

REGULATING FOR AN EQUAL AI: A NEW ROLE FOR EQUALITY BODIES

Meeting the new challenges to equality
and non-discrimination from increased
digitisation and the use of Artificial Intelligence

A GOOD PRACTICE GUIDE

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A Good Practice Guide

The good practice guide was initially developed by DAVID COULTER from the Equality and Human Rights Commission of the UK within the framework of the AI Taskforce of the Equinet Working Group on Communication.



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Prioritizing AI in the Strategic Agenda of Equality Bodies

- The **Austrian Ombud for Equal Treatment** made discrimination based on “Artificial Intelligence” a thematic priority in the current Strategy Plan of the institution. This allowed it to dedicate sufficient time to the systematic monitoring of potential AI-related discrimination cases with the goal of initiating future strategic litigation.
- The **Netherlands Institute for Human Rights** has a new strategic agenda 2020-2023 where digitalization is one of the strategic topics. This gave the Institute additional leverage for participating in the lively public debate which surrounded the releases of one of first court decisions in Europe on the compliance AI systems with human rights standards – namely the so-called “Syri” decision of the Court of the Hague from early 2020, which ruled on the legality of an AI based system to combat fraud with social security money, and found the proportionality in its current form wanting from the perspective of privacy.

Targeted monitoring of key sectors with AI applications (e.g. employment, goods and services such as housing and financial)

- The **Belgian equality body Unia** is monitoring housing initiatives related to a digitalisation of the renting process. The process involves the creation of an online profile by the potential tenant, containing a considerable amount of private information (e.g. income, number of people in the household, contact detail), which is then processed by the real estate agent and only a limited amount of information is transferred to the house owner. Unia has flagged the discrimination risks of such digital renting projects, as this could lead to discrimination on the grounds of income (a recognized discrimination ground under Belgian law) and on the basis of ethnic origin or nationality (due to “foreign” or “strange”-sounding names), if the incomes of the applicants are the same.
- The **Slovenian Advocate for Equality** is following the development of experimental software using AI in criminal-law decision making, which is the result of a project of the Institute for Criminology at the Faculty of Law Ljubljana in cooperation with the private sector. The software is supposed to aid judges by providing them with a suggestion on the sentencing decision, while excluding all data that could entail engraved prejudices or prohibited discriminatory parameters of decision-making, thereby blocking the algorithm to use such data or learn on its basis.

Awareness raising on the impact of AI systems on equality

- The **National Commission for the Promotion of Equality in Malta** organised a conference in March 2020, to commemorate the International Women's Day, on AI and gender equality. The main focus of this conference was on how equality can be mainstreamed in AI and on measures which are necessary in order to sustain an environment which is free from any form of discrimination. The conference also served as a positive awareness-raising tool and an environment for discussion among different stakeholders, including academics and social partners, on their experience with working with AI and how this technology may affect gender equality.
- The **Head of the Advocate for the Principle of Equality in Slovenia** gave an interview for a popular national weekly magazine, emphasising the challenges posed by AI in the field of non-discrimination. He noted that fast technological advances make it difficult for us to understand how our personal data is used and that profiling based on big data may potentially prove to be discriminatory.

Building capacity and knowledge on AI and discrimination

- The **Austrian Ombud for Equal Treatment** is in contact with different universities and research institutions working on algorithmic discrimination. As a result, the Ombud for Equal Treatment is going to organize a dedicated workshop on AI-related discrimination as part of an anniversary conference "20 years of the Regional Ombud for Equal Treatment in Styria" scheduled for the fall of 2020.
- The **Defender of Rights in France** organised (May 2020) a seminar on algorithmic discrimination to enhance the understanding on the subject and discuss some potential approaches to tackling the challenges that it poses. The seminar has been co-organised with the National Data Protection Authority of France (CNIL) and involved around 50 interdisciplinary experts, mainly from the academia, but also from international organisations, other national equality bodies, etc. In order to prevent algorithmic discrimination, remedy its consequences and sanction perpetrators, the Defender of Rights has called for collective awareness and urged public authorities and stakeholders to take measures to prevent discrimination from being reproduced and amplified by these technologies by publishing some recommendations.¹ The Defender of Rights and the CNIL plan to continue their collaboration on this subject and contri-

¹ <https://www.defenseurdesdroits.fr/fr/communique-de-presse/2020/05/algorithmes-et-discriminations-le-defenseur-des-droits-avec-la-cnil> (english version to come)

bute to relevant initiatives of public decision-makers.

