CODED* BIAS

The General Equal Treatment Act and protection against discrimination by algorithmic decision-making systems

Legal opinion on behalf of the
Federal Anti-Discrimination Agency

Presented by
Prof. Dr. iur. Indra Spiecker gen. Döhmann, LL.M. (Georgetown Univ.)
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About the legal opinion

According to the terms of reference, the legal opinion is to examine how the General Equal Treatment Act (AGG) can cope with the challenges arising from the use of discriminatory algorithmic decision-making systems (ADM systems). The aim is to investigate the extent to which the AGG is an effective instrument for protection against such discrimination and to identify possible gaps in protection.

The first step is to document the current scope of legal and social science literature on claims and possibilities of legal enforcement under the General Equal Treatment Act before examining and addressing the gaps in protection and challenges of the use of ADM systems, particularly with regard to

- the scope of the AGG,
- the protected characteristics in the AGG,
- discrimination types,
- measures and protection obligations of employers,
- the problem of mass transactions when algorithmic decision-making systems are individualised and thus no comparable conditions are established, and
- the problem of justification, for example by insurance companies on the basis of automated calculation and risk assessment.

Furthermore, the legal opinion will examine how discrimination resulting from the use of ADM systems can be proven and which documentation obligations and rights of inspection are necessary for this. Questions of responsibility for discriminatory results of ADM systems will also be examined.

The legal opinion should formulate initial approaches and recommended solutions that would be suitable for closing the identified gaps in protection and strengthening legal enforcement. Concrete proposals for amending the AGG will be made and other or additional instruments for closing the protection gaps and strengthening legal enforcement will be suggested. The considerations should also be related to the main characteristics of the Proposal for a regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act).

Summary

The main task of these systems is to identify a large number of correlations with the help of statistical methods in order to establish relationships between variables. Despite their undisputed discriminatory potential, ADM systems are associated with the idea of being able to make objective and neutral decisions that are uninfluenced by human bias, as well as more efficient and better decisions, not least because human error, prejudice and cognitive limitations can be eliminated or at least reduced (section 1 of the legal opinion).

The use of such systems covers almost all areas of private and public life: Pricing, access to and participation in public and private services, marketing, contractual terms, diagnostic and therapeutic decisions, or distribution decisions when resources are scarce.

Among other things, the functioning of ADM systems enables probability statements about persons to be generated. Through the attribution of group characteristics, large numbers of automated (selection) decisions are made or, with the help of mass individualisation, contracts are optimised and made more efficient. From the point of view of anti-discrimination law, it is precisely this group attribution that is problematic.

Discrimination through statistics is the result of an attribution of characteristics obtained by statistical means, which are based on (actual or assumed) average values of a group. The reference to these average group characteristics is supposed to help overcome uncertainties regarding the individual characteristics of a single person. The social mechanism underlying such an assessment is not of interest, a causality is not claimed or proven. This perpetuates (historical) structural inequalities and creates new ones.

The quality of the decision of an ADM system is essentially dependent on the quantity, quality, modelling and evaluation of the data used. Thus, the discrimination potential of ADM systems may already be inherent in the system itself. In addition, non-transparency is inherent in the way ADM systems function. Determining responsibility for discriminatory elements in ADM systems is problematic due to the diversity of those involved in their programming,

development, use and further use, for example in network structures and individually varied standard algorithms. In fact, those potentially responsible can often exculpate themselves. The technological progress of digital evaluation methods and technologies means that there are practically no technical limits to the sharing, further use and merging of large amounts of data, making the dissemination and use of discriminatory data sets uncontrollable. It cannot be assumed that discrimination can be identified on a case-by-case basis.

The greatest challenge to legally effective protection against discrimination through ADM systems is the deficits of the AGG in enforcing the law. These fundamental deficits are well known and are not initially a specific problem of discrimination through ADM systems. However, due to the particularly pronounced asymmetry of power and information, these effects are amplified: among other things, the frequently encountered black box character of ADM systems and the inability to deduce the use of such systems and their functionalities from the decisions make it practically impossible for the affected entities to trace the causes of discrimination due to a lack of resources (section 2 of the legal opinion).

The following is missing:
- In the AGG, unambiguous elements of discrimination that also record ADM system-specific discriminations, especially the group discriminations;
- In the AGG, the information and publication obligations that enable insight in the concrete functioning methods and data of an ADM system;
- In the AGG, effective measures regarding contextual and institutional support of the affected entities in detecting and legal tracking of potential error sources from the ADM systems;
- In the EU proposal for the Artificial Intelligence Act, classic regulations for effective legal implementation (e.g. reversal of burden of proof, causality simplifications).

In order to ensure effective protection against discrimination by ADM systems and to overcome the deficits in law enforcement that are contrary to EU law, the following measures should therefore be considered (section 3 of the legal opinion):

- Fundamental reorientation of the AGG with regard to the role of the Federal Anti-Discrimination Agency (ADS):
  - Granting comprehensive rights of information and investigation;
  - Granting of own rights of action by means of a right of associations to initiate legal proceedings to pursue collective rights;
  - Establishment of an independent conciliation body for the ADS;
- Authorisation of anti-discrimination associations to act on behalf of a person who has been discriminated against and to assert their claims;
- Extension of the protected characteristics of Section 1 of the AGG to include the characteristic of relationships;
- Addition of the legal definition of Section 3, paragraph 2 of the AGG;
- Expansion of the circle of addressees of the AGG to the developers and service providers of the ADM systems;
- Adjustments to the interpretation of the reversal of the burden of proof in Section 22 of the AGG;
- Inclusion of the ADS in the scope of application of the Artificial Intelligence Act.

Legal opinion

1 Discrimination by algorithmic systems

1.1 Algorithmic systems

1.1.1 Algorithms and how they function

Algorithms are computational operations that are carried out in a determined sequence in order to solve precisely defined problems with the help of input data.[1] They are translated into binary machine code and form the basis of all software and enable the automatic implementation of the programme code to transform input information into output.[2] Algorithms can be specifically programmed for the execution of a certain operation, in which case they implement this programming directly and produce the desired, predetermined result. Navigation systems that calculate the shortest path between two points follow this way of working.

If algorithms are to solve problems that are not (or cannot be) defined in advance, the algorithm must be a **"learning"** one. Such an algorithm, which is normally called *artificial intelligence*[3], regularly uses large amounts of data to

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1   Knorre, Big Data im öffentlichen Diskurs (Big Data in public discourse), in: Knorre/Müller-Peters/Wagner, Die Big-Data-Debatte (The Big Data Debate), 2020, page 1, 6 et seq.

2   Refer to Martini, Blackbox Algorithmus (Black Box Algorithm), 2019, page 17 et seq.; Orwat, Diskriminierungsrisiken durch Verwendung von Algorithmen (Discrimination risks through the use of algorithms), 2019, page 3 et seq.; Heise, Algorithm, in: Heesen (Publisher), Handbuch Medien- und Informationsethik (Manual of Media and Information Ethics), 2016, page 202 et seq.

3   On the development of the term and the ambiguous to contentious terminology, see Martini, Fn. 2, page 20 (Fn. 86) and Spiecker gen. Döhmann, in: Kischel/Kube (Publisher), Handbuch des Staatsrechts (Manual of Constitutional Law), Volume 1, iE 2023, Section 20: Digitalisierung, Informationsgesellschaft, Massendaten, Künstliche Intelligenz (Digitalisation, Information Society, Mass Data, Artificial Intelligence), para. 21 with further proofs. Significantly, the 17 (!) Definitionen bei AGI Sentinel Initiative (Definitions for AGI Sentinel Initiative), https://www.agisi.org/Defs_intelligence.html, last accessed on 1 April 2023; Historical overview by Nils Nilsson, The Quest for Artificial Intelligence, Stanford University 2010, https://ai.stanford.edu/~nilsson/QAI/qai.pdf, last accessed on 1 April 2023.

analyse and evaluate using statistical methods, and is able to refine statistical probabilistic predictions based on the insights gained from the evaluated data by identifying correlations.[4] Such algorithms can be machine-learned, i.e. "trained", by constantly inputting new data and by confirming or correcting the output (improvements in speech recognition software, for example, are based on such learning algorithms). The language software ChatGPT[5], which is much discussed at present, is such a learning algorithm.

1.1.2   Algorithmic decision-making systems

Algorithmic decision-making systems (or ADM systems) support or replace human decisions and forecasts by combining at least two algorithms for automated decision-making.[6] They can be constructed as learning, but also as non-learning algorithmic systems.

The first algorithmic subsystem uses general data from the past to study or categorise the behavioural characteristics of people; it then creates a set of rules as a result. The data of the person who is to be the subject of the decision-making process, is fed into this set of rules – so that a second algorithm can assess the probability of future behaviour or make a statement about which category the person falls into. The two algorithms jointly generate scoring values that can form the basis of a decision about a person's creditworthiness, for example, or they make prognosis decisions, for example about the risk of recidivism in the case of offenders.[7]

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4   Martini, Fn. 2, page 21; Orwat, Fn. 2, page 5.

5   See for example Bachgrund/Nesum/Bernstein/Burchard, Das Pro und Contra für Chatbots in Rechtspraxis und Rechtsdogmatik (The Pros and Cons for Chatbots in Legal Practice and Legal Dogmatics), CR 2023, 132. Due to data protection issues regarding the origin of the data used for programming, ChatGPT was banned in Italy at the end of March 2023, https://www.zdf.de/nachrichten/digitales/italien-chatgpt-kuenstliche-intelligenz-100.html (accessed on 1 April 2023).

6   Zweig/Fischer/Lischka, Wo Maschinen irren können (Where machines can err). Fehlerquellen und Verantwortlichkeiten in Prozessen algorithmischer Entscheidungsfindung (Sources of error and responsibilities in processes of algorithmic decision-making), 2018, page 12.

7   Hacker, Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies against Algorithmic Discrimination under EU Law, Common Market Law Review 2018, pages 1114, 1144.

Despite their undisputed discriminatory potential[8], ADM systems are associated with the idea of being able to make objective and neutral decisions that are uninfluenced by human bias, as well as more efficient and better decisions, not least because human error, prejudice and cognitive limitations could be eliminated or at least reduced.[9]

ADM systems can be divided into three categories according to the degree of influence that algorithms have on human decision-making:

- Algorithm-based decisions are decisions where human decision-makers base their decision on information from ADM systems.
- Algorithm-driven decisions are those in which the human decision has little room for manoeuvre because the decision is essentially prepared and determined by ADM systems.
- Decisions determined by algorithms are independently taken by the ADM systems; a decision by a human is no longer intended.[10]

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8   Refer to Orwat, Fn. 2, page 20 et seq.

9   Müller, Algorithmische Entscheidungssysteme im Nichtdiskriminierungsrecht – Dogmatische Herausforderungen und konzeptionelle Perspektiven (Algorithmic Decision Systems in Non-Discrimination Law – Dogmatic Challenges and Conceptual Perspectives), in: Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection, and Frauke Rostalski (Ed.), Artificial Intelligence, 2022, http://dx.doi.org/10.2139/ssrn.3976213, page 205; Hacker, Fn. 7, page 1144.

10 Data Ethics Commission, expert report, 2019, page 161.

1.2 Discrimination

1.2.1 Types of discrimination

Discrimination is legally defined as a factually unjustifiable disadvantage of a person on the basis of one or more legally protected grounds, for example under the German Basic Law (GG) or the General Equal Treatment Act (AGG).

Such disadvantages can be *directly* linked to discriminatory characteristics, namely to "race" or ethical origin, gender, religion or belief, one (or more) disability(ies), age and sexual identity (Section 1 of the AGG) (e.g. a job advertisement is only addressed to male applicants), or *indirectly* the result of an approach that is neutral in itself but that typically disadvantages certain groups of persons (e.g. a job advertisement requires "reliable knowledge of German").[11]

1.2.1.1 Direct discrimination

Section 3, paragraph 1, sentence 1 of the AGG defines direct discrimination as less favourable treatment than another is, has been or would be treated in a comparable situation on any of the grounds referred to under Section 1. The disadvantage is explicitly linked to one of the discrimination characteristics mentioned in Section 1 of the AGG.

1.2.1.2 Indirect discrimination

Section 3, paragraph 2 of the AGG defines indirect discrimination as discrimination where an apparently neutral provision, criterion or practice would put persons at a particular disadvantage compared with other persons on any of the grounds referred to under Section 1, 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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11 Sacksofsky, Unmittelbare und mittelbare Diskriminierung (Direct and indirect discrimination), in: Mangold/Payandeh, Handbuch Antidiskriminierungsrecht (Handbook of Anti-Discrimination Law), 2022, page 594.

1.2.1.3   Intersectional discrimination

A third form of discrimination is *intersectional discrimination* (also called multidimensional discrimination). In these cases, the disadvantage is not only linked to one of the grounds for discrimination, but several discrimination categories are affected.[12] Intersectional discrimination is not legally defined, but Section 4 of the AGG refers to this form of discrimination by stating that the justification of such discrimination must include all relevant grounds.

1.2.1.4   Proxy discrimination

Discrimination that is linked to characteristics that are not initially assigned to any of the classic grounds of discrimination is referred to as proxy discrimination. It is similar to indirect discrimination because it is not linked to one of the particularly protected grounds of discrimination; rather, the choice of an apparently neutral ground that correlates strongly with a prohibited ground in fact leads to discrimination:[13] from this correlation a group membership is derived, and from this group probability conclusions are drawn about the individual.[14] The characteristic of a postcode, for example, which is not discriminatory in itself, becomes a proxy for the prohibited discriminatory characteristic of origin,[15] because, for example, many migrants live in a certain district for historical reasons; employment without interruption in a company is a proxy for the characteristic of gender, because women disproportionately often interrupt their careers due to pregnancy and maternity leave.

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12   Holzleithner, in: Mangold/Payandeh, Fn. 11, page 540.

13   Buchholtz/Scheffel-Kain, Fn. 94, page 615.

14   Wildhaber/Lohmann/Kasper, Diskriminierung durch Algorithmen – Überlegungen zum schweizerischen Recht am Beispiel prädiktiver Analytik am Arbeitsplatz (Discrimination through algorithms – Reflections on Swiss law using the example of predictive analytics in the workplace), ZSR 2019, pages 459, 468.

15   Hermstrüwer, Fairnessprinzipien der algorithmischen Verwaltung (Fairness principles of algorithmic management), AöR 145 (2020) pages 479, 493.

This proxy discrimination is gaining importance in the context of increasing digitisation and is particularly relevant in the use of ADM systems, since due to the large number of available "neutral" characteristics, decisions are (or can be) based on such (supposedly) neutral criteria that (may) correlate highly with particularly protected discrimination characteristics,[16] and thus non-discrimination requirements can be intentionally or unintentionally circumvented.

1.2.1.5 Discrimination by ADM systems in the conflict area of these categories

In cases of algorithmic discrimination, the boundaries between direct and indirect discrimination become blurred.[17] If a decision made by an ADM system has a discriminatory effect, it can either be a case of hidden direct discrimination or indirect discrimination. A clear classification is made difficult by the fact that the cause of a disadvantage often cannot be traced due to the amount of data used and the lack of transparency of the decision-making process. On the one hand, it can have an indirect effect due to the link to a "neutral" characteristic, and on the other hand, it can be the result of a covertly direct discriminatory process due to the deliberate choice of an apparently objective characteristic, which, however, can regularly only be fulfilled by members of certain groups and is directly linked to one of the discriminatory characteristics mentioned in Section 1 of the AGG.[18]

It is therefore also argued that there is a need for a separate form of discrimination, a **"unit model"**, which would be more in line with the specific characteristics of ADM systems and the requirements for their justification, but also for the presentation of evidence.[19] The categories of indirect and direct discrimination are to be replaced by a reference to the (technical) causes of discrimination.[20] However, this unit model cannot effectively meet the challenges arising from the lack of transparency of the decision-making process; it rather

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16   Hacker, Fn. 7, page 1153.

17   Müller, Fn. 9, page 230; Sesing/Tschech, AGG und KI-VO-Entwurf beim Einsatz von Künstlicher Intelligenz (AGG and Artificial Intelligence Act Draft for the usage of artificial intelligence), MMR 2022, pages 24, 231.

18   Müller, Fn. 9, page 229.

19   Müller, Fn. 9, page 231.

20   Müller, Fn. 9, page 231.

introduces new hurdles to penetrate the technical processes. Moreover, the link to technology makes it difficult to deal dynamically with the constant development of technology.

The unit model should therefore be rejected, and recourse to the traditional categories of discrimination is preferable even in cases of discrimination by ADM systems, as these are designed in a goal-oriented manner and aim to prevent discrimination.

1.2.2   Dilemma of difference and essentialisation

The already mentioned catalogues of discrimination prohibitions establish categories and lead anti-discrimination law into the *"dilemma of difference"*[21] (known from feminist legal theory); discrimination can only be identified if a differentiation is made on the basis of those characteristics for which a differentiation is to be excluded. For example, discrimination on the basis of gender can only be identified if a differentiation is made according to gender. The fact that this perpetuates the idea of a difference between the sexes and emphasises the difference is a dilemma that cannot be resolved.

In the application, this also leads to the third-party allocation of attributes, which may not be accurate and/or additionally contain a stigmatisation, which in turn is based on stereotypes. For example, the idea of a clear separation from and an unambiguous assignment to (e.g. "ethnic") groups is awakened and strengthened, which in any case does not exist in this unambiguity (*"Essentialisation"*).[22] The diversity within a supposedly homogeneous group is often

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21   Baer, in: Mangold/Payandeh, Fn. 11, page 235; Holzleithner, Rechtskritik der Geschlechterverhältnisse (Legal critique of gender relations), CY 2008, page 250, 252, Lembke/Liebscher, Postkategoriales Antidiskriminierungsrecht? – Oder: Wie kommen Konzepte der Intersektionalität in die Rechtsdogmatik? (Postcategorial anti-discrimination law? – Or: How do concepts of intersectionality enter legal dogmatics?), in: Philipp/Meier/Apostolovski/Starl/Schmidlechner (Publisher), Intersektionelle Benachteiligung und Diskriminierung (Intersectional disadvantage and discrimination), 2014, page 261 et seq.

22   Supik, Statistik und Diskriminierung (Statistics and discrimination), in: Scherr/El-Mafaalani/Yüksel (Publisher), Handbuch Diskriminierung (Discrimination Manual), 2017, pages 191, 201.

greater than between different groups as it can be observed in genetics:[23] most genetic differences in the DNA sequence of humans are found within a geographical population. The genetic differences between geographical population, on the other hand, make up only a very small part.[24] In addition, such categorisations often mask intersectional or multidimensional patterns of discrimination.[25]

This conflict cannot be resolved. Even post-categorical concepts[26] cannot do without categories; only the starting points for the assessment of discrimination change, for example by focusing on discrimination as a result of historically entrenched social structures or disadvantage and exclusion from social participation and recognition.[27]

1.2.3   Special discrimination potential of algorithms

The main element of any ADM system is the identification of a large number of complex correlations using statistical methods.[28] Thus, relationships between variables are established that allow probability statements to be made, as complex correlations can be identified with the help of algorithms. These allow a variety of differentiations. However, this increases the risk of *discrimination due to statistics*.[29]

Discrimination due to statistics is the result of an attribution of characteristics obtained by statistical means, which are based on (actual or assumed) **average values of a group**. The reference to these average group characteristics is

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23   Refer to Kattmann, Reflections on "race" and science and society in Germany, Journal of Anthropological Sciences, Vol. 95 (2017), page 1, 6; Serre/Pääbo, Evidence for Gradients of Human Genetic Diversity Within and Among Continents, Genome Research 2004 (14), pages 1679, 1683; Towfigh/Herberg, Kann im Lebensrecht Religion wirksam werden? (Can religion be effective in the right to life?), ZfL 2017, page 2 et seq.

