

# The Procedural Obstacles of Enforcing Anti-discrimination Law in the Context of AI-based Decision-making

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# Introduction

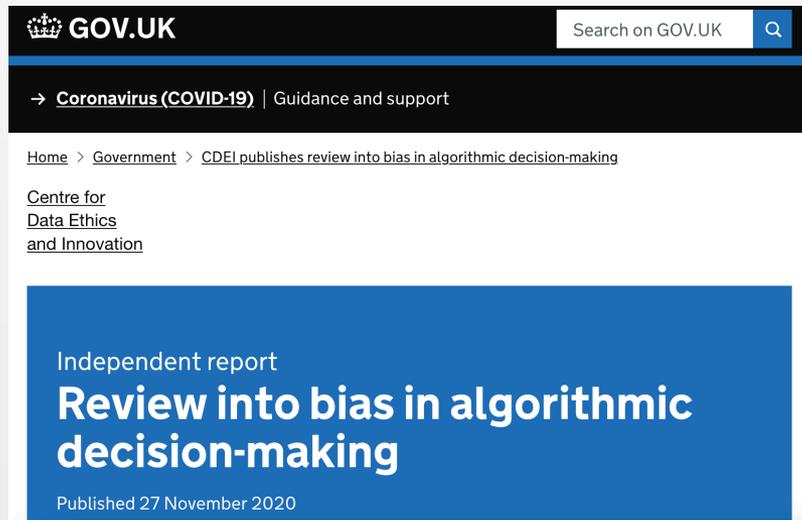
- Breadth of the topic of legal regulation requires focus:
  - Alejandra Bringas – Combining a technical, legal, and ethical assessment of the rights to information and explanation;
  - Ioanna Papageorgiou – Legal issues of mitigating bias at a national and EU level.
- The procedural law framework – judicial and extrajudicial procedures and rules that shape the enforcement of substantive anti-discrimination rights;
- Substantive legal rights and obligations must be capable of being enforced effectively;
- Different degrees of harmonisation re substantive and procedural law across the EU.

# Outline

- Framework of legal regulation;
- The doctrinal framework of anti-discrimination law;
- Procedural law framework of enforcement in the context of AI-based decision making;
- Normative proposals?

# Legal Regulation of AI-based Decision Making

## Widespread calls for regulation:



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→ **Coronavirus (COVID-19)** | Guidance and support

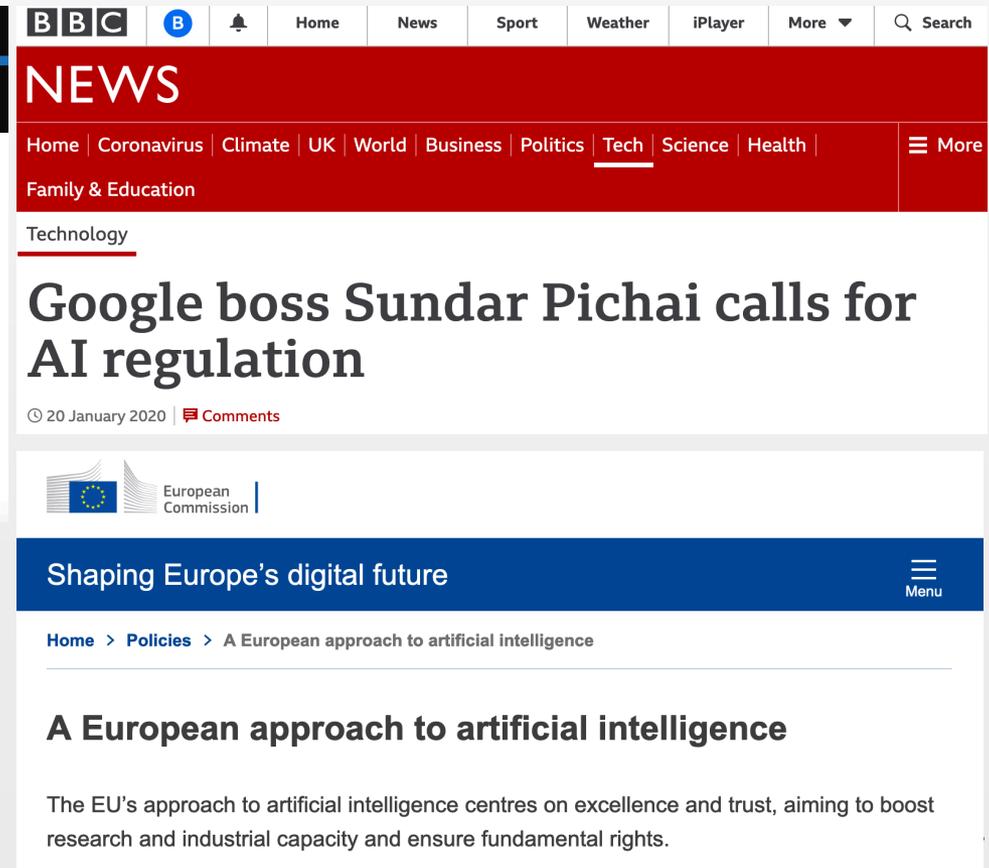
Home > Government > [CDEI publishes review into bias in algorithmic decision-making](#)