- In **Germany, the Federal Anti-Discrimination Agency** funded a study by a leading national university on “Discrimination risks concerning the use of algorithms” which was released in September 2019. The Equality Body plans to use this study as a springboard to advise the government on necessary legislative changes.
- In a project that was finished in spring 2020, the **Swedish Equality Ombudsman** has conducted a survey of the use of artificial intelligence in the areas covered by the Swedish Discrimination Act and the risks of discrimination that are linked to it. In particular, the project analysed the applicability of the Discrimination Act on matters related to artificial intelligence, as well as the possibly discriminatory effects of AI in the areas of recruitment and credit. In addition, issues relating to AI and the GDPR were examined, especially with regard to transparency.
- The **Belgian equality body Unia** is in touch with the Flemish Inter-University expert group “Kenniscentrum Data en Maatschappij” which gives it access to projects which the group co-develops or advises with public authorities such as the Flemish public employment agency (the VDAB). The VDAB developed algorithms that provide insight into the way people search for jobs on their website. The system analyses thousands of job seeker files and looks at the click behavior of people who are looking for jobs on the VDAB website as a predictor for long-term unemployment. The job seeker who is not active enough online would then be invited for an interview and the next step would be a penalty.

Deciding on cases

Some important examples of Equinet’s Members using their powers to issue decisions in relation to algorithms have also been identified:

- The **Defender of Rights in France** has used its powers to publish opinions and decisions outlining its concerns into the use of automatic decision-making. There have been decisions into the use of algorithms for:-
 - the credit scoring practices in banks and insurance companies²;
 - a decision in April 2019 setting out criticisms of Parcoursup³ (the national platform for admission to initial training in higher education), which eventually led to a recent ruling of the French Constitutional Court in the spring of 2020 that universities should specify precisely how algorithms have been used to select candidates;

² See https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=12969

³ See https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=18803

- an opinion in October 2018 which outlined concerns about the use of algorithms in the justice system.⁴
- The **Swedish Equality Ombudsman** investigated a matter where a national state-owned bank had used an algorithm to calculate the credit risk for an individual aged over 60 years old in 2018.⁵ After the investigation was completed, the bank changed its rules.
- The **Finnish Non-discrimination Ombudsman** requested the National Non-Discrimination and Equality Tribunal to investigate whether a credit institution company was liable for discrimination by a refusal to grant credit to a client in connection with the client's making online purchases, based on matters classified as grounds of discrimination, such as gender, age, language and their combined effect. The Tribunal decided that the behaviour of the company towards the client constituted a case of multiple discrimination related to gender, first language, age and place of residence of the client.
- Furthermore, the **Austrian Ombud for Equal Treatment** was faced with algorithmic discrimination in the field of the establishment of an employment relationship. In this case, a job seeker contacted the Ombud and reported that when she applied for a job via an Online Application Form and specified her age with "more than 50 years" she was not able to submit the application. However, when she changed the age (less than 50 years) an application was possible. As an age under 50 years did not constitute a genuine and determining occupational requirement for the position (§ 20 Abs. 1 GLBG) the Ombud contacted the employer and informed him about the discrimination based on the age of job seekers. The next day the employer changed the requirements for an application via an Online Application Form.
- The **Advocate of the Principle of Equality of Slovenia** received its first complaint related to AI and discrimination during the COVID-19 situation. The complainant alleges that the algorithm forming queues for online grocery shopping at one of the supermarket chains in Slovenia is discriminatory against the elderly and should be accordingly adapted. The Advocate is still processing the complaint.