24   Kattmann, Reflections on "race" and science and society in Germany, Journal of Anthropological Sciences 95 (2017), pages 1, 6; Serre/Pääbo, Evidence for Gradients of Human Genetic Diversity Within and Among Continents, Genome Research 14 (2004), pages 1679, 1683.

25   Towfigh, in: Mangold/Payandeh, Fn. 11, page 762.

26   For this purpose, refer to Baer, in: Mangold/Payandeh, Fn. 11, page 251.

27   More details by Baer, Fn. 21, page 253 with further proofs; Lembke/Liebscher, Fn. 21, page 284.

28   Refer to Towfigh, in: Mangold/Payandeh, Fn. 11, page 782.

29   Towfigh, in: Mangold/Payandeh, Fn. 11, page 762.

supposed to help overcome uncertainties regarding the individual characteristics of a single person. This principle is used, for example, by the Schufa information system, which determines creditworthiness partly independently of the individual economic situation, among other things with the help of the place of residence, or by traditional motor vehicle insurance, which includes data on vehicle performance in the classification of accident risk, but not on the driving style of the person insured. Here, one characteristic – for example place of residence or vehicle performance – is used as an indicator for another characteristic – creditworthiness or accident risk – and other possible influencing factors are not taken into account. The social mechanism underlying such an assessment is not of interest, a causality is not claimed or proven. This perpetuates (historical) structural inequalities and creates new ones.[30]

1.3 Special problems and risks of algorithmic discrimination

1.3.1 Typical fields of application of algorithmic systems with discrimination potential

ADM systems are used, among other things, wherever either a **selection decision** has to be made or **mass individualisation or personalisation** is desired – for example, for concluding and designing contracts, advertising, setting individual prices, but also in medicine.[31] They promise independent, objective decisions that are uninfluenced by personal views and are based solely on determined selection criteria. Moreover, they can often process complexity better than human decision-makers. Therefore, they are typically used in particularly data-rich contexts or where particular importance is attached to the objectivity of the decision.

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30 Arrow, What has Economics to Say about Racial Discrimination?, Journal of Economic Perspectives 12 (1998), pages 91, 96; Schauer, Statistical (and non-statistical) discrimination, in: Lippert-Rasmussen (Publisher), Routledge Handbook of the Ethics of Discrimination, 2018, pages 42, 48.

31 Algorithmwatch, Atlas der Automatisierung (Atlas of automation), https://atlas.algorithmwatch. org/report/ (last accessed on 1 April 2023). For the State, also refer to Spiecker gen. Döhmann, Fn. 3, Section 20, para. 28 et seq.

For example, ADM systems now automate key decisions in **working life**, such as structuring application processes and standardising selection procedures for new employees.[32] Applicants' CVs are compared with those of employees who have already been hired and evaluated accordingly, or application videos sent in by applicants are automatically analysed.[33] However, the productivity of employees is also analysed and the knowledge gained is used for performance evaluations and promotions.

The **granting of loans** has also been based on ADM systems for some time; the credit industry can even be considered a pioneer in this respect, also with regard to the acceptance of its results. This might concern the basic decision on the approval of a loan, but also the conditions under which a loan is granted.[34] The scoring dimension of ADM systems in which a numerical value (score) is determined on the basis of certain correlating statistical characteristics plays a role here. This score is then compared with the predefined values, to which standardised decision-making sequences are assigned, e.g. rejection of a loan or setting of a risk premium. The problem with these score-based decisions is that the score issued is also only a probability decision calculated from the analysed characteristics; the individual situation of the borrower is not taken into account.[35]

The same applies to the **insurance industry**, which uses similar mechanisms when concluding contracts and settling claims.[36] For example, telematics tariffs in car insurance, which were introduced some years ago, rely on ADM systems that include individual circumstances (e.g. frequency of braking manoeuvres) in addition to general criteria (such as night or daytime driving). In particular,

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32 A well-known example is a recruiting software used by Amazon for a time, which also favoured male applicants in the past because of its preference for male applicants: https://www.reuters.com/article/us-amazon-com-jobs-automation- insight-idUSKCN1MK08G (last accessed on 1 April 2023).

33 Buolamwini/Gebru, Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification, Proceedings of Machine Learning Research (81) 2018.

34 Orwat, Fn. 2, page 49 f.

35 Orwat, Fn. 2, page 51.

36 Hänold, Profiling und automatisierte Einzelentscheidungen im Versicherungsbereich (Profiling and automated individual decisions in the insurance sector), 2019; Pohlmann/Vossen/Everding/Scheiper, Künstliche Intelligenz, Bias und Versicherungen – Eine technische und rechtliche Analyse (Artificial Intelligence, Bias and Insurance – A Technical and Legal Analysis), ZVers Wiss 111 (2022), page 135 et seq.

but not only in **online retail**, ADM systems influence the display of individualised advertising[37] in the context of what is known as *micro-targeting* or are used for individualised **pricing and contract design**: customers who have purchased high-priced products in the past are offered a higher price for the same product than those who have previously purchased low-priced products.

The **medicine** sector also uses ADM systems, for example to support or even make **diagnostic** and **therapeutic** decisions or to allocate resources.[38]

It's not just the private sector and private individuals that use ADM systems, but the state is also increasingly using them, for example in the area of **predictive policing**, in tax law or in **the awarding of state services** to private individuals.[39]

1.3.2 Discrimination through input (data input) or output (use of an algorithm)

The quality of the decision of an ADM system is essentially dependent on the data used. Both the quantity and the **quality of the data** are crucial.

A specific phenomenon of the use of ADM systems is that their discrimination potential can already be inherent in the system itself.[40] The reason for this can be a data set that is qualitatively inferior, faulty or unsuitable for the intended purpose[41] or distorted (and thus perpetuating discrimination) on which the

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37 Kalbhenn/Hemmert-Halswick, EU-weite Vorgaben für die Content-Moderation in sozialen Netzwerken (EU-wide guidelines for content moderation on social networks), ZUM 2021, pages 184, 191; refer to Towfigh/Luckey, Zielgruppenbasierte Ansprache von Wahlberechtigten durch politische Parteien (Target group-based addressing of eligible voters by political parties). Zur rechtlichen Zulässigkeit politischen Online-Microtargetings in Deutschland (On the legal admissibility of political online micro-targeting in Germany), RW 2022, page 61 et seq. with historical and technical backgrounds of micro-targeting.

38 Algorithmwatch, Atlas der Automatisierung (Atlas of automation), https://atlas.algorithmwatch. org/report/gesundheit-medizin/ (last accessed on 1 April 2023).

39 For the wide field of application areas, refer to Spiecker gen. Döhmann, Fn. 3, Section 20 para. 28 et seq.

40 Details in Orwat, Fn. 2, page 77 et seq.

41 Ungern-Sternberg, in: Mangold/Payandeh, Fn. 11, page 1135; Scheer, Algorithmen und ihr Diskriminierungsrisiko (Algorithms and their discrimination risk), page 12.

ADM system is based.[42] In addition, specifications for the evaluation of ambivalent data can produce errors, for example if the absence of data for a certain period is evaluated negatively.

A data record used can also be discriminating (referred to as *biased training data*[43]). This is the case, for example, if the data fed in is not non-discriminatory: a learning system based on non-discriminatory data cannot logically make non-discriminatory decisions. The problem is exacerbated for learning systems based on data from different points in time. If these were not non-discriminatory even once, neither are the decisions of the ADM system. The immanent unequal treatment is perpetuated:[44] for example, facial recognition software that was trained almost exclusively with data from white people was not able to reliably identify black people.[45] A data set fed with outdated role models and stereotypes led to translation software choosing the male form when translating academic professions from English, and the female form for less qualified professions.[46] And a medical school placement algorithm that used past selection criteria disproportionately selected white male students – and discriminated against women and ethnic minority students; an existing historical bias was reproduced here.[47]

The poor quality of a data set can manifest itself particularly in the case of "bought-in" data sets that have not been specifically compiled for a particular application. Often, users do not know how the data used was generated, whether it is representative, whether (and if so, which) control variables are part of the data, whether recognised quality standards were adhered to and whether

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42 Fröhlich/Spiecker gen. Döhmann, Können Algorithmen diskriminieren? (Can algorithms discriminate?), Verfassungsblog dated 26.12.2018, https://verfassungsblog.de/koennen-algorithmen-diskriminieren/ (last accessed on 1 April 2023); Altenburger/Ho, When Algorithms Import Private Bias into Public Enforcement, Journal of Institutional and Theoretical Economics 175 (2019), page 98 et seq.

43 Hacker, Fn. 7, page 1147.

44 More details in Orwat, Fn. 2, page 79 f.; Lauscher/Legner, Künstliche Intelligenz und Diskriminierung (Artificial intelligence and discrimination), ZfDR 2022, pages 367, 371; Hermstrüwer, Fn. 15, page 492.

45 Lauscher/Legner, Fn. 44, page 371.

46 Scheer, Fn. 41, page 12.

47 Barocas/Selbst, Big Data's Disparate Impact, California Law Review, Vol. 104 (2016), pages 671, 682.

the data is suitable for the desired purpose.[48] Therefore, it is a common misconception that data processing is neutral and objective. All data processing is always based on human modelling and evaluation – with all its shortcomings.

1.3.3 Speed and extent of the spread of discrimination by algorithms

The technological progress of digital evaluation methods and techniques, which became visible with the first major changes through big data and whose current endpoint is likely to be quantum computerisation and the metaverse, enables the processing of large amounts of data. Even without structured and consistent data sets on the basis of the most diverse manifestations, organisations, data carriers, sources and formats,[49] big data applications[50] enable the recognition of patterns and correlations, rarely also of probabilities, often in real time, thus generating new information, and should thereby facilitate the prognosis of future behaviour or future events on the basis of past-related data.[51]

There are practically no technical limits to the sharing, further use and merging of large amounts of data. Data from a wide variety of sources can be merged, new data sets can be created, new correlations can be identified. This also means that (potentially) discriminatory data sets are disseminated, shared and merged with other data sets and that discrimination is perpetuated in this way. These processes are virtually impossible to control. Since the complexity that can be managed, the amount of data and the number of application scenarios are also constantly increasing, it cannot be assumed that discrimination can be identified on a case-by-case basis. Rather, structural measures are required to address the problem.

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48 Towfigh, in: Mangold/Payandeh, Fn. 11, page 773.

49 Refer to Hackenberg, in: Hoeren/Sieber/ Holznagel (Publisher), Handbuch Multimedia-Recht (Manual of Multimedia Law), 58th EL March 2022, Part 15.2, para. 7 f.

50 The term big data is used to describe very large and complex data sets. For the typical four criteria Volume, Variety, Velocity, Analysis and the other characteristics, see for example Hoffmann-Riem, Rechtliche Rahmenbedingungen für regulative Herausforderungen durch Big Data (Legal framework for regulatory challenges due to big data), in: Hoffmann-Riem (Publisher), Big Data – Regulative Herausforderungen (Regulative challenges), 2018, Page 11, 19 f.

51 Spiecker gen. Döhmann, Fn. 3, Section 20, para. 12 with further proofs.

1.3.4 Non-transparency

A major challenge for handling the ADM systems and for evaluating the discrimination by ADM systems – especially by the learning systems – is their intrinsic non-transparency.[52] Therefore, they are often called *"black boxes"*. As a rule, the subjects and also the users of algorithmic decisions are unable to ascertain whether the decision is based on lawfully processed data or which specific reasons were decisive for a negative decision. Often it is not transparent that mistakes were made – or even that discrimination took place.

This is especially a problem in the area of **mass transactions** (such as retail, transport, catering or hotel business)[53] since, in this case, *mass individualisation* leads to the fact that the conditions underlying a decision differ individually in each case and the criteria underlying a decision, especially in learning systems, cannot be compared. It is therefore often difficult to assess whether the data on which a decision is based is biased or erroneous. Even if it is possible to identify data input and output, the method of **data processing as such often remains hidden**.[54] Even the code of a supposedly simple, rule-based algorithm is not at all comprehensible to laypersons and often not easy to understand even for experts. It is even more difficult with self-learning systems, where the parameters of data processing as well as the database itself are not static, but are constantly changing and evolving.[55] Since this dynamic results from the concrete new data and the concrete use, a parallelisation of the respective ADM system for control is also hardly possible. This complicates the enforcement of the law considerably, as it requires a profound technical knowledge to be able to comprehend these changes at all.[56]

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52 For extensive information, refer to Martini, Fn. 2.

53 Bauer/Krieger/Günther, AGG, 5th Edition, Section 19, para. 8.

54 Grünberger, Reformbedarf im AGG: Beweislastverteilung beim Einsatz von KI (Need for reform in the AGG: Distribution of the burden of proof in the use of AI), ZRP 2021, Pages 232, 233.

55 Gerards/Xenidis, Algorithmic discrimination in Europe. Challenges and Opportunities for Gender Equality and non-discrimination Law, 2021, pages 45; Grünberger, Fn. 54, page 233.

56 Martini, Algorithmen als Herausforderung für die Rechtsordnung (Algorithms as a challenge for the legal system), JZ 2017, pages 1017, 1018.

1.3.5   Accountability for discrimination

In order to effectively counter discrimination and obtain effective legal protection, it is crucial to know who is responsible for the discrimination, i.e. to whom it can be attributed. Due to their complexity and lack of transparency, ADM systems pose a challenge for questions of attribution.[57] The decisions of these systems are technically based on the interplay of different components of hardware and software and possibly still constantly changing, learning algorithms, partly derived from individually changed standards, brought together and executed by different instances or actors, partly on platforms and in networks that may be located in different legal systems. Often, the users do not develop the ADM systems they use themselves or are only users of the platform's data usage evaluations, so they have no influence on their design and further development. This is particularly clear in the case of social media, but also applies, for example, to sales platforms of all kinds.

On the one hand, it is therefore questionable to which processing step the question of attribution should be linked, at which point in the process the causal condition for discrimination was set: did this already happen in the development process, during the selection and feeding of the data, during the development of the score or only when it was used or possibly only in the context of an ADM-supported *human* decision?[58] On the other hand, depending on the point of connection, the responsibility may change, for example, the question arises as to whether (and how) users of an ADM system attribute errors in programming and data collection to themselves or to what extent the users of a platform must accept its curation criteria as their own.[59]

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57   Spiecker gen. Döhmann, Zur Zukunft systemischer Digitalisierung – Erste Gedanken zur Haftungs- und Verantwortungszuschreibung bei informationstechnischen Systemen (On the Future of Systemic Digitalisation – Initial Thoughts on the Attribution of Liability and Responsibility in Information Technology Systems), CR 2016, Page 698 et seq.; Zech, Entscheidungen digitaler autonomer Systeme: Empfehlen sich Regelungen zu Verantwortung und Haftung? (Decisions of digital autonomous systems: Do regulations on responsibility and liability recommend themselves?), Proceedings of the 73rd German Jurists' Day, Volume 1, 2020, A, Page 98 et seq.

58   Ungern-Sternberg, in: Mangold/Payandeh, Fn. 11, page 1144.

59   ECJ, C-210/16, ECLI:EU:C:2018:388 – Wirtschaftsakademie (Academy of Economics) Schleswig-Holstein.

Special legal solutions tailored to the particularities of discrimination by ADM systems do not exist yet, and even the relevant bases are disputed. The need for regulation is great and the subject of detailed, if not always knowledgeable, debates.[60] The recourse to existing legal institutions, which are usually not geared to the technical and systematic peculiarities of ADM systems, often remains incomplete, resulting in gaps in responsibility and liability.[61]

The technical and legal ambiguities in responsibility and attribution are currently to the detriment of those potentially discriminated against, who can hardly recognise violations of the law and can therefore only pursue their rights with difficulty; at the same time, they lead to a far-reaching and, to this extent, unfounded de facto exculpation of users of ADM systems.

1.4   Interim conclusion

The use of ADM systems can be problematic from an anti-discrimination law perspective. Their potential for discrimination is already inherent in their technical functioning. There is reason to be concerned that structural inequalities are perpetuated by the use of ADM systems and that discriminatory data sets and conclusions are disseminated (uncontrolled). This affects not only individuals but also groups. Therefore, anti-discrimination law needs to be structurally adapted in order to overcome the current barriers to effective protection against discrimination through ADM systems. In particular, the difficulties in identifying discrimination and its causes as well as its proof and the possibilities of enforcing the rights granted must be taken into account. In addition, it should be clear in which discrimination category a normatively undesirable unequal treatment by ADM systems must be classified. Furthermore, gaps in the attribution of responsibility for discrimination must be closed.

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60 Hacker, Europäische und nationale Regulierung von Künstlicher Intelligenz (European and national regulation of artificial intelligence), NJW 2022, pages 2142, 2146; Zech, Fn. 57, A, page 98 et seq.; Beckers/Teubner, Three Liability Regimes for Artificial Intelligence, 2022; Freyler, Robot-Recruiting, Künstliche Intelligenz und das Antidiskriminierungsrecht (Artificial intelligence and anti-discrimination law), NZS 2020, pages 284, 288.

61 Klingbeil, Schuldnerhaftung für Roboterversagen (Debtor's liability for robot failure), JZ 2019, page 718 et seq.; Grünberger, Fn. 54, page 232 et seq.

2 Challenges posed by digitalisation-related discrimination for the General Equal Treatment Act (AGG)

2.1 European Law

European anti-discrimination law knows a multitude of legal sources: first of all, the European Convention on Human Rights (ECHR), the EU Charter of Fundamental Rights (CFR) and the European Treaties (in particular the Treaty on the Functioning of the European Union (TFEU)). The link between the Convention rights of the ECHR and European Union law is made via Article 52, paragraph 3 of the CFR, according to which the ECHR is to serve as a source of legal knowledge for the interpretation of the Charter rights.[62]

The ECHR does not contain a general principle of equality.[63] Article 14 of the ECHR states that the rights and freedoms laid down in this Convention shall be guaranteed 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. According to its wording, the prohibition of discrimination is an *accessory* right, i.e. potential complainants must invoke Article 14 of the ECHR in conjunction with other Convention rights.[64] The use of Article 14 the ECHR does not, however, require the violation of the other right of freedom – it is sufficient that the regulatory

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62 Hölscheidt, in: Meyer/Hölscheidt, Charta der Grundrechte der Europäischen Union (Charter of Fundamental Rights of the European Union), Article 52, para. 4.

63 Peters/Altwicker, in: Dörr/Grote/Marauhn (Publisher), EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz (ECHR/GG Concordance Commentary on European and German Fundamental Rights Protection), section 21, para. 6.