Centre for Data Ethics and Innovation

Independent report  
**Review into bias in algorithmic decision-making**  
Published 27 November 2020

## Civil society calls for AI red lines in the European Union's Artificial Intelligence proposal

European Digital Rights together with 61 civil society organisations have sent an open letter to the European Commission demanding red lines for the applications of AI that threaten fundamental rights.



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## Google boss Sundar Pichai calls for AI regulation

© 20 January 2020 | Comments

European Commission

### Shaping Europe's digital future

Home > Policies > A European approach to artificial intelligence

## A European approach to artificial intelligence

The EU's approach to artificial intelligence centres on excellence and trust, aiming to boost research and industrial capacity and ensure fundamental rights.

# Legal Regulation of AI-based Decision Making

Widespread recognition of risk AI-based decision making poses to fundamental rights:

- **European Commission:** “entails a number of potential risks’ including ‘gender-based or other kinds of discrimination” (White Paper, COM(2020) 65 final, p 1);
- **European Parliament:** impact on “the backbone of fundamental rights and values of our society” (Resolution, Culture and Education Committee, 16/03/21);
- **Council of Europe Ad hoc Committee on Artificial Intelligence, Feasibility Study, CAHAI(2020)23:** risk to equality and other fundamental rights.

# Legal Regulation of AI-based Decision Making

Take for granted - AI-based decision making **can** generate a **risk** of discrimination to individuals.

- Various typologies elaborated to categorise bias:
  - Eg Jon Kleinberg and others, 'Discrimination in the Age of Algorithms' (2019) 25548 NBER Working Paper Series 21-23 and Solon Barocas and Andrew D. Selbst, 'Big Data's Disparate Impact' (2016) 104 California law review 671, 677-680.
- Eg Amazon recruitment system, COMPAS, racial bias in healthcare management, resulting from proxy (healthcare spending).

# Legal Regulation of AI-based Decision Making

Acknowledgment of need for regulation and risk to fundamental rights, however:

- What are the challenges with legal regulation of AI-based decision making?
- How should it be regulated? What exists and is there need for reform?

# Legal Regulation of AI-based Decision Making

## Challenges regulating AI:

- Ubiquitous nature of AI-based decision making - common place in everyday life;
- AI-based decision making → generates risks across various fields, which law seeks to protect.

# Legal Regulation of AI-based Decision Making

Challenges of legal regulation:

- Only one mechanism for regulating social, technical, economic problems – typically responds retroactively to developments;
- Is law “fit” to promote/facilitate non-legal standards?
- Global/ubiquitous scope vs regional/national scope of legal regulation.

# Legal Regulation of AI-based Decision Making

## Scope of legal rules

- Neither a vacuum for legal regulation of AI-based decision making;
- Nor a comprehensive legal framework for AI.

[cf: “European Approach to Artificial Intelligence” inc. April 2021 Proposal for a Regulation on AI, COM/2021/206 final]

# Legal Regulation of AI-based Decision Making

Does not operate in a vacuum – multitude of sectoral EU-law regimes, with overarching fundamental rights framework.

Key question → what exists? What are its limits? How do these regimes interact?

