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Workers' Organisations as Enforcement Actors against Algorithmic Discrimination: What Role for the AI Act and Platform Work Directive?

Contents: 1. Introduction. 2. When does algorithmic discrimination occur? 3. Proving algorithmic discrimination. 4. Legal standing. 5. The AI Act and PWD. 6. Conclusion.

1. *Introduction*

In 2024, the European legislator adopted both the AI Act[1] and the Platform Work Directive (PWD)[2]. The two instruments are a milestone for regulating the digitalisation of, *inter alia*, labour relations in the EU. Interestingly, both the AI Act and the PWD give workers' organisations a role in managing the digital transition at work[3]. Amongst other things, this development raises the question of what the AI Act and PWD offer to workers' organisations striving to tackle one of the core issues of digitalisation: algorithmic discrimination[4]. Like humans, algorithms can develop biases against certain groups. A well-known example is Amazon's selection algorithm, which favoured men based on characteristics of previous employees[5]. As a result, employers who use algorithms may violate equal

[1] Reg. 2024/1689 of 13 June 2024.

[2] Dir. 2024/2831 of 23 October 2024.

[3] See, *e.g.*, AI Act, art. 26(7); PWD, art. 13. These provisions are discussed in section 5.

[4] On these core issues, see, *e.g.*, OECD, *Using AI in the workplace. Opportunities, risks and policy responses*, in *OECD AIP*, March 2024.

[5] College voor de rechten van de mens, *Als computers je CV beoordelen, wie beoordeelt*

treatment legislation. However, enforcing the right to equal treatment traditionally rests with the individual employee, for whom it is difficult to prove discrimination. This is all the more true when the discrimination is hidden behind algorithms the employee cannot see, making them less likely to realise discrimination occurs. For this reason, litigation by workers' organisations, such as trade unions, may be a promising route to counter algorithmic discrimination. Workers' organisations represent a larger group of workers and generally have more capacity and oversight than individual workers. As a result, they are usually in a better position to become informed and gather evidence of, and take legal action against, discrimination. In addition, it may be particularly interesting to act against algorithmic decision-making for trade unions, as it allows them to highlight and reinforce the value of the union and its membership[6].

It is unclear, however, what options workers' organisations have to take legal action against algorithmic discrimination. How can they prove algorithmic discrimination, and under what circumstances do they have legal standing to bring a discrimination claim? And – most importantly – what additions do to the AI Act and Platform Work Directive provide in this context? Taking EU law as the starting point, this contribution addresses these questions. First, it briefly discusses when algorithmic discrimination occurs (section 2)[7]. Next, it analyses how a collective approach can help prove algorithmic discrimination (section 3) and addresses the legal standing of

dan de computers? Algoritmes en discriminatie bij werving en selectie, College voor de Rechten van de Mens, 2020, p. 4.

[6] van Schadewijk, *Collectief procederen tegen algoritmische discriminatie*, in *ArbA*, 2024, 3, pp. 3-24; Gaudio, *Litigating the Algorithmic Boss in the EU: A (Legally) Feasible and (Strategically) Attractive Option for Trade Unions?*, in *IJCL,* 2024, 1, pp. 91-130; Spiecker, Towfigh, *Automatisch Benachteiligt. Das Allgemeine Gleichbehandlungsgesetz und der Schutz vor Diskriminierung durch algorithmische Entscheidungssysteme*, Rechtsgutachten im Auftrag der Antidiskriminierungsstelle des Bundes, April 2023, available at https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Rechtsgutachten/schutz_vor_diskriminierung_durch_KI.html, pp. 79-87; Hakkarainen, *Naming something collective does not make it so: algorithmic discrimination and access to justice*, in *IPR,* 2021, 4, pp. 1-24.

[7] On this much-researched topic, see, more extensively, *e.g.* Gerards, Xenidis, *Algorithmic Discrimination in Europe. Challenges and Opportunities for Gender Equality and Non-discrimination Law*, European Commission, 2020; Hacker, *Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies Against Algorithmic Discrimination Under EU Law*, in *CMLR*, 2018, 55, pp. 1143-1186; Zuiderveen Borgesius, *Discrimination, Artificial Intelligence and Algorithmic Discrimination*, Council of Europe, 2018.

workers' organisations in discrimination cases (section 4). Finally, it analyses what the AI Act and PWD add to the discussed legal framework (section 5). The contribution ends with a conclusion (section 6).

The analysis of the EU legal framework is complemented by a comparative legal study of three Member States: the Netherlands, Germany and Italy. The comparative analysis is particularly relevant for sections 4 and 5, since, as will become clear, the legal standing of workers' organisations and the impact of the AI Act and the PWD largely depend on national implementation. The selection of jurisdictions, which does not aim to be comprehensive but is intended to illustrate the meaning and potential impact of the EU legal framework, is informed by a combination of doctrinal and practical considerations. The Netherlands was included due to its relatively expansive mechanisms for collective enforcement and the author's in-depth familiarity with its legal system. Germany presents a useful contrast, given its more limited avenues for collective enforcement[8]. Italy was selected based on empirical developments, since it is, to the author's best knowledge, the only Member State where workers' organisations (specifically trade unions) have already been actively involved in addressing algorithmic discrimination through litigation[9].

1. *When does algorithmic discrimination occur?*

Algorithmic discrimination falls within the scope of the EU equal treatment directives, which prohibit direct and indirect discrimination in employment and occupation on several grounds: gender,[10] racial or ethnic origin[11], religion or belief, disability, age and sexual orientation[12]. For

[8] De jong et al., *Rechtsvergelijking toegang tot de rechter van belangenorganisaties in algemeenbelangacties*, Eindrapport voor het Wetenschappelijk Onderzoek- en Datacentrum (WODC), May 2025, available at https://repository.wodc.nl/handle/20.500.12832/3455; Herberger, Bielefeld, *Verbandsklageverfahren für diskriminierungsrechtlichte Ansprüche*, in *RdA*, 2022, pp. 220–228.

[9] Trib. Bologna 31 December 2020 no. 2949, in *RIDL*, 2021, 2, pp. 175-195; Trib. Palermo 17 November 2023 no. 9590. Also *cf.* Trib. Palermo 12 April 2021, in *ADL*, 2021, 4, p. 1081 ff.

[10] Dir. 2006/54/EC of 5 July 2006.

[11] Dir. 2000/43/EC of 29 June 2000.

[12] Dir. 2000/78/EC of 27 November 2000. See, regarding the question of whether the classic list of protected grounds in EU law requires expansion, Ganty, Benito Sanchez, *Expanding the List of Protected Grounds within Anti-Discrimination Law in the EU*, in *Equinet*, 2021.

the applicability of EU equal treatment law to employers[13], it is irrelevant whether the algorithm itself makes the discriminatory decision, or whether the employer engages in discriminatory behaviour based on the discriminatory output of the algorithm[14]. Also of note is that EU equal treatment law in the field of employment and occupation not only protects workers, but extends to most self-employed persons[15]. As for algorithmic discrimination, this is particularly relevant for workers who perform work through digital platforms, since – as is well known – it is not always clear whether this type of worker falls under the legal classification of a "worker" and in the platform economy, many work-related decisions are made by algorithms (who does what job, in what place, at what time and for what remuneration, etc.)[16].

In the context of algorithms, indirect discrimination is the most relevant form of discrimination. *Direct* discrimination occurs when one person is treated less favourable than another because of one of the aforementioned protected grounds. This would occur when an algorithm disadvantages workers by taking into account a variable that coincides (or nearly completely overlaps)[17] with a protected ground. However, most algorithms have

[13] The application of equal treatment legislation to *AI providers*, although interesting, falls outside the scope of this contribution.

[14] *Cf.* CJEU 8 November 1990, C-177/88, ECLI:EU:C:1990:383 (*Dekker*) (employer not hiring a pregnant employee because insurer does not pay sick pay violates the prohibition of discrimination); 25 April 2013, C-81/12, ECLI:EU:C:2013:275 (*Accept*) (homophobic statements made by an employee lead to the presumption that an employer's rejection of a homosexual job applicant is discriminatory). See also *e.g.* Dzida, Groh, *Diskriminierung nach dem AGG beim Einsatz von Algoritmen in Bewerbungsverfahren*, in *NJW*, 2018, p. 1920.

[15] This applies at least to the grounds of racial or ethnic origin and sex, as Dir. 2000/43/EC contains an explicit reference to the provision of goods and services and another directive, Dir. 2004/113/EC, regulates the principle of equal treatment on grounds of gender in the provision of goods and services. For the remaining grounds, the CJEU requires that the self-employed person engages in a "genuine activity" in the context of a legal relationship with "a degree of stability"; CJEU 12 January 2023, C-356/21, ECLI:EU:C:2023:9 (*JK/TP*).

[16] See, in more detail, *e.g.* Kloostra, *De positie van de werker bij platformwerk*, Wolters Kluwer, 2024, pp. 34-40; Jovović, *Ter Visie - Algoritmische discriminatie*, in *TAO*, 2018, 4, pp. 141-145.

[17] Such as being an immigrant, which was equated with race or ethnic origin in the *Feryn* case (CJEU 10 July 2008, C-54/07, ECLI:EU:C:2008:397); Gerards, Xenidis, *cit.*, p. 64. These are, however, exceptions. For direct discrimination the CJEU usually requires that the variable is explicitly linked to the protected ground. An apt example is CJEU 7 December 2000, C-79/99, ECLI:EU:C:2000:676 (*Schnorbus*) (preference for candidates who have completed men's military service is not direct discrimination on grounds of sex); Barnard, *EU Employment Law*, OUP, 2012, p. 354.

reached the point where they do not use variables that directly coincide with a protected ground[18]. *Indirect* discrimination occurs when an apparently neutral provision, criterion or practice puts individuals from a protected group at a particular disadvantage, unless the difference can be objectively justified. This may be the case when the algorithm disadvantages employed persons by taking into account a variable that statistically, but not exclusively, correlates with a protected ground. For example, in the aforementioned example of Amazon, the selection algorithm developed a preference for masculine language such as 'executed' and 'captured' to account for the disparity between men and women in the training data (which had arisen because Amazon had hired fewer women than men in the past), with the result that the algorithm later rejected women's applications based on these preferences.

The existence of indirect discrimination does not require the outcome of the algorithm *as such* (i.e. all variables taken together) to be particularly disadvantageous to the protected group[19]. Even taking into account a single variable, which statistically correlates with a protected ground, can be regarded as a 'provision, measure or practice' that particularly disadvantages persons with the protected ground[20]. However, when a variable exhibits such a statistical correlation with persons of a protected group – causing it to 'particularly' disadvantage those persons – is unclear. So far, the Court of Justice of the EU (CJEU) has provided limited specificity, requiring a 'much greater' or 'significant' difference[21]. In literature, it has been argued that a significant difference exists if the probability of persons in the protected

[18] Hacker, *Teaching Fairness to Artificial Intelligence*, cit., p. 1153.

[19] Of course, this is possible, for instance if a probability value resulting from an algorithm is statistically higher for men than for women. See, on such "bias in the algorithm" (as opposed to "bias in the data"), *e.g.* Hacker, *Teaching Fairness to Artificial Intelligence*, cit., pp. 1146-1150; Vetzo, Gerards, Nehmelman, *Algoritmes en grondrechten*, Boom juridisch, 2018, pp. 142-145. Nevertheless, just like in case of bias in the algorithm, one would consecutively – in the context of objective justification – have to look at the underlying variables to find out the "real2 reason for the distinction.

[20] See also Hacker, *Teaching Fairness to Artificial Intelligence*, cit., p. 1153; Gaudio, *Litigating the Algorithmic Boss*, cit., pp 109-110; College voor de rechten van de mens, *Advies aan Dazure B.V. over premiedifferentiatie op basis van postcode bij de Finvita overlijdensrisicoverzekering*, 28 January 2014, available at https://publicaties.mensenrechten.nl/publicatie/29c613ac-efab-4d2a-a26c-fe1cb2556407. For an argument to move away from this approach and look exclusively at the algorithm as a whole, see Jovović, *cit.*, p. 143.

[21] *E.g.* CJEU 18 October 2017, C-409/16, ECLI:EU:C:2017:767 (*Kalliri*). The question of which groups should be compared is often equally difficult to answer. On this aspect, see

group being positively assessed is at most 75 per cent of the probability of persons outside the group being positively assessed. As a result, providing statistics is of major importance[22].

2. *Proving algorithmic discrimination*

As is well known, producing statistics indicating indirect discrimination presents significant challenges, especially when the variables are diverse and hidden behind an algorithm[23]. As such, to enable the effective enforcement of EU equal treatment law, litigants are not expected to prove these statistics. Instead, EU equal treatment law provides for an alleviation of the burden of proof, entailing that if a person who believes he or she has been discriminated against (presents and if necessary) proves facts that may suggest direct or indirect discrimination, it is up to the opposing party to prove that no discrimination has occurred (or that it is justified)[24]. In the view of the author, there are two routes that litigants can follow to prove a presumption of algorithmic discrimination. In both routes, the collective aspect comes into play.

Route 1: insight in the algorithm

The first route relates to identifying the variables used by the algorithm, which may enable the establishment of a link between the algorithm and a protected ground. EU equal treatment law does not give litigants the right to access the decision models and data used by the employer, as became clear in the cases *Kelly* (2011) and *Meister* (2012)[25]. Since 2018, however, litigants do have the toolbox of the General Data Protection Regulation

e.g. Bell, Numhauser-henning, *Equal treatment*, in Jaspers, Pennings, Peters (eds.), *European Labour Law*, Intersentia, 2024, pp. 279-284.

[22] Hacker, *Teaching Fairness to Artificial Intelligence*, cit., p. 1153; Thüsing, *Comment on § 3 AGG*, in Säcker et al. (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, C.H. Beck 2021, c. 31.

[23] See also *e.g.* Jovović, *cit.*, p. 144; Dzida, Groh, *cit.*, p. 1922.

[24] Dir. 2000/43/EC, art. 8(1); Dir. 2000/78/EC, art. 10(1); Dir. 2006/54/EC, art. 19(1).

[25] CJEU 19 April 2012, C-415/10, ECLI:EU:C:2012:217 (*Meister*); CJEU 21 July 2011, C-104/10, ECLI:EU:C:2011:506 (*Kelly*).