64 Peters/Altwicker, Fn. 63, section 21, para. 11; European Union Agency for Fundamental Rights and Council of Europe (Publisher), Handbuch zum Europäischen Antidiskriminierungsrecht (Handbook of European Anti-Discrimination Law), 2018, page 31.

scope of another Convention right is opened.[65] In this respect, the ECHR prohibition of discrimination differs from the general principle of equality in Article 3, paragraph 1 of the GG, which does not require that other fundamental rights are affected.[66] Article 14 of the ECHR is in this respect more comparable to Article 3, paragraph 3 of the GG, but contains further and more sensitive discrimination criteria (for example "wealth" and "birth").[67] According to Article 6, paragraph 3 of the Treaty on European Union (TEU), Article 14 of the ECHR is a binding part of European Union law.[68]

Article 1 of the Additional Protocol No. 12 to the ECHR[69] extends beyond Article 14 of the ECHR as it is not accessory to other Convention rights.[70] The further listed discrimination prohibitions are identical to those in Article 14 of the ECHR.

Article 20 of the CFR is almost identical in wording to Article 3, paragraph 1 of the GG.[71] It is a general principle of equality under European Union law, which standardises equality both in the application of the law and in legislation.[72] All natural persons are entitled to fundamental rights; Article 20 of the CFR has no direct effect on third parties.[73] According to Article 21, paragraph 1 of the CFR, discrimination is prohibited in particular on the grounds of gender, "race", colour, ethnic or social origin, genetic characteristics, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

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65   Peters/Altwicker, Fn. 63, section 21, para. 38. Article 14 of the ECHR has been most frequently discussed by the European Court of Human Rights (ECtHR) in conjunction with Article 8 of the ECHR and with Article 1 Additional Protocol No. 12, the same, section 21, para. 11.

66   Peters/Altwicker, Fn. 63, section 21, para. 21.

67   Peters/Altwicker, Fn. 63, section 21, para. 19.

68   Kotzur, in: Geiger/Khan/Kotzur (Publisher), EUV TFEU Comments, Article 10, para. 3.

69   It must be noted that not all Member States of the ECHR have also ratified the Additional Protocol.

70   EGMR, Sejdic and Finci vs. Bosnia and Herzegovina, 27996/06, 34836/06 para. 53; European Union Agency, Fn. 64, page 35.

71   Hölscheidt, Fn. 62, Article 20, para. 1.

72   Peters/Altwicker, Fn. 63, section 21, para. 34; Hölscheidt, Article 20, para. 18.

73   Hölscheidt, Fn. 62, Article 20, para. 14 f.

Article 21 of the CFR is a special manifestation of the principle of general equal treatment from Article 20 CFR.[74] Even though Article 20 is conceived as a subsidiary provision to Article 21 and Article 23 of the CFR, the European Court of Justice (ECJ) considers the norms in parallel.[75] In addition, the ECJ has ruled that a norm of national law that violates a characteristic of Article 21 of the CFR may not be applicable even in a private law relationship.[76]

Unlike Article 14 of the ECHR, Article 21 of the CFR is an independent prohibition of discrimination, since no reference to the other rights of the CFR is presupposed.[77] For this reason, Article 14 of the ECHR – contrary to Article 52, paragraph 3 of the CFR – must not be used for the interpretation of Article 21 of the CFR.[78] In addition, gender equality is particularly emphasised in Article 23 of the CFR.[79] This states that equality between women and men must be ensured in all areas, including employment programmes, work and pay. This is a special principle of equality.[80]

But the principle of non-discrimination of the EU Charter of Fundamental Rights is only applicable if the matter at issue falls within the scope of European Union law.[81] Article 23 of the CFT is in turn comparable to Article 157 of the TFEU,[82] according to which each Member State shall ensure the application of the principle of equal pay for men and women for equal work or work of equal value. According to its wording, Article 157 of the TFEU is addressing the Member States, but the ECJ affirms an indirect third-party effect also in private law relationships.[83]

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74   European Union Agency, Fn. 64, page 38.

75   Hölscheidt, Fn. 62, Article 20, para. 11.

76   Hölscheidt, Fn. 62, Article 21, para. 34.

77   European Union Agency, Fn. 64, page 37; Peters/Altwicker, Fn. 63, section 21, para. 34.

78   Hölscheidt, Fn. 62, Article 21, para. 32.

79   Hölscheidt, Fn. 62, Article 21, para. 20.

80   Peters/Altwicker, Fn. 63, section 21, para. 34.

81   European Union Agency, Fn. 64, page 39.

82   Hölscheidt, Fn. 62, Article 23, para. 2.

83   Hobe/Fremuth, European Law, para. 25.

Article 18 of the TFEU is a general prohibition of discrimination in European Union law, which prohibits discrimination on grounds of nationality.[84] It is an elaboration of the general principle of equality and subsidiary to the prohibitions of discrimination in the fundamental freedoms.[85] Citizens of the Union can directly invoke Article 18 of the TFEU, whereby, in addition to the Member States, the Union is also a subject of its actions – in particular in its legislation.[86]

Finally, Article 10 of the TFEU provides that discrimination on the grounds set out in Article 19 of the TFEU is to be combated. Thus, the article is comparable to a state objective and addresses the policies of the Union.[87] Although it does not provide a legal basis for anti-discrimination measures, it has an effect when secondary European Union law is to be interpreted in light of Article 10 of the TFEU.[88]

2.2 German Constitutional Law: Article 3, paragraphs 1 and 3 of the GG (Fundamental Law)

2.2.1 Meaning of Article 3 of the GG for discrimination protection

Article 3 of the GG, as a fundamental norm of equal treatment, obliges the state to treat equal things equally and unequal things unequally.[89] In addition to the general principle of equality of Article 3, paragraph 1 of the GG, the special principle of equality of Article 3, paragraph 3 of the GG, which guarantees a comprehensive prohibition of discrimination, is central for anti-discrimination

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84   European Union Agency, Fn. 64, page 19.

85   Khan/Heinrich, in: Geiger/Khan/Kotzur (Publisher), EUV TFEU Comments, Article 18, para. 2.

86   Khan/Heinrich, Fn. 85, Article 18, para.s 2, 5, 7.

87   Kotzur, Fn. 68, Article 10, para. 1.

88   Kotzur, Fn. 68, Article 10, para. 1.

89   Towfigh/Gleixner, Smartbook Grundrechte (Smart book of fundamental rights), page 374.

law.[90] It prohibits unequal treatment because of one of the special characteristics mentioned in Article 3, paragraph 3 of the GG (gender, descent, "race", language, homeland and origin, faith, religious or political opinion, disability). The prohibition of discrimination in Article 3, paragraph 3 of the GG is supplemented by Article 3, paragraph 2 of the GG, which is, on the one hand, a prohibition of discrimination, but on the other hand also a requirement of equality and thus the basis of the mandate to promote the establishment of equality in the sense of individual equality of opportunity.[91]

At first sight, the exhaustive catalogue of characteristics protected by Article 3.3 of the GG excludes indirect discrimination or discrimination on the basis of non-protected proxies[92] from its scope of application. Their protection under fundamental rights would thus be limited to the general principle of equality of Article 3, paragraph 1 of the GG; however, in the case of indirect discrimination on grounds of gender, the BVerfG (Federal Constitutional Court) has in the meantime affirmed in several decisions the applicability of Article 3, paragraph 2 of the GG if there is a causal connection between the use of the characteristic and the unequal treatment.[93] With regard to the other grounds of discrimination of Article 3, paragraph 3 of the GG, an explicit decision has not yet been made, but the principles of this case law are transferable to indirect discrimination on the basis of one of the grounds of discrimination of Article 3, paragraph 3 of the GG; they contribute to ensuring effective protection against discrimination.[94] Thus, the BVerfG has recognised that Article 3, paragraph 3, sentence 2 of the GG also covers indirect discrimination against disabled persons.[95]

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90 Mangold/Payandeh, Fn. 11, page 30 f.

91 Towfigh/Gleixner, Fn. 89, page 395.

92 See above 1.2.1.4.

93 BVerfGE 97, 35, 43 – Hamburg Pension Law; BVerfGE 104, 373, 393 – Double family names; BVerfGE 113, 1, 15 – Child-raising periods in the lawyer's pension scheme; BVerfGE 121, 241, 254 f. – Pension for part-time officials; BVerfGE 126, 29 (53) – Hamburg Pension Fund; BVerfGE 132, 72, 97 f. – Child-raising allowance for foreign nationals; BVerfGE 138, 296, 354 para. 144 – header II.

94 Baer/Markard, in: from Mangoldt/Klein/Starck, Fundamental Law, Article 3 of the GG, para. 430; Nußberger, in: Sachs, Fundamental Law, Article 3 of the GG, para. 248; Buchholtz/Scheffel-Kain, NVwZ 2022, 612, 614; another view contrary to Langenfeld, in: Dürig/Herzog/Scholz, GG, Article 3, paragraph 3, para. 38 f.

95 BVerfG NJW 2019, 1201 para. 55; NJW 2020, 1282 para. 35; Langenfeld, Fn. 94, Article 3, paragraph 3, para. 116.

This question is of particular importance in the context of justifying a violation of the prohibition of discrimination. Article 3, paragraph 3 of the GG is a fundamental right guaranteed without restriction and is conceived as an *absolute prohibition of connecting factors*: direct discrimination can only be justified by conflicting constitutional law.[96] The level of protection is thus higher than in the scope of application of Article 3, paragraph 1 of the GG. Violations of the general principle of equality had to be measured for a long time against the so-called "new formula" of the Federal Constitutional Court (BVerfG), according to which a violation of fundamental rights was to be affirmed,

> "*if a group of norm addressees is treated differently in comparison to other norm addressees, although there are no differences between the two groups of such a kind and weight that they could justify the unequal treatment*".[97]

In the further development of this "new formula" by the BVerfG, the *intensity of the unequal treatment* is now taken into account in the determination of the standard of review with regard to the factual and regulatory areas concerned,[98] a "infinitely variable constitutional standard of review oriented towards the principle of proportionality"[99] is applicable. The intensity of the examination is higher and the requirements for justification are stricter, for example, if the influence of the affected entities on the differentiation criterion is low or if the differentiation criterion is close to the discriminatory characteristics of Article 3, paragraph 3 of the GG as well as in the event of a stronger impairment of liberties.[100] Lower requirements for justification apply, on the other hand, if the discriminatory criterion is available to the affected entities, since then it is merely a matter of fact- or behaviour-related unequal treatment.[101]

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96 Baer/Markard, Fn. 94, para. 433.

97 BVerfGE 55, 72, 88 – Foreclosure I.

98 BVerfGE 129, 49, 68 – Federal Medicine Education and Training Assistance Act; Towfigh/Gleixner, Fn. 89, page 381.

99 BVerfGE 129, 49, 68 – Federal Medicine Education and Training Assistance Act.

100 In this regard, BVerfGE 88, 87, 90 – Transsexuals II; BVerfGE 131, 239, 256 f. – Civil partnership of civil servants; BVerfGE 132, 179 para. 31 – Unequal treatment of civil partners/spouses.

101 Refer to BVerfGE 55, 72, 89 – Foreclosure I; BVerfGE 111, 176, 184 – Child-raising allowance to foreigners.

With this "new formula in a new guise", the BVerfG has raised the level of protection of Article 3, paragraph 1 of the GG. By including Article 3, paragraph 3 of the GG in the justification standard of Article 3, paragraph 1 of the GG, the concrete dogmatic classification of indirect discrimination on the grounds of one of the discriminatory characteristics of Article 3, paragraph 3 of the GG loses significance, since in any case the justification standards of Article 3, paragraph 3 of the GG are also included when linking to Article 3, paragraph 1 of the GG in the context of justifying an interference, and the level of protection against indirect discrimination is also adequate.

2.2.2 Article 3 of the GG and discrimination due to non-protected proxies

Due to the growing importance of proxy discrimination – not only in the context of discrimination by ADM systems – the question of its constitutional linkage has also become relevant. The ECJ and the Federal Labour Court (BAG) go quite far in the basic classification of proxy discrimination and qualify it as direct discrimination if there is an inseparable connection between the chosen ("neutral") criteria and the particularly protected discrimination categories.[102] Such an inseparable connection exists, for example, between pregnancy and gender.

Another view qualifies proxy discrimination as a case of indirect discrimination in the case of a disproportionate affectedness of carriers of a certain characteristic that is particularly protected by Article 3, paragraph 3 of the GG.[103]

For constitutional protection, the classification might be irrelevant anyway, since the prohibitions of connection of Article 3, paragraph 3 of the GG are also relevant for cases of proxy discrimination.

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102 ECJ C-499/08, Slg. 2010, I-09343 – Andersen; BAG NZA 2011, page 1370.

103 Buchholtz/Scheffel-Kain, Fn. 94, page 615.

2.2.3 Binding of private parties to fundamental rights

The question is whether private persons can also be bound by the prohibition of discrimination in Article 3, paragraph 3 of the GG through the principles of the indirect third-party effect of fundamental rights.[104] Fundamental rights are initially conceived as **defensive rights of citizens against the state** and thus cannot directly bind private actors.[105] However, through the principles of the indirect third-party effect of fundamental rights developed by the BVerfG, they have a decisive influence on the interpretation and application of simple legal norms (*radiating effect of fundamental rights*).[106]

Whether private persons can also be bound by the prohibition of discrimination of Article 3, paragraph 3 of the GG by means of these principles of the indirect third-party effect of fundamental rights is disputed. According to one opinion, the binding of private persons to fundamental rights is also to be assumed within the framework of Article 3, paragraph 3 of the GG, since only in this way can the practical significance of the prohibitions of discrimination as a general standard of interpretation in general clauses under civil law be taken into account.[107] The rejection of such a direct connection of private parties' fundamental rights to Article 3, paragraph 3 of the GG is justified with a view to the **principle of private autonomy**, which precisely allows the free selection of the contracting parties and fundamentally prevents a compulsion to contract – which, conversely, can be interpreted as the freedom to discriminate.[108]

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104 Towfigh/Gleixner, Fn. 89, page 57 et seq.

105 For more details, refer to Towfigh/Gleixner, Fn. 89, page 54 et seq.

106 Towfigh/Gleixner, Fn. 89, page 54 et seq.

107 Baer/Markard, in: from Mangoldt/Klein/Starck, Fundamental Law, Article 3 of the GG, para. 415.

108 Langenfeld, Fn. 94, Article 3, paragraph 3, para. 81 et seq.; Lehner, Zivilrechtlicher Diskriminierungsschutz und Grundrechte (Civil law protection against discrimination and fundamental rights), 2013, page 190 et seq.; Jestaedt, Diskriminierungsschutz und Privatautonomie (Protection against discrimination and private autonomy), VVDStRL 64 (2004), page 330 et seq.

The BVerfG also first expressly states that the general concept of equality does not, in principle, guarantee an objective constitutional right according to which legal relationships between private individuals must, in principle, be structured in a way that is in accordance with equality.[109] However, the court limits this statement in its *stadium ban decision* and states that in "specific constellations" an equality obligation can be assumed:

> *"The decisive factor for the indirect third-party effect of the principle of equal treatment is its character as a unilateral exclusion, based on domestic law, of events that are opened to a large public audience without regard to the person on the basis of the organisers' own decision and which decides to a considerable extent on the participation in social life for the affected entities. When a private party organises such an event, it also incurs a special legal responsibility by virtue of the constitution. It may not use its decision-making power resulting here from the right of the house – as in other cases possibly from a monopoly or from structural superiority – to exclude certain persons from such an event without objective reason."[110]*

This leads to a "situational state-like binding of private actors to observe fundamental rights"[111] if there is **an objective reason for them to be bound by fundamental rights**. A fundamental indirect binding of private actors to the fundamental rights of equality cannot be derived from this; private actors are still essentially bound by simple legal regulations such as the AGG, which restricts the possibilities of discrimination and obliges them to observe equal treatment.[112] Such simple law regulations are also to be given preference, since they avoid a confusion of those entitled to fundamental rights, and the addressees of fundamental rights, and at the same time preserve for the affected entities the possibilities of legal protection by the constitutional court, since the simple law regulations must be able to be measured against fundamental rights. This means that any gaps in legal protection must be compensated for by simple law.

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109 BVerfGE 148, 267, 283 ff. – Stadium ban.

110 BVerfGE 148, 267, 283 ff. – Stadium ban.

111 Michl, Situativ staatsgleiche Bindung privater Akteure (Situational state-like binding of private actors), JZ 2018, page 910.

112 Towfigh/Gleixner, Fn. 89, page 58.

2.3 General Equal Treatment Act

2.3.1 Elements of discrimination under the AGG

The AGG, as a simple legal regulation obliging equal treatment, aims to prevent or eliminate discrimination on the grounds of "race" or ethnic origin, gender, religion or belief, disability, age or sexual identity, Section 1 of the AGG.

Since with the AGG the European Directives 2000/43/EC of 29 June 2000 (Directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin), 2000/78/EC of 27 November 2000 (Directive establishing a general framework for equal treatment in employment and occupation), 2002/73/EC of 23 September 2002 (Directive amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions) and 2004/113/EC of 13 December 2004 (Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services), the terms are to be interpreted autonomously under European Union law unless the AGG goes beyond the requirements of the Directives. However, a more far-reaching interpretation may not be to the detriment of another group protected by Section 1 of the AGG.[113]

2.3.1.1 Scope of application

First of all, it must be clarified whether disadvantages caused by the use of ADM systems are sufficiently included in the scope of application of the AGG.

Section 2 determines the material scope of application of the AGG, a general prohibition of discrimination, which is specified in concrete terms for certain areas in paragraph 1 to the effect that discrimination in relation to these areas is unlawful.[114] One focus is on the area of labour law with nos. 1–4, as well as closely related areas of life such as education (Section 2, paragraph 1, no. 7 of the

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113 Roloff, in: Rolfs/Giesen/Meßling/Udsching (Publisher), BeckOK ArbR, preliminary remark regarding Section 1 AGG (General Equal Treatment Act).

114 Roloff, Fn. 113, Section 2, para. 1.

AGG). The protection of employees against discrimination is determined by European Union law because of the obligation to transpose the relevant directives. European Union law would still have had to be transposed only for the "race"/origin characteristic and within the scope of application determined by Section 2, paragraph 1, no. 8 with regard to the characteristic of gender[115] so that the further scope of application in nos. 5–8 of Section 2, paragraph 1 is subject to the interpretation maxims of German law, at least where independent provisions have been made without a European Union law superstructure.

The scope of application is extended to other civil law transactions via Section 2, paragraph 1, no. 8 of the AGG or Section 19 of the AGG. However, this prohibition of discrimination only covers those contractual relationships in which the providers make offers to an undefined group of persons beyond the private sphere,[116] as is the case with advertisements, notices, publications on the internet, window displays, advertising brochures and so on[117] – and can typically be affirmed for digital offers, for example via the Internet. Furthermore, the prohibition of discrimination under civil law in Section 19, paragraph 1 of the AGG is of particular importance for **mass transactions and insurance companies**, as these are particularly suitable areas of application for ADM systems. Such systems promise to increase efficiency and reduce complexity above all by being able to process large amounts of data.[118] This can be realised particularly well in mass transactions as well as in private insurance, which is usually standardised and at the same time developed and offered for a large number of potential customers. An indication can be the use of general terms and conditions or general insurance contract conditions, because they can also only be used where individualised contract conditions are and should only be agreed upon as an exception. Individualisation by means of personalisation or scoring via ADM systems is not geared towards the individual as an individual business with its own negotiating power, but serves to optimise the legal position of the user. An ADM system that assesses creditworthiness on the basis of group membership and consequently offers worse conditions for the

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115 Husmann, The EC Equal Treatment Directives 2000/2002 and their implementation in German, English and French law, ZESAR 2005, page 107, 108; also refer to Roloff, Fn. 113 Section 2, para. 1.