4 See https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=18058

5 Information provided at a meeting of national equality bodies with the Council of Europe Commissioner for Human Rights in September 2019, Paris.

Monitoring government initiatives on AI and identifying opportunities for engagement

Some of Equinet's Members are keeping close tabs on government structures and initiatives for regulating AI, while others collaborate directly with governmental bodies to consider AI and discrimination in sectors which were deemed particularly sensitive. Examples include:

- The **Non-Discrimination Ombudsman in Finland** has liaised directly with governmental organisations responsible for examining AI and ethics in Finland, including the Ministry of Justice, to ensure that the principle of non-discrimination is fully considered.⁶
- The **Slovenian Advocate of the Principle of Equality** has been following the ongoing development of a draft national strategy on AI, which has been delayed by the COVID-19 outbreak. The Advocate is planning to study the draft document during the anticipated public debate stage and intends to provide the drafters, if necessary, with recommendations in line with its mandate.
- **Netherlands Institute for Human Rights** was part of an expert group by the Dutch government to evaluate proposals for the development of a digital contact tracking application for COVID-19. The Dutch equality body developed guidelines that the proposals had to comply with, which focused, among other things, on the need to tailor the app for use also by persons in a vulnerable position (persons with disabilities, the elderly, persons with limited digital access and/or with limited reading capacity, migrants who may not speak Dutch). As a result, the government is now considering instead whether it will use the app at all, and if so, whether it will be developed in house instead.
- The **Advocate of the Principle of Equality in Slovenia** is also waiting for the Ministry of Justice to finish the redrafting of an amendment of the Personal Data Protection Act (PDPA) in order to submit potential further recommendations. In its last recommendation to the Ministry of Justice in September 2019, the Advocate recommended that the provision of PDPA on automated decision making should explicitly state that all ex ante impact assessments of automated decision-making systems should explicitly address the prohibition of discrimination. The Advocate also recommended that a provision should be adopted mandating such ex ante impact assessment not only for systems used by public sector actors in the field of policing, justice and security, but also for systems used by private sector actors that could affect fundamental rights of individuals, including the right to equal treatment.

6 Equinet survey research.

- The **Finnish Non-Discrimination Ombudsman** also used a case on discriminative online credit decision making, in which it was involved, to recommend to the Financial Supervisory Authority in Finland (FIN-FSA) to evaluate financial institutions' credit scorings from non-discrimination perspective and also proposed enhanced cooperation on this with the Ombudsman. This dialogue between the Ombudsman's office and the FIN-FSA is currently ongoing and the FIN-FSA has been sharing relevant credit scorings with the Ombudsman.
- The **Czech Equality Body (Public Defender of Rights)** reported this year's creation of a new advisory expert body, set up within the Ministry of Industry and Commerce, concerning AI-based systems and their impact (among others) on human rights.
- The **Institute of Women and for Equal Opportunities in Spain** is following the work of the new State Secretary for Digitalisation and Artificial Intelligence of the Ministry of Economic Affairs and Digital Transformation, which is working on a new National Strategy on Artificial Intelligence to be launched in the near future.
- The **Commissioner for Protection of Equality in Serbia** has been invited to support the Government of the Republic of Serbia in the development of the Action plan for implementation of the Strategy for development of AI.
- The **German equality body FADA** used the launch of its study on AI and discrimination, which alongside with recommendations to society at large and its own institution, contains recommendations addressed to the German lawmakers, to establish a network for collaboration with key government and public sector stakeholders such as the Federal Commissioner for Data Protection, as well as representatives from relevant ministries.
- The **Austrian Ombud for Equal Treatment** contacted the Austrian Public Employment Service, Austria's leading provider of labour-market related services, regarding the discriminatory potential of an algorithm used for categorizing unemployed people into three categories based on their chances of finding a new job and using this classification to decide on the kind of support a currently unemployed person (i.e. training, assistance with job applications, etc.) should receive. Besides education, previous career and overall labour market situation in the region of residence, the algorithm uses sex, age, ethnicity/nationality, care-giving obligations (for women only) and health status as determinant factors in its assessment, with the more "risk factors" present in a given personal profile leading to a worse qualification under the algorithm. The objections to the algorithm that the Ombud for Equal Treatment raised with the Austrian Public

Employment Service led the Service to establish a “Sounding Board” to discuss and evaluate the discriminatory potential of the algorithm. The Ombud for Equal Treatment is a member of the Board.

Collaborating with regional organizations with relevant expertise

- The **Serbian Commissioner for Protection of Equality** hosted a presentation of the publication “Unboxing Artificial Intelligence: 10 steps to protect Human Rights”, issued by the Office of the Commissioner for Human Rights of the Council of Europe. The publication was presented by an Adviser to the Commissioner for Human Rights and served as an occasion to connect representatives of the Prime minister’s Cabinet and relevant government representatives with private sector stakeholders and civil society organizations.
- The **Institute of Women and for Equal Opportunities in Spain** has been part of the working group of the Advisory Committee on Equal Opportunities for Women and Men of the European Commission and has contributed to the development of the Committee’s recent Opinion on “Artificial Intelligence – opportunities and challenges for gender equality.”

Collaboration with private companies

- The **Finnish Ombudsman** has also liaised directly with representatives of the banks, insurance companies and finance to ensure that discrimination does not occur in relation to ADM.⁷
- The **Office of the Equal Opportunity Ombudsman in Lithuania** has met with financial institutions including banks and insurance providers to discuss algorithmic discrimination and it has made recommendations for insurance companies in relation to selling travel insurance to people aged over 65.⁸

7 Equinet survey research.

8 Equinet survey research.

A LEGAL CHECKLIST FOR EQUALITY BODIES CONSIDERING TAKING LEGAL ACTION WHERE THEY SUSPECT DISCRIMINATION IN AI SYSTEMS.

This checklist has been prepared for Equinet so that its members can assess whether AI systems and other similar technologies, including those that use Automatic Decision-Making systems, comply with equality and non-discrimination laws. The adoption of such an assessment checklist by equality bodies is proposed by the [Equinet Report on AI](#) as a good practice to be promoted by national and European authorities and by the equality bodies themselves.

Direct discrimination		
Q1.	<p>Does the artificial intelligence system treat people differently because of a protected characteristic?</p> <p>This could be for various different reasons, such as direct bias in the code used, in the data set to which it is applied, or because machine learning has treated a particular personal characteristic as a proxy for gender, race, ethnicity, etc.</p>	Direct discrimination
Indirect discrimination		
Q2 a)	<p>Does the artificial intelligence system consist of an algorithm?</p> <p>Is the AI system working from a data set that places certain protected groups at a disadvantage?</p>	If so, there is <i>prima facie</i> indirect discrimination.
Q2 b)	If so, can the body using the artificial intelligence system point to a legitimate aim to justify the use of the algorithm and / or data set?	Assess the extent to which there is a defence to <i>prima facie</i> indirect discrimination

Q2 c)	If so, is the artificial intelligence system capable of achieving the aim?	Assess the extent to which there is a defence to <i>prima facie</i> indirect discrimination
Q2 d)	<p>If so, is the artificial intelligence system proportionate?</p> <p>Is there a non- or less discriminatory means by which the aim could be achieved?</p> <p>Does the system comply with relevant ethical standards such as transparency and explainability?</p>	Assess the extent to which there is a defence to <i>prima facie</i> indirect discrimination
Transparency		
Q3	<p>What information is available to assess the answers to Q1 to Q2 above?</p> <p>Has any audit been carried out?</p> <p>Are there national or pan-European laws such as the GDPR which will allow my Equality Body to understand more about what is going on?</p> <p>Is the system so lacking in transparency that the courts are entitled to infer <i>prima facie</i> discrimination?</p>	Consider the evidential burden
Other types of equality claim		
Q4	Are there other equality-type claims that could be brought, such as harassment?	Assess further legal breaches

Data protection

Q5

Are any data protection provisions engaged here at national level or European level, such as the prohibitions in Articles 21 and 22 in the GDPR?

Assess whether there has been a breach of data protection principles

Liability issues

Q6

Who is the correct party against which any complaint should be made?

Would this be the developer of the artificial intelligence system, or the provider or the party who implements it? The answer will depend on national legislation and the specific facts. It may be that there is more than one party who should be made liable.

Identify the right defendant

Cross-over jurisdictions

Q7

Are there other regulators which might have powers in this area, such as Data or Financial Regulators?

Assess whether other regulatory regimes may apply

Q8 a)

Are other areas of the law engaged by the artificial intelligence system?

Assess other legal breaches

Q8 b)

Does public law apply?

Assess other legal breaches

Since artificial intelligence is being used extensively in the public sector, it is important to be aware that Equinet's Members may be able to challenge the use of algorithms and other technology on the basis that it offends basic principles of public law.⁹

Q8 c)

Does competition law apply?

Assessing other legal breaches

There is a growing sense that big data and artificial intelligence may create competition issues.¹⁰ There is already joint action proposed between French and German competition authorities,¹¹ and there is no reason why this should not be undertaken by other such authorities with inputs from Equinet's Members.

9 For example, <https://www.theguardian.com/uk-news/2019/oct/29/ai-system-for-granting-uk-visas-is-biased-rights-groups-claim> & <https://adminlawblog.org/2019/12/05/jack-maxwell-and-joe-tomlinson-algorithms-artificial-intelligence-and-the-law-public-law-reflections-on-lord-sales-sir-henry-brooke-lecture/>

10 For example, <https://algorithmwatch.org/en/story/competition-authorities-ready-for-price-fixing-algorithms/>

11 See the Executive summary produced by the Autorité de la Concurrence and the Bundeskartellamt of their joint policy on AI and competition at https://www.bundeskartellamt.de/Shared-Docs/Publikation/EN/Berichte/Algorithms_and_Competition_summary.pdf?__blob=publicationFile&v=4

Q8 d)	<p>Have privacy laws been infringed?</p> <p>The prevalence of artificial intelligence may also create privacy issues, as data could be processed by algorithms to gather sensitive information about individuals.¹²</p>	Assess other legal breaches
Q8 e)	<p>Has employment law been infringed?</p> <p>Artificial intelligence is being used by some employer to monitor their workforce which could give to breaches of national employment law.¹³</p>	Assess other legal breaches
Q8 f)	<p>Have any consumer laws been breached?</p>	Assess other legal breaches
Q8 g)	<p>Have any product liability laws been breached?</p>	Assess other legal breaches
Q8 h)	<p>Have any other fundamental rights been breached?</p>	Assess other legal breaches

12 For example, <https://iapp.org/news/a/why-artificial-intelligence-may-be-the-next-big-privacy-trend/>

13 See for example, <https://www.theguardian.com/technology/2019/apr/07/uk-businesses-using-artificial-intelligence-to-monitor-staff-activity>. There is also a concern that there is a growing sector of society, predominantly, gig economy workers who are being essentially managed remotely by algorithm: see <https://www.doteveryone.org.uk/2019/10/insights-gig-economy-research/>

Identification of the liable party

Q9 a)	Who has designed or created the AI system?	Dependent on the course of action, identify the correct defendant
Q9 b)	Who has created the data set that is used within the AI system?	Dependent on the course of action, identify the correct defendant
Q9 c)	Who has placed the AI system on the market?	Dependent on the course of action, identify the correct defendant
Q9 d)	Who is using the AI system in such a way as to give rise to harm?	Dependent on the course of action, identify the correct defendant