

Algorithmic management meets EU law

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

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Book recommendation: Your Boss is an Algorithm – Artificial Intelligence, Platform Work and Labour

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?

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. CV filtering
 2. background screening
 3. job instructions
 4. day-to-day practices
 5. performance monitoring
 6. firing

Pressure

Job-intensification (workload, tempo and working time)

OSH effects → psychosocial risks

- 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

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
- 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

Theory and regulation – Legal avenues to tame algorithmic bosses

Wearables, AI & algorithms in workplaces

The Problem

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

The solutions

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

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 challenged

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*

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*)
- Discrimination litigation: effects are crucial, *no need to “open the black box”*
- intent does not matter + *simplified burden of proof* (triggering *ex ante* compliance)
- *association (Coleman)*, *proxy (CHEZ, residency)*, *reluctance to provide data (Meister → Art. 15 GDPR)*

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

Workers are not defenceless

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 *claims* 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)

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*