116 Nickel, Mandates to Combat Ethnic Discrimination in the New Equal Treatment Directive 2000/43/EC, NJW 2001, page 2669.

117 Schlachter, in: Müller-Glöge/Preis/Schmidt (Publisher), Erfurt Commentary on Labour Law, Section 2 AGG, para. 15.

118 Orwat, Fn. 2, page 18.

conclusion of a contract than if the creditworthiness were determined on the basis of further, individual factors falls within the scope of application of Section 19, paragraph 1 of the AGG and could constitute unequal treatment that is not objectively justified.[119]

Therefore, it is crucial for the protection against discrimination by ADM systems to specifically focus the factual scope of application of the AGG on algorithmic discrimination and its fields of application and to expand it to that effect. In particular, areas of life in which *scoring* and *profiling* are used are sensitive to discrimination and should – insofar as they are not already covered – be expressly included in the scope of application of the AGG.

2.3.1.2   Protected characteristics

The existing catalogue of discrimination categories must be reviewed to see whether it covers those characteristics that ADM systems can identify. Furthermore, it must be examined whether the differentiations made by ADM systems are included or whether characteristics need to be added for effective anti-discrimination protection.

Section 1 of the AGG lists the grounds and thus the characteristics[120] on the basis of which discrimination should be inadmissible. Although this is conclusive for the AGG, Section 2, paragraph 3 of the AGG makes it clear that prohibitions of discrimination or requirements for equal treatment existing alongside the AGG should continue unchanged. This also covers further protected characteristics regulated there.

Since the AGG has its origin in the implementation of Union directives, the protected characteristics are based on the regulatory competence of the Union from Article 19 of the TFEU.[121] Eight characteristics are mentioned, namely "race", ethnic origin, gender, religion, world view, one (or more) disability(ies), age and sexual orientation. The individual characteristics have been described extensively in the literature. Their content and the associated values do not change due to digitalisation: the formulation of the AGG is **technology-neu-**

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119 Example in Sesing/Tschech, Fn. 17, page 26.

120 Roloff, Fn. 113, preliminary remark regarding Section 1 AGG (General Equal Treatment Act).

121 Roloff, Fn. 113, preliminary remark regarding Section 1 AGG (General Equal Treatment Act).

tral.[122] Therefore, a specific presentation will be omitted here. It is also not possible to go into the criticism of the restriction of characteristics in more detail here, which identifies a blank space, for example, in socio-economic origin, political views, illness, nationality, genetic characteristics, birth or even membership of a regional or national minority.[123]

The values underlying normative identification as a protected characteristic also apply in principle in the context of algorithmic procedures. Therefore, the recognised normatively undesirable characteristics remain of particular relevance. In addition, the existing catalogue of discriminatory characteristics is however not geared to the functioning of ADM systems. It is therefore necessary to take a closer look at the identification features and differentiation criteria of an algorithmic procedure and to adapt the catalogue of protected features accordingly.

2.3.1.3   Addressees

Furthermore, the AGG would have to address those who are potentially responsible for a disadvantage in the use of an ADM system.

The addressees of the AGG are those who can cause discrimination. The regulations of the second section on the employment relationship are directed at employers in the sense of Section 6, paragraph 2 of the AGG, while the third section on protection against discrimination in civil law transactions addresses in particular providers of goods and services, insurers and landlords of living space. These can be **private** entities. But the legal entities of public law are covered as well,[124] even if the scope is not always clear in detail.

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122 Dritter Gleichstellungsbericht (Third Equality Report) BReg: Digitalisierung geschlechtergerecht gestalten (Designing gender-neutral digitalisation) (2020), page 21; Freyler, Fn. 60, page 287; Martini, Fn. 56, page 1021.

123 See Thüsing, in: Munich Commentary on BGB, Section 1 of the AGG, para. 70; Mangold/Payandeh, Fn. 11, Page 45.

124 Bauer/Krieger/Günther, Fn. 53, introduction para. 1.

With regard to the addressee position according to the AGG, the respective technical use of the ADM system plays a decisive role, because the addressee position presupposes that addressees can influence the process: an obligation cannot be detached from a legal connecting factor. As long as there is no *strong artificial intelligence* that independently sets its own goals[125], even among the currently most advanced ADM systems, the commissioning or use of an ADM system will suffice for addressee status.[126] However, such an attribution of legal responsibility falls short when one considers the various systemic components of many ADM systems, for example in the use of platforms. Then the problems outlined above arise (see 1.3.5).

Consequently, an addressee position that is exclusively linked to the commissioning or use of an ADM system does not cover all responsible parties that come into consideration. Therefore, a revision of the AGG is also necessary in this respect and those who develop ADM systems and prepare them for use by the actual users, for example as platform operators, must also be included in the responsibility for compliance with the regulations.

2.3.2 Actors of the AGG

Institutional actors contribute significantly to anti-discrimination protection. Their current role in the AGG must be considered in order to subsequently identify their potential for effective legal protection against algorithmic discrimination.

The AGG provides for three groups as essential actors:

- First, those who discriminate;
- Second, those affected who experience a disadvantage due to a violation of the provisions of the AGG; and
- Third, the AGG institutionalises the Federal Anti-Discrimination Agency (ADS) in Section Six.

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125 For this purpose, refer to Döhmann, Fn. 3, Section 20 para. 21.

126 Refer to Sesing/Tschech, Fn. 17, page 26; Dzida/Groh, Diskriminierung nach dem AGG beim Einsatz von Algorithmen im Bewerbungsverfahren (Discrimination under the AGG when using algorithms in the application process), NJW 2018, pages 1917, 920.

According to Section 27, paragraph 2 of the AGG, the ADS assists persons who turn to it because they believe they have been disadvantaged on one of the grounds of Section 1 of the AGG. According to Section 27, paragraph 2, sentence 1 of the AGG, the assistance of the ADS covers support in enforcing the rights of affected persons, including information, legal advice and amicable settlement. However, only public bodies in the federal sector have a duty to provide information and to cooperate with the ADS according to Section 28, paragraph 4 of the AGG.

Beyond these concrete support tasks, the ADS is also responsible for an abstract range of tasks according to Section 27, paragraph 3 of the AGG. In this paragraph, it states that it conducts public relations work, takes measures to prevent discrimination on the grounds mentioned in Section 1 of the AGG and of employees pursuant to Section 27, paragraph 1, sentence 2 of the AGG and conducts scientific studies on these discriminations. In addition, in accordance with Section 27, paragraph 4 of the AGG, it works with the commissioners of the Federal Government and the German Bundestag who are affected in its area of responsibility, to submit reports every four years on discrimination on the grounds set out in Section 1 and on discrimination against employees in accordance with paragraph 1, sentence 2, and makes recommendations on how to eliminate and prevent such discrimination.[127]

In order to carry out its tasks, the ADS and the **Independent Federal Anti-Discrimination Commissioner** are granted a number of further powers in Section 28 of the AGG. Of these, only the power that is significant for dealing with possible discrimination through ADM systems will be briefly presented.

Section 28, paragraph 3 of the AGG standardises the power to obtain opinions. In cases where a person has turned to the ADS and is seeking an amicable settlement of a dispute, the Independent Federal Commissioner can obtain opinions from parties involved if the person concerned has given their consent. This gives the ADS the opportunity to obtain opinions on the functioning, areas of application and precautionary measures against potential discrimination on the part of an ADM system from the users in order to better assess

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127 Refer to the latest report from 2021, https://www.antidiskriminierungsstelle.de/SharedDocs/
downloads/DE/publikationen/BT_Bericht/gemeinsamer_bericht_vierter_2021.pdf?__blob=pub-
licationFile&v=9 (last accessed on 1 April 2023).

discrimination in a specific case. In principle, the provision enables information to be obtained about a specific ADM system. Due to the experience and competence as well as the resources of the ADS, which are systematically better than those of the individual affected persons, it is fundamentally easier to monitor the use of ADM systems. However, there is no obligation to issue a statement.[128]

This deficit is serious in the context of discrimination resulting from ADM systems, because only such information from users provides a basis for a discrimination test – regardless of whether they have the technical, human and other resources to provide such information.

2.3.3   Claims under the AGG – Overview

The AGG provides (exclusively) for individual claims of the person who has been unlawfully discriminated against in the case of unjustified unequal treatment.

2.3.3.1   Damages and compensation

This includes the category of damages and compensation (Section 15 of the AGG for the employment context, Section 21 of the AGG for other disadvantages in civil law transactions). A special feature of the AGG is that monetary damages are also provided for immaterial damage (Section 15, paragraph 2 of the AGG or Section 21, paragraph 2, sentence 3 of the GG) in exceptional cases. Nevertheless, the return on damages or compensation claims in consumer law is usually rather low.[129]

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128 BT-Drs. 16/1780, 52 (for Section 28, paragraph 1 of the AGG old version, the provisions of which were essentially incorporated into Section 28, paragraph 3 of the AGG by the Amendment Act dated 23.05.2022, see BT-Drs. 20/1332, 16).

129 Expert Council for Consumer Affairs (SVRN), Verbrauchergerechtes Scoring (Consumer-oriented scoring), 2018, page 40.

2.3.3.2   Protection obligations (employers)

Section 12 of the AGG obliges employers, within the scope of their duty of care, to take appropriate measures to protect employees from discrimination. The general clause-like organisational duties established in Section 12 serve the prevention of discrimination and oblige employers to ensure the protection of all employees against discrimination.[130] For the use of ADM systems, this can mean that employers must ensure that they use non-discriminatory systems.[131] If an employer does not comply with the information and training duties under Section 12, paragraph 2 of the AGG, this is deemed to be a *violation of the organisational duties.*

Section 12, paragraph 3 of the AGG obliges employers to take appropriate, necessary and reasonable measures to prevent discrimination. As examples of such measures, the provision mentions labour law sanctions up to and including dismissal of the perpetrator. The claim of the employee being discriminated against is however limited by the employer's discretion.[132]

In order to protect against discrimination in the employment relationship, Section 17, paragraph 1 of the AGG also standardises a general duty of the parties to collective agreements, employers and employees as well as their representatives to cooperate in the prevention and elimination of discrimination within the meaning of Section 1 of the AGG. However, concrete rights and obligations to act for associations do not result from this.[133]

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130 Horcher, in: Hau/Poseck, BeckOK AGG, Section 12, para. 2.

131 Wimmer, Algorithmenbasierte Entscheidungsfindung als Methode des diskriminierungsfreien Recruitings (Algorithm-based decision-making as a method of non-discriminatory recruiting), page 420.

132 Horcher, Fn. 130, Section 12, para. 7.

133 Kritisch Berghahn/Klapp/Tischbirek, Evaluation des Allgemeinen Gleichbehandlungsgesetzes (Evaluation of the General Equal Treatment Act). Prepared on behalf of the Federal Anti-Discrimination Agency, 2016, page 141.

2.3.3.3 European Union law concerns against the liability system of the AGG

The evaluation of the AGG in 2016 already came to the conclusion that the AGG does not satisfy the Member States' obligation under European Union law to provide for **"effective, proportionate and dissuasive sanctions"**, as they result from the transposing Directives (Article 15 of Directive 2000/43/EC, Article 17 of Directive 2000/78/EC and Article 25 of Directive 2006/54/EC), in view of the existing protection gaps in the liability system. Specifically, this is justified by the fault requirement of the claims for damages in Section 15, paragraph 1, sentence 2, paragraph 3 and Section 21, paragraph 2, sentence 2 of the AGG. In the *Draemphaehl* legal case, the ECJ maintained that the Member States may not make liability for a violation of specific prohibitions of discrimination dependent on a fault requirement, unless European Union law itself provides for such fault.[134]

According to the predominant opinion in legal literature, the sanctions of Section 15 of the AGG do not have a sufficient deterrent effect, at least because of the fault requirement in paragraph 1, sentence 2.[135] On the other hand, assuming that Section 15, paragraph 3 of the AGG does not refer to the compensation claim from paragraph 2,[136] a sufficiently deterrent sanction effect is justified with reference to the accompanying compensation claim.[137]

With regard to discrimination on the grounds of severe disability and gender, the requirement of fault in Section 15 of the AGG is also held to be unlawful under European Union law on the grounds of a violation of the prohibition of deterioration in the Directives. According to Article 27, paragraph 2 of Directive 2006/54/EC and Article 8, paragraph 2 of Directive 2000/78/EC, a level of protection once granted may not be reduced to the disadvantage of the person concerned. However, this was precisely the case with regard to Section 81, paragraph 2, no. 2 of the SGB IX (old version) and Section 611a, paragraph 2 of

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134 ECJ, C-180/95 para. 16 et seq., 22, 25 – Draemphaehl; also refer to ECJ, C-177/80 – Dekker.

135 With further proofs Horcher, Fn. 130, Section 15 of the AGG, para. 2; Berghahn/Klapp/Tischbirek, Fn. 133, page 149 f.

136 Horcher, Fn. 130, Section 15 of the AGG, para. 27.

137 Horcher, Fn. 130, Section 15 of the AGG, para. 2 f.

the BGB (old version), which were superseded by Section 15 of the AGG and provided for strict liability.[138]

With regard to Section 21, paragraph 2, sentence 2 of the AGG, the unlawfulness under European Union law is however less clear because of the fault requirement. Here – at least in isolated cases – a sufficiently deterrent sanction is assumed in view of the claim to the conclusion of a contract resulting from the refusal to conclude a contract according to Section 21, paragraph 1 of the AGG, which is designed irrespective of fault.[139]

The effective implementation of the directives can also be doubted in view of the considerable gaps in the **legal protection system** of the AGG.[140] As the ECJ fundamentally stated in the decision *Commission vs. Germany* on data protection, the main function of the independent data protection supervisory authorities is that of a guardian of fundamental rights. The supervision by the supervisory authorities is an essential element of the protection of fundamental rights intended by the Directive.[141] This is rooted in the idea of an advanced protection of fundamental rights through independent supervision.[142] Anti-discrimination law is related to data protection law in that it is also intended to fulfil a fundamental rights protection function. However, European Union law does not expressly provide for the establishment of independent supervisory authorities with regard to the protection against discrimination – unlike, for example, in data protection law (refer to Article 8, paragraph 3 of the CFR, Article 16, paragraph 2, sentence 2 of the TFEU and Article 52, paragraph 1 of the General Data Protection Regulation (GDPR)). This means the lack of supervisory authority powers with regard to anti-discrimination law does not

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138 Berghahn/Klapp/Tischbirek, Fn. 133, page 148 et seq.

139 Wagner/Potsch, Haftung für Diskriminierungsschäden nach dem AGG (Liability for discrimination damages under the AGG), JZ 2006, page 1085, 1099; Other view, Thüsing, Fn. 115, Section 21 of the AGG, para. 39 et seq.

140 See under 2.3.5.

141 ECJ, C-518/07, ECLI:EU:C:2010:125, 21 et seq. – Commission / Germany. This is confirmed and continued in the late case law of the ECJ: ECJ, C-614/10, ECLI:EU:C:2012:631 – Commission / Austria; ECJ, ECLI:EU:C:2014:237, 47 f. – Commission / Hungary; for this purpose, also refer to Spiecker gen. Döhmann, in: Kröger/Pilniok (Publisher), Unabhängiges Verwalten in der Europäischen Union (Independent Administration in the European Union), 2016, 97 (100 f.); Thomé, Reform der Datenschutzaufsicht (Reform of data protection supervision), 2014, page 68, 121 f.

142 Dix, in: Kröger/Pilniok (Publisher), Unabhängiges Verwalten in der Europäischen Union (Independent Administration in the European Union), 2016, 121, 121 f.

directly result in an illegality under European Union law. Nevertheless, it remains to be said that in order to guarantee effective protection of the fundamental rights of equality, which is the aim of the EU directives, an effective legal protection system is required, which is not currently guaranteed.[143] But if the basic guarantee of effective legal protection is already lacking, deficits are all the more apparent in the demanding liability system of discrimination by ADM systems.[144]

2.3.4   Justification of difference in treatment

The prohibitions of discrimination under the AGG do not apply absolutely. If there is a compelling objective reason, a disadvantage can be justified – unless it is harassment or sexual harassment, which normally cannot be justified.[145]

For indirect discrimination, the standard of justification is already contained directly in the facts of the case in Section 3, paragraph 2 of the AGG, whereas for direct discrimination, different standards of justification may apply, depending on which area of life and which ground of discrimination is affected. Section 8–10 of the AGG standardise the possibilities of justification for difference in treatment in the area of labour law, while Section 19 and 20 of the AGG relate to general civil law, mass transactions and insurance contracts. Section 5 of the AGG contains a further, independent justification ground of positive action.

2.3.4.1   Proportionality of difference in treatment

The criterion for the justification of difference in treatment is its proportionality both in the case of a justification according to Section 3, paragraph 2 of the AGG and Sections 5, 8–10 of the AGG.

In accordance with Section 3, paragraph 2 of the AGG, indirect discrimination can be objectively justified if the discrimination pursues a non-discriminatory, legal aim and the means chosen to achieve the aim are appropriate and

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143 See under 2.3.5.1.

144 See under 2.3.5.

145 Althoff, in: Scherr/El-Mafaalani/Yüksel (Publisher) Fn. 22, page 251.

necessary.[146] No less disadvantageous means may be available.[147] An explicit designation of the regulatory aim is not necessary, but it must be derivable from the context and verifiable.[148]

In Sections 8–10 of the AGG, exceptions to the prohibition of discrimination in Section 7 of the AGG are regulated for employment relationships. According to this, essential and decisive occupational requirements based on a discriminatory criterion can justify a difference in treatment (Section 8 of the AGG), religious and ideological communities as well as institutions affiliated to them can make employment dependent on religious affiliation (Section 9 of the AGG)[149] and discrimination on grounds of age is permissible (Section 10 of the AGG), for example in the case of age limits. The objective pursued (the occupational requirements) must be lawful and proportionate; only if the unequal treatment is suitable and necessary as well as appropriate to achieve the objective is it permissible.

2.3.4.2   Justification of difference in treatment in mass transactions

Section 19, paragraph 1 of the AGG standardises a fundamental prohibition of discrimination for the establishment, implementation and termination of mass transactions, i.e. contractual obligations that typically come into being without regard to the person in a large number of comparable cases, as well as for insurance contracts. Section 19, paragraph 2 of the AGG extends the prohibition of discrimination with regard to the characteristics of "race" and ethnic origin to other contractual obligations within the meaning of Section 2, paragraph 1, nos. 5–8 of the AGG. Exceptions to this prohibition of discrimination are standardised in Section 20 of the AGG and for the special case of housing tenancy in Section 19, paragraph 3 of the AGG.

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146 Horcher, Fn. 130, Section 3, para. 50 f.

147 BAG NZA 2016, 897, para. 30 with further proofs.

148 Thüsing, Fn. 123, Section 3 of the AGG, para. 41.

149 Here, the case law of the ECJ must be taken into account, which sets narrow limits to this preferential treatment and requires an interpretation of the norm in conformity with European law.