# Legal Regulation of AI-based Decision Making

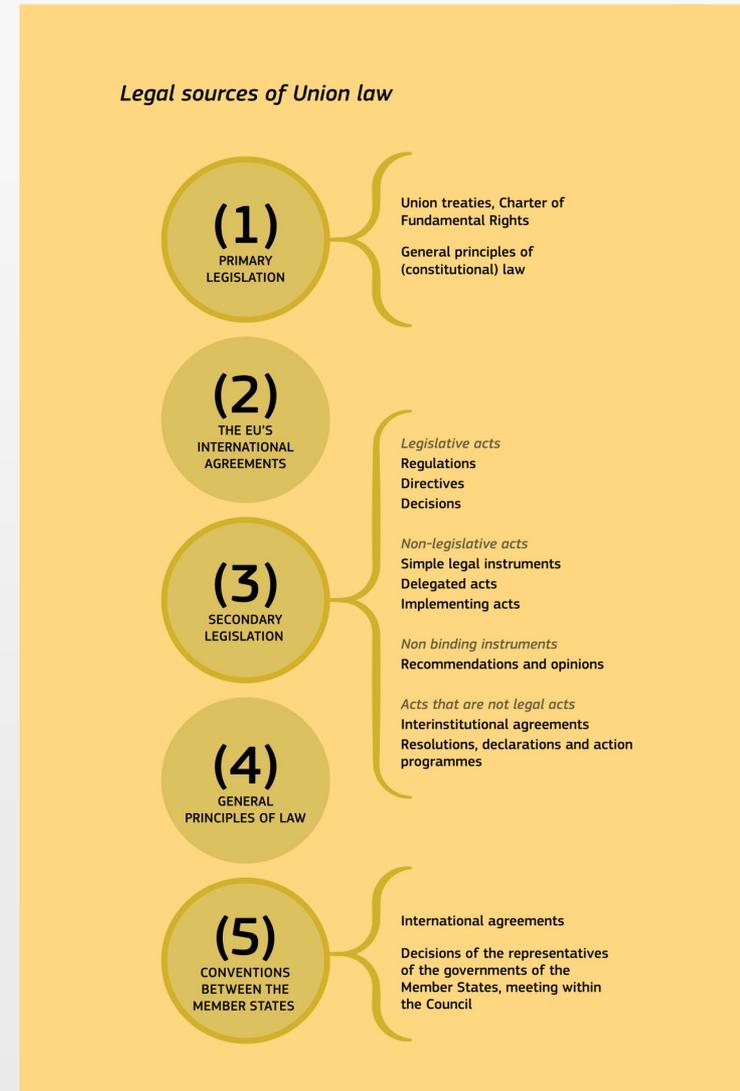
Who makes these rules? What form do they take?

→ Shape how rights established therein can be enforced.

Focus on EU and national legal framework.

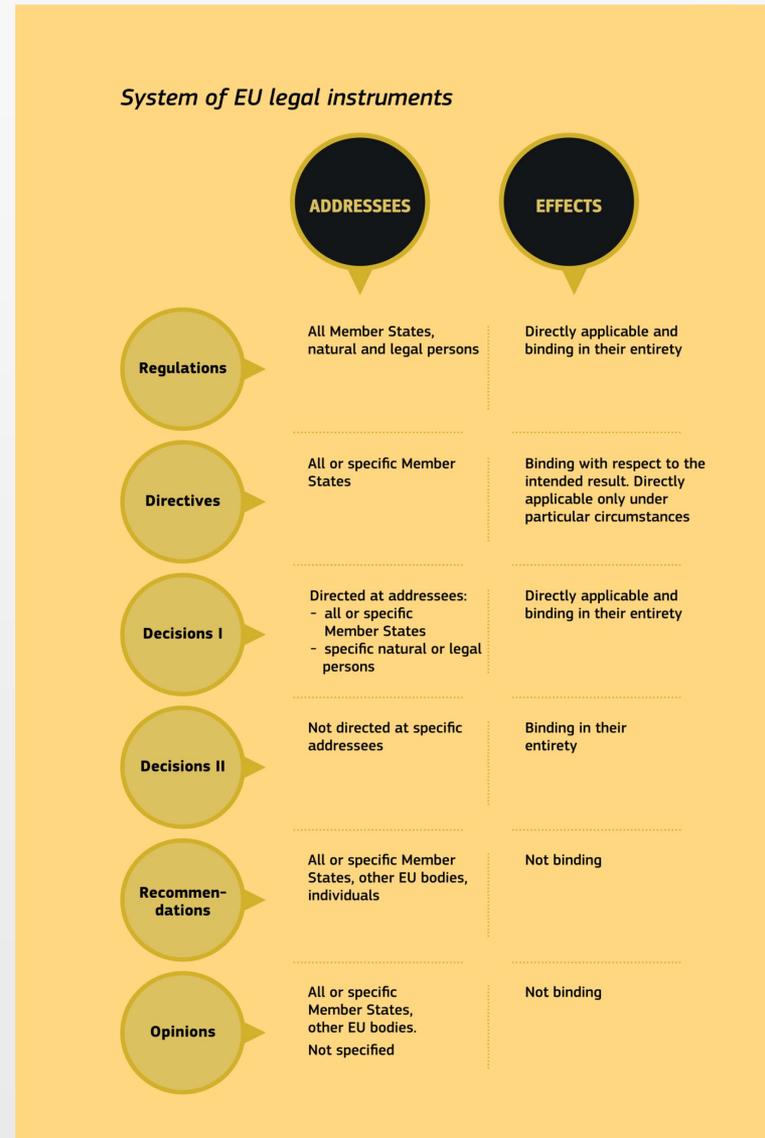
# Legal Regulation of AI-based Decision Making

- EU law = “primary” or “secondary” law;
- Primary law = EU Treaty and fundamental rights;
- Secondary law = law by which most rights are conferred, including protection against discrimination.



# Legal Regulation of AI-based Decision Making

- Secondary law: can take different forms;
- Shapes basis for enforcement;
- Whether further step of implementation is required by the national legislature;
- Shapes degree of harmonisation – uniformity.



# Legal Regulation of AI-based Decision Making

General comments on enforcement of EU law:

- EU lawyers speak of a “hybrid” notion of rights and remedies;
- Substantive rights = EU law; procedure and remedies = national;
- Fragmentation – of regulatory regimes and between EU and national levels.

# Legal Regulation of AI-based Decision Making

Key question: what does the existing legal framework provide for? Are these rules able to address the risks of AI-based decision making and can they be effectively enforced?

# The Doctrinal Framework: Anti-discrimination and Equality

Background to anti-discrimination law:

- Relatively recent; diverse theoretical bases;
- Responds to specific harms re particular groups;
- Arnardottir – three phases of EU anti-discrimination law, beginning with equal pay – from EU legislature interpreted by European Court of Justice (Case C-144/04, *Mangold*).

# The Doctrinal Framework: Anti-discrimination and Equality

Importance: non-discrimination as value of European identity and of the internal market:

In international law: European Convention on Human Rights, Art 14:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured **without discrimination** on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

# The Doctrinal Framework: Anti-discrimination and Equality

In EU primary law: Art 2, Treaty on the EU

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. **These values are common to the Member States** in a society in which pluralism, **non-discrimination**, tolerance, justice, solidarity and equality between women and men prevail.

# The Doctrinal Framework: Anti-discrimination and Equality

Art 10 Treaty on the Functioning of the EU

In defining and implementing its policies and activities, the Union shall aim to **combat discrimination** based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

# The Doctrinal Framework: Anti-discrimination and Equality

Art 19(1) Treaty on the Functioning of the EU

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, **may take appropriate action to combat discrimination** based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

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# The Doctrinal Framework: Anti-discrimination and Equality

## EU Charter of Fundamental Rights

- Art 6(1) TEU – CFR has the status of primary EU law;
- The EU institutions, as well as EU Member State authorities must ensure their decisions and actions are compliant with the provisions of the CFR (the latter only when they are implementing EU law);
- The CFR provides for:
  - Art 10 – Freedom of thought, conscience and religion;
  - Art 20 – Equality before the law;
  - Art 21 – Principle of non-discrimination:
  - Art 23 – Equality between men and women.

# The Doctrinal Framework: Anti-discrimination and Equality

## Secondary law:

- Five key directives;
- Implemented in national legal systems by national legislation;
- NB: Directive Proposal (COM(2008)462) against discrimination based on age, disability, sexual orientation and religion or belief beyond the workplace (not adopted).

