, 2022, 25.

accordance with problems indicated in the memorandum of the same Directive[13], such as the uncertainty with the applicable rights and the social protection of workers in digitalised new forms of employment (whereas 4) and the abuse of the status of self-employed persons (whereas 8). Therefore, the right of information included in the Transparency Decree would fall within the Directive spirit.

As it can be seen, each law derives from totally different contexts. While the Spanish law comes from a negotiation period between social agents involved and affected by the algorithmic management, the Italian law has used the transposition of a Directive to introduce informational rights related to the employment context. In my opinion, this difference has a clear influence on each law, as it shall be exposed in the following paragraphs.

2.2. The requirements for the application of the right of information

Considering that both legal systems introduce a right of information in favour of workers' representatives, it must be analysed when the obligation to provide information appears. That is, under which conditions would the use of algorithms at work raise the obligation to inform.

In that sense, both regulations have followed the same formula or scheme for the obligation to inform workers' representatives to be born. More specifically, in order to determine when it is mandatory to provide workers' representatives with information related to the algorithmic technologies, it is necessary to consider in both article 64.4.d) WS and article 1-bis LD n. 152/1997 (i) the existence of automated systems to make decisions; (ii) what influence do these automated systems have in the employer decision-making process; and (iii) which working conditions shall be affected by the automated decision-making.

Nevertheless, each regulation has its own particularities regarding the conditions that would lead to the obligation to inform workers' representatives.

Regarding the existence of automated decision-making systems, article 64.4.d) WS requires that the technologies to be used must be "algorithms or artificial intelligence systems" (*algoritmos o sistemas de inteligencia artificial*) af-

[13] Carinci, Giudici, 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, 1, pp. 10-11.

fecting decision-making, while article 1-bis LD n. 152/1997 demands the use of "fully automated decision-making or monitoring systems" (*sistemi decisionali o di monitoraggio integralmente automatizzati*). In my opinion, both regulations refer to the same phenomena: the use of automated systems to make decisions.

However, I consider that the wording used by the Italian legislator is much more appropriate. First, because the terms "algorithm" and "artificial intelligence" are not easy to comprehend. There is no agreement among academic experts on what "algorithm"[14] or "artificial intelligence"[15] is, abounding the definitions to specify what they really mean[16]. It should also be highlighted that there is neither a legal definition in the Spanish legal system on those terms, nor the legislator has incorporated it in Law 12/2021. Meanwhile, although the Italian legislator has also been criticised since it has not established what should be understood by "automated decision-making or monitoring systems"[17], understanding what an "automated" decision-making system is far easier, as it could mean any automated decision-making process without human intervention[18].

Further, the term "automated decision-making" is also used by the GDPR. Consequently, the interpretations of the European Union institutions could be easily used to support or clarify the concept of automated decision-making systems as used by the Italian legislation[19]. In fact, based on

[14] Mittelstadt, Allo, Taddeo, Wachter, Floridi, *The ethics of algorithms: Mapping the debate*, in *BDS*, 2016, p. 2.

[15] In AI Watch, *Automating Society. Taking Stock of Automated Decision-Making in the EU*, Bertelsmann Stiftung, 2019, p. 9 can be read "*Artificial Intelligence is a fuzzily defined term that encompasses a wide range of controversial ideas and therefore is not very useful to address the issues at hand. In addition, the term intelligence invokes connotations of a human-like autonomy and intentionality that should not be ascribed to machine-based procedures.*"

[16] AI Watch, *Defining Artificial Intelligence - Towards an operational definition and taxonomy of artificial intelligence*, Publications Office of the European Union, 2020.

[17] Faioli, *Giustizia contrattuale, tecnologia avanzata e reticenza informativa del datore di lavoro. Sull'imbarazzante "truismo" del decreto trasparenza*, in Dagnino, Garofalo, Picco, Rausei (ed.), *Commentario al d.l. 4 maggio 2023, n. 48 c.d. "decreto lavoro"*, ADAPT University Press, 2023, pp. 48-49. Dagnino, *Obblighi informativi in materia di algoritmo e condotta antisindacale: i primi effeti di una disposizione dibattuta*, in *Bolletino ADAPT*, 2023, 14.

[18] Information Commissioner s Office, *What is automated individual decision-making and profiling?* (Available in: https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/-individual-rights/automated-decision-making-and-profiling/what-is-automated-individual-decision-making-and-profiling/#id2; consulted, 28.6.2023).

[19] As done by Rossili, *Gli obblighi informative relative all'utilizzo di sistemi decisionali e di monitoraggio automatizzati indicati nel decreto "Trasparenza"*, in *Federalismi.it*, 2022, p. 3.

the Guideline WP251 of Article 29 Working Party[20], predecessor of the European Data Protection Board, Marazza and D Aversa consider that it would fall under the application of article 1-bis LD n. 152/1997 an automated decision-making system meeting the following requirements: (a) being a technological tool; (b) that this technological tool can render all its programmed functions without human intervention; (c) that the technological tool is able to make decisions[21].