According to Section 20 of the AGG, unequal treatment on the basis of the discrimination grounds mentioned there (religion, disability, age, sexual identity or gender) can be justified if there is an objective reason. In contrast to the prohibition of discrimination in labour law, Section 20 of the AGG does not exhaustively specify which grounds are to be considered objective in the sense of the law. These include the avoidance of danger, the need for protection of privacy or personal security, the granting of an advantage if there is no interest in enforcing equal treatment, and the link to religion or the right of self-determination of religious communities.

It is questionable whether, in addition to the objective reason for the disadvantage, proportionality should also be required. This requirement cannot be derived from the wording of Section 20, paragraph 1 of the AGG; and a systematic consideration of Section 20 of the AGG in relation to Section 3, paragraphs 2, 8, 10 of the AGG could also suggest that a proportionality test is dispensable. However, Directive 2004/113/EC, on which Section 20 is based, requires a proportionality test for the justification of difference in treatment on grounds of sex, so that a *legal application in conformity with European law* also requires a proportionality test in the case of justification under Section 20 of the AGG.[150]

For insurance contracts, Section 20, paragraph 3 of the AGG provides for a special justification possibility: according to this, the different design of insurance contracts under private law is permissible if it is based on actuarial and statistical data for risk assessment (Section 20, paragraph 3 of the AGG); a gender-specific design of insurance contracts, on the other hand, cannot be justified in any case.[151]

2.3.4.3 Justification of algorithmic discrimination

If disadvantages in connection with algorithmic decisions are to be justified, there are in principle no deviations from the general principles and regulations of the AGG. Algorithmic decisions that constitute a violation of the prohibition of discrimination under Sections 7 and 19 of the AGG can also be justified in principle under Sections 5, 8–10 and 20 of the AGG if, for example, in the case of Section 8 AGG, the essential and decisive occupational requirements justify the

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150 Thüsing, Fn. 123, Section 20 of the AGG, para. 10 et seq.
151 ECJ, C-236/09, ECLI:EU:C:2011:100 – Unisex.

difference in treatment or, under Section 20 of the AGG, there is an objective reason for the difference in treatment.[152] The same applies to indirect discrimination pursuant to Section 3, paragraph 2 of the AGG, which is due to the use of an ADM system.

In addition to the general requirements for justification, however, the specific characteristics of algorithmic decisions would have to be taken into account. For example, in order to justify a discrimination that violates the prohibition of occupational discrimination in Section 7 of the AGG, it must be taken into account that algorithmic selection decisions can fall back on correlations that expand the spectrum of possible characteristics of applicants and enable a decision based on criteria that are not available in conventional selection decisions – for example, if a data set should show that "applicants who pay church tax are more productive than applicants who do not pay church tax" (fictitious example). Only if the reason for the discrimination constitutes a substantial and decisive occupational requirement (Section 8(1) AGG) can it justify the discrimination. For the justification of preferential treatment of church tax-paying applicants, the question would therefore be decisive whether greater productivity is merely conducive to the exercise of the activity or whether it constitutes an essential and decisive professional requirement. Although productive employees are advantageous for employers, the BAG's standard of justification does not allow mere considerations of expediency to suffice; rather, the activity must not be able to be carried out or not be carried out properly without the characteristic.[153] If, on the other hand, it can be affirmed that a correlation actually reveals an essential and decisive requirement, an additional detailed examination would be required as to whether this particular correlation is also causal for the essential occupational requirement.[154]

The same applies to justification under Section 20 of the AGG: if the ADM system recognises a correlation, the next step is to determine whether it is causal for one of the grounds for justification listed in Section 20 of the AGG. In

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152 See above 2.3.4.1.

153 BAG, NZA 2009, 1016; BAG NZA 2009, 1355 para. 68; Staudinger/Rieble, 2018, AGG, Section 8, para. 13; Erman/Belling/Riesenhuber, AGG, Section 15, para. 8.

154 Von Lewinski/de Barros Fritz, Arbeitgeberhaftung nach dem AGG infolge des Einsatzes von Algorithmen bei Personalentscheidungen (Employer liability under the AGG as a result of the use of algorithms in personnel decisions), NZA 2018, pages 620, 623; Freyler, Fn. 60, page 288.

order to justify a disadvantage caused by the decision of an ADM system, it is consequently necessary in each case, after the *correlation*, to also determine the *causality* – the law requires to identify the social mechanism.

The justification of indirect discrimination through ADM systems under Section 3, paragraph 2 of the AGG faces greater challenges.[155] The ADM system must be used in pursuit of a legitimate purpose and must also be suitable, necessary and proportionate for that purpose. The challenge is primarily to assess suitability and necessity, which leads to the challenge of how to document and explain the relevant factors of a decision made by an ADM system.[156] In order to be able to assess the suitability of the predictive accuracy of an ADM system, insight into the underlying data sets or at least into the evaluation data of an ADM system is required.[157] If the suitability of the use of an ADM system is assumed, the use will usually also be necessary, since the ADM system is used precisely because of its superiority over non-automated decisions.

In the question of reasonableness, it must finally be weighed up whether the means used – i.e. the use of an ADM system – is proportionate to the objective pursued.[158]

2.3.5 Legal protection on the basis of the AGG

2.3.5.1 General: Deficient structures for the enforcement of anti-discrimination law

Enforcement of rights in anti-discrimination law is fundamentally more difficult due to **structural imbalances of the parties**.[159] Here, anti-discrimination law and consumer law are similar, both serving to balance power asymmetries. The imbalance already manifests itself in unequal starting conditions for the decision whether claims arising from an assumed violation of rights are asserted at all. According to rational standards, such a decision will be made as a

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155 Sesing/Tschech, Fn. 17, page 26.

156 Lauscher/Legner, Fn. 44, page 376. Hacker, Fn. 7, page 1161.

157 Lauscher/Legner, Fn. 44, page 376. Hacker, Fn. 7, page 1161.

158 For a possible standard of reasonableness, see 3.1.4.

159 SVRV, Fn. 129, page 40.

cost-benefit assessment on the basis of an expert assessment of the legal situation, the actual possibilities of proof for the existence of a possible claim, as well as an assessment of the duration of the process, the cost risk and the expected return in the event of success. The entities affected by discrimination, like consumers – in contrast to many companies that have access to in-house or external legal expertise – will regularly not be in a position to competently assess the legal situation, let alone make an expert judgement, because they are not familiar with the process and risks of legal proceedings and are therefore inexperienced.[160] Seeking legal advice can involve considerable costs and thus already stand in the way of a decision to take legal action.

In addition, the return on damages or compensation claims is usually rather low and the possibilities of proof will often be limited. This is because, in general, there is typically a lack of insight into internal company processes, and in the case of discrimination by an ADM system, an even greater lack of insight into its mechanisms.[161] A cost-benefit assessment will therefore in many cases lead to a decision against legal action (*rational disinterest/rational apathy*)[162]. This results in the thesis of the **fundamental inadequacy of individual rights protection** in consumer law when it comes to damages of small economic magnitude,[163] which can be transferred to anti-discrimination law.

On the other hand, there is a **collective interest** in the clarification of legal issues and the effective prosecution of legal infringements that affect a large

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160 SVRV, Fn. 129, page 40; in detail on the inferiority of consumers in the process: Fries, Consumer law enforcement, 2016, page 30 et seq. On a certain conflict aversion of consumers and ignorance regarding enforceable claims under the AGG: Berghahn/Klapp/Tischbirek, Fn. 133, page 161.

161 SVRV, Fn. 129, page 40.

162 SVRV, Fn. 129, page 40; Podszun/Busch/Henning-Bodewig, Behördliche Durchsetzung des Verbraucherrechts? Darstellung und Systematisierung von Möglichkeiten und Defiziten der privaten Durchsetzung des Verbraucherschutzes sowie Einbeziehung der Kartellbehörden zu dessen Durchsetzung (Official enforcement of consumer law? Presentation and systematisation of possibilities and deficits of private enforcement of consumer protection as well as involvement of the cartel authorities in its enforcement), 2018, page 174 f.; in relation to data protection law: Busch, Algorithmic Accountability, ABIDA – Assessing Big Data, page 52; grundsätzlicher zum rationalen Desinteresse als Problem des Individualrechtsschutzes (More fundamentals to rational disinterest as a problem of individual rights protection): van den Bergh/Keske, Rechtsökonomische Aspekte der Sammelklage (Legal economic aspects of the class action), in: Casper/Janssen/Pohlmann/Schulze (Publisher), Auf dem Weg zu einer europäischen Sammelklage? (Towards a European class action?), 2009, page 17, 20 f.

163 Ponti/Tuchtfeld, Zur Notwendigkeit einer Verbandsklage im AGG (On the necessity of a class action in the AGG), ZRP 2018, 139, 140; Busch, Fn. 162, page 51.

number of consumers (especially in the case of mass transactions), but only cause minor individual damage (*stray damage*[164]).[165] The *inter-party* effect of court rulings also acts as an obstacle to collective anti-discrimination protection. In cases of successful (injunctive) actions, the binding effect of the judgments remains limited to the parties to the litigation, so that parallel proceedings must be sought even in cases of numerous similar infringements if the responsible parties do not adjust their practice on their own responsibility (*factual effect*).[166]

When it comes to cross-border situations that require action against legal entities abroad, the enforcement of rights is associated with additional ambiguities and difficulties. The same applies when opaque business models in the domestic market lead to unclear responsibilities. In view of global economic integration and division of labour, which can operate across borders at low thresholds, especially in the digital sphere, these additional hurdles are becoming increasingly relevant.[167]

2.3.5.2   Instruments for the improvement of legal protection in the AGG

Section 4 of the AGG standardises special regulations for legal enforcement, which are intended to counter these structural deficits.[168] The deficiencies of the existing current regulation also consistently affect the possibilities for legal protection in the use of ADM systems.

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164 Zur Unterscheidung zwischen Streu- und Massenschäden (On the distinction between stray and mass damage): Podszun/Busch/Henning-Bodewig, Fn. 162, page 174 et seq.

165 Ponti/Tuchtfeld, Fn. 163, page 140; Compare with regard to the enforcement of data protection law Podszun/De Toma, Die Durchsetzung des Datenschutzes durch Verbraucherrecht, Lauterkeits- recht und Kartellrecht (The enforcement of data protection through consumer law, fair trading law and antitrust law), NJW 2016, page 2987, 2989; van den Bergh/Keske, Fn. 162, page 20 f.

166 Podszun/Busch/Rupprecht, Fn. 162, page 171 (referring to actions for injunctions in consumer law).

167 Podszun/Busch/Henning-Bodewig, Fn. 162, page 170 f. with further proofs; also refer to SVRV, Fn. 129, page 40; Expert Council for Consumer Affairs (SVRV) (Publisher), consumer law 2.0. Verbraucher in der digitalen Welt (Consumers in the digital world), 2016, page 70; grundlegend zu grenzüberschreitenden Verbraucherverträgen (Fundamental information regarding cross-border consumer contracts): Callies, Grenzüberschreitende Verbraucherverträge (cross-border consumer contracts). Rechtssicherheit und Gerechtigkeit auf dem elektronischen Weltmarktplatz (Legal certainty and justice in the electronic world marketplace), 2006.

168 Refer to Section 22 of the AGG Wendland, in: Hau/Poseck Fn. 130, Section 22 of the AGG, para. 1.

First of all, Section 22 of the AGG eases the **burden of proof for the affected entities**.[169] A potentially disadvantaged person only has to present circumstantial evidence that suggests a disadvantage due to a reason mentioned in Section 1 of the AGG. If such circumstantial evidence is presented, the opposing party must *prove* that no such discrimination has taken place. The easing of the burden of proof only refers to the fact that a disadvantage has occurred for one of the reasons mentioned in Section 1 of the AGG. For other prerequisites for a claim, such as unequal treatment compared to other persons from whom the affected persons differ with regard to a characteristic of Section 1 of the AGG, they bear the full burden of proof.[170] Indications that establish such a presumption are facts or at least factual indications that, in an overall assessment from an objective point of view, establish a sufficient probability of a disadvantage within the meaning of Section 1 of AGG.[171]

In the case of ADM systems, this burden of proof rule has only an insufficient effect.[172] For the persons concerned must provide circumstantial evidence of discrimination in order to benefit from the burden of proof. In the case of ADM systems, this is often difficult for the reasons mentioned above, because the affected entities can only rely on the result for which the ADM system was the cause.[173] Moreover, the burden of proof remains unchanged, i.e. in particular with regard to the possible failures of the ADM system. However, it is hardly possible to meet their requirements. In order to support affected persons, anti-discrimination associations organised under private law are also authorised under Section 23 of the AGG to act as counsel for affected persons in legal proceedings (paragraph 2, sentence 1) and to deal with legal matters on their behalf (paragraph 3). The latter allows for legal advice outside and within court proceedings.[174] As "advisers", however, the anti-discrimination associations may not be authorised as representatives of the affected entities in court proceedings or to act on their behalves and to assert their claims. They are limited to an

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169 Schlachter, Fn. 117, Section 22 of the AGG, para. 1.

170 Wendtland, Fn. 168, Section 22 of the AGG, para. 2; Orwat (2019), page 107.

171 Wendtland, Fn. 168, Section 22 of the AGG, para. 2; BAG, NZA 2012, pages 1345, 1348, para. 33.

172 Also refer to the Equality Report BReg (Fn. 122), page 138.

173 On the lack of visibility of errors in the result: Equality Report BReg (Fn. 122), page 102.

174 Berghahn/Klapp/Tischbirek, Fn. 133, page 159.

accompanying role.[175] Therefore, they cannot appear otherwise in ADM system proceedings.

With the possibility of the assistance of anti-discrimination associations, a European Union law obligation of the Member States, resulting directly from the Anti-Discrimination Directive, to provide for the participation of associations in administrative or judicial proceedings is implemented.[176] According to prevailing opinion, however, a complement of collective or administrative redress is needed to ensure the effective enforcement of rights required under Article 4, paragraph 3 of the TEU.

In particular in the case of what is referred to as *victimless discrimination*, where the discrimination does not affect a specific person, but leads to a *disadvantage in advance*, for example through the exclusion of entire groups of persons,[177] collective or administrative legal protection is required in order to be able to effectively implement the sanctions provided for under European Union law.[178] The use of ADM systems often concerns such groups of cases, among other things because of the system of personalisation[179]. However, they are not punished if only individuals in the sense of holders of subjective rights can defend themselves against the use of such systems and check them.

In addition, the Federal Anti-Discrimination Agency at the Ministry for Family Affairs, Senior Citizens, Women and Youth (Section 25), which has already been mentioned[180], acts as a contact point for the affected entities (Section 27, paragraph 1) and is authorised to support them as an independent body in

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175 Berghahn/Klapp/Tischbirek, Fn. 133, page 159.

176 Berghahn/Klapp/Tischbirek, Fn. 133, page 160; Ponti/Tuchtfeld, Fn. 163, page 140.

177 On the problem of victimless discrimination, also refer to Equality Report BReg (2020), Fn. 122, page 95; Fröhlich, Männer fahren LKW, Frauen erziehen Kinder (Men drive trucks, women raise children). Diskriminierendes Gendertargeting durch Facebook (Discriminatory gender targeting by Facebook), VerfBlog, 6 November 2020, https://verfassungsblog.de/diskriminierende-facebook-algorithmen/ (last accessed on 1 April 2023).

178 Ponti/Tuchtfeld, Fn. 163, page 140 f. with further proofs; also Fröhlich, Fn. 177. Reference is made to a preliminary ruling on the interpretation of the Anti-discrimination Directive, in which the ECJ clarified that the Member States must also provide for effective, proportionate and dissuasive sanctions in cases of victimless discrimination and must guarantee the possibility of enforcing them in court, ECJ, C-54/07, ECLI:EU:C:2008:397 para. 37 f. – Feryn.

179 For this purpose, refer to 1.3.1 above.

180 For this purpose, refer to 1.3.2 above.

enforcing the law by providing information, arranging counselling services by legal bodies and working towards an amicable settlement (Section 27, paragraph 2). Unlike the anti-discrimination associations, it does not have the power to support or accompany legal proceedings. This, too, has a similar effect on ADM systems. Given the need to understand the technical background, this is particularly unfortunate because individual affected entities regularly do not have the technical, financial or other resources to identify and enforce their rights.

Works councils and trade unions can, in accordance with Section 17, paragraph 2, sentence 1 of the AGG in conjunction with Section 23, paragraph 3 of the BetrVG (Works Council Constitution Act), assert the rights arising from Section 23, paragraph 3 of the BetrVG in court in the event of gross violations of statutory obligations by the employer. This is an element of the *collective legal protection*, which is, however, very limited in its scope of application and has hardly any practical relevance.[181] An assertion of claims by disadvantaged persons is expressly not provided for by Section 17, paragraph 2, sentence 1 of the AGG.

A significant restriction of the rights under the AGG is the **time limit regulations** intended therein. Section 15, paragraph 4 of the AGG stipulates that claims for damages and compensation in the context of an employment relationship must be asserted within a period of two months, typically calculated from the time when the disadvantage became known, Section 15, paragraph 4, sentence 2 of the AGG. Section 21, paragraph 5 of the AGG provides a similar rule for the extended scope of application under civil law. These time limits, which, however, only cover claims under the AGG (refer to Section 15, paragraph 5 of the AGG and Section 21, paragraph 3 of the AGG), are significantly shorter than the general limitation periods; this is problematic in view of the special relationship between employers and employees, particularly in the employment relationship. In addition, the determination of a possible disadvantage, the clarification of existing rights and a decision on whether to assert claims within such a short period of time create considerable pressure.[182]

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181 Berghahn/Klapp/Tischbirek, Fn. 133, page 142 f.

182 On the fundamental problems of consumer law protection, see also below 2.3.5.1.

2.4   Interim conclusion

The existing deficits in legal protection in anti-discrimination law have an amplified effect in the case of discrimination by ADM systems due to the particularly pronounced power and information asymmetry. The *black box* character of ADM systems makes it practically impossible for the affected entities to track down the causes of discrimination, and the legal facilitation of proof in the AGG in its current form is not sufficient to overcome these hurdles.

2.5   Artificial Intelligence Act

2.5.1   Main legal provisions and intentions

Anti-discrimination is also regulated in the proposal of the European Union for a Regulation laying down harmonised rules on artificial intelligence of 2021 (Artificial Intelligence Act)[183] and is even an explicit goal.[184] The chosen legal regime is oriented towards technical law and product liability law.[185] Thus, in the future it must be examined preventively whether AI applications can cause particularly high risks for certain legal interests; depending on the findings, protective measures must be taken.

The material **scope of application** is opened up by the very broad[186] term "artificial intelligence system", which is abbreviated in the draft as "AI system". Article 3, no. 1 of the Artificial Intelligence Act defines such an AI system as software developed using one or more of the techniques and concepts listed in Annexe I and capable of producing results such as content, predictions, recommendations or decisions that influence the environment with which it interacts, in view of a set of objectives defined by humans. Annexe I provides

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183 Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence and Amending Certain Union Legislative Acts, COM(2021) 206 final, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CE-LEX-:52021PC0206&from=EN (last accessed on 1 April 2023).

