Algorithmic management meets EU law

Integrating data protection, non-discrimination and collective rights to curb the powers of 'automated bosses'

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AI & algorithms in workplaces

Mapping the workers' experiences

❝ How are Italian and Spanish "ordinary" workforces managed by workplace tech?
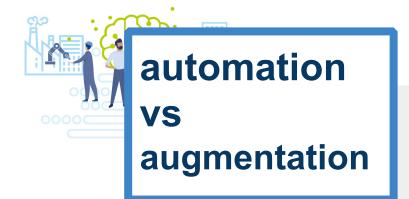

Regulating algorithmic bosses

A multidimensional, anticipatory and participatory approach

❝ Is the existing legal framework suitable to address the augmented power of algorithmic bosses?

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The workers' experiences

Boss ex machina: the marvel and the menace

automation vs augmentation

□ **Augmenting** the full range of an **employer's traditional functions (organisation, control and disciplinary powers)**

- Still left relatively undetermined is the workplace-level penetration

- To meet this gap, we map the **concrete experiences** of a group of private-sector employees in Italy and Spain

1 — 2 — 3 — 4 — 5 — 6

CV filtering — **background screening** — job instructions — day-to-day practices — **performance monitoring** — **firing**

4

- Reduced agency
- **Micromanagement**
- Excessive self-reporting
- **Constant monitoring and assessment** (co-workers & customers)

- **Rudimentary organisational model**
- Dysfunctional technologies
- **Non-meaningful data**
- Arbitrariness of **company decisions**

PRESSURE

Job-intensification (workload, tempo and working time)

OSH effects → psychosocial risks

findings: wrap-up

- □ New management practices (**assistive and executive**) interact with **pre-existing authority structures and features**

  - ■ organisational structures have a relatively more important weight in explaining the impact on workers' conditions

  - ■ workers' **discretionary power is constrained**

    - ▣ definition of goals, the methods, the speed

- □ Scarce penetration of modern tools

- □ Managers using tech to **expand and routinise their authority**

  - ■ amplification of the centres of power

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□ Workers are witnessing a shift **from direct observation to technocratic control**

- Not confined to workplaces and working time

□ **Not matched by the counterweights defined by the legislature/statutes or collectively negotiated by social partners**

- **Human bosses** are far from perfect

- EU legal frameworks constrain how managers must go about taking decisions

- Modern legal systems develop **practices in confronting flaws in human decision making**

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Theory and regulation

Legal avenues to tame algorithmic bosses

The problem

wearables, AI & algorithms in workplaces

○ **what's new?**

- □ Algorithmic management involves:

  - ■ A **slow, undetected and gradual shift** at different paces in different industries

  - ■ An **invisible** trend that is also **faceless**, leading to a **chilling effect**

    - ▣ Competitive entitlements differentiated in a **tailor-made**, **evolvable** or **unintuitive** way

  - ■ A perception of being **innocuous**, presented as a **magic wand** for solving problems related to **OSH**, human subjectivity, bottlenecks, and systematic disparities in regular workplaces

9

The solutions

wearables, AI & algorithms in workplaces

○ **the legal context**

☐ Labour law **moderates** the **unilateral discretionary power** of the dominant party by deploying controlling factors

- ■ **Are existing countervailing forces limited** as they were designed upon forms of power that were significantly less sophisticated than today's technocratic authority?

- ■ A **convergence** towards more encompassing and dissuasive methods

- ■ **Re-engineering strategic litigation,** by deploying responsive strategies to limit abuses before they are perpetrated

leveraging uncertainty

□ Misplaced emphasis on **transparency** (along the lines of the "black box" metaphor)

  ■ Such rhetoric shifts attention to inner workings, rather than **external effects**

□ Worker reps can rely on **evidentiary tools** that **leverage the lack of information**

□ The benefits of this **uncertainty principle**

  ■ Placing the **burden** on employers to deploy processes that are reasonable and reportable

  ■ **Instrumental** rights for **changing decisions** and laying the groundwork for a grievance

11

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a cultural paradigm shift

- **Retrospective** and complaint-led answers
  - Issues mobilised in isolation + ex-post **damage-control approach**
- **More strategic**, less litigation

multidimensional
business practices are shaped, not only ~~changed~~

collective
involvement of workers' reps as a "force multiplier"

preventive
pro-actively fostering equality & accountability

data protection

- Two roadblocks:

  - **Inferential analytics** –detecting correlations and patterns– could escape the GDPR

  - The **opacity** is as an obstacle to the legibility

    - **Code mutates** after a decision is made

- This underestimates or obfuscates the **role** of the programmers, providers or users who:

  - **Decide to adopt** tools to pursue goals that could be achieved by less intrusive means

  - **Introduce key commands**

  - **Validate the original datasets**

association (*Coleman*),
proxy (*CHEZ*, residency),
reluctance to provide data
(*Meister* → Art. 15 GDPR)

intent does not matter + **simplified burden of proof** (triggering *ex ante* compliance)

Discrimination litigation: effects are crucial, **no need to "open the black box"**

A relational approach towards data legibility & equality

Art. 9 **health data** is not processable, but… OSH exception!

Art. 35 **DPIA** (risk mitigation)

Art. 13, 14, 15 **information & access** rights

Art. 22 **ban on ADMS** & profiling (work-related exceptions + objection & human intervention)

Recital 71 (**explanation**)

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overcoming the current limitations

☐ Algorithmic management's "**harms** typically arise from how systems classify and stigmatise **groups**"

☐ This intrinsic "**data network effect**" requires **responses** at the **collective level**

- Data protection law is rather **individualistic and defensive in nature**

- Non-discrimination struggles to capture the **disparate effects stemming from ADMS** affecting persons with characteristics outside the circle of protected grounds

  - **comparisons** not easy at the individual level

15

workers are not defenceless

3. co-design & training

Workers are in the best position to **draw up internal rules due to their knowledge of operational practices** and hurdles

Workers' reps can foster **digital literacy + rely on experts**

1. consultation & co-determination

From the earliest phases when companies are considering the installation or **revision** of electronic devices

Lawfulness for data collecting and processing (Art. 5 + 88 GDPR)

2. multistakeholder risk-assessment and ex-post litigation

- Trade union representatives: (i) participating in the **DPIA** + (ii) filing c**laims** before a court and exercising data protection rights before the employer or the **DPA** "independently of a data subject's mandate" (Art. 80 GDPR).
- The same rights are laid down in the proposed **EU Dir. on Platform Work** (Art. 14)
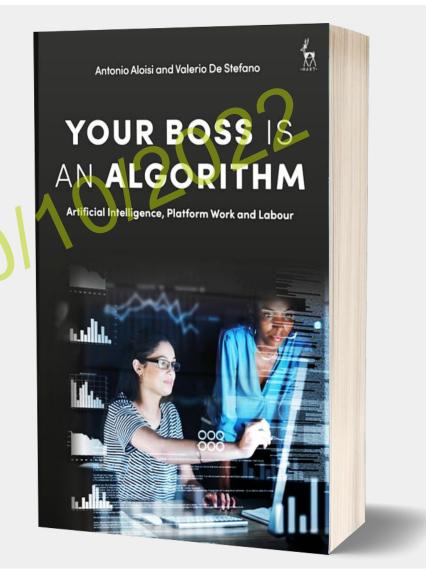
16

thank you!

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YOUR BOSS IS AN ALGORITHM

Artificial Intelligence, Platform Work and Labour