It could be said that the Spanish jurists could do likewise the Italian counterparts with the GDPR, but regarding the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence, also known as AI Act. This regulation is meant to provide a definition of artificial intelligence in article 3. However, this does not solve the second critic, which is the fact of relying on the technology and not on the practice of automated decision-making.

Indeed, the Spanish regulation relies on the technology, but not on the fact of decision-making in itself. I mean, the obligation to provide information exists if the employer uses algorithms and artificial intelligence to make decisions, but an employer using automated decision-making systems not included in the concept of "algorithm" or "artificial intelligence" could defend its exemption from article 64.4.d) WS.

It needs to be noted that technology changes, and in the following years there might be new industrial developments allowing employers to make automated decisions without using algorithms or artificial intelligence systems. In that scenario, unless there is a modification, article 64.4.d) WS could no longer be invoked to obtain information on the automated systems used by employers to take employment decisions. Instead, article 1-bis LD n. 152/1997 does rely on the fact of automated decision-making. Consequently, it could be a much more abiding law, since apart from including algorithms and artificial intelligence systems[22], it could include future developments related to automated decision-making. That is, the Italian approach is independent of the technologies used to make automated decision.

[20] Article 29 Working Party, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 (wp251)*, 2018.

[21] Marazza, D Aversa, *Dialoghi sulla fattispecie dei "sistemi decisionali o di monitoraggio automatizzati" nel rapporto di lavoro (a partire dal decreto trasparenza)*, in *GC*, 2022, 11, p. 7.

[22] Carinci, Giudici, Perri, *cit.*, p. 17.

Regarding the influence of the automated systems in the decision-making process, there might be some disparities in both regulations.

In that sense, Spanish article 64.4.d) WS requires that the algorithms and artificial intelligence systems "affect" the decision-making process. This has been interpreted by the Spanish doctrine as meaning that employers will have the obligation to inform workers' representatives if they use algorithms or artificial intelligence systems to influence in the decision-making process, irrespective of the human involvement on it[23]. Consequently, both when the algorithmic system takes a decision by itself and when it only makes a suggestion in a much more complex decision-making process that includes human involvement, the obligation to inform workers' representatives shall remain the same.

Meanwhile, Italian paragraph 1 of article 1-bis LD n. 152/1997, modified by the Law-Decree n. 48/2023 (known as "Labour Decree"), requires now that the systems meant to provide indications to the employer (*deputati a fornire indicazioni*) must be fully automated (whilst the original wording demanded that they were simply automated). This change in the regulation could be on the account that, considering the original wording, the Italian Ministry of Employment deemed that article 1-bis LD n. 152/1997 was limited to decisions based solely on automated decision-making or when human involvement was irrelevant[24], while there was doctrine thinking that it applied also when there was human intervention in the decision-making process[25], thus semiautomated decision-making.

The new wording appears to create some inconsistency because, on the one hand, it seems to require that the decision-making must be fully automated but, on the other, the role of technology is to provide instructions to the employer making the final decision, allowing then semiautomated decision-making. Despite the difficulty of the writing, I would differentiate the way in which the technology works (fully automated systems) with the role it has in the decision-making (provide instructions to the employer). Therefore, I agree with Dagnino that the new wording only determines that the result of the data processing must come from fully automated systems but

[23] Pastor Martínez, *Los derechos colectivos de información, consulta y negociación del uso de algoritmos y sistemas de inteligencia artificial*, in Ginès Fabrellas (ed.), *Algoritmos, inteligencia artificial y relación laboral*, Aranzadi, 2023 (digital version).

[24] Ministero del Lavoro e delle Politiche Sociali, Circolare n. 19 del 20 settembre 2022.

[25] Faioli, *cit.*, 12, p. 111; Carinci, Giudici, Perri, *cit.*, p. 17.

does not change the fact that that same result is meant to influence the employment decisions affecting employees[26], acknowledging thus article 1-bis LD 192/1997 the right of information also when there are semiautomated decisions.

Nevertheless, the Tribunal of Palermo thinks otherwise. In its decision of 20.6.2023 considers that the Labour Decree reform has specified that the right of information of article 1-bis LD 192/1997 only applies when there are no human interventions in the final phase of the decision-making process. Therefore, when the decisions are fully automated.

Anyway, although there is no clear position in the Italian case, it looks as if both regulations had considered the limited scope of application of the right of information (articles 13.2.f) and 14.2.g)) and the right of access (article 15.1.g)) contemplated in the GDPR regarding automated decision-making and wanted to enlarge it. According to those rights, data subjects are entitled to receive meaningful information about the logic of the automated systems, together with the importance, and the envisaged consequences of an automated decision. However, these rights are only applicable when the decision-making process is completely automated, according to article 22 GDPR, that is when the human involvement in the decision-making process is irrelevant[27]. Nonetheless, in my opinion, both the Spanish and Italian regulation seem to recognise their informational rights also when there is a significative human involvement in the decision-making, rendering those decision-making processes as semiautomated.

As per the working conditions that must be object of automated decision-making in order to render applicable the national right of information, both countries have chosen a broad list of employment matters. In the case of the Spanish article 64.4.d) WS, the law determines that the algorithms and artificial intelligence systems used in the decision-making process must

[26] DAGNINO, *Modifiche agli obblighi informativi nel caso di utilizzo di sistemi decisionali o di monitoraggio automatizzati (art. 26, comma 2, d.l. n. 48/2023)*, in DAGNINO, GAROFALO, PICCO, RAUSEI (ed.), *Commentario al d.l. 4 maggio 2023, n. 48 c.d. "decreto lavoro"*, ADAPT University Press, 2023, pp. 56-63. Nevertheless, RECCHIA appears to be against this interpretation, considering that "the reference to fully automated systems seems to align and overlap the obligation of information of the creditor of the employment relationship to the provisions of GDPR, specifically to article 22" (own translation) in RECCHIA, *Condizioni di lavoro trasparenti, prevedibili e giustiziabili: quando il diritto di informazione sui sistemi automatizzati diventa uno strumento di tutela collettiva*, in *LLI*, 2023, Vol. 9, 1, p. 52.

[27] Article 29 Working Party, *Directrices sobre decisiones individuales automatizadas y elaboración de perfiles a los efectos del Reglamento 2016/679*, 2017, p. 23.

have an impact on "working conditions, access and employment conservation" (*condiciones de trabajo, el acceso y mantenimiento del empleo*). Italian article 1-bis LD n. 152/1997, as commented before, provides that the automated decision-making or monitoring system must produce relevant indications concerning termination of working relationships, and indications affecting the assignment of tasks or jobs, surveillance, evaluation, performance, and compliance of the workers contractual obligations. This has been interpreted by the doctrine of both countries as including such a wide range of matters that comprise any kind of impact on working conditions[28]. Therefore, the obligation to inform on the automated systems used shall apply in both countries even with a minor impact on any working condition.

2.3. The nature and subjects of the right

Having exposed what requirements lead to the application of the right of information established in each country, I think it is convenient to determine which subjects participate in the execution of this right. That is, who is the subject entitled to demand the provision of the information on the automated systems and who is the subject obliged to provide it. In that sense, both countries have opted for a different approach.

As explained before, the Spanish legislator incorporates the right of information on algorithmic and artificial intelligence systems in article 64 WS, which includes the main competences of the Work Council, the unitary body of representation in companies of 50 or more employees. The competences of the Work Council are extended by article 62.2 WS to personal delegates (*delegados de personal*), the unitary body of representation in companies between 6 and 49 employees. Additionally, article 10.3 of the Organic Law 11/1985 (LOLS by the Spanish initials), acknowledges that in companies of more than 250 employees, any trade union delegate that is not part of the Work Council is entitled to access to the same information provided to the Work Council.

[28] As per the Italian regulation, Marazza, D Aversa, *cit.*, pp. 3-4; as per the Spanish regulation, Gómez Gordillo, *Algoritmos y derecho de información de la representación de las personas trabajadoras*, in *TL*, 2021, Vol. 157, pp. 173-175; and, Cruz Villalón, *La participación de los representantes de los trabajadores en el uso de los algoritmos y sistemas de inteligencia artificial*, in *Blog de Jesús Cruz Villalón*, 2021 (Available in: http://jesuscruzvillalon.blogspot.com/2021/05/la-participacion-de-los-representantes.html; consulted: 30.3.2023).

The previous have several implications that need to be noted. The first is that the Spanish right of information on algorithms is of general application, meaning that is applies irrespective of the economic activity rendered by the employer[29] and irrespective of the employment contract binding the parties of the relationship. Consequently, the passive subject of the right – the person that must comply with the obligation – shall be the employer in a subordinate contractual relationship – subject to the worker statute –, whether it is a public or a private institution and whether it is a gig economy platform or an industrial business.

The second is that the right of information on algorithms is hold exclusively by collective bodies of representation. That is, by the personal delegates and the Work Council – unitary representative bodies – and trade union delegates – trade union representative body –, but not by employees themselves. Therefore, in those workplaces or companies in which there is no unitary representation, employees would not be entitled to receive the information on the algorithms and artificial intelligence systems established in article 64.4.d) WS.

Consequently, in those cases, employees can only rely on the individual right of information on automated decision-making included in the GDPR. Nevertheless, as exposed before, this right is limited to fully automated decision-making processing personal data. Therefore, companies with no unitary representation bodies in which the decision-making on employment conditions is done by humans but with the support of algorithms and artificial intelligence systems, would not be forced to comply with any right of information. Consequently, workers in such circumstances shall not be covered by any algorithmic transparency mechanism in Spain.

In my opinion, the fact that the Spanish right of information on decision-making algorithms is limited to workers' representative bodies is in a way related to the fact that this right was the result of the social dialogue table, being part of it the most representative unions and entrepreneurial associations.

The Italian right of information introduced in article 1-bis LD n.

[29] Among others, Garrido Pérez, *El nuevo y complejo derecho de información sobre algoritmos y sistemas de inteligencia artificial que inciden en el empleo y las condiciones laborales*, in *Net21*, 2021, 4, p. 1-2; and, Baylos Grau, *A vueltas con el algoritmo: derechos de información y negociación colectiva*, in *Según Antonio Baylos (blog)*, 2021 (Available in: https://baylos.blogspot.com/2021/05/a-vueltas-con-el-algoritmo-derechos-de.html; consulted: 27.4.2023).

152/1997 having also a general application[30], instead, has a double approach related to workers. That is, the law obliges the employer or contractor to provide both the worker and workers' representatives with the information on the automated decision-making or monitoring systems. This double approach has been confirmed by the Court of Palermo in its decision n. 14491/2023[31]. That means that both parties have the right to request the employer the submission of the information[32], including those workers that do not count with collective representatives. Consequently, under the Italian regulation, the right of information has an individual and a collective nature.

Since article 1-bis LD n. 152/1997 has general effects, like the Spanish article 64.4.d) WS, and acknowledges a double right of information (to workers individually considered and their representatives), like article 6 of the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, it is said that it was inspired by these two regulations[33].

In fact, this double approach, or double level of protection, is also manifested in two other ways that differ from the Spanish regulation. Regarding the individual expression, the Italian article 1-bis LD n. 152/1997 covers both workers rendering any kind of activity and subject to any kind of employment contract[34] and, unlike the Spanish legislation, some categories of parasubordinate workers. Indeed, according to its paragraph 7, the Italian right of information is also acknowledged to certain freelance workers (*raporti che si concretino in una prestazione di opera continuativa e coordinata*) and other forms of employment (*contratto eterorganizzato*). In these cases, in which *stricto sensu* there is no employer (*datore di lavoro*), the passive subject of the right of information would be the contractor (*committente*) of the parasubordinate worker or freelancer. Therefore, the general application of the Italian article 1-bis LD n. 152/1997 is wider than the Spanish article 64.4.d) WS as it applies not only to employees, but to other kind of workers.

[30] Recchia, *cit.*, p. 45.

[31] Court of Palermo 3.4.2023 no. 14491 in which it can be read that "it needs to be emphasised that the information can be requested "also" by the trade unions, in other words in addition to and not alternatively to the possible provision to the worker" (own translation).

[32] Faioli, *cit.*, 12, p. 113.

[33] Recchia, *cit.*, p. 45.

[34] Carinci, Giudici, Perri, *cit.*, p. 19.

Probably the fact that the Italian article 1-bis LD n. 152/1997 includes both employees and parasubordinate workers is also related to the origin of the law. In that regard, the Transparency Decree transposes Directive 2019/1152, which in its whereas 8 determines that its content could be applied also to workers meeting the status of "worker" set the Court of Justice of the European Union in its decisions.

Regarding the collective expression, together with acknowledging this right to the unitary and trade union representatives (*rappresentanza sindacale aziendali ovvero alla rappresentanza sindacale unitaria*), in the absence of them, the law entitles the territorial establishments of the most representative national trade unions (*sedi territoriali delle associazioni sindacali comparativamente più rappresentative sul piano nazionale*) the right to be informed on the algorithmic management delivered by the employers of its area of influence. Therefore, the Italian law imposes on the employer a trade union interaction when dealing with automated monitoring and decision-making devices in any case[35]. Something that I consider needs to be endorsed, because individual workers are not always in the best position to contest or refute employment practices, while trade unions are in a better position and have more means to challenge entrepreneurial practices[36].

Nevertheless, it needs to be noted that workers' representatives could only claim this right when representing workers subject to an employment contract or in case of a *contratto eterorganizzato* (according to article 2 d. lgs. n. 81/2015), but not freelancers (*raporti che si concretino in una prestazione di opera continuativa e coordinata*), because law does not recognise them the right to collective representation[37]. Anyway, they could still claim their right to be individually informed when a contractor uses automated system to make decision or monitors them in relation to their working conditions, based both in GDPR and in article 1-bis LD n. 152/1997.

Considering the previous, it is strange that the Spanish table of negotiations did not include a similar provision in their regulation in order to protect workers without representatives, since there are legal precedents also within the Spanish legal systems in which the most representative unions have been entitled to assume the representation of employees it such cir-

[35] Tursi, *Il "decreto trasparenza": profili sistematici e problematici*, in *LDE*, 2022, 3, p. 15.

[36] Gaudio, *Litigating the Algorithmic Boss in the EU: A (legally) Feasible and (Strategically) Attractive Option for Trade Unions?*, in *IJCL*, 2024 (forthcoming).

[37] Carinci Giudici, Perri, *cit.*, p. 23.

cumstances. For example, regarding the furlough proceedings during the pandemic[38] or regarding the gender equality plan negotiations[39]. Existing this possibility, in my opinion, it has not been sensible to leave out of this right of information workers without representation.

2.4. The content of the rights of information

It remains to be determined which information exactly must be provided when the requirements for its application are met, when it must be handed over, and how must it be delivered. In other words, what is the real content of the right of information according to both the Spanish and the Italian regulation. In fact, these factors will ascertain the real effectiveness of the laws, because they will determine whether it permits a certain function of control on the algorithmic management or not.

In that regard, both regulations have used different approaches. The Spanish article 64.4.d) foresees that when an employer uses algorithms or artificial intelligence systems to influence its decision-making process regarding working conditions, the employer will be forced to hand over workers' representatives the "parameters, rules, and instructions" in which those technologies are based. Meanwhile paragraph 2 of article 1-bis LD n. 152/1997 provides that, prior to the beginning of the employment activity, the employer must supply the following information: a) the aspects of the working relationship influenced by automated decision-making and monitoring systems; b) the purposes and aim of the automated systems; c) the logic and functioning of the automated systems; d) the data categories and the principal parameters used to programme and train the automated systems, including the mechanisms to evaluate the performances; e) the control measures applied to the automated decision-making, the potential correction processes and who is the person responsible of the quality of the system; f) the level of accuracy, robustness and cybersecurity of the automated systems, and the metrics used to measure such parameters, together with the potential discriminatory impacts of the same metrics.

Consequently, unlike the Italian regulation, the Spanish article 64.4.d) WS does not foresee a list of aspects to be provided regarding the algorithms.

[38] Royal Decree-law no. 8 of 17 March 2020, Art. 23.1, a).
[39] Royal Decree no. 901 of 13 October 2020, Art. 5.3.

The wording used by the Spanish legislator as the content of the information ("*parámetros, reglas e instrucciones*") is uncertain, although it has been considered an exemplificative list obliging the employer to provide information regarding the "reasoning" of the algorithm. That is, what is its goal, how it works and how it makes its suggestions[40]. Still, this interpretation does not resolve the main question, which is what specific information the employer must hand over to workers' representatives regarding algorithms and artificial intelligence instruments used for employment management.

The Spanish Ministry of Employment has tried to solve this circumstance by publishing a guide on the matter establishing a list of fifteen aspects to be delivered to the workers' representatives[41]. Among others, the employer must inform of the decisions to be taken with the influence of those systems, the specific software used, the human involvement in the decision-making process, the variables and parameters used by the technology, the data used to train the algorithm, the envisaged impact of the decisions to be taken, the results of the data protection impact assessment (DPIA) when necessary according to article 35 GDPR, etc[42].

Certainly, there are coincidences between paragraph 2 article 1-bis LD n. 152/1997 and the proposed list by the Ministry of Employment. However, the main difference between both is that while paragraph 2 article 1-bis LD n. 152/1997 is enforceable, as it is included in a law, the guidelines of the Spanish Ministry of Employment remain as that, guidelines. Consequently, as opposed to their Italian counterparts, I do think that workers' representatives in Spain cannot legally request the obtention of all the specifics of the right of information determined by the Ministry of Employment. Thus, the guide has no effect on the regulation itself.

Nevertheless, workers' representatives and their business association counterparts in Spain could obviously use the 15 aspects stablished in the Guideline on the algorithmic right of information of the Spanish Ministry of Employment as a reference in their collective bargaining agreements when regulating on the specifics of article 64.4.d) WS. That way, although not de-

[40] Gorelli Hernández, *Algoritmos y transparencia: ¿pueden mentir los números? Los derechos de información*, in *TD*, 2022, 86, p. 19.

[41] Ministerio de Trabajo y Economía Social, *Información algorítmica en el ámbito laboral: guía práctica y herramientas sobre la obligación empresarial de información sobre el uso de algoritmos en el ámbito laboral*, 2022.

[42] Ministerio de Trabajo y Economía Social, *cit.*, p. 12-15.

termined by law, workers' representatives could both concretise in what really consists of the right of information and resort to a legally enforceable document to request that information.

In fact, the content determined by the Spanish Ministry of Employment could also be used by negotiating parties in Italy, since there are points of the Italian list that would also need clarification. For example, what should be understood by the logic of the automated system or what would prove the accuracy, robustness, and cybersecurity of the automated system – probably the DPIA –.

Moreover, paragraph 3 article 1-bis LD n. 152/1997 determines that the worker, by herself or assisted by workers' representatives – including territorial trade union establishments –, is entitled to access the data used by the employer when using the monitoring or decision-making automated systems, in what would be a specific right of access (article 15 GDPR) related to employment relationships, and also to request further information on the listed matters of paragraph 2. What further information (*ulteriori informazioni*) really means would need to be determined, although I consider that at least it allows workers to request clarifications or more information regarding the aspects determined in paragraph 2 if they think their right of information has not been satisfied by a first communication of the employer.

Regarding the moment in which the information must be delivered, the Italian regulation in paragraph 2 article 1-bis LD n. 152/1997 determines that all the abovementioned listed information must be showed to the worker individually considered prior to the beginning of the employment activity. It also needs to be noted that the response to both the right to access and the right to request further information must be given within 30 days upon the request.

Paragraph 5 of article 1-bis LD n. 152/1997 also determines that employers must give written notice 24 hours before of any change in the information given at the beginning of the employment activity. This imposes the right of information not only in an initial phase, but also when, for example, the employer decides to modify the uses it gives to the automated systems during the performance of the employment contract or when it detects a new risk for the rights of workers.

Nevertheless, for workers' representatives the regulation does not specify neither the moment (at the beginning of the employment activity and when modifications are introduced) nor the proceeding for them to receive the

information (whether it is necessary to request it or it must be delivered directly by the employer)[43].

The Spanish article 64.4.d) WS, instead, provides that the information must be handed over "in the appropriate periodicity". Therefore, it does not explicitly demand the delivery of the information neither before nor after the use of these algorithmic and artificial intelligence systems. However, since the unitary representation must control and supervise that the employer respects the employment regulations (article 64.7 WS), the only way in which this function can be granted is by informing them at least prior to the use of these technologies. Otherwise, the effectiveness of the law in controlling algorithmic usages and biases could be avoided[44], and no modifications on the functioning of the algorithms could be suggested[45] in order to adjust them to respect fundamental rights.

It must be highlighted that, although there is no specific provision obliging the employer to provide information when there is a change in the conditions of the algorithms, part of the Spanish doctrine considers that the right of information of article 64.4.d) WS is a dynamic right[46], which implies that any change in the use or way of functioning of the algorithm must lead to inform again workers' representatives on the changes that have been introduced. This position is also endorsed by the Ministry of Employment[47].

As per the mode of providing the information, the Italian regulation foresees in paragraph 6 article 1-bis LD n. 152/1997 that the employer or contractor must provide the information in a transparent manner, with a structured format, of common use and in a machine-readable format. Spanish article 64.5 WS, that applies to all the information provisions foreseen in article 64 WS, determines that the information delivered to workers' representatives must be done "with the appropriate manner and content". Therefore, the information handed over must permit that workers' representatives control and supervise the employer practices[48] being necessary thus

[43] Recchia, *cit.*, p. 44.

[44] Gómez Gordillo, *cit.*, p. 178.

[45] Garrido Pérez, *cit.*, p. 5.

[46] Gorelli, Hernández, *cit.*, p. 20; Cruz Villalón, *cit.*

[47] Ministerio de Trabajo y Economía Social, *cit.*, p 16.

[48] Sáez Lara, *Gestión algorítmica empresarial y tutela colectiva de los derechos laborales*, in *CRL*, 2022, Vol. 40, 2, p. 294.

that it does use a language adapted to the interlocutor, without employing an excessive technological language. Otherwise, it risks becoming non-understandable to workers and, thus, the objective of the right of information would not be met.

Having exposed the previous, it can be said that the terms and conditions for the fulfilment of the right of information are clearer in the Italian regulation, since it specifies the content of the obligation, the moment in which the information must be delivered (only when the individual right of information is concerned) and that the concrete right of information must be fulfilled in a transparent manner. The Spanish regulation, instead, only determines clearly that the information must be given appropriately but does not specify neither the information to be delivered nor when it must be delivered. Therefore, from my point of view, it makes necessary the intervention of collective bargaining to render the right of information on algorithms completely effective.

2.5. The rights of information and their coexistence with the trade secret protection

When upholding their respective right of information, both the Spanish employees' representatives and the Italian workers could face the reluctance of the employer or the software designer to provide such information. In that sense, the trade secret regulation could be used as an excuse not to provide the corresponding information. In fact, on the decision of the Tribunal of Palermo of June 20th, 2023, Glovo refused to provide the information regarding the accuracy, robustness and cybersecurity of the automated system on the grounds it was covered by the trade secret regulation. Probably, because paragraph 8 article 1-bis LD n. 152/1997 foresees a non-disclosure clause based on the trade secret regulation.

Therefore, it needs to be ascertained, first, if the information to be provided when complying with the rights of information can be considered a trade secret. And second, if that was the case, whether that information could be also provided or not.

Regarding the first point, the regulation on trade secrets in both countries is clearly influenced by Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. In fact, the definition of a trade

secret is basically the same in both the Spanish[49] and the Italian[50] regulations as in article 2 of Directive 2016/943. Therefore, it would constitute a trade secret all the information meeting the following requirements: (a) it is secret in the sense that is not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) it has commercial value because it is secret; (c) the person lawfully in control of the information has applied measures to keep the information secret.

In that regard, the Spanish doctrine denies that the parameters, rules and instructions of the algorithms or artificial intelligence systems – namely, the information on their functioning – can be considered a trade secret[51]. In Italy, the Court of Palermo in its decisions of 20.6.2023 has stated that the only information protected by the trade secret regulation would be the source code and the mathematic formulas used by the software, following the position of article 29 WP on the matter related to the individual right of information in GDPR[52]. That would mean that under both legal systems their respective content of the right of information cannot be considered a trade secret, and, thus, the employer cannot deny workers the information on the technology used to make automated decisions.

Nevertheless, it must be highlighted that even if the information on the algorithms was considered a trade secret, the employee representatives in Spain could still obtain such information, since article 2 of Law 1/2019 determines that an information considered a trade secret can be provided to them for the exercise of their rights of information and consultation. In fact, this is a transposition of article 5.1.c) of Directive 2016/943.

A transposition of such a kind is not foreseen in the Italian legal system. However, part of the Italian doctrine considers that article 5.1.c) Directive 2016/943 would be fully applicable, since its lack of transposition could only mean that the legislative power has considered it implied in the regulation[53]. Therefore, the existence of trade secrets linked to the automated systems used to monitor or take decisions regarding employees would not be an excuse in order not to provide the information to workers' representatives.

[49] Law no. 1 of 20 February 2019, art. 1.

[50] Legislative Decree no. 30 of 10 February 2005, art. 98, Code of the industrial property.

[51] Gorelli, Hernández, *cit.*, p. 21; Gómez Gordillo, *cit.*, p. 182.

[52] Article 29 Working Party, *cit.*, p. 28.

[53] Carinci, Giudici, Perri, *cit.*, pp. 28-33.

2.6. The consequences of infringing the collective right of information

The effectiveness of these provisions can also be determined by the consequence of its infringement. That is, the level of punishment foreseen in the regulation could prevent the employer from wrongdoing, in this case, not giving the information requested or giving in a manner that does not meet the expectations.

When a Spanish employer does not supply the information determined by law to workers' representatives, it is deemed a severe infringement by virtue of article 7.7 of the Royal Legislative Decree 5/2000, of August 4th, on Infringements and Sanctions in the Social Context (LISOS by its Spanish initials), implying that any employer could face an economic sanction, that could amount to a quantity between 751€ and 7.500€ applying article 40.1.b) LISOS.

The infringement of the right of information will only lead to an additional violation of the freedom of association right (article 28.1 Spanish Constitution) when there are trade union representatives involved, that is, when the information has not been successfully delivered to trade union representatives. In those cases, the trade union representative could additionally request a compensation for moral damages (article 183 Law 36/2011, of October 10th, regulatory of the social jurisdiction). Therefore, the infringement of the right of information on algorithms in companies of less than 250 employees will stick to an administrative fine since unitary representatives in Spain are not protected by the freedom of association[54].

However, in Italy the infringement of the right of information leads to both an administrative fine and a breach of the right of freedom of association. According to article 19 of the Legislative Decree of September 10th, 2003, n. 276, the fine would amount between 400€ and 1.500€ per each month of infringement. Apart, two decisions[55] published in Italy regarding article 1-bis LD n. 152/1997 determine that Uber Eats and Glovo (respectively) infringed the freedom of association right (article 28 Law of May 20th, 1970, n. 300) by denying the trade unions the information on the automated systems established in article 1-bis LD n. 152/1997.

[54] Among others, Spanish Constitutional Court 11 January 1983 no. 118, and 13 June 1994 no. 134.

[55] Court of Palermo 3 April 2023 no 14491; Court of Palermo 20 June 2023.

Therefore, both legal systems foresee economic fines of a low-range scale as punishment for the violation. Additionally, the protection of the fundamental right of freedom of association is guaranteed in the Italian legal system, but not completely in the Spanish regulation as the unitary representatives are not protected by it.

3. *Conclusions*

The technological impacts that are occurring in the employment context need bold responses to protect the weak party in the employment relationship: workers. That answer might come in the form of new legislations, as it is the case of Spain and Italy. Both countries, by introducing the right of workers' representatives to receive information on the automated systems used to make decisions on employment conditions, have moved ahead not only of other countries with a similar economic context, but also the European Union legislation, which so far is limited to the generic and individual GDPR right of data subjects to know the logic of the fully automated systems using personal data to make decisions.

Considering the previous, both new national rights of information have in common the fact that they apply irrespective of the data used to make employment decisions. That is, the importance for their rights to apply is not the use of personal data, but the fact of automated decision-making. Additionally, although there is an ongoing debate in the Italian case, I think that both rights of information apply to semiautomated decision-making. Therefore, the Italian and Spanish rights of information are extending the scope of application of the GDPR right of information on automated systems, limited to the processing of personal data and to fully automated decision-making systems.

Another similarity between legislations – and difference regarding the GDPR right of information – is that both countries have given workers' representatives the ownership of this right, something that is sensible, since they are in a better position to contest the employer's power.

Apart from that, there are several differences among the national rights of information. It could be said that those differences are huge in relation to the active subjects of the right, the content, and the conditions for the completion of the right. As it has been explained, the Italian regulation on the

right of information covers more kind of workers and specifies the content of the right together with the moment in which the information must be submitted to the workers individually considered (it is not clear when the information must be delivered to the workers' representatives). Instead, the Spanish right of information is limited to workers with at least unitary representatives, and it is imprecise on the content and the moment of compliance of the right.

In that regard, the Italian right of information has probably benefited both from the scope of application of Directive 2019/1152 and the pre-existence of the Spanish right of information.

Anyway, as these rights of information are right now, it could be said that the boldness of these laws is limited. It is true that both regulations might allow to exercise some accountability on the use of such technologies by the employer. Nevertheless, the control foreseen by each regulation looks to me insufficient.

First, because both legislations have opted for the feeblest participatory right[56], even though it cannot be denied the usefulness of the right of information not only because of its supervisory function, but also because it is instrumental for the execution of other participatory rights, such as collective bargaining and, even, the strike[57]. A brave legislative practice would have implied the opportunity of workers' representatives to negotiate the conditions of the use of algorithms in the workplace and even the right to negotiate the algorithm itself[58]. However, such legal modification might be a step that these countries are not willing to implement yet.

Second, because of the configuration of the respective rights of information themselves. Neither the Italian article 1-bis LD n. 152/1997 nor the Spanish article 64.4.d) WS have dared to also include the right to check that the employer applies the algorithmic management as informed after the automated decisions are taken, even though this information might include personal data. Namely, from none of both regulations can be derived the existence of an *ex-post* right of information, including personal data, in order to control that these technologies have been used as they were meant to be in the first instance, and, more importantly, that no wrongful decisions have

[56] Baylos Grau, *cit.*; Recchia, *cit.*, p. 48.

[57] Gómez Gordillo, *cit.*, p. 170.

[58] De Stefano, *"Negotiating the algorithm": Automation, artificial intelligence and labour protection*, in *ILO Working Paper*, 2018, 246.

been taken. This, in fact, would facilitate the real control on algorithmic management since it could check the lawfulness of the automated processing of data in a broad sense. Both verifying that the data processing has respected GDPR and that the processing does not infringe the employment regulation and other fundamental rights.

In any case, the existence of these laws must be welcomed since they are the first opportunity to exert some control over algorithmic management, allowing workers' representatives to anticipate and mitigate possible negative impacts related to the use of these technologies[59]. Additionally, it cannot be ignored that they could also encourage collective bargaining to assume a more proactive role in extending these rights of information (by recognising an ex-post right of information or a formation right to workers' representatives in order to detect the wrongful use of these technologies) or even acknowledging other collective rights related to algorithmic management control.

[59] Adams-Prassl, Abraha, Kelly-Lyth, Silberman, Rakshita, *Regulating algorithmic management: a blueprint*, in *ELLJ*, 2023, Vol. 14, 2, p. 146.

Abstract

This article compares the right of information of both the Spanish article 64.4.d) WS and the Italian article 1-bis LD n. 152/1997. Both provisions acknowledge to the workers' representatives the right to obtain certain information on the use of algorithms at work. The aim of the article is to underline the points in common that have both regulations and highlight their differences, determining the positive and negative impacts that these regulations might have in controlling the algorithmic management at work. That way, this paper could help as a reference for new regulations that might come in the future.

Keywords

Algorithmic management, Collective right of information, Worker's representatives, Ley Rider, Decreto Trasparenza.