184 Proposal for a Regulation, Fn. 183, page 4.

185 Lauscher/Legner, Fn. 44, page 384 with further proofs.

186 Hornung, in: Schoch/Schneider (Publisher), Administrative Law, Section 35a, VwVfG (Administrative Procedures Act), para. 55.

further technical specifications in concrete terms, for example on machine learning. This typically covers ADM systems.

In order to counteract discrimination and to achieve the other objectives, the Artificial Intelligence Act distinguishes between four different **risk levels**:

- Unacceptable risk
- High risk
- Low risk
- Minimal risk

The last two levels are not further differentiated in the draft.[187] Depending on the risk level, the users of AI are given different obligations.

The use of AI in the highest risk level is to be prohibited in principle. These also include some areas of use that are particularly susceptible to discrimination, in particular the use of AI for the purposes of "social scoring", Article 5, paragraph 1, point c) of the Artificial Intelligence Act.[188] The protection against discrimination is thus significantly extended compared to the classic characteristics, such as those set out in the AGG.

Apart from that, the Artificial Intelligence Act does not generally prevent discriminatory assignments. In principle, they are allowed – but with special obligations:

- ADM systems for the selection of applicants, Article 6, paragraph 2 in conjunction with Annexe II,I no. 4, point a) Artificial Intelligence Act, or
- those for checking creditworthiness, Article 6, paragraph 2 in connection with Annexe III, no. 5, point b) Artificial Intelligence Act.[189]

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187 Refer to justification regarding Artificial Intelligence Act, page 12 f.; Ebert/Spiecker gen. Döhmann, Die EU als Trendsetter weltweiter KI-Regulierung: Der Kommissionsentwurf für eine KI-Verordnung der EU (The EU as a trendsetter in global AI regulation: The EU Commission's proposal for an Artificial Intelligence Act), NVwZ 2021, page 1188.

188 Refer to Spindler, Der Vorschlag der EU-Kommission für eine Verordnung zur Regulierung der Künstlichen Intelligenz (The EU Commission's proposal for a regulation laying down harmonised rules on artificial intelligence) (Artificial Intelligence Act), CR 2021, pages 361, 365.

189 Lauscher/Legner, Fn. 44, page 384.

These special obligations include, among other things, **requirements for the data sets** that are used. They also include high data quality to "ensure that the high-risk AI system [...] does not become a cause of discrimination"[190]. Article 10, paragraph 2, point f) of the Artificial Intelligence Act explicitly demands that data must be analysed with regard to possible bias. Article 10, paragraph 3 of the Artificial Intelligence Act also states that training, validation and testing data sets must be relevant, representative, error-free and complete. This requirement has an anti-discriminatory effect because such objectified and neutral data at least minimises the risk of discrimination. However, in view of the possibility of indirect, intersectional or proxy discrimination,[191] this is not sufficient.

The detection of potential discrimination is promoted by Article 10, paragraph 5 of the Artificial Intelligence Act, which provides a legal basis, beyond the GDPR, for the processing of special sensitive data if this is strictly necessary for the "monitoring, detection and correction of biases in the context of high-risk AI systems".

This means that the law itself provides for countermeasures to be used through technology. However, unlike Article 25 GDPR, which follows the approaches of *"privacy by design"* and *"privacy by default"*[192], this does not have a preventive approach, but a monitoring and continuous processing of the AI system. At the same time, this formulates a dynamic obligation to which the users are *continuously* subject throughout the entire period of operation, as is also explicitly described in Article 9, paragraph 2 of the Artificial Intelligence Act for the entire risk management process.

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190 Proposal for a Regulation, Fn. 183, EC 44.

191 See above 1.2.1.

192 "Privacy by design" circumscribes the approach that the normatively presented approach is already realised by the technology design, see Article 25, paragraph 1 of the GDPR. "Privacy by default" circumscribes the approach that the default settings of the technology are data protection friendly, the goal is data protection built into the technical data processing, see Hansen, in: Simitis/Hornung/Spiecker gen. Döhmann (Publisher), Data Protection Law, Article 25, para. 1 et seq.

Closely related to this is the provision in Article 12 of the Artificial Intelligence Act: according to this, there is a **logging and documentation obligation**, which is intended to enable traceability and verifiability. This makes it easier to prove possible violations of the provisions of the Artificial Intelligence Act. However, it is unclear whether these requirements will also mean that logging and documentation can also be used to prove violations of other rights, such as anti-discrimination law. Article 12, paragraph 3 of the Artificial Intelligence Act states the following:

> *"in particular, the monitoring of the operation of the high-risk AI system with a view to the occurrence of situations which may lead to the AI system posing a risk within the meaning of Article 65, paragraph 1 or which lead to a substantial change",*

which facilitates "post-market monitoring pursuant to Article 61" of the Artificial Intelligence Act.

The term "in particular" precedes this, so that with recourse to the possibilities created by the standard, more extensive violations of the law can also be proven. This is also in line with Article 12, paragraph 2 of the Artificial Intelligence Act, according to which "logging ensures that the functioning of the AI system is traceable throughout its life cycle to an extent appropriate to the purpose of the system". A limitation solely to the specific purposes of the Artificial Intelligence Act is thus not envisaged.

In addition, Article 14, paragraph 1 of the Artificial Intelligence Act requires that AI systems can be supervised **by humans in an effective manner**. In turn, it follows from Article 14, paragraph 2 of the Artificial Intelligence Act that the objective of such supervision extends beyond the immediate purposes of the Artificial Intelligence Act because, for example, "risks to health, safety or fundamental rights" are also to be avoided.

In contrast, the **transparency obligations** under Article 13 of the Artificial Intelligence Act are primarily aimed at users, including instructions for use and further information.

The approach of the Artificial Intelligence Act as a whole – and with other provisions such as the further conformity requirements under Article 43 of the Artificial Intelligence Act – on the one hand formulates clear obligations for the users of AI systems, which can have an anti-discriminatory effect. On the other hand, these are largely left to the self-regulation of the users. The compliance must then be checked by supervisory authorities. The effectiveness of these measures depends largely on the resources allocated to the supervisory authorities under national law and the way in which they enforce the obligations.

2.5.2   Gaps in protection

Since the first comments on the Artificial Intelligence Act, it has been repeatedly emphasised that the **affected side is underrepresented**. This is particularly evident in the fact that the overall perspective is primarily directed towards users, but not towards those affected. For example, no rights of data subjects are provided for – in contrast to the provisions of Article 12 et seq. of the GDPR. Accordingly, there is also a lack of further-reaching regulations, which are sufficiently known from consumer law, to ensure effective enforcement of the law. There is no reversal of the burden of proof, alleviation of causality or lump sum damages including compensation regulations and immaterial damages.

Other criticism is directed at the fact that the **goal of preventing distortions by data is hardly achievable** and that the Artificial Intelligence Act does not clarify which types of distortions are to be avoided.[193] However, this openness works rather in favour of those affected, because even new types of distortions can be problematised.

Furthermore, discrimination and distortions can also be based on a multitude of other elements of processing,[194] which are addressed by the Artificial Intelligence Act at best in an extensive interpretation.

What cannot be resolved is the problem that the Artificial Intelligence Act continues to allow the further use of data to identify and correct biases. This, however, can lead to a perpetuation of the distortion.

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193 Lauscher/Legner, Fn. 44, page 385 with further proofs.
194 Spiecker gen. Döhmann, Fn. 3, Section 20, para. 15 et seq. with further proofs.

With regard to legal protection against discrimination, it should also be criticised that the **susceptibility to discrimination in special situations of power asymmetry is not addressed separately**. It can be implicitly inferred from some classifications as high-risk systems that the legislator wants to take these situations into account. However, this is not regulated clearly enough and can therefore hardly be extended, if not through a complicated procedure of drafting annexes to the Artificial Intelligence Act.

Furthermore, the **concept** of **self-regulation** as such is problematic – as has been sufficiently and repeatedly explained in legal discourse in a wide variety of contexts; this is particularly true for the regulation of a technical development with the dynamics of artificial intelligence. Self-regulation is only as good as the shadow of the law behind it.[195] This is already true in other areas in which state institutions have knowledge comparable to that of the regulated. However, in areas where the regulating authority has knowledge that clearly lags behind that of the users, self-regulation as a regulatory concept is particularly questionable. This is even more true since the extent and density of supervisory measures as well as the demarcation from the competences of other supervisory authorities in other regulatory areas (especially the GDPR) are unclear. This leads to uncertainties that are ultimately to the detriment of the data subjects.

Finally, it must be criticised that although the recitals and the objective of the Artificial Intelligence Act address anti-discrimination, there are **hardly any discrimination-specific regulations**. It is true that individual, particularly vulnerable AI systems are classified as high-risk systems and distortions are taken into account within the framework of data governance. However, these are neither comprehensive nor conclusive measures. There is no general clause or catch-all provision – and no clear objectives. These would be necessary to cover external effects, indirect, intersectional and proxy discrimination as well as possible *chilling effects*[196].

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195 Ebert/Spiecker gen. Döhmann, Fn. 187, page 1191.

196 Chilling effects are intimidation and deterrence effects to adapt in advance and to refrain from lawful behaviour in order to prevent potentially negative impressions from arising in the first place, see Spiecker gen. Döhmann, Fn. 3, Section 20, para. 32 with further proofs.

2.6   Interim conclusion

The investigation has shown that effective legal protection in a case of discrimination due to usage of an ADM system requires adapting the simple anti-discrimination law of the AGG. The legal protection system of the AGG is in any case deficient – not least in fulfilment of EU law requirements – and is all the more unable to cope with the special challenges arising from the use of ADM systems. There are starting points for amendments in various regulatory areas of the AGG; in particular, the regulations in the fourth section of the AGG on improving legal protection could be expanded. The Artificial Intelligence Act makes it seem possible that the obligations for users of AI systems could have an anti-discriminatory effect in the future. However, in order for the Artificial Intelligence Act to effectively contribute to its explicit goal of anti-discrimination, the gaps in protection with regard to legal protection against algorithmic discrimination by AI must be closed. Possible starting points and proposed solutions are outlined below.

3   Recommended solutions

In order to be able to effectively meet the challenges outlined above with regard to protection against discrimination by ADM systems, possible solutions will be proposed on two levels that are suitable for closing the identified protection gaps and strengthening law enforcement:

- The first level concerns solutions that can serve to improve the **individual legal protection** of those affected.
- On a second level, the **institutional actors** of anti-discrimination law are to be considered and proposals made for expanding their competences to **implementing legal protection effectively**. This primarily concerns the Anti-Discrimination Agency, but also other institutional actors such as data protection supervisory authorities and the users of ADM systems.

The following proposals can usually be implemented cumulatively – and should be, in the interest of combating gaps in legal protection that arise in the use of ADM systems as effectively as possible.

3.1   Improvement of the individual legal protection of affected persons

For the individual entities affected by discrimination through ADM systems, the challenges in enforcing rights are, on the one hand, in the **lack of transparency** of ADM systems and, on the other hand, in the sometimes too **narrowly defined legal regulations of the AGG**, which are not geared towards adequately taking the specific circumstances of algorithmic discrimination into account. It is therefore necessary to examine which measures can be used to limit the transparency risk of those affected by discrimination and which additions and extensions to the AGG are appropriate in the sense of improved legal enforcement. The general problems of subjective legal protection will not be addressed separately, even if they also apply in principle to anti-discrimination law, i.e. the lack of resources and knowledge of the law on the part of those affected, a

lack of confidence in the legal system or insecurity and fear of repression, even if these are unfounded.

3.1.1 Burden of proof under Section 22 of the AGG: Limiting the risk of transparency

The frequently encountered black box character of ADM systems or the inability to conclude from a decision on their use and quality is a major hurdle in asserting claims for discrimination based on the use of these systems and jeopardises effective legal enforcement.[197] It is questionable whether the allocation of this transparency risk to the affected entities by the decisions of the ADM system can be absorbed by Section 22 of the AGG, which provides for a facilitation of proof with regard to the causality between the unequal treatment and one of the discrimination features of Section 1 of the AGG,[198] or whether more far-reaching mechanisms are needed to limit the risk for individual legal protection resulting from the lack of transparency.

In the case of discrimination through the use of ADM systems, it is difficult to trigger the reversal of the burden of proof under Section 22 of the AGG, since circumstantial evidence of discrimination is difficult to show without more detailed knowledge of the concrete functioning of the ADM system. Circumstantial evidence recognised today in case law on discrimination in working life practically no longer plays a role in decisions by ADM systems (for example, discriminatory job advertisements).[199] There is an **information asymmetry**, which makes it difficult or even impossible to enforce the claims of those affected by discrimination.

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197 See above 1.3.4.

198 Thüsing, Fn. 148, Section 22 of the AGG, para. 15.

199 Grünberger, Fn. 54, page 233; Martini, Fn. 2, page 247; Wimmer, Fn. 131, page 425 and page 430; For detailed information on the law of evidence, see Muthorst, Beweisrecht, in: Payandeh/Mangold, Fn. 11, page 799 et seq.

One possibility proposed in the literature and recommended for achieving the aims of the AGG when using ADM systems to counter this information asymmetry in the interest of effective legal protection is to have the evidence that, according to Section 22 of the AGG, an ADM system was used to trigger the reversal of the burden of proof.[200] On the one hand, the use of an ADM system entails specific discrimination risks and, on the other hand, shifts the transparency risk to those affected by decisions.[201] It is therefore appropriate to attribute these risks to the users and to significantly lower the hurdle of shifting the burden of proof for the affected entities. In the next step, according to this proposal, it would be the responsibility of the users to prove that discrimination did not take place.[202] Here, a rebuttable presumption could be introduced, according to which the burden of proof is already satisfied by the fact that the ADM system meets a best practice standard. Initial approaches to this are currently being discussed. This could be confirmed by **independent certification**.[203] If the ADM system does not meet these requirements or if the presumption can be rebutted, the full reversal of the burden of proof under Section 22 of the AGG shall be applicable. However, such a rebuttable presumption is in turn presuppositional due to the (still to be determined) requirements for independent certification and carries its own risks. The use of an ADM system is the responsibility of the users; they are expected either to use only those ADM systems that do not discriminate or to use systems that are comprehensible to them and for which they are able to prove that there is no discrimination in the event of a shift in the burden of proof (through appropriate documentation, disclosure of training data, etc.).

However, this transfer of responsibility is appropriate, since the risk of a deficient ADM system thus materialises at the place where the responsibility for the use of the system lies. It also gives users an important incentive to develop or use fair systems. An obligation to inform users of ADM systems that such a system has been used in a specific case would further strengthen this incentive.

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200 Grünberger, Fn. 54, page 234. This is clearly the case in the BReg Equality Report (2020), Fn. 122, page 138 and page 169, for the labour sector.

201 See above 1.2.3.

202 Equality Report BReg (2020), Fn. 122, page 138 and page 169.

203 Grünberger, Fn. 54, page 235.

3.1.2   Extension of the scope of the AGG

The AGG is designed to be technology-neutral; within its scope of application, discrimination through ADM systems is in principle covered in the same way as "analogue" discriminatory decisions.[204] Nevertheless – as already shown – specific legal protection gaps remain in the use of ADM systems, which should be closed because of the discrimination risks of these systems.

3.1.2.1   Addition to Section 1 of the AGG

In accordance with the individual legal character of the AGG, Section 1 of the AGG conclusively lists *individual characteristics* as prohibited grounds for discrimination.[205] However, **group formation**, i.e. the conclusion of a correlation from relationships, is characteristic of the functioning of ADM systems. As a rule, the affected entities have no influence on this group formation and attribution, nor on the relationships established by the ADM system. The principles of indirect discrimination do not easily capture these relationships, since it is not a matter of correlating a supposedly neutral characteristic with a frowned-upon characteristic, but rather a disadvantage can result solely from the fact that a relationship (of whatever kind) exists between the affected person and third parties. This can result from an assignment to a group made by the ADM system or from an inclusion of the living environment of the affected entities. For example, a prediction tool for assessing the recidivism risk of offenders in the USA included criminal behaviour, drug use or gang membership of family members, friends and the neighbourhood in its calculation.[206] The partly personal relationships of the offender to be assessed, but also random connections to neighbours created by the ADM system became a variable in an algorithm and a trigger for the assessment.

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204 Martini, Fn. 56, page 1021; Sesing/Tschech, Fn. 17, page 26.

205 See above 2.3.1.2.

206 Angwin/Larson/Mattu/Kirchner, Machine Bias, https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing (last accessed on 1 April 2023).

Section 1 of the AGG should therefore be expanded to include a discrimination criterion that covers this disadvantage due to **relationships**. Such a characteristic would go beyond the area of associated discrimination, i.e. discrimination due to a close relationship to another person who belongs to a group of persons protected under Section 1 of AGG[207] since it would not depend on the fact that the other persons belong to such a group and are particularly protected. The discrimination resulting from a relationship that is only based on statistical correlation would be covered.

Such a solution would correspond to the fundamental conception of the AGG as a closed system with a conclusive catalogue of discrimination grounds and would preserve this character of the law.[208] At the same time, a discrimination ground covering relationships would be open enough to address the most diverse statistical correlations identified by ADM systems that lead to discrimination.

3.1.2.2   Addition to the legal definition of Section 3, paragraph 2 of the AGG

Section 3, paragraph 2 of the AGG contains the legal definition of indirect discrimination. In both national and European jurisprudence, discrimination by ADM systems is qualified as indirect discrimination; however, alternative proposals for a classification show that this interpretation is not compelling.[209] Therefore, a clarification within the framework of Section 3, paragraph 2 of the AGG is necessary or required.

According to Section 3, paragraph 2 of the AGG, indirect discrimination occurs when apparently neutral rules, criteria or procedures discriminate against a person on a ground mentioned in Section 1. The question arises whether ADM systems can already be considered "procedures" in the sense of the legal definition or whether an explicit extension of the legal definition should be made.

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207 Sutschet, Assoziierte Diskriminierung (Associated discrimination), EuZA 2009, page 245.

208 Müller, Fn. 9, page 224; for more details, refer to other conceptual approaches Gerard/ Zuid-erveen Borgesius, Protected Grounds and the System of Non-Discrimination Law in the Context of Algorithmic Decision-Making and Artificial Intelligence, Colorado Technology Law Journal, Vol. 20 (2022), page 1, 60 et seq.

209 See above 1.2.1.5.

According to the wording of Section 3, paragraph 2 of the AGG, it is not excluded to include automated procedures such as ADM systems, especially since they work neutrally and objectively according to their external claim. However, such a broad interpretation is contradicted by the fact that the enumeration in Section 3, paragraph 2 is more likely to be aimed at covering (legally) formal procedures. This would also be in line with the rest of the system of Section 3, paragraph 2 of the AGG, which also takes up legal categories with "provisions" and "criteria" (neutral criteria in distinction to the discrimination categories of Section 1 of the AGG). There is therefore legal uncertainty as to whether ADM systems are already covered by the legal definition of Section 3, paragraph 2 of the AGG. However, this systematic argument could also speak against including ADM systems as a further category in the legal definition. They are not a legal category, as due to their highly dynamic development, inclusion in the legal definition would possibly increase ambiguities rather than contribute to legal certainty, among other things because interpretations would have to adapt to this change. However, this should be accepted in the interest of clarification.

An addition to the legal definition of Section 3, paragraph 2 of the AGG is necessary in order to include ADM systems with legal certainty.

