

AI and equal access to goods and services



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Structure of the talk

- Thematic Report for the EU Commission: 'In search of the potential of the forgotten Directive'
- What is AI?
- What are algorithms?
- Why do they pose problems for gender equality?
- Is EU Law equipped to deal with AI?
- Focus on the Goods and Services Directive

AI and Algorithms

- AI is a set of technologies that 'make computers do the sort of things that [human] minds can do' (M. Boden)
- Algorithms are a set of computer instructions aimed at solving a problems, answer questions and perform specific tasks. Based on a series of input data, can produce a certain values as outputs.
- There are different types of algorithms that have different functions

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Algorithms and Discrimination

Decision-making based on algorithms can be positive as it makes decision, more accurate and can eradicate or reduce, human bias in decision making process.

However the very ability to learn and discover correlations can increase the risk of discrimination. Hacker identifies two main problems:

- Biased training Data
- Unequal ground truth



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Stereotyping

An algorithm might reflect biases and stereotypes of those who develops it

- If you google 'nurse'

Lack of information about a certain groups

- Case *Test-Achat*



Structural discrimination

When the product of past discrimination is institutionalised over time and reflected in the organisation of society



Algorithms and EU Equality Law: a sophisticated framework but a hierarchical approach

- Articles 2 and 3 TEU: equality as an aim and a goal of EU law
- Articles 8 and 10 TFEU: gender mainstreaming.
- Article 157 TFEU: equal pay between men and women and positive action
- Article 19 TFEU: extend non-discrimination to several grounds, namely sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
- EU Charter of Fundamental Rights (Arts. 20, 21 and 23)
- Directive 2006/54 (Gender Recast Directive): equal opportunities and treatment of men and women employment and occupation
- Directive 2000/43: prohibits discrimination on the ground of racial and ethnic origin – in and outside the market
- Directive 2000/78: prohibits discrimination on ground of religion, belief, disability, age and sexual orientation sexual – only employment related situation
- Directive 2004/113 (the Goods and Services Directive) extending the principle of equal treatment of men and women beyond the workplace. The Directive has the potential for 'gap-filling.' (A. McColgan)
- Proposed Horizontal Directive (COM92008) 426 final.

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AI and EU non-discrimination Law

- Discrimination must be on one of the protected grounds
- **Direct Discrimination:** a situation where 'one person is treated less favorably than another is, has been or would be treated, in a comparable situation' on the basis of one of the protected grounds defined in the relevant directives.
- **Indirect Discrimination:** a situation 'where an apparently **neutral provision, criterion or practice** would put [members of a protected category] at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.

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Directive 2004/113 (Goods & Services Directive)

- Algorithm discrimination is likely to happen in the context of offering goods and services where consumers' behavior and patterns is analysed.
- Long and 'troubled' history.
- The original proposed content was 'watered down' in the final version.
- However, it can have the potential to be 'gap-filling' (A. McColgan, 2004)
- Adopted in December 2004; Member States had three years to implement it (December 2007).

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The Goods & Services Directive: Scope of application

The Directive lays down a framework for combating discrimination based on gender in access to and supply of goods and services, 'with a view to putting into effect in the Member States the principle of equal treatment between men and women' (Article 1). The Directive applies to all providers of **goods and services in the private and public sectors** (Article 3(1)) and prohibits **both direct and indirect discrimination** based on gender; the various forms of **harassment and instruction to discrimination** are also considered 'discrimination' (Articles 2 and 4).

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The exceptions:

Article 3(3). This Directive shall not apply to the content of media and advertising nor to education.



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Consideration has also been given to the possibility of wider legislative action, covering fields such as taxation, education and the media. Consultation with the stakeholders, examination of the legal possibilities offered by the Treaty and respect for subsidiarity has led the Commission to conclude that the evidence was less clear-cut or that it was not apparent that the difficulties could be resolved through legislative means. The Commission has decided therefore that other means would be more appropriate to deal with these issues. (...) for example, to continue its contacts with the media industries to explore how far voluntary action to contribute to reducing and eliminating damaging sex stereotyping from the media and advertising.'

(SEC(2003) 1213 of 5 November 2003, extended impact assessment, accompanying the 'proposal for a Council directive implementing the principle of equal treatment for men and women in the access to and supply of goods and services'.)

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When can differences be permitted?

Derogations are the most problematic areas in the implementation of the Directive

- differential pricing for services;
- sex segregation of services utilised by both men and women;
- single sex provisions of services;
- needs to be justified by a legitimate aim and the means of achieving that aim are justified;
- different interpretation.



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The Goods & Services Directive and Financial Services

- Article 5(1):
 - Member States shall ensure that in all new contracts (...) the use of sex as a factor in the calculation of premiums and benefits for the purpose of insurance and related financial services shall not result in individuals' premium and benefits.
- Case C-236/09, *Test-Achats* EU:C:2011:100 at para 34.
- Art 5(2):
 - Member States might decide... to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of the risk based on relevant and accurate actuarial and statistical data ...
 - All MSs have amended their legislation.
 - However, the extent to which this has happened is questionable.
 - Art 5(2) is still in the text

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Sexual and Reproductive Health

- Health can be a 'service' within the meaning of Article 57 TFEU;
- sexual and reproductive health
- algorithms in the context medical services
- link with education and advertising?
- discrimination might not arise because of sex but because of other circumstances (eg. disability and religious belief):
- perhaps other Directives more effective in such cases?



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Has the Good & Services Directive been useful in your country?

- 'has been of limited use'
- 'realistically of limited benefit'
- 'difficult to access its success in the absence of case law/data/research'
- Issues falling at the hard core of the directive (e.g. medical services) have not been identified as gender discrimination
- 'correctly transposed but not tested'
- 'the most important problem relates to its awareness of all stakeholders'
- 'due to underreporting and not enough statistics is difficult to quantify its impact'
- 'not at the forefront of the social justice struggle'
- 'the national context and application of the directive have not been able to provide a spark to lighten the unrealistic potential of the Directive.'

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But:

The Directive is 'a very needed instrument for addressing gender discrimination in the field'

It 'touches upon many areas of life (eg healthcare, social services ...) that can have serious consequences to people's life'.



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Concluding remarks (... of a work in progress)

- Directive 2004/113/EC is nearly two decades old;
- it has never been used at its full potential;
- It has been implemented across the EU, but has not been used much;
- very little domestic and EU case law;
- certain areas were not contemplated;
- impact of COVID-19;
- what can make Directive 2004/113 effective?

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Further reading

R. Xenidis and L. Senden, EU Non-Discrimination law in the era of artificial intelligence: mapping the challenges of algorithm discrimination in Bernitz et al (eds.) General Principles of EU Law and the EU Digital Order (Kluwer Law International 2020)

J. Gerards and R. Xenidis, [‘Algorithm Discrimination in Europe’](#) (2020 EU Commission)

P. Hacker (2018) Teaching fairness to Artificial intelligence: Existing and Novel Strategies against Algorithmic Discrimination under EU Law’ 55 CMLRev 1143-1186



thank you!