Protected grounds	Field of protection from discrimination	Directive
Race or ethnic origin	<ul style="list-style-type: none"> <li>• Access to employment</li> <li>• Conditions of employment (including pay and dismissal)</li> <li>• Occupational pensions</li> <li>• Vocational guidance and training</li> <li>• Access to self-employment</li> <li>• Social protection (including social security and healthcare)</li> <li>• Education</li> <li>• Access to and supply of goods and services (including housing)</li> </ul>	Racial Equality Directive (2000/43/EC)
Sex	<ul style="list-style-type: none"> <li>• Access to employment</li> <li>• Conditions of employment (including pay and dismissal)</li> <li>• Occupational pensions</li> <li>• Vocational guidance and training</li> <li>• Access to self-employment</li> <li>• Social security</li> <li>• Access to and supply of goods and services</li> </ul>	The Gender Equality Directive (Recast Directive) (2006/54/EC)  Gender Goods and Services Directive (2004/113/EC)  Gender Social Security Directive (79/7/EEC)
Religion or belief, disability, age, or sexual orientation	<ul style="list-style-type: none"> <li>• Access to employment</li> <li>• Conditions of employment (including pay and dismissal)</li> <li>• Occupational pensions</li> <li>• Vocational guidance and training</li> <li>• Access to self-employment</li> </ul>	Employment Equality Directive (2000/78/EC)

# The Doctrinal Framework: Anti-discrimination and Equality

Implementation of EU directives in English law:

- Two key pieces of legislation: Equality Act 2006 and consolidated in the **Equality Act 2010**;
- Human Rights Act 1998: incorporates ECHR rights into English law; can be relied upon in English courts.

# The Doctrinal Framework: Anti-discrimination and Equality

- Prohibits discrimination for distinct “protected groups” in limited and specific spheres;
- Employment, access to goods and services, social security and free movement;
- Limits?
  - Does not extend to all fields in which AI-based decision making may be engaged;
  - Only to protected groups.

# The Doctrinal Framework: Anti-discrimination and Equality

- Why?
  - 1) The field in which the AI-based decision making is engaged is not caught, or
  - 2) The group negatively impacted is not a « protected group ».
- Including, new types of differential treatment (eg spelling errors on a insurance application, postal code);
- Single grounds approach – no recognition of intersectionality.

# The Doctrinal Framework: Anti-discrimination and Equality

Direct and indirect discrimination:

Art 2(2)(a) Racial Equality Directive 2000/43/EC:

Direct discrimination shall be taken to occur where one person is treated **less favourably than another** is, has been or would be treated in a **comparable situation** on grounds of racial or ethnic origin.

# The Doctrinal Framework: Anti-discrimination and Equality

Direct and indirect discrimination:

Article 2(2)(b), Racial Equality Directive 2000/43/EC

Indirect discrimination shall be taken to occur where an **apparently neutral provision, criterion or practice** would put persons of a racial or ethnic origin 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**.

# The Doctrinal Framework: Anti-discrimination and Equality

- Scope for justification of indirect discrimination?
- Establishing a prima facie case of discrimination?
- What is required with direct and indirect discrimination claims?
  - Black box issues vs outcome?

# The Procedural Law Framework: Anti-discrimination and Equality

- Effective enforcement of rights and existence of effective, proportionate and dissuasive remedies;
- Right to an effective remedy as general principle of EU law;
- Procedural issues:
  - Jurisdiction
  - Standing;
  - Content of claim;
  - Remedies;
  - Timing, costs and legal representation.

# The Procedural Law Framework: Anti-discrimination and Equality

Access to justice:

Art 47, CFR: Art 47: Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the **right to an effective remedy** before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a **fair and public hearing within a reasonable time by an independent and impartial tribunal** previously established by law. Everyone shall have the possibility of being advised, defended and represented.

**Legal aid shall be made available** to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

# The Procedural Law Framework: Anti-discrimination and Equality

*R v Secretary of State for the Home Department ex p Leech* (No 2) [1994] QB 198, at 210A: “It is a principle of our law that every citizen has a right of unimpeded access to a court.”

*R v Lord Chancellor exp Witham* [1998] QB 575: right of access to a court as a constitutional right.

# The Procedural Law Framework: Anti-discrimination and Equality

Art 7(1) Racial Equality Directive 2000/43/EC:

Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under [these Directives] are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

# The Procedural Law Framework: Anti-discrimination and Equality

Key mechanism for enforcing rights derived from EU secondary law – before national courts.

In England – a civil law matter; not criminal (generally, not administrative) – thus the courts engaged in their civil jurisdiction.

Substantive rights: EU directive and Equality Act 2020.

Procedural rules: Civil Procedure Rules and Practice Directions.

# The Procedural Law Framework: Anti-discrimination and Equality

CPR aim to:

- Ensure parties are on an equal footing;
- Avoid unnecessary expense;
- Deal with the case in ways which are proportionate to the:
  - amount of money involved
  - importance of the case
  - complexity of the issues
  - financial position of each party
- Ensure that the case is dealt with expeditiously and fairly;
- Allocate an appropriate share of the court's resources to the case, while taking into account the needs for resources of other cases.

# The Procedural Law Framework: Anti-discrimination and Equality

Before going to court:

- Requirement to engage ADR (eg conciliation, mediation or arbitration) before taking a discrimination claim to court?
- Requirement to advise that case will be brought (eg Advisory, Conciliation and Arbitration Service in England re employment discrimination).
- Recommend attempts to resolve informally.

# The Procedural Law Framework: Anti-discrimination and Equality

## Standing:

- Who is the claimant and defendant? Who is bringing the claim and who is defending it?
- Claimant – party who has suffered loss;
- Defendant - the “user” of the AI-based decision making? Eg the bank who engages it in the context of credit applications? Or the developer?

# The Procedural Law Framework: Anti-discrimination and Equality

- Can an organisation provide support in legal proceedings?
- Art 7(2) of the Racial Equality Directive 2000/43/EC – “associations [...] with legitimate interest...may engage...either on behalf of or in support of...in any judicial...procedure”;
- In England: *R v Home Secretary ex parte T & V* [1997] 3 WLR 23 and *HM Treasury v Ahmed* [2010] UKSC 2.

# The Procedural Law Framework: Anti-discrimination and Equality

Jurisdiction: Which court is competent/has the power to hear a case and render a decision?

- Depends on where parties are established; where the discrimination took place and relevant field (eg Employment Tribunal);
- Otherwise, value and complexity - county court (less than 100,000 GBP) or High Court (more than 100,000).

# The Procedural Law Framework: Anti-discrimination and Equality

## Claim:

- Prima facie claim of discrimination – direct?  
Indirect?
- Claim form to be completed, sent to relevant court - CPR, Part 7 (form N1);
- Then claim form served on defendant to initiate proceedings.

# The Procedural Law Framework: Anti-discrimination and Equality



## Claim Form

You may be able to issue your claim online which may save time and money. Go to [www.moneyclaim.gov.uk](http://www.moneyclaim.gov.uk) to find out more.

**In the**

**Fee Account no.**

**Help with Fees - Ref no. (if applicable)**

For court use only

**Claim no.**

**Issue date**

**Claimant(s) name(s) and address(es) including postcode**

SEAL

**Defendant(s) name and address(es) including postcode**

**Brief details of claim**

**Value**

**You must indicate your preferred County Court Hearing Centre for hearings here (see notes for guidance)**

**Defendant's name and address for service including postcode**

<b>Amount claimed</b>	£
<b>Court fee</b>	
<b>Legal representative's costs</b>	
<b>Total amount</b>	

For further details of the courts [www.gov.uk/find-court-tribunal](http://www.gov.uk/find-court-tribunal).  
When corresponding with the Court, please address forms or letters to the Manager and always quote the claim number.

**N1** Claim form (CPR Part 7) (10.21) © Crown Copyright 2021

<b>Claim No.</b>	
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Does, or will, your claim include any issues under the Human Rights Act 1998?  Yes  No

Particulars of Claim [\(attached\)](#)(to follow)

# The Procedural Law Framework: Anti-discrimination and Equality

Direct discrimination:

- Where model is not neutral re a protected group – ie group integrated as a relevant (negative) factor → direct;
- Eg proxy correlating with protected group.
- Establishing proof?
  - No need to show intent;
  - But need to show less favourable treatment, on comparison – black box?

# The Procedural Law Framework: Anti-discrimination and Equality

Indirect discrimination:

- Apparently “neutral provision, criterion or practice” that places persons of protected group at disadvantage;
- No need to show intent;
- Eg biased training data or proxies;
- Focus on outcome not parameters or content of algorithm.

# The Procedural Law Framework: Anti-discrimination and Equality

Indirect discrimination:

- Once prima facie case established by claimant
  - burden of proof → defendant.
- To establish justification: « objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary »;
- What legitimate aim?

# The Procedural Law Framework: Anti-discrimination and Equality

Indirect discrimination:

- Justification - engages proportionality assessment;
- Eg by the need to estimate risk of default on a loan;
- Case C-170/84 *Bilka-Kaufhaus*, Case C-157/15 *Achbita*: ECJ unlikely to accept blanket aims as legitimate and proportionate (ie appropriate, necessary and minimum harm).

# The Procedural Law Framework: Anti-discrimination and Equality

COM(2021) 139 final:

There are some situations in which it is especially difficult to establish prima facie evidence, e.g. for claims of indirect discrimination...

...even more complicated where the alleged discrimination follows from the use of artificial intelligence...stakeholders pointed to difficulties in the availability and accessibility of relevant statistical data, and how courts take them into account.

# The Procedural Law Framework: Anti-discrimination and Equality

Need for **‘effective, proportionate and dissuasive’** sanctions or remedies to be available...may include **compensation** to victim (Art 15, Racial Equality Directive 2000/43/EC).

Civil proceedings – generally compensation (damages) to compensate injured party for loss suffered (and possible injury to feelings); difficulties in calculating loss?

# The Procedural Law Framework: Anti-discrimination and Equality

Other remedies?

- A declaration of a finding of discrimination;
- A recommendation on “specified steps for the purpose of obviating or reducing the adverse effects on the complainant” – eg an apology or equality training;
- Equality and Human Rights Commission - can issue binding ‘compliance notice’ to require organisation to cease discriminatory practices

# The Procedural Law Framework: Anti-discrimination and Equality

## Timing:

- “Prescription periods” attached to claims, diverge across national legal systems;
- Generally, in England, claims must be brought before a court within six months (minus one day) of discriminatory practice (three for employment claims);
- Length of proceedings – a deterrent?

# The Procedural Law Framework: Anti-discrimination and Equality

## Costs:

- Fee for filing a claim;
- Court fees;
- Depend on complexity of case and value of claim;
- Loser pays principle;
- Limited legal aid and costs of legal representation;
- Fees and loser pays principle → reported as significant barrier to bringing claims.

# The Procedural Law Framework: Anti-discrimination and Equality

## Money claims – Civil Fees Order 1.1-1.2

To issue a claim for money, the fees are based on the amount claimed, including interest. For Court Issued Claims, please round fractions of pence down to the nearest penny. Example: A Fee calculated as being £1050.5096 rounds down to a payable fee of £1050.50:

Value of your claim				Fee payable
Up to	£300			£35
Greater than	£300	but no more than	£500	£50
Greater than	£500	but no more than	£1,000	£70
Greater than	£1,000	but no more than	£1,500	£80
Greater than	£1,500	but no more than	£3,000	£115
Greater than	£3,000	but no more than	£5,000	£205
Greater than	£5,000	but no more than	£10,000	£455
Greater than	£10,000	but no more than	£200,000	5% of the value of the claim
Greater than	£200,000			£10,000

## Hearing fees – fees order 2.1

Small Claim Track where the amount claimed is:

up to £300	£25
between £300.01 and £500	£55
between £500.01 and £1,000	£80
between £1,000.01 and £1,500	£115
between £1,500.01 and £3,000	£170
more than £3,000	£335

Fast track claim	£545
Multi track claim	£1,090

(Civil Fees Order,  
1.1-1.2, 2.1)

# Procedural challenges and improvements?

- Establishing the claim and proving prima facie case of discrimination – elaboration on transparency obligations/right to information? GDPR?
- Clarification on who is liable?
- Complexities of international cases - where to sue? What national law?
- Justice must be seen to be done – reporting and awareness?
- Feasible or realistic to rely on private enforcement before courts?

**Thank you.**

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