3.1.2.3   Extension of Section 2, paragraph 1 of the AGG

Section 2, paragraph 1 of the AGG could be extended by a further paragraph, according to which disadvantages based on one of the discrimination grounds of Section 1 of the AGG, which were caused by the use of ADM systems, are explicitly included in the scope of application of the AGG.

Systematic reasons could speak against such an extension of the scope of application. The factual scope of application of the AGG is characterised by links to access to working life and to goods and services. Specific, particularly discrimination-sensitive areas of life are covered. However, the manner in which discrimination occurs is irrelevant to the scope of application of the law. A blanket inclusion of discrimination through ADM systems in the material scope of application runs counter to this concept in two ways: on the one hand, it would depend on the type and manner of discrimination in order to open up the substantive scope of application of the AGG; on the other hand, such a provision would contradict the normative purpose of the AGG, which is to

achieve a balance of interests between private autonomy and protection against discrimination by limiting it to areas of life that are particularly sensitive to discrimination.

However, a specific regulation to extend the scope of application is possible. For this purpose, the consumer protection dimension of the AGG could be taken up: According to this, such consumer contracts would have to be included in the scope of application of the AGG, where the contractual conditions vis-à-vis a consumer are based on *scoring* or *profiling*.[210] In such a constellation of structural imbalance between contracting parties, the BVerfG assumes an effect of the general principle of equality from Article 3, paragraph 1 of the GG also on legal relationships under private law.[211] Like consumer protection law, anti-discrimination law consequently also serves the purpose of mitigating the consequences of structural asymmetries between different parties. Such a solution would, on the one hand, correspond to the normative intention of Section 2 of the AGG to open the factual scope of application of the law only for selected areas of life and, on the other hand, would not contradict the systematics of Section 2 of the AGG by relegating the type and manner of discrimination (by an ADM system) to the background.

The scope of application of Section 2, paragraph 1 of the AGG should be extended to consumer contracts where the terms of the contract vis-à-vis a consumer are based on *scoring* or *profiling*.

3.1.2.4   Extension of the scope of Section 19 of the AGG

Whether an extension of Section 19 of the AGG to include the use of ADM systems is necessary depends on whether the use of ADM systems is already covered by the material scope of application of Section 19, paragraph 1 of the AGG.

Section 19, paragraph 1, no. 1 of the AGG opens up the material scope of application of the AGG for contractual obligations that are typically concluded without regard to the person on comparable terms in a large number of cases (mass transactions) or where the person's reputation is of secondary importance

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210 Refer to Martini, Fn. 2, page 237.

211 BVerfGE 148, 267, 283 f. – Stadionverbot; Gärditz in: Mangold/Payandeh, Fn. 11, page 43 f.

according to the nature of the contractual obligation and which are concluded on comparable terms in a large number of cases. As a rule, ADM systems make a large number of decisions that (can) form the basis of numerous debt relationships; in this respect, they are similar to mass transactions within the meaning of the AGG. However, it is characteristic of mass transactions that they come about without regard to the person (Section 19, paragraph 1, no. 1 of the AGG). ADM systems, on the other hand, are characterised by mass individualisation; it seems to be precisely a matter of determining the best possible contractual arrangement in relation to an individual with the help of the ADM system. However, the individualisation is carried out with the aim of achieving a (unilateral) optimisation of the conditions within the framework of the respective business model, the concrete contractual partners are usually not important to the users, the conclusion of the contract is carried out without regard to the person. ADM systems are therefore covered by Section 19, paragraph 1, no. 1 of the AGG, especially in the context of scoring.[212]

The use of ADM systems when concluding contracts is already covered by Section 19, paragraph 1, no. 1 of the AGG. An explicit inclusion is therefore not necessary.

3.1.3 Expansion of the circle of addressees of the AGG

A further problem in controlling the use of ADM systems is that responsibilities are often divided and become diffuse. This is especially true if ADM systems are based on essentially standardised developments or are used via platforms.[213] The concept of "users" and thus the addressees can become diffuse and further complicate individual legal protection. Unlike data protection law[214] the AGG does not recognise an extension of the group of addressees that would make the beneficiaries and the platforms or ADM system service providers behind them equally responsible.

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212 Also refer to Ungern-Sternberg, Fn. 41, page 1155.

213 1.3.5

214 ECJ, C 210/16, ECLI:EU:C:2018:388 – Wirtschaftsakademie (Academy of Economics) Schleswig-Holstein.

In order to take effective and systematic action against discrimination through ADM systems, however, the developers or service providers of the ADM systems behind the contractual partners as addressees of the AGG must also be covered, also with regard to a holistic effect of individual legal protection on the legal system. Section 2 of the AGG could be amended to this effect.

3.1.4 Reasonableness standard to justify discrimination as per Section 3, paragraph 2 of the AGG

In order to justify indirect discrimination according to Section 3, paragraph 2 of the AGG, it has to be weighed up within the framework of the proportionality of the discrimination whether the use of the ADM system is proportionate to the objective pursued.[215] It is questionable which standard should be applied for the assessment of reasonableness.

One yardstick could be the ADM system's susceptibility to discrimination. If it can be proven that an ADM system is not susceptible to discrimination, for example because it is based on an essentially non-discriminatory database or has operated in a non-discriminatory manner in the past, the hurdle for proportionality is lower or, in the opposite case, higher. This proof should be provided by the users of the ADM system, who regularly have access to this information. Furthermore, this interpretation of adequacy creates a meaningful and legally intended incentive to minimise the susceptibility of an ADM system to discrimination.

Accordingly, such a standard is only effective if, in the event of a dispute, the users of the ADM system have to demonstrate and prove that the ADM system used is not susceptible to discrimination.[216]

Whether this is already the case according to the existing rules on the burden of proof is not unproblematically given, since in the context of Section 3(2) of the AGG, it is disputed who bears the burden of presentation and proof for the

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215 See above 2.3.4.3.
216 Equality Report BReg (2020), Fn. 122, page 138 and page 169.

(lack of) justification. In particular, the legislative history speaks in favour of the claimants having to prove the lack of justification, as the explanatory memorandum of the law classifies the existence of an objectively justified reason as a precondition for a claim.[217] However, the probably prevailing opinion considers this idea of the legislator – with convincing reasons – to be irrelevant and speaks in favour of the burden of proof of the opponents of the claim.[218] For them, in this case the users of the ADM system, the justification is a favourable provision that they have to explain and prove according to general national rules of distribution of evidence.[219] In addition, only they tend to know the reason for the discrimination.[220]

The standard of susceptibility to discrimination could also be used in the context of a justification according to Sections 5, 8–10 or 20 of the AGG in the examination of reasonableness. The fact that the justification threshold of these grounds for justification is significantly higher than the threshold under Section 3, paragraph 2 of the AGG[221] is unproblematic for the basic transferability of such a standard. A comparatively higher threshold can still be taken into account. It is indisputable that the opponents of the claim have to present and prove the existence of the grounds for justification according to Sections 5, 8–10, 20 of the AGG,[222] so that the questions of proof do not arise here.

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217 BT-Drs. 16/1780, 33; BAG NZA 2011, 1412, para. 26; Bauer/Krieger/Günther, Fn. 53, AGG Section 3, para. 37; Schlachter Fn. 117, Section 3, para. 13.

218 For more details, refer to BAG NZA 2017, 715, para. 40 et seq.; Horcher in: Hau/Poseck (Publisher), BeckOK BGB, 1.2.2023, AGG Section 3, para. 54; Roloff in: BeckOK, Fn. 113, AGG Section 3, para. 22; Thüsing in: MüKoBGB, Fn. 123, AGG Section 22, para. 21.

219 BAG NZA 2017, 715, para. 41.

220 BAG NZA 2017, 715, para. 41, from which they deduce an incompatibility with Union law; Roloff, Fn. 113, AGG Section 3, para. 22.

221 Bauer/Krieger/Günther, Fn. 53, AGG Section 22, para. 32.

222 Bauer/Krieger/Günther, Fn. 53, AGG Section 22, para. 9.

3.2 The role of institutional actors

In addition to strengthening the *individual legal protection possibilities* of the entities affected by discrimination through ADM systems, the institutional actors (ADS, authorities, users) must be involved and strengthened or made responsible in order to close the existing protection gaps and improve protection against discrimination through ADM systems.

3.2.1 Extension of the competence of the Anti-Discrimination Agency

A higher level of protection could be achieved by extending the competences of the ADS. The ADS is designed to support those affected by discrimination and refer them to specialist advice; it is not assigned any direct or indirect right of action or even the authority to act on behalf of a person who has been discriminated against and to assert their claims.[223] It is questionable which mechanisms could be suitable to extend the powers of the Anti-Discrimination Agency in favour of more effective legal protection.

3.2.1.1 Right of associations to initiate legal proceedings to pursue collective rights

The right of associations to initiate legal proceedings to pursue collective rights serves to overcome imbalances by granting associations the possibility to bundle their special expertise, especially resources, for effective legal enforcement and to independently assert legal violations of individuals or the general public.[224] Especially if the economic damage caused by discrimination to the individual affected entities is only in the range of a trivial loss, the costs of proceedings are often disproportionate to the possible benefits in the event of a successful conclusion of the proceedings. The possibility of pursuing discrimination in court by means of a class action suit, irrespective of whether individuals are individually affected, would be an effective means of overcoming existing deficits in legal enforcement and, in particular, of taking action in

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223 See above 2.3.5.2.

224 Althoff, Fn. 145, page 256.

cases of *"victimless discrimination"* – indirect discrimination through ADM systems that is not noticed by the affected entities.[225]

Particularly in the case of violations of rights by ADM systems, the actual difficulties and costs of legal protection often mean that there is little motivation to take legal action. At the same time, the effects of the decisions of discriminatory ADM systems can affect a large number of addressees equally; a right of associations to initiate legal proceedings to pursue collective rights can therefore lead to fundamental decisions promoting the development of law.

Such a right of action could either result from existing legal provisions if they are applicable to discrimination; otherwise, the ADS and anti-discrimination associations could possibly be granted an independent right to initiate legal proceedings directly.

Grating of an independent right of the ADS to initiate legal proceedings (to pursue collective rights)

Due to the gaps in protection already mentioned and the challenges for effective legal protection of those affected, it seems obvious to grant institutions involved in anti-discrimination law an independent right to initiate legal proceedings and thus to follow a path that has already been emphatically taken elsewhere.

While German law used to be considerably opposed to this and saw it as a fundamental breach of the connection between subjective public law and the right to sue in order to avoid popular lawsuits, class actions have now also arrived in German law, not least due to the influence of European law. They are admissible as altruistic class actions, for example, against certain violations of law under the Injunctions Act (UKlaG), the Environmental Remedies Act (UmwRG), the Federal Nature Conservation Act (BNatSchG) or the Disability Equality Act (BGG), as well as in some federal states under the state animal protection laws.[226]

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225 For a fundamental discussion of a right of associations to initiate legal proceedings to pursue collective rights in cases of discrimination, refer to Berghahn/Klapp/Tischbirek, Fn. 133; Ponti/Tuchtfeld, Fn. 163; Orwat, Fn. 2, page 135; Herberger, Verbandsklageverfahren für diskriminierungsrechtliche Ansprüche (Class action suit procedure for claims under discrimination law), RdA 2022, page 220.

226 Weber, Legal Dictionary, class action.

What these legally granted rights of associations to initiate legal proceedings to pursue collective rights have in common is that they entitle associations, but not authorities, to sue.

It is therefore questionable whether the ADS, as a professionally independent contact point at the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (BMFSFJ) for people affected by discrimination,[227] could be granted such a right of action at all alongside the anti-discrimination associations.

The ADS was established at the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth on the basis of Section 25, paragraph 1 of the AGG. The ADS is provided with the necessary material and personnel resources to fulfil its tasks (Section 25, paragraph 2, sentence 1 of the AGG). It performs its tasks in an independent manner (Section 27, paragraphs 2 and 3 of the AGG) and is headed by the Independent Federal Anti-Discrimination Commissioner (Section 25, paragraph 3 AGG). The Independent Federal Anti-Discrimination Commissioner is independent in the exercise of their office and subject only to the law (Section 26a, paragraph 1, sentence 2 of the AGG). Thus, due to its legal construction, the ADS is in any case a body that, with regard to its appointment[228] and the performance of its tasks,[229] has a close state involvement. This involvement could speak against granting the ADS the right of associations to initiate legal proceedings to pursue collective rights, since otherwise the state would be unilaterally involved on the side of a party in a civil law dispute through the vehicle of an action by associations.

Such participation is considered problematic by critics with regard to the general principle of equal treatment under Article 3, paragraph 1 of the GG, since such unilateral support would mean a privileging of individual groups in

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227 https://www.antidiskriminierungsstelle.de/DE/ueber-uns/gesetzliche-grundlagen/gesetzliche-grundlagen-node.html (last accessed on 1 April 2023).

228 Refer to Section 25, paragraph 1 of the AGG.

229 Refer to the functional concept of authorities, which focuses on "the material performance of administrative tasks under public law, not the organisational incorporation into the (direct) state administration", Schönenbroicher, in: Mann/ Sennekamp/Uechtritz, VwVfG (Administrative Procedures Act) Section 1, para. 45.

comparison to victims of other civil law offences.[230] Likewise, a right of an authority to initiate proceedings to pursue collective rights could constitute a violation of the civil procedural law requirement of equality of arms between the parties[231]. While the position of one party would receive support and assumption of the process and the litigation risk by a professional body of the state, the other party would have to assert itself in the process without this support. By bringing a class action in a specific case, the state, through the agency bringing the action, would make the accusation that a violation of rights had occurred on its own; the state would therefore take sides against private individuals.

It is characteristic for class actions to allow an exception to the constitutionally anchored principle, which requires personal involvement for the opening of legal action (Article 19, paragraph 4, sentence 1 of the GG), within the framework of some legally determined subjects of proceedings and in favour of selected associations (refer to example in Section 3 of the Environmental Remedies Act (UmwRG)).[232] This exception is to apply, for example, for the control of official decisions, if otherwise, due to a lack of personal involvement[233] (environmental law, animal protection) or factual inferiority (consumer protection, protection of the disabled), there is a risk of enforcement deficits. In some cases, these regulations also follow from European legal obligations to use class actions (refer to Article 9, paragraph 2 of Directive 2000/78/EC (Framework Directive on Equal Treatment)).

Discrimination through ADM systems is structurally comparable to these exceptions. As shown, it is systematically extremely difficult for those affected to uncover discrimination and take effective action against it. Enforcement deficits are therefore to be expected as a rule, especially in the case of victimless discrimination.[234] At the same time, there is a structural imbalance between those affected by discrimination and the users of ADM systems. The introduc-

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230 Already with regard to the regulations made in Section 23 of the AGG Philipp, NVwZ 2006, 1235, 1238 f.

231 Refer to Becker-Eberhard, Munich Commentary on ZPO, prior to Section 253, para. 3.

232 Deinert/Welti/Luik/Brockmann, Keyword Commentary on Disability Law, class action, para. 1.

233 In the environmental law, refer to BVerwG NVwZ 2008, 1010, para. 6.

234 See above 2.3.5.1.

tion of a right of associations to initiate legal proceedings to pursue collective rights into anti-discrimination law is therefore not contrary to the system. This is also supported by the fact that essential parts of the AGG transpose European directives. European law is much more open to access to court and repeatedly requires a break with (German) legal traditions for effective enforcement of the law.[235] However, if, especially in the case of ADM systems, the anti-discriminatory effect of the transposing law is not effectively guaranteed because the AGG does not provide sufficient legal protection, it could be necessary, in order to avoid legal disputes up to the ECJ, to also provide the ADS with a right to initiate legal proceedings to pursue collective rights. Its status as a public authority does not argue against this. The threat of a systematic lack of legal protection in the case of discrimination by ADM systems justifies, in principle, an extension of the right of associations to initiate legal proceedings to pursue collective rights to the ADS as well, since it is independent to a certain extent despite its public law character.

However, it must be stated that this would be a major step in terms of the legal system that the legislator would have to take; moreover, the resources of the ADS would then have to be considerably expanded in order to be able to actively carry out detection and legal prosecution.

The right of associations to initiate legal proceedings to pursue collective rights in accordance with the Injunctions Act (UKlaG)

If one assumes that the legislature can in principle also grant the ADS, as a federal authority with a certain degree of independence, a right of action by associations, one could possibly link such a right of associations to initiate legal proceedings to pursue collective rights with the UKlaG.

The UKlaG enables bodies entitled to file claims under Sections 3, 4 of the UKlaG (such as consumer protection associations, business associations, chambers of industry and commerce) to assert claims for injunctive relief and revocation arising from the use of general terms and conditions (Section 1 of the UKlaG) or in the case of the violation of consumer protection laws in "a manner other than through the use or recommendation of general terms and conditions" (Section 2, paragraph 1, sentence 1 of the UKlaG). Whether

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235 Only refer to ECJ, C-319/20, ECLI:EU:C:2022:322.

Section 19 of the AGG can be qualified as a consumer protection law in this sense is controversial:[236]

- *Against* the character as consumer protection law it is argued that the AGG primarily serves the protection of the right of personality, the discrimination of certain groups of the population is to be prevented.[237]
- The character of Section 19 of the AGG as a consumer protection law is *supported* by the fact that the AGG is precisely intended to protect against the impairment of the development of personality rights through discrimination and that a separation of the "consumer" from the "personality as such" is a theoretical construct that abridges the consumer protection rights of minorities.[238]

For the specific case of legal protection against discrimination by ADM systems, Section 2, paragraph 2, sentence 1, no. 11 of the UKlaG could be relevant, as it mentions data protection laws as one of the regular examples and grants legal protection against unlawful automated individual decisions (Article 22 of the GDPR) if the data processing is intended to serve economic business transactions. However, the regulations on data processing in the context of the conclusion of a contract are not included, because Section 2, paragraph 2, sentence 2 of the UKlaG excludes them. The conclusions from the data processing, i.e. the (discriminatory) decision of the ADM system, are also not covered by the provisions of the GDPR and are therefore not included in the scope of application of the UKlaG. Significant gaps in legal protection therefore remain.

A possible way to close these gaps in legal protection is to expand the scope of application of the UKlaG in such a way that actions to stop an unlawful discriminatory business practice become possible. An explicit inclusion of the

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236 Braunroth, Repräsentative Kollektivklagen im Antidiskriminierungsrecht (Representative collective actions in anti-discrimination law) 2021, page 108; Welti/Wenckebach, Schleswig-Holstein OLG: Sachlicher Grund für pauschales Verbot der Mitnahme von E-Scootern in Bussen des öffentlichen Personennahverkehrs (Factual reason for blanket ban on taking e-scooters on local public transport buses), VuR 2016, page 190, 195; Köhler, in: Köhler/Bornkamm/Feddersen, UKlaG Section 2, para. 2.

237 OLG Schleswig-Holstein, NJW-RR 2016, 749, 750; Martini, Fn. 2, page 310.

238 Welti/Wenckebach, Fn. 236, page 195.

AGG in the standard examples of Section 2, paragraph 2 of the UKlaG is also possible due to its consumer protection dimension.[239]

However, the ADS is not a consumer protection association in the sense of the UKlaG, since it does not represent consumer interests as a registered association as a statutory task (not on a commercial basis) (Section 4, paragraph 2 of the UKlaG).

Anti-discrimination associations in the sense of Section 23, paragraph 1 of the AGG, on the other hand, could be registered as eligible bodies under the UKlaG, if they do not only provide education and advice with regard to consumer protection in the context of a subordinate secondary task.[240] For example, the Bundesverband Selbsthilfe Körperbehinderter (Federal Association of Self-Help for the Physically Disabled) is recognised as a qualified body under Section 3, paragraph 1, no. 1 of the UKlaG, and has already conducted proceedings with reference to the AGG.[241]

However, only claims for injunctive relief and revocation can be asserted with actions under the UKlaG, so that, in contrast to the genuine class action, the involvement of a concrete individual and their "case" is required. They are thus smaller in scope than a genuine class action. This shortcoming, combined with the fact that in any case of discrimination by ADM systems, considerable gaps in legal protection remain, makes the granting of a right of associations to initiate legal proceedings to pursue collective rights under the UKlaG unattractive even for anti-discrimination associations. The possible advantages are probably disproportionate to the (legislative) effort if ADSs were also to be included in the scope of application of the UKlaG.

3.2.1.2 Introduction of a right of associations to initiate legal proceedings to pursue collective rights into the AGG

The evaluation of the AGG in 2016 already called for the introduction of a *qualified right to initiate legal proceedings to pursue collective rights* for anti-discrimination associations and a right of the ADS to initiate legal proceedings to

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239 Vergleiche Welti/Wenckebach, Fn. 236, page 195.

240 Köhler, Fn. 236, Section 4, para. 6.

241 OLG Schleswig-Holstein, NJW-RR 2016, 749, 750.

pursue collective rights.[242] The basic arguments for this are still valid, the demand is still virulent, also and even more so with regard to discrimination by ADM systems.[243] The risks of discrimination by ADM systems have even increased the urgency of such a right of associations to initiate legal proceedings, since in cases of algorithmic discrimination the hurdles of individual legal enforcement are particularly high due to the complexity of the technical processes.

Effective protection against discrimination is a challenge for society as a whole and should not depend on the resources, knowledge, preferences and particularities of the life situation of individual victims. Their adoption is also not alien to the legal system.[244] Section 15 of the Equal Opportunities for Persons with Disabilities Act (Behindertengleichstellunggesetz, BGG), for example, enables class actions to establish violations of the essential provisions of the BGG. Section 9 of the Berlin State Anti-Discrimination Act (Landesantidiskriminierungsgesetz Berlin – LADG) allows for collective actions at least against discriminatory state action.

Particularly in the case of violations of the law by ADM systems, the actual difficulties and costs of individual legal protection mean that there is little motivation to assert the violation of discrimination prohibitions in court. At the same time, the effects of the decisions of discriminatory ADM systems can affect a large number of addressees at the same time. While the harm to individuals may be small, the overall harm caused by the discriminatory ADM system is often significant.

European law also requires the introduction of a genuine right of class action suits law. The Equal Treatment Directives oblige Member States to sanction violations of discrimination prohibitions by "effective, proportionate and dissuasive" measures.[245] According to the prevailing view, the current provision

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242 Berghahn/Klapp/Tischbirek, Fn. 133, pages 159, 196.

243 Berghahn/Klapp/Tischbirek. Fn. 133, page 161; Digital Autonomy Hub, Algorithmenbasierte Diskriminierung: Warum Antidiskriminierungsgesetze jetzt angepasst werden müssen (Algorithm-based discrimination: Why anti-discrimination laws need to be adapted now), Policy Brief #5, 2022, page 8.

244 Althoff, Fn. 145, page 256.

245 Article 15 of the Directive 2000/43/EC, Article 17 of the Directive 2000/78/EC, Article 25 of the Directive 2006/54/EC.

of Section 23, paragraph 2 of the AGG, which grants anti-discrimination associations the possibility of assistance, should formally meet these requirements.[246] However, as already explained, this is not convincing: although assistance rights may be sufficient with regard to "classic" discrimination, in cases of discrimination through ADM systems, Section 23, paragraph 2 of the AGG as an individual legal protection instrument does not constitute an "effective, proportionate and dissuasive" sanctioning possibility within the meaning of the Equal Treatment Directive: discrimination through ADM systems cannot as a rule be reduced to individual concern, their effects go far beyond the individual affected precisely because of their characteristic mass use. If they have a disadvantaging effect, then this disadvantage is structurally conditioned.

At the same time, the hurdles of individual legal enforcement are particularly high due to the technical complexity of the processes. The tools of individual legal protection, as provided by the AGG so far, cannot cover this dimension. An instrument of collective legal protection, such as the genuine class action, is needed to do justice to this characteristic and to punish systemic violations of discrimination prohibitions in the use of ADM systems, independently of the individual affected entities. Therefore, a right of associations to initiate legal proceedings to pursue collective rights is also required under European law.[247]

The concern about waves of lawsuits by "warning associations" can be countered by granting the right to bring a class action – as in the UKlaG – only to those associations that meet certain requirements and are included in a corresponding list.[248]

Such qualified anti-discrimination associations should therefore be granted a genuine right to initiate legal proceedings to pursue collective rights.

In addition, the ADS should be granted a right to initiate legal proceedings to pursue collective rights, contrary to the concerns occasionally expressed in the literature regarding its role in civil disputes.

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246 Berghahn/Klapp/Tischbirek. Fn. 133, page 160 with further proofs.

247 Lauscher/Legner, Fn. 44, page 388.

248 Berghahn et al., Fn. 225, page 161.

3.2.1.3 Authorisation to act on behalf of a person who has been discriminated against and to assert their claims

An additional possibility to improve the legal protection of those affected by discrimination through ADM systems could be the authorisation of the ADS or the anti-discrimination associations to act on behalf of a person who has been discriminated against and to assert the person's rights in their own name. The State Anti-Discrimination Act of Berlin already contains such legal standing for anti-discrimination associations (Section 9, paragraph 3 of the LADG Berlin), and there are also Member States within Europe that have implemented such an authorisation.[249]

Particularly in view of the discrimination caused by ADM systems and the specific challenges in enforcing the law, the authority to act on behalf of a person who has been discriminated against and to assert their claims offers an effective means of countering the weak enforcement of anti-discrimination law. It lowers the hurdle for individual affected entities to seek legal protection against discrimination, and more discrimination becomes the subject of legal proceedings. Users of discriminatory ADM systems would be effectively held accountable, they could not "hide" behind the complexity of their system. In addition, the associated publicity would also have a general preventive effect. The achievement of the legal purpose of the AGG – the "combating of discrimination in legal transactions"[250] – would thus come a good deal closer.

The reservations about the ADS's powers in civil law disputes between private individuals (see above 3.2.1.1) make it seem advisable not to transfer the authority to act on behalf of a person who has been discriminated against to the ADS and anti-discrimination associations alike, but to empower only the anti-discrimination associations to assert the rights of discriminated persons.

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249 Refer to Chopin/Do, Developing anti-discrimination law in Europe, page 103 et seq.
250 Horcher, in: Hau/Poseck, Fn. 146, Section 1, para. 1.

3.2.1.4 Conciliation proceedings at the Anti-Discrimination Agency

In addition, a conciliation procedure before the ADS as a conciliation body could be a suitable means of improving law enforcement in cases of discrimination by ADM systems. Despite its basic character as a mediation and support body, the ADS does not have a binding, legally regulated right to arbitration. However, conciliation procedures are familiar in the context of anti-discrimination law:

— Section 15a, paragraph 1, no. 3 of the Act on the Introduction of Civil Procedure (EGZPO) opens up the possibility for the states to introduce a compulsory conciliation procedure for the amicable settlement of the conflict before a conciliation body prior to the judicial assertion of claims under the Third Section of the AGG (protection against discrimination in civil law transactions). NRW[251], Lower Saxony[252], Bavaria[253] and Schleswig-Holstein[254] have made use of this option.

— Furthermore, there is the possibility of a voluntary conciliation procedure according to the Consumer Dispute Settlement Act (VSBG). The VSBG regulates the out-of-court settlement of disputes between consumers and entrepreneurs before a recognised, commissioned or established consumer arbitration board (Section 2, paragraph 2 of the VSBG).[255] In such a conciliation procedure, the parties involved work out a proposal for a solution, which they make binding by accepting it, but which they can also reject – there is no obligation to accept it.[256] The practical significance of consumer arbitration in general, but also with regard to discrimination complaints in particular, has so far been low. Since the CDBG came into force, only a few consumer arbitrations have been carried out.[257] The reasons given for this

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251 Section 53, paragraph 1, no. 3 of the JustG NRW.

252 Section 1, paragraph 2, no. 3 of the NSchlG (conciliation before bringing an action before the local court).

253 Article 1, no. 3 of the BaySchlG (conciliation before bringing an action before the local court).

254 Section 1, paragraph 1, no. 1 of the LSchlG SH.

255 Ulrici, in: MüKo ZPO, Consumer Dispute Settlement Act, Sections 41–43, para. 13 f.

256 Ulrici, Fn. 255, para. 55 f.

257 For discrimination complaints, refer to Beigang/Boll/Egenberger/Hahn/Leidinger/Tischbirek/Tuner, Möglichkeiten der Rechtsdurchsetzung des Diskriminierungsschutzes bei der Begründung, Durchführung und Beendigung zivilrechtlicher Schuldverhältnisse (Possibilities of legal enforcement of discrimination protection in the establishment, implementation and termination of civil law obligations), 2021, page 141.

include the low level of awareness of this arbitration option among consumers, but also a low level of willingness on the part of companies to participate in such proceedings.[258]

- The conciliation body at the Federal Commissioner for the Disabled according to Section 16 of the BGG can also be seen as a possible model body.[259] According to this, persons with disabilities (Section 3 of the BGG) can voluntarily turn to the conciliation board in the event of disputes with public bodies of the Federation concerning the rights of the BGG[260] in order to settle the dispute out of court. Associations of persons with disabilities are also authorised to file an application (Section 16, paragraph 3 of the BGG). They must prove an unsuccessful attempt at conciliation in order to be able to bring a class action under Section 15 of the BGG (Section 15, paragraph 2, sentence 6 of the BGG). If no prior agreement is reached, the mediator submits a proposal for conciliation that the parties can accept – a contractual obligation only arises in the case of mutual acceptance.

There are thus models in the legal system for the establishment of a conciliation procedure with the involvement of the ADS as a conciliation body, and the question arises whether and in what form such a procedure should be established.

Due to the presumably still quite high settlement rate in anti-discrimination disputes[261] it seems reasonable to conclude that a conciliation procedure could be a low-threshold and low-cost alternative to judicial legal protection, as the willingness to settle in such cases seems to be high. However, the reasons for these high settlement rates are not clearly identifiable. This could be due to the fact that the affected entities primarily seek legal protection in court if they are able to provide the circumstantial evidence of Section 22 of the AGG in a court-proof manner, or, due to the above-mentioned challenges in obtaining effective legal protection, only those cases reach court at all in which the

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258 Steffek/Greger, Verbraucherstreitbeilegung – Zehn Optionen zur Reform (Consumer Dispute Resolution – Ten Options for Reform), ZRP 2022, page 202.

259 https://www.schlichtungsstelle-bgg.de/Webs/SchliBGG/DE/AS/startseite/startseite-node.html (last accessed on 1 April 2023).

260 In the case of disputes with state authorities and municipalities, the provisions of state law apply.

261 Mahlmann/Rottleuthner, Diskriminierung in Deutschland (Discrimination in Germany), page 373 et seq.

discrimination is obvious and serious and, for this reason, the willingness to settle is high.[262]

The interest of the users of ADM systems in an arbitration procedure could in any case be that it offers them a non-public framework to prove the non-discriminatory nature of their ADM system or to meet their burden of proof in a lawsuit without having to make the functioning of their ADM system and any trade secrets accessible to a broad public in the context of a court procedure.

Bundling anti-discrimination conciliation at the Anti-Discrimination Agency as an independent institution competent in anti-discrimination law would be logical and in the interest of all parties involved in competent conciliation. The expertise required specifically for discrimination by ADM systems could also be bundled and further developed or expanded at such a central conciliation body.

Such a conciliation procedure could be voluntary or unilaterally obligatory. One argument against the establishment of a voluntary arbitration procedure modelled on the VSBG is the presumably low willingness of users of ADM systems to participate in such a voluntary procedure. In the case of discrimination through ADM systems, the challenges for the affected entities in providing evidence are particularly great and the current design of the AGG only puts victims in a limited position to provide the necessary evidence.[263] This plays into the hands of the users of these systems and reduces the incentive to participate in voluntary arbitration. Therefore, the introduction of a unilaterally **obligatory conciliation procedure** seems preferable.[264] If the affected entities request the implementation of such a procedure, users would be obliged to participate in this conciliation procedure.

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262 Beigang/Boll/Egenberger/Hahn/Leidinger/Tischbirek/Tuner, Fn. 257, page 143.

263 See above 2.3.5.

264 Also refer to Steffek/Greger, Fn. 258, with regard to the VSBG; Beigang/Boll/Egenberger/Hahn/Leidinger/Tischbirek/Tuner, Fn. 257, page 143.

3.2.1.5 Right of access of the Anti-Discrimination Agency

In order to be able to effectively support affected entities in asserting claims based on discrimination by an ADM system, the ADS needs a right to information vis-à-vis the users of these systems. So far, there is no legal basis for the ADS's right to information; only the Independent Federal Anti-Discrimination Commissioner has a right to information vis-à-vis all federal authorities and other public bodies in the federal sector pursuant to Section 28, paragraph 4, sentence 1 of the AGG. It does not have a comparable right for the private sector either. This deficit is particularly serious in the context of discrimination stemming from ADM schemes.

A right to information would have to be designed in such a way that it balances the interests of the persons concerned in comprehensive information on the one hand and the interests of the users in the protection of their business secrets on the other. In terms of content, the ADS must be granted information about the algorithm on which the use is based, as well as training, test and application data. In the sense of improving legal protection against discrimination by ADM systems, information about the functioning of an ADM system on which the use is based is necessary.[265] The protection of the users of ADM systems could be guaranteed by confidentiality obligations and *in camera* procedures.

In principle, the AGG would be the right starting point for such a right to information of the ADS, where it is institutionalised and where its powers are regulated. However, this is not possible without a legal extension of these powers. Until now, the ADS has been conceptualised as *an advisory and supporting institution*. A right to information to which it is directly entitled is in principle not necessary for the fulfilment of this task and could therefore be perceived as contrary to the system. However, it must be considered that already within the framework of the task assigned to it of working towards an amicable settlement with the parties involved (Section 27, paragraph 2, no. 3 of the AGG), a right to information of the ADS would be appropriate in the interest of a well-founded assessment of the case in question, so that it could be realised even without a comprehensive extension and change of the powers of the ADS. If, on the other hand, the powers of the ADS were extended to include a right to

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265 Hacker, page 1173 f.

initiate legal proceedings to pursue collective rights[266], a right to information associated with this would be necessary in the interest of effective legal protection and a statutory link in the correspondingly modified AGG would be coherently possible.

3.2.1.6   Investigation rights according to the Artificial Intelligence Act

The investigation rights of the ADS could be derived from the rights of access granted to certain national authorities and public bodies under Article 64 of the AI Regulation or a qualification of the ADS as a market surveillance authority under Articles 63, 64, paragraphs 1, 2 and 65 of the Artificial Intelligence Act.

Article 64 of the Artificial Intelligence Act
Such an investigation right of the ADS could result, for example, from Article 64 of the Artificial Intelligence Act. Article 64 of the Artificial Intelligence Act is intended to regulate the powers of the authorities or public bodies responsible for the protection of fundamental rights. It states that national authorities or public bodies that monitor or enforce compliance with European Union law on the protection of fundamental rights in relation to the use of high-risk AI systems listed in Annexe III shall have the power to request and inspect all documents drawn up or kept on the basis of this Ordinance, provided that access to these documents is necessary for the exercise of their mission within the scope of their powers, Article 64, paragraph 3, sentence 1 of the Artificial Intelligence Act. The public body must inform the market surveillance authority[267] thereof, paragraph 3, sentence 2. At the same time, if the documentation received from the actor concerned is not sufficient, it may request the market surveillance authority to carry out technical tests of high-risk AI systems by means of a reasoned application, paragraph 5.

Whether the ADS is a public body within the meaning of this article of the Artificial Intelligence Act has not yet been clearly clarified. The Artificial Intelligence Act does not contain a legal definition of the term. As a professionally independent contact point assigned to the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, the ADS is in principle a public body. The status of the ADS as a *public body* within the meaning of Article 64,

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266 See above 3.2.1.1.

267 Refer to this regarding their role.

paragraph 3 of the Artificial Intelligence Act is further supported by the fact that a broad understanding of the term applies in other regulatory areas of European Union law.[268] Moreover, the ADS was established on the basis of obligations under the EU Law.[269] Another argument in favour of subsuming the ADS under Article 64 of the Artificial Intelligence Act is that the Council's draft explicitly states that public bodies for the protection of fundamental rights "including the right to non-discrimination" are included.[270] It can therefore be assumed that the Council explicitly had the anti-discrimination agencies existing under the EU Law in mind. This is also supported by the fact that recital 79a of the Council draft – like recital 79 of the Artificial Intelligence Act before it – explicitly names equality bodies as bodies entitled to access.

However, according to the wording, the right of access to documentation produced on the basis of the Artificial Intelligence Act is linked to existing powers of the ADS. Accordingly, documents can only be requested and inspected to the extent that access to them is necessary for the exercise of their mandate within the scope of their powers, Article 64, paragraph 3, sentence 1 of the Artificial Intelligence Act. Accordingly, the rights of investigation under Article 64 of the Artificial Intelligence Act will be based on the current role of the ADS as a mediation and support body and will not go beyond its powers there. Here, it will be necessary to wait for the further course of legislation, which may provide an answer to the question of whether the ADS will be explicitly covered by this norm or whether, if necessary, the national legislator will have to make changes to the position of the ADS in order to grant it the corresponding investigation rights.

The rights associated with Article 64 of the Artificial Intelligence Act would in themselves be an effective starting point in the effort to enable the ADS to improve the enforcement of rights in cases of discrimination by ADM systems and the legal protection possibilities offered by the AGG.

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268 Refer to the definitions in Article 2, no. 1, 2 of Directive 2003/98/EC, to which the EDSA also refers for the interpretation of the term in the GDPR, Guidelines 2/2020, para. 8, under https://edpb.europa.eu/system/files/2021-05/edpb_guidelines_202002_art46guidelines_international-transferspublicbodies_v2_de.pdf (last accessed on 1 April 2023).

269 Especially article 13 of the Anti-Racism Directive; Article 8 a of Directive 76/207/EEC – Gender Directive; Ernst/Braunroth/Franke/Wascher AGG, Section 25, para. 1.

270 https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CONSIL:ST_15698_2022_INIT&from=EN (last accessed on 1 April 2023).

Articles 63, 64, paragraphs 1, 2, 65 of the Artificial Intelligence Act
It is possible that the ADS can also be qualified as a market surveillance authority in the sense of Article 65 of the Artificial Intelligence Act. This would give it an even stronger position – compared to the investigation rights under Article 64 of the Artificial Intelligence Act – with significantly more far-reaching investigation rights and further remedial measures.

According to Article 65, paragraph 2 of the Artificial Intelligