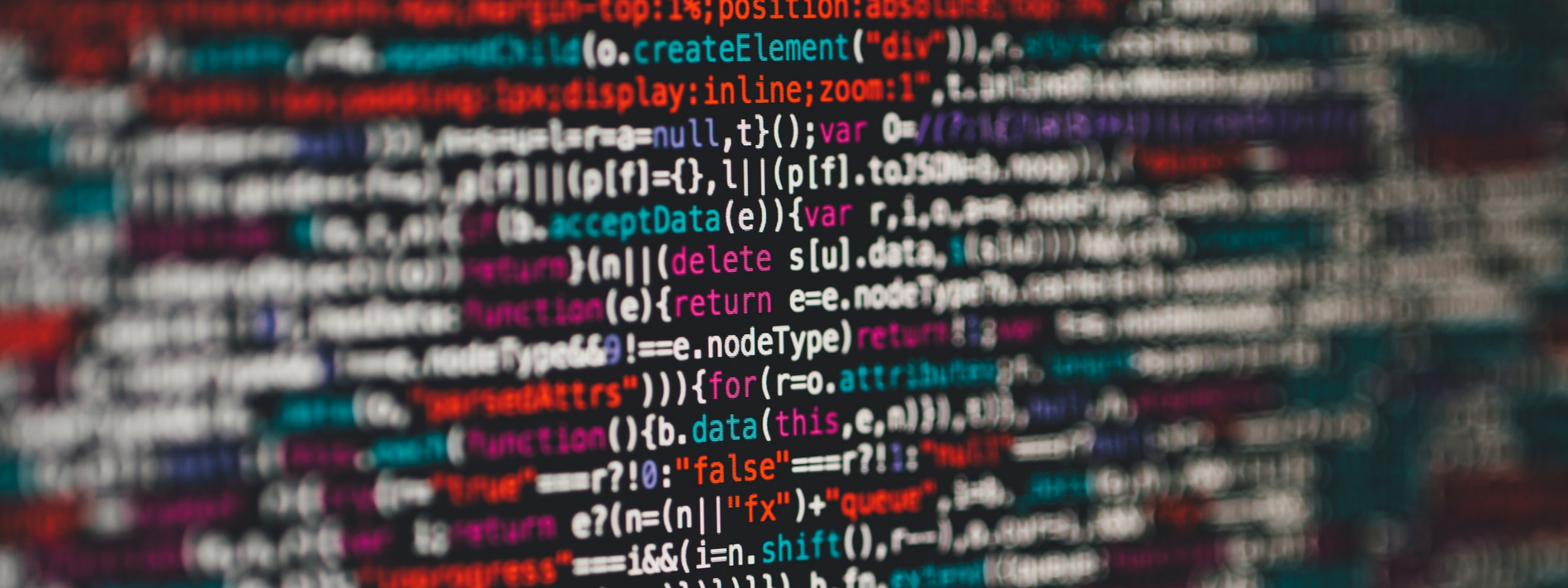




Pricing algorithms and EU anti-discrimination law

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Current Reflections on EU Anti-discrimination Law

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Price discrimination and pricing algorithms

Price discrimination is broadly defined

Personalised pricing

Pricing differently based on personal data (≠ dynamic pricing)

Personalised discounts

Providing targeted discounts based on personal data

Search steering

Providing targeted search results based on personal data

Price discrimination is broadly defined

Retail

Hairdressers
Mother's Day
Online stores

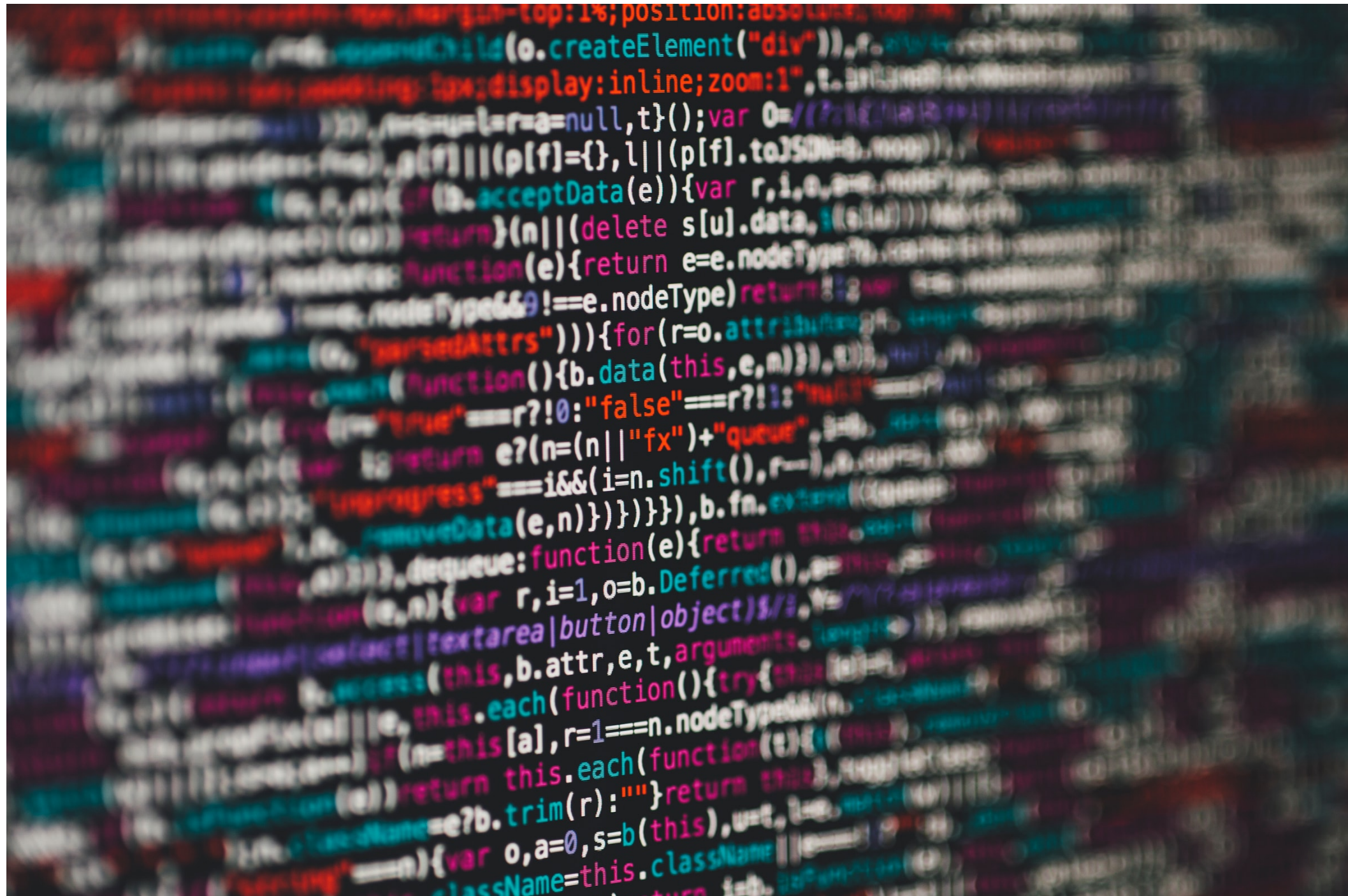
Insurance

Longer life expectancy
Smoking habits
Fitness habits

Lending

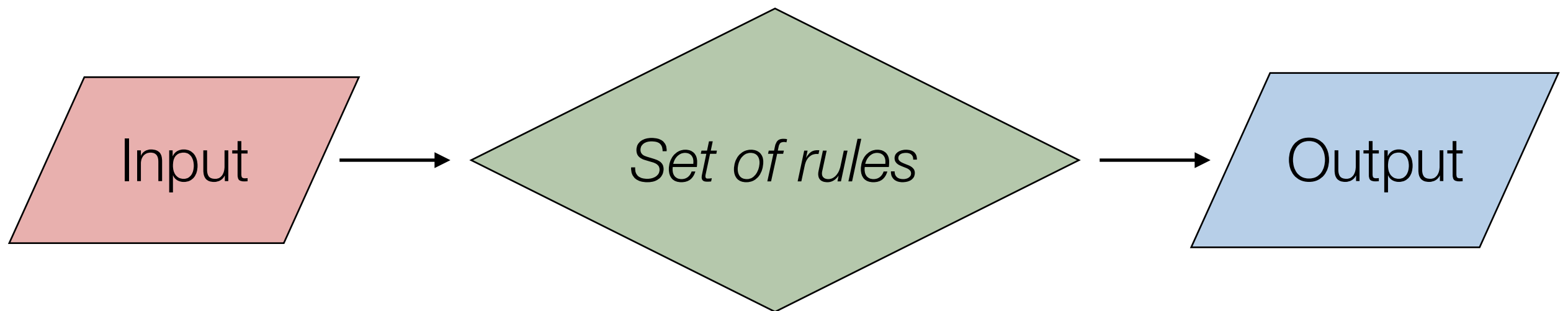
Redlining
Subprime lending
Credit scoring

What is a (pricing) algorithm?



What is a (pricing) algorithm?

Algorithm



Examples of pricing algorithms

Websites Vary Prices, Deals Based on Users' Information

It was the same Swingline stapler, on the same Staples.com website. But for Kim Wamble, the price was \$15.79, while the price on Trude Frizzell's screen, just a few miles away, was \$14.29.

The Wall Street Journal (24 December 2012)

Examples of pricing algorithms

PERSONALISERING: VAN PROMOTIE TOT PRIJS



Gepersonaliseerde prijzen in Nederland – Floris Kreiken

26 april 2016



BITS OF FREEDOM
VERDEDIGT DIGITALE BURGERRECHTEN

Examples of pricing algorithms



€ 159,-

179,-

Bits of Freedom
(26 April 2016), p. 24

Examples of pricing algorithms



- Factors: Age, sex and moves

The OpenSchufa data set suggests that factors such as age, gender and many moves affect the Schufa score. For example, young men are often worse off.

Open Knowledge Foundation, “OpenSchufa: The first results”
(29 November 2018)

Examples of pricing algorithms

Original

Anwältin verklagt Schufa

Google
Translate

lawyer sued Schufa

They earn a similar amount and have shared real estate. Nevertheless, a Munich lawyer is rated worse by the Schufa credit agency than her husband.

Süddeutsche Zeitung (24 February 2016)

Pricing algorithms are complex

The algorithmic
“black box”

Thousands of parameters,
logic behind often unclear

Potential bias

Testing and training data,
third-party brokers

Practical difficulties

How to know if used?
How to prove it?

EU data protection law



The GDPR has a wide scope

Personal data

Any information allowing an individual to be identified or identifiable

Data processing

Data collection, organisation, storage, combination...

Territorial scope

EU data subject targeted or monitored

The GDPR protects data subject rights

Right to information

Ex ante, automated decision-making or profiling, logic involved

Right to access

Ex post, workings of the algorithm, possible consequences

Automated
decision-making

Art. 22 GDPR, does it apply?
If so, additional protection

EU anti-discrimination law

Price discrimination prohibited on grounds of...

Gender

Directive 2004/113/EC

Racial or ethnic origin

Directive 2000/43/EC

Nationality,
“place of residence”

Art. 18 TFEU,
“Geo-Blocking Regulation”
(2018/302)

Anti-discrimination legal concepts apply

Direct discrimination

Price decided on the basis of a prohibited ground, even partly, or a proxy thereof

Indirect discrimination

Pricing disproportionately disadvantages a protected group without an adequate justification

Discrimination by association

Individual affected is associated with those holding a protected characteristic

Applicable CJEU case law

Test-Achats (C-236/09)

Use of sex as a factor to calculate premiums and benefits in insurance no longer allowed

CHEZ (C-83/14)

Direct discrimination if measure introduced for reasons relating to the ethnic origin of most inhabitants

NH, Accept, Feryn

Discriminatory statements by employers or those having a decisive influence on recruitment policy

Pitfalls of current EU anti-discrimination law

Burden of proof

Too high in practice,
new rules on the sharing
of the burden of proof needed?

Enforcement

Reliance on individual litigation,
role of national equality bodies

“Minor” harm

Where to set the bar?
De minimis, expressive harm

Moving forward

EU anti-discrimination law should evolve

More comprehensive,
adequate protection

Clarify what direct and indirect discrimination entail in algorithms, sharing of the burden of proof

Stronger mandate
to equality bodies

Recognise their role to combat algorithmic discrimination and enhance their powers

Socioeconomic
disadvantage

Link between price discrimination and poverty

Additional safeguards in EU law

Data subject rights as
transparency tools

Right to information and
to access to facilitate proof
of discrimination

Automated
decision-making

Recognise the applicability
of Art. 22 GDPR to pricing
algorithms

Pre-contractual obligations
(consumer protection)

Inform consumers of price
personalisation based on
automated decision-making

Conclusions

Conclusions

- Pricing algorithms pose real challenges in terms of (EU) anti-discrimination law
- Existing EU anti-discrimination law is inadequately equipped to tackle algorithmic price discrimination
- EU anti-discrimination law should evolve to face those challenges: new rules needed
- Additional safeguards may be derived from other EU norms: data protection law, consumer protection law

Conclusions

Laura Drechsler and Juan Carlos Benito Sánchez.
“The Price Is (Not) Right: Data Protection and
Discrimination in the Age of Pricing Algorithms”.
European Journal of Law and Technology 9, no. 3 (2018)



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