(GDPR) at their disposal[26]. In addition to the EU equal treatment directives, the GDPR places restrictions on the discriminatory processing of personal data, including in the area of personnel decisions[27]. Of particular relevance to this contribution is that, under Article 15 GDPR, individuals have a right to access the processing of their personal data, including data relating to protected characteristics such as religion or gender[28]. The right of access under the GDPR is granted to the individual data subject (the person whose data is being processed). By extension, the right of access is, in principle, limited to the (processing of) personal data of the individual concerned and does not extend to the operation of the algorithm as such. Nevertheless, in certain circumstances an individual may invoke his or her right of access to gain insight into the functioning of algorithms and verify whether variables related to a protected ground are used by the algorithm[29]. More specifically, this route is open if *automated decision-making* is involved, in which case Article 15(1)(h) GDPR requires the data subject to be informed of the existence of automated decision-making, as well as the underlying logic and the significance and expected consequences of the processing for the data subject. This means that the user of the algorithm must provide insight into the key variables and their weight in the decision-making, so that data subjects can verify the accuracy and lawfulness of the processing[30].

[26] Reg. 2016/679 of 27 April 2016.

[27] See, *inter alia*, art. 5(1)(a) (processing of personal data must be lawful and proper), art. 9 (the processing of special personal data, including data on ethnicity, religion and sexual preference, is prohibited in principle) and art. 22 (the use of fully automated decision-making is, in principle, prohibited). On these provisions and their significance for algorithmic discrimination, see, *e.g.*, Hacker, *Teaching Fairness to Artificial Intelligence*, cit., pp. 1170-1183; Aloisi, *Regulating Algorithmic Management at Work in the European Union: Data Protection, Non-discrimination and Collective Rights*, in *IJCL*, 2025, 1, pp. 48-55.

[28] Under art. 13-14 GDPR, they are also entitled to this information in advance. For equal pay of men and women, a similar obligation arises from the Pay Transparency Dir. (Dir. (EU) 2023/970 of 10 May 2023), which requires employers to provide employees with easy access to the criteria (which must be objective) used to determine pay (art. 6), and grants worker(s' organisations) a passive information right (art. 7). In view of the specificity of equal pay of men and women and the different burden of proof (pointing out a single man or woman who earns more is sufficient to prove a presumption of discrimination; *e.g.* Kullmann, *Discriminating job applicants through algorithmic decision- making*, in *AA,* 2019, 1, pp. 45-53), this Directive will not be discussed further in this contribution.

[29] *Idem* Hacker, *Teaching Fairness to Artificial Intelligence*, cit., pp. 1173-1174; Aloisi, *cit.*, p. 60.

[30] Article 29 data protection working party (wp29), *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, Adopted on 3 October 2017,*

Automated decision-making within the meaning of the GDPR occurs when a decision is based solely (i.e. without meaningful human intervention) on automated processing of personal data and produces legal effects or otherwise significantly affects the data subject[31]. As regards (potentially) discriminatory algorithms in the workplace, this is often the case. In the *SCHUFA* case of 2023, the CJEU interpreted the term "decision" broadly and held that it can also include preparatory acts[32]. Similarly, in a Dutch case concerning taxi platform Ola the Amsterdam Court of Appeal ruled that the risk profile ("suspicious" or "not suspicious") drawn up by the platform's algorithm – on the basis of which Ola decided whether or not to take measures against the driver – involved automated decision-making. In line with the *SCHUFA* case, according to the Court of Appeal of Amsterdam, the issue was not whether automated decision-making took place *on the basis of* the score ("suspicious" or "not suspicious"), but whether the score *itself* came about through exclusively automated processing (which was the case)[33]. Put differently, it seems sufficient that the algorithm independently attaches something of a judgement (such as a score or a probability value) to the collected data[34]. In addition, in an employment law context, a decision that 'significantly affects' the data subject is present quickly. This is the case, for example, if it involves a rejection of a job application or if the decision has financial consequences for the person concerned[35].

As last Revised and Adopted on 6 February 2018, available at https://ec.europa.eu/newsroom/article29/items/612053, pp. 30 and 32-33; Amsterdam Court of Appeal 4 April 2023, ECLI:NL:GHAMS:2023:804 (*Ola*); ECLI:NL:GHAMS:2023:793 and ECLI:NL:GHAMS:2023:796 (*Uber*).

[31] GDPR, art. 22(1).

[32] CJEU 7 December 2023, C-634/21, ECLI:EU:C:2023:957 (*SCHUFA*), c. 44-46 and 60-62. The fact that the follow-up action is performed by a human being does not preclude the second condition ("based solely on automated processing"), as the preparatory action is qualified as the "decision".

[33] Amsterdam Court of Appeal 4 April 2023, ECLI:NL:GHAMS:2023:804 (*Ola*), c. 3.43. The same applied to the earning profile and the allocation of rides by Ola's algorithm, as well as the deactivation decisions, the batched matching system, the upfront pricing system and the determination of average ratings by Uber's algorithm; Amsterdam Court of Appeal 4 April 2023, ECLI:NL:GHAMS:2023:793 and ECLI:NL:GHAMS:2023:796 (*Uber*).

[34] Also called an "outcome" or a "target variable"; *e.g.* Vetzo, Gerards, Nehmelman, *cit.*, p. 144.

[35] Preamble 71 GDPR; WP29, *cit.*, p. 26; Amsterdam Court of Appeal 4 April 2023, ECLI:NL:GHAMS:2023:793 and ECLI:NL:GHAMS:2023:796 (*Uber*).

The right of access in case of automated decision-making can make it possible (though not always: see *infra*) to find out the variables used by the algorithm. This may open the door to establishing a link between the algorithm and a protected ground. More specifically, the right of access under the GDPR facilitates the demonstration of a presumption of discrimination without an identifiable or identified victim. This possibility is of great importance for workers' organisations that wish to combat discrimination independently, for example in the public interest. Indeed, for various reasons, such as the unwillingness to come forward or a lack of transparency of the decisions made by the employer or the algorithm, it is not always possible to identify one or multiple victims[36]. The cases *Feryn* (2008) and *Associazone* (2020) show that EU equal treatment law prohibits discrimination in employment and occupation, even when there is no identifiable victim[37]. EU equal treatment law aims to promote conditions for a socially inclusive labour market. According to the CJEU, this aim would be jeopardised if the prohibition of discrimination applied only to cases where an alleged victim of discrimination initiates legal proceedings against the employer. As a result, in *Feryn* and *Associazone*, the CJEU qualified public statements made by (an employee of) an employer as a form of discrimination, despite there being no identifiable victim. Consequently, it can be assumed that for there to be a presumption of discrimination, it suffices that a workers' organisation can point to a variable in the algorithm used by the employer that correlates with a protected ground, even if no victim had been identified.

The follow-up question is how strong the correlation between the variable and the protected ground must be to trigger the presumption. Since it concerns a presumption, it is not necessary to demonstrate the aforementioned statistical percentage of, say, 75%[38]. Instead, a possible correlation (a possible link) between the variable and the protected ground may suffice. For example, the Tribunal of Bologna considered that Deliv-

[36] See also *e.g.* Gaudio, *Litigating the Algorithmic Boss*, cit.; Lahuerta, *Enforcing EU equality law through collective redress: Lagging behind?*', in *CMLR*, 2018, 55, pp. 783-818.

[37] CJEU 23 April 2020, C-507/18, ECLI:EU:C:2020:289 (*Associazone*); CJEU 10 July 2008, C-54/07, ECLI:EU:C:2008:397 (*Feryn*).

[38] If the statistical difference is established, the employer can (only) redeem himself by proving an objective justification; e.g. CJEU 10 March 2005, C-196/02, ECLI:EU:C:2005:141 (*Nikoloudi*).

eroo used an algorithm that discriminated against workers on the basis of union membership,[39] because it penalised workers who, after accepting an order, decided to go on strike instead of to work[40]. The Tribunal considered that by not distinguishing between the reasons why an assignment was cancelled, the algorithm worked in practice to disadvantage striking workers. In other words, after the union had shown that the algorithm attached consequences to cancelling assignments (the variable), the existence of a possible link between that variable and union membership seemed sufficient to establish a presumption of discrimination[41]. Similarly, the Tribunal of Palermo held the work organisation system adopted by food delivery platform Foodinho, which awarded a series of benefits to the most productive riders and who were most available to work on weekends, indirectly discriminated against workers on various protected grounds (including age, disability and religious beliefs that prevented them from working on weekends)[42].

If a presumption of discrimination is established, the onus is on the employer to rebut the presumption. The employer can rebut the presumption by showing no actual correlation exists or that there is another, objective explanation underlying the use of the variable. It is clear that, if the litigant succeeds in establishing a link between a variable used and a protected ground, it will be difficult for the employer to rebut the presumption[43]. In the aforementioned Italian cases, both Deliveroo and Foodinho also failed to rebut the presumption of discrimination.

[39] Under Italian law, the protected ground '(religion or) belief' includes trade union membership.

[40] Trib. Bologna 31 December 2020 no. 2949, in *RIDL*, 2021, 2, pp. 175-195.

[41] See also Purificato, *Behind the scenes of Deliveroo's algorithm: the discriminatory effect of Frank's blindness*, in *ILLEJ*, 2021, 1, p. 184; Pietrogiovanni, *Deliveroo and Riders' Strikes: Discriminations in the Age of Algorithms*, in *ILECL*, 2021, 7, p. 320; Gaudio, *Litigating the Algorithmic Boss*, cit., p. 114.

[42] Trib. Palermo 17 November 2023 no. 9590; Gaudio, *Trade Unions, Strategic Litigation and Digital Labour Platforms: A Case-Study of the CGIL*, in *AmbDir*, 2024, 2, available at https://ssrn.com/abstract=4872370, p. 14.

[43] See also, and in more detail, *e.g.* Jovović, *cit.*, pp. 144-145; Hacker, *Teaching Fairness to Artificial Intelligence*, cit., pp. 1160-1170.

Route 2: identifying victims

Route 1 does not always offer a solution. For example, some employers use 'AI-based compensation support', which means that algorithms recommend the variables of the pay or bonus to be determined. It can be doubted whether the algorithm's recommendation is always a decision that affects the worker 'significantly', for instance if the recommendation is not decisive for the employer's judgement or further circumstances (variables) come into play[44]. If the algorithmic decision does not have significant consequences, then, under the GDPR, the employer does not have to provide insight into the operation of the algorithm[45]. In addition, even for experts it may not be possible to identify the variables used by some algorithms. This is particularly true for self-learning algorithms that are trained on the basis of previous human decisions, where any human biases may translate into the system and be difficult to identify and correct (the well-known 'black box')[46]. In such cases, the question arises whether, and, if so, how, litigants can prove a presumption of discrimination without an understanding of the algorithm and the variables used. One approach that may offer a solution is identifying victims[47]. The fact that one person from a protected group has been disadvantaged (for example, if a woman is denied a promotion) is usually insufficient to establish a presumption. There have to be additional circumstances[48]. Identifying multiple victims is one such circumstance, and this is where worker' organisations can play an important role. For example, in the *Danfoss* case of 1989 a trade union managed to prove by sampling

[44] For instance, in the Schufa case, the fact that the bank's conduct was 'primarily' determined by the probability value was a relevant factor (c. 48).

[45] In that case, however, it can be argued that it is not (the decision of) the algorithm but (only) the possible follow-up action of the employer that is discriminatory, making the evidentiary issue logically a different one. In this sense, there is some harmony between the GDPR and EU equal treatment law. *Cf.* Hacker, *A legal framework for AI training data - from first principles to the Artificial Intelligence Act*, in *LIT*, 2021, 2, pp. 271-274.

[46] *E.g.* Grozdanovski, *In search of effectiveness and fairness in proving algorithmic discrimination in EU law*, in *CMLR*, 2021, 58, pp. 99-136; Jovović, *cit.*, p. 144; Hacker, *Teaching Fairness to Artificial Intelligence*, cit., p. 1153.

[47] *Cf.* Aloisi, *cit.*, p. 61.

[48] In exceptional cases, this may be different; *e.g.* College voor de Rechten van de Mens 24 August 2023 no. 2023-92 (automated rejection while the applicant had only provided their name and age leads to a presumption of discrimination, although an additional relevant factor was that the vacancy had not been filled).

that the remuneration of female employees in the company was on average lower than that of men, shifting the burden of proof to the employer[49]. In addition, a lack of transparency is also indicative of discrimination, according to the aforementioned *Kelly* and *Meister* cases. The CJEU considered that, although EU equal treatment law does not provide a right of access, a refusal by the employer to give access to the details of the selected candidate is one of the circumstances the national court must take into account when assessing a presumption of discrimination. By extension, it can be argued that if a worker(s' organisation) can point to more than one victim from a protected group[50], supplemented by a refusal or inability of the employer to provide insight into the algorithm, a presumption of discrimination can be established[51].

Since the presumption in route 2 relies on identifying victims, the employer can rebut this presumption by pointing to other employees in the protected group who have not been disadvantaged by the decision-making at issue. In route 1, this option does not exist: in that case, the suspect variable has been identified and the employer has to prove, based on more comprehensive, statistical data, that this variable does not actually correlate with the protected ground. For this purpose, pointing to non-disadvantaged persons from the protected group is insufficient. If the employer succeeds in pointing to non-disadvantaged workers from the protected group in route 2, the burden of proof returns to the litigant who can then try to prove the alleged discrimination on the basis of the normal, national rules on evidence. In that case, due to the opacity of the algorithm, the possibility of proving discrimination seems to be out of the question. However, if the employer cannot point to other persons in the protected group, then the claim has a good chance of succeeding. It is difficult for an employer to prove that he did not discriminate if he cannot indicate on the basis of which

[49] CJEU 17 October 1989, C-109/88, ECLI:EU:C:1989:383 (*Danfoss*).

[50] Or a victim and someone outside the protected group who was not disadvantaged, such as a woman who was rejected for a job application and a man who was hired.

[51] *Cf.* Amsterdam Court of Appeal 7 October 2014, ECLI:NL:GHAMS:2014:4132 (unclear selection criteria combined with an existing disadvantage in the sector give rise to a presumption of discrimination). When taking this route, it seems irrelevant whether the litigant takes the position that there is *direct* or *indirect* discrimination. Establishing a presumption of discrimination involves the litigant proving facts that may suggest direct *or* indirect discrimination. In this context, the CJEU has so far not distinguished between direct and indirect discrimination.

considerations he came to a certain decision and cannot substantiate it with documentation. Logically, the same applies when not he, but an algorithm he uses makes the decision[52].

3. *Legal standing*

Section 3 outlined two routes to prove a presumption of algorithmic discrimination, showing that in both routes the collective aspect plays an important role. With this, however, it is not yet clear what possibilities workers' organisations have to bring an algorithmic discrimination case to court. In general, several roles for workers' organisations in (algorithmic) discrimination cases can be identified[53]. First, workers' organisations can act in support of individual claimants in court proceeding[54]. This is the dominant model in Germany[55], where the principle is that claimants can only advocate for the protection of their own individual rights and interests[56]. Second, workers' organisations can engage on behalf and with the consent of one or more specific workers, for example by means of power of attorney[57]. Third, in several Member States, including the Netherlands[58] and Italy[59], workers' organisations can act as independent litigants on behalf of a

[52] *Idem* Jovović, *cit.*, pp. 144-145.

[53] For a general framework regarding legal standing of representative entities, see De Jong et al., *cit.*; Amaro et al., *Collective Redress in the Member States of the European Union*, Study requested by the JURI committee of the European Parliament, 2018, pp. 27-31. Specifically with regard to discrimination: Chopin, Germaine, *A comparative analysis of non-discrimination law in Europe 2022*, European Commission, 2023, pp. 87-97.

[54] *E.g.* Amsterdam Court of Appeal 4 April 2023, ECLI:NL:GHAMS:2023:804 (*Ola*); ECLI:NL:GHAMS:2023:793 and ECLI:NL:GHAMS:2023:796 (*Uber*).

[55] *Allgemeines Gleichbehandlungsgesetz* ("AGG") of 18 August 2006, 23; Spiecker, Towfigh, *cit.*, p. 61; Herberger, Bielefeld, *cit.*; Chopin, Germaine, *cit.*, p. 88; Berghahn et al., *Evaluation des Allgemeinen Gleichbehandlungsgesetzes*, erstellt im Auftrag der Antidiskriminierungsstelle des Bundes, October 2016, available at https://www.antidiskriminierungsstelle.de/SharedDocs/forschungsprojekte/DE/AGG_Evaluation.html, pp. 142-144.

[56] *Grundgesetz* of 23 May 1949, 19(4); Heidbrink, *Comparative legal research on access to justice in public interest litigation. Germany*, attachment to De jong et al., *cit.*, pp. 86-99.

[57] For the Netherlands, see *Burgerlijk Wetboek* of 1 January 1992, art. 3:60. For Italy, see l. no. 215 of 9 July 2003, art. 5, c. 1; l. no. 216 of 9 July 2003, art. 5, c. 1; l. no. 67 of 1 March 2006, art. 4, c. 1.

[58] *Burgerlijk Wetboek*, art. 3:305a.

[59] L. no. 215/2003, art. 5, c. 3; l. no. 216/2003, art. 5, c. 3; l. no. 67/2006, art. 4, c. 3.

larger group. Such action, which has been described as "genuine collective redress"[60], can be divided into class action or group action (claims on behalf of an identified or undefined group of victims) and *actio popularis* (claims by organisations acting in the public interest, without a specific (group of) victim(s) to support or represent)[61]. As for Germany, equal treatment law also provides for an *actio popularis*, but – in line with the aforementioned principle – the thresholds are high, requiring, *inter alia*, a severe violation of equal treatment law[62]. As a result, this *actio popularis* is rarely used in practice[63].

However, as has been noted elsewhere, workers' organisations may have a clear interest in acting as independent litigants on behalf of a larger group, especially in algorithmic discrimination cases.[64] In discrimination cases, the added value of collective redress clearly exists if no victim has been identified (route 1), but can also be present if there are one or more victims (route 2). By not limiting the legal playing field to the representation of specific victims, positive effects can be achieved for a wider group of workers, and – in the words of the CJEU in the *Feryn* and *Associazone* cases – a socially inclusive labour market can be promoted on a larger scale[65]. This is particularly true for algorithmic discrimination, since algorithms by their very nature cover multiple groups of workers yet make it difficult, because of their opacity, to identify specific victims. By extension, the German model has been deemed unfit to offer effective protection against (algorithmic) discrimination[66].

[60] Gaudio, *Litigating the Algorithmic Boss*, cit., p. 100; Rasnača, *Special Issue Introduction: Collective Redress for the Enforcement of Labour Law*, in *ELLJ*, 2021, 4, p. 407; also *cf.* Ter haar, *The role of collective interest representatives in enforcing EU labour rights*, in *ELLJ*, 2024, 4, p. 658.

[61] Chopin, Germaine, *cit.*, p. 95.

[62] AGG, § 17(2). For the protected ground of disability, the thresholds are lower; AGG, § 23(4); Herberger, Bielefeld, *cit.*, p. 224.

[63] Spiecker, Towfigh, *cit.*, p. 61; Herberger, Bielefeld, *cit.*; Berghahn et al., *cit.*, pp. 142-144.

[64] Gaudio, *Litigating the Algorithmic Boss*, cit., pp. 100-103; Spiecker, Towfigh, *cit.*, pp. 61 and 79-87; Hakkarainen, *cit.*, p. 3 ff.

[65] See also Gaudio, *Litigating the Algorithmic Boss*, cit., p. 102; Nagy, *The European Collective Redress Debate After the European Commission's Recommendation. One Step Forward, Two Steps Back?*, in *MJECL*, 2015, 4, pp. 534-535; European Parliament Resolution of 18 May 2000, A5-0136/2000, pp. 21-22.

[66] For general criticism, see Herberger, Bielefeld, *cit.*; Berghahn et al., *cit.*, pp. 142-144. Specifically with regard to algorithmic discrimination: Spiecker, Towfigh, *cit.*, pp. 61 and 79-87.

Furthermore, a closer examination of the Dutch and Italian models suggests that genuine collective redress is indeed a viable path in addressing algorithmic discrimination[67]. In case of algorithmic decision-making, workers are usually affected homogenously by the same or analogous decision-making processes. Therefore, when this is in breach of their rights, there will be a similar harm resulting from the same illicit behaviour, which is a precondition for obtaining collective redress in both legal systems (and for collective redress in general)[68]. Furthermore, both legal systems allow litigation by organisations on behalf of an undefined group of claimants or in the public interest, provided that certain criteria are met. Like in other systems providing for collective redress[69], the most substantive criterion is that organisations must possess a certain degree of representativeness. In Italy, organisations may engage in proceedings in support or on behalf of victims if they are included in a list approved by decree of the Minister of Labour and Social Policies and the Minister for Equal Opportunities[70]. However, as is illustrated by the abovementioned *Deliveroo* and *Foodinho* cases (where this was not an issue), this limitation does not apply to trade unions: they have legal standing to engage on behalf or in support of victims of discrimination on all grounds[71]. Similarly, in the Netherlands the requirement of representativeness is primarily intended to prevent claims organisations with commercial motives from initiating proceedings. As a result, workers' organisations generally meet this standard. This goes for established trade unions that defend various employee interests, and the same can be said for associations who have as their specific goal to combat discrimination, such as the *Bureau Clara Wichmann*[72].

Thus, while the potential for genuine collective redress in cases of algorithmic discrimination is limited in Germany, it appears to be a viable option in both the Netherlands and Italy. It is important to recognise that this divergence is enabled by the underlying EU legal framework. EU equal

[67] For a similar conclusion, not linked to a specific national legal system, see Gaudio, *Litigating the Algorithmic Boss*, cit., p. 101.

[68] Van Schadewijk, *cit.*, pp. 16-17; Gaudio, *Litigating the Algorithmic Boss*, cit., p. 101.

[69] De Jong et al., *cit.*, pp. 52-56.

[70] L. no. 215/2003, art. 5, c. 2; l. no. 216/2003, art. 5, c. 2; l. no. 67/2006, art. 4, c. 1.

[71] Chopin, Germaine, *cit.*, p. 88.

[72] *Burgerlijk Wetboek*, art. 3:305a(2); van Schadewijk, *cit.*, pp. 15-16; Bij De Vaate, Özkul, *Collectieve handhaving door de vakbonden: mogelijkheden en uitdagingen*, in *TRA*, 2024, 5, pp. 19-20.

treatment law allows, but does not force Member States to give organisations legal standing to act as independent litigants on behalf of a larger group. Despite attempts of the European Commission and the European Parliament to include such an obligation in the EU equal treatment directives in the late 1990s, a number of Member States did not consider it desirable to allow workers' organisations to bring discrimination cases independently and without a victim's consent[73]. As a result, although the Member States are obliged to grant legal standing to organisations, this obligation only exists if and to the extent that organisations (1) have a legitimate interest in complying with equal treatment law based on criteria in national law (*e.g.* because they represent such interests according to their articles of association), and (2) are acting on behalf or in support of, and with the consent of, a victim[74]. The wording 'on behalf or in support of' makes clear that Member States are not required to grant workers' organisations independent legal standing and, therefore, enable genuine collective redress. Furthermore, the requirement of a victim's consent implies that a victim must have been identified. This means that, although discrimination without an identifiable or identified victim – the aforementioned route 1 – is prohibited under EU equal treatment law, that same legislation does not require enforcement if such discrimination occurs[75]. Ultimately, this helps explain why some Member States – such as the Netherlands and Italy – have used the discretionary space offered, thus making genuine collective redress in algorithmic discrimination cases possible, whereas others – such as Germany – have opted for a more restrictive approach that is grounded in national legal traditions.

A final comment pertaining to the legal standing of workers' organisations in algorithmic discrimination cases can be made in relation to the GDPR. In section 3, it was discussed that the right of access under the GDPR is an important means to gain insight into the algorithm and the variables used[76]. Although the GDPR, like the EU equal treatment direc-

[73] Lahuerta, *cit.*, p. 802.

[74] Dir. 2000/43/EC, art. 7(2); Dir. 2000/78/EC, art. 9(2); Dir. 2006/54/EC, art. 17(2).

[75] CJEU 23 April 2020, C-507/18, ECLI:EU:C:2020:289 (*Associazone*); CJEU 10 July 2008, C-54/07, ECLI:EU:C:2008:397 (*Feryn*). For critical comments, see: Dorssemont, *Collective Actors Enforcing EU Labour Law*, in Rasnača et al. (eds.), *Effective Enforcement of EU Labour Law*, Bloomsbury Publishing, 2022, p. 375; Lahuerta, *cit.*

[76] The right of access can also be used to demonstrate the opacity of the algorithm,

tives, allows Member States to enable the rights laid down therein to be exercised by organisations by means of collective redress and this is dealt with in different manners in the Member States[77], this is not an obvious route for exercising the right of access in algorithmic discrimination cases. Exercising the right of access in algorithmic discrimination cases by means of collective redress would mean that the workers' organisation first initiates legal proceedings to gain insight into the algorithm, and then initiates a second legal proceeding to demonstrate a presumption of discrimination. After all, the workers' organisation needs the former to do the latter and, depending on the results in the first legal proceeding, chooses to follow route 1 or 2. This process strategy does not seem feasible for various reasons. Instead, and although this does entail more risk for the workers (who must identify themselves by name to the employer), it seems more logical for the workers' organisation to consult with the workers of the employer and for them to submit a request for access to the data to the employer, if necessary via the court, on the basis of the GDPR. Put differently, consultation and cooperation with the workers concerned, and not collective redress, currently seems to be the most effective way to gain insight into the algorithm.

4. *The AI Act and PWD*

What do the AI Act and PWD add to the legal framework discussed above? The AI Act is the EU's digitalisation flagship and is designed to counter the risks associated with the deployment of AI systems, including bias and discrimination. Like the GDPR, the AI Act complements equal treatment legislation by imposing various obligations on providers and users of AI systems that should, *inter alia*, prevent bias and discrimination[78].

which was previously mentioned to play a role in route 2, but even without the right of access the workers' organisation can achieve this result by invoking the *Kelly* and *Meister* cases. However, the presence of a statutory right to information may lead to a presumption of discrimination being assumed more readily when following route 2; see section 5 *infra*.

[77] GDPR, art. 80(2). In the Netherlands, collective redress for data protection breaches is governed by the abovementioned *Burgerlijk Wetboek*, art. 3:305a. In Italy, qualified consumer bodies and public enforcement bodies are empowered to bring representative actions for data protection breaches following law no. 28 of 25 June 2023, art. 140-ter ff. In Germany, there is no mechanism for collective redress in case of data protection violations.

[78] AI Act, art. 9 (mandatory risk management system), 10 (quality requirements for data-

Similarly, in addition to the well-known qualification issue, the PWD addresses specific problems that the use of algorithmic management poses for platform workers[79]. In doing so, the AI Act and PWD are an important addition to the GDPR, particularly since – unlike the GDPR – they do not focus on the processing of individual personal data but on the operation of the algorithm as a whole[80].

Importantly, both legislative instruments contain different information rights that complement the right of access under the GDPR[81]. Article 26(7) AI Act requires employers, before implementing a high-risk AI system in the workplace, to inform the workers concerned and their representatives of the use of the AI system[82]. AI systems used for personnel decisions, such as algorithms that see to recruitment or compensation, in principle qualify as high risk[83]. In addition, workers are entitled to clear and substantive explanations of the role of these AI systems on personnel decisions affecting them[84]. The PWD, in turn, contains several information obligations that address the use of algorithmic management by work platforms. A platform must: assess the impact of the processing of personal data by automated monitoring and automated decision-making and submit the assessment to

sets), 11 (documentation requirement bias tests), 15 (transparency requirement) and 27 (fundamental rights test).

[79] PWD, artt. 7 (further restrictions on automated decision-making in the workplace, including an unqualified ban on processing personal data relating to a protected ground), 8 (mandatory impact assessment), 9 (transparency obligation) and 10 (mandatory human monitoring).

[80] See also, in relation to the PWD, Otto, *A step towards digital self- & co-determination in the context of algorithmic management systems*, in *ILLEJ*, 2022, 1, p. 60.

[81] On this, see also Spinelli, *Industrial Relations Practices in the Digital Transition: What Role for the Social Partners?*, in this journal, 2024, 2, pp. 470-472.

[82] This provision came about in response to an amendment by the European Parliament (P9 TA(2023)0236, Amendment 408). The original lack of a role for worker representation was widely criticised; *e.g.* ETUC, *Commission's proposal for a regulation on Artificial Intelligence fails to address the workplace dimension*, 17 April 2025, available at https://etuclex.etuc.org/european-commission-proposal-regulation-artificial-intelligence; Doellgast, *Strengthening Social Regulation in the Digital Economy: Comparative Findings from the ICT Industry*, in *LInd*, 2023, 1, pp. 9-10; De Stefano, Taes, *Algorithmic management and collective bargaining*, in *FB*, 2021, 10, pp. 10-11.

[83] AI Act, preamble 57, art. 6(2) and Annex III under 4; Hacker, *A legal framework*, *cit.*, p. 189. This may be different, for example, if the system is only intended to perform a limited procedural task or only performs a preparatory act; AI Act, preamble 53 and art. 6(3). It can be argued that the latter is not the case if the algorithm makes a 'decision' within the meaning of the GDPR (see section 3).

[84] AI Act, art. 86.

the workers' representatives[85]; provide platform workers and their representatives with detailed information on the use of automated monitoring and automated decision-making[86]; evaluate together with workers' representatives the impact of individual decisions resulting from automated surveillance and automated decision-making and submit this evaluation to them[87], and; inform and consult workers' representatives on the introduction or substantial modification of the use of automated surveillance and automated decision-making, for which purpose workers' representatives may be assisted by an expert[88].

Although the AI Act and PWD do not explicitly link the new information rights to discrimination, the aforementioned rights put workers(s' organisations) in a better position to verify whether the algorithm uses variables related to a protected ground. After all, the right to information is extended to other subjects than just automated decision-making, and in case of automated decision-making the employer will have to provide more detailed information. As a result, it is likely that route 1, which depends on getting insight in the algorithm, can be followed more frequently. In addition, it is of great importance that the AI Act and PWD grant information rights to workers' representatives *directly*. This is unlike the GDPR which, as discussed in section 3, grants the right of access to individual data subjects only. This is an important step forward for workers' organisations seeking to independently stand up against algorithmic discrimination via route 1. This becomes particularly evident when examining Italian law, which since 2022 has established detailed information requirements to be provided not only to individual workers but also to trade unions[89]. This has swiftly resulted in several cases where trade unions have directly enforced their rights[90] to access data and information about the algorithm[91].

[85] PWD, art. 8; GDPR, art. 35.

[86] PWD, art. 9. This includes, for example, information about decisions supported or made by the algorithm, the possible consequences for the worker (such as dismissal) and the underlying reasons.

[87] PWD, art. 10.

[88] PWD, art. 13.

[89] L. no. 104 of 27 June 2022.

[90] On the basis of law no. 300 of 20 May 1970, art. 28.

[91] Trib. Torino 5 August 2023, in *ADL* 2024, 1, p. 111 ff.; Trib. Palermo 20 June 2023, in *DeJure (IUS Lavoro)*, 26 July 2023; Trib. Palermo 3 April 2023 no. 14491, in *ADL*, 2023, 5, pp. 1004-1019; Gaudio, *Trade Unions, Strategic Litigation*, cit., pp. 15-19.

However, the bestowment of information rights on workers' representatives in the AI Act and PWD does raise the important question of who are meant by "workers' representatives" in the AI Act and PWD. The AI Act does not contain a definition. The PWD defines workers' representatives as representatives of platform workers, such as trade unions and representatives who are freely elected by the platform workers, in accordance with national law and practice[92]. For both legal instruments, the approach mirrors that of other EU directives regulating information and consultation, where the European legislator, because of different national traditions, has left the designation of the competent workers' representatives to the discretion of the Member States[93]. This means that it is up to the Member States to determine which workers' representatives are entitled to the information rights under the AI Act and PWD. There is, however, an important caveat. Both the AI Act and PWD contain a reference to Directive 2002/14/EC (establishing a general framework for informing and consulting employees). It concerns the right to information in Article 26(7) AI Act (concerning the introduction of a high risk AI system in the workplace) and Article 13 PWD (concerning the introduction or substantial change in the use of automated surveillance and automated decision-making)[94]. With regard to the AI Act, the reference aims to clarify that the obligation to inform (which entails an obligation to disclose) is without prejudice to any more far-reaching information and consultation obligations arising under Directive 2002/14/EC. With regard to the PWD, the reference has a more far-reaching meaning and makes clear that, per definition, an information and consultation obligation exists within the meaning of Directive 2002/14/EC[95]. In both cases, the reference to Directive 2002/14/EC does not require Member States to align with the competent workers' representatives within the meaning of Directive 2002/14/EC, but such an alignment does seem logical[96]. At the

[92] PWD, preamble 22 and art. 2(1)(f).

[93] See, *inter alia*, Dir. 2002/14/EC of 11 March 2002, art. 2(e); Dir. 98/59/EC of 20 July 1998, art. 1(1)(b); Barnard, *cit.*, pp. 686-687; Jaspers, Lorber, *Workers' Participation in Business Matters*, in Jaspers, Pennings, Peters (eds.), *cit.*, pp. 534-537.

[94] AI Act, preamble 92 and art. 26(7); PWD, art. 13.

[95] Originally, the same applied to the AI Act, but the reference to Directive 2002/14/EC was later moved to the Preamble. As a result, the introduction of a high-risk AI system in the workplace does not necessarily entail an obligation to inform and consult within the meaning Directive 2002/14/EC, but this must be assessed on a case-by-case basis.

[96] van Schadewijk, *cit.*, p. 21; De Jager, *De Europese Artificiële Intelligentie-Verordening*

same time, however, it can be doubted whether this is the best course of action. In several Member States, including Italy, Germany and the Netherlands, the information and consultation rights of Directive 2002/14/EC are exercised by works councils (*rappresentanze sindacali aziendali* and *rappresentanze sindacali unitarie*; *Betriebsrat*; *ondernemingsraad*). The link is not binding: Directive 2002/14/EC, too, leaves the designation of the workers' representatives to the Member States and other Member States refer not (only) to works councils but (also) to other bodies such as trade unions[97]. By extension, for the subjects regulated by the AI Act and PWD it is not self-evident to grant the information rights to works councils (only)[98]. It can be argued this is particularly true for the ability of workers' organisations to litigate algorithmic discrimination. Although decisions regarding the use of algorithmic management will often be subject to information and consultation rights of works councils – meaning they can play an important role in preventing algorithmic discrimination – works councils may lack legal standing to initiate legal proceedings if and when algorithmic discrimination occurs. This is the case in Italy and the Netherlands[99]. Interestingly, the situation is different in Germany, where works councils have legal standing to start the *actio popularis* laid down in German equal treatment law[100]. However, as was discussed in section 3, this particular *actio popularis* is limited in scope and usage. More generally speaking, putting forward works

en algoritmen op het werk: voldoende future-proof?, in *TRA*, 2024, 5, p. 7. To the author's best knowledge, no official information on this is currently available in the Netherlands, Germany or Italy.

[97] For an overview, see SEC(2008) 334 final, par. 3.2(e).

[98] Given the complex relationship between works councils and platform work, this is particularly true for the PWD; Aloisi, Rainone, Countouris, *An unfinished task? Matching the Platform Work Directive with the EU and international "social acquis"*, ILO, 2023, pp. 20-24; Veale, Silverman, Binns, *Fortifying the algorithmic management provisions in the proposed Platform Work Directive*, in *ELLJ*, 2023, 2, pp. 321-326. According to Aloisi, Potocka, Sionek, *De-gigging the labor market? An analysis of the "algorithmic management" provisions in the proposed Platform Work Directive*, in *ILLEJ*, 2022, 1, p. 41, "workers' representatives" refers primarily to trade unions and the lack of an explicit definition is primarily intended to not unduly limit the scope of the PWD.

[99] For Italy, the lack of legal standing stems from l. no. 300/1970, art. 28. For the Netherlands, see Dutch Supreme Court 3 December 1993, ECLI:NL:HR:1993:ZC1163; Van Schadewijk, *cit.*, p. 22. Dutch works councils can, however, lodge a non-judicial complaint before the Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*); *Wet College voor de rechten van de mens* of 17 December 2011, art. 10(2)(d).

[100] AGG, § 17(2).

councils as enforcement actors can be said to be problematic for different reasons, such as their dual purpose (representing workers' interests while also contributing to the effective functioning and decision-making of the organisation as a whole) and associated issues related to independence and equality, as well as limited (legal) knowledge of works councils members[101]. By extension, if national legislators implementing the AI Act and PWD wish to strengthen the synergy with equal treatment law, more specifically the possibilities for workers' organisations to litigate algorithmic discrimination, it may not be the best course of action to grant the information rights of the AI Act and PWD to works councils (only).

The follow-up question is, then, what or what kind(s) of workers' organisation(s) should (also) be granted the information rights under the AI Act and PWD. It goes without saying that employers should not be required to share information about algorithms – which are usually company secrets[102] – with all sorts of interest groups. It seems logical to attach certain national criteria which are related, for example, to the independence and representativeness of the organisation. As a potential example, the aforementioned list of approved organisations in Italy comes to mind. Through such an approach, national legislators can ensure that certain workers' organisations with legal standing are granted the information rights, without requiring to circulate sensitive company information unnecessarily. Organisations that do not meet the criteria retain their current options for gaining insight into the algorithm, such as involving the workers concerned or, if national law provides for this possibility[103], filing a complaint with a public body protecting fundamental rights. The issue also provides an impetus for further cooperation between works councils, trade unions and other organisations that stand up against discrimination.

With regard to trade unions, their position can also be strengthened through collective agreements. Like the GDPR, both the AI Act and PWD acknowledge the importance of collective agreements in regulating algorithms at work, allowing further rules to be laid down therein[104]. Throughout the EU

[101] Van Schadewijk, *cit.*, p. 22; Berghahn et al., *cit.*, p. 143.

[102] On this aspect, see *e.g.* Kullmann, *cit.*, pp. 52-53; PWD, art. 21(2).

[103] Of the three researched Member States, only the Netherlands provides for this possibility with the Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*); see also Chopin, Germaine, *cit.*, pp. 84-85.

[104] GDPR, art. 88; AI Act, art. 2(11); PWD, art. 26(2). See also European Social Partners'

(perhaps even the world), arrangements in collective agreements regarding the use of algorithms at work, including specific information rights, are slowly beginning to emerge[105]. By extension, such arrangements can also improve trade unions' possibilities to take legal action against algorithmic discrimination.

Finally, it is important to note that Article 77 AI Act grants bodies charged with supervising or enforcing fundamental rights, which can be assumed to include courts, the power to order information concerning the algorithm from the employer. The PWD provides for something similar[106]. In most legal systems, courts and other public bodies charged with protecting fundamental rights will already have the possibility to order information from the employer. At the same time, the fact that they can order the employer to provide information does not alter the fact that, as is clear from the *Kelly* and *Meister* cases, a lack of transparency in itself is insufficient to establish a presumption of discrimination. However, it cannot be ruled out that, now that we are dealing with the enforcement of a statutory EU right to request information, an employer's refusal or failure to provide the required information may more readily give rise to a presumption of discrimination. This could be helpful, for example, if the workers' organisation follows route 2 but can only identify one alleged victim. In this case, it could be argued that even though there is only one victim, the circumstance that the employer is not complying with his legal duty to provide information is sufficient to establish a presumption of discrimination. If this is correct, then the AI Act and PWD are relevant not only for route 1, but also for route 2.

5. *Conclusion*

Algorithmic discrimination is one of the core challenges of digitalisation. Enforcement by workers' organisations is a promising means to take

Autonomous Framework Agreement on Digitalisation (22 June 2020), available at https://www.etuc.org/en/document/eu-social-partners-agreementdigitalisation.

[105] See, *e.g.*, TUC, *Dignity at work and the AI revolution: a TUC manifesto*, 2021, available at https://www.tuc.org.uk/sites/default/files/2021-03/The_AI_Revolution_20121_Manifesto_AW.pdf; Aranguiz, *Spain's platform workers win algorithm transparency*, 18 March 2021, https://www.socialeurope.eu/spains-platform-workers-win-algorithm-transparency; Dagnino, Armaroli, *A Seat at the Table: Negotiating Data Processing in the Workplace: A National Case Study and Comparative Insights*, in *CLLPJ*, 2019, 1, pp. 173-196.

[106] PWD, art. 21(1).

up the challenge. While proving algorithmic discrimination is – and will remain to be – a difficult exercise, EU and national law offer workers' organisations several tools to increase the chances of success. To this end, the right to information about the functioning of algorithms is essential. This right does not follow from EU equal treatment law, but is enshrined in the GDPR and, to a more far-reaching extent, the AI Act and PWD. This legislation is partly, but not primarily, aimed at countering and providing remedies against algorithmic discrimination. As a result, as highlighted by the diffuse notion of "workers' representatives", a lack of alignment with the effective enforcement of equal treatment law lies in wait[107]. The same applies to the legal standing of workers' organisations to act as independent litigants, which is not governed by EU law but is left to the discretion of the Member States. Consequently, by having to define the notion of "workers' representatives" in the AI Act and PWD, and by regulating the legal standing of workers' organisations, Member States currently play an essential role in either enabling or hindering collective redress against algorithmic discrimination. Collective agreements can also play an important role in this process. After all, why make things more difficult when they can be addressed collaboratively?

[107] For similar criticism regarding the lack of synergy between equal treatment law and the AI Act, see Adams-Prassl, *Regulating algorithms at work: Lessons for a "European approach to artificial intelligence"*, in *ELLJ*, 2022, 1, pp. 30-50.

Abstract

This contribution aims to analyse what the recent AI Act and Platform Work Directive offer to workers' organisations striving to tackle algorithmic discrimination through litigation. How can workers' organisations prove algorithmic discrimination, under what circumstances do they have legal standing to bring a discrimination claim, and what additions do to the AI Act and Platform Work Directive provide in this context? Focusing on EU, Dutch, German and Italian law, this contribution addresses these questions.

Keywords

Digitalisation, Collective enforcement, Algorithmic discrimination, AI Act, Platform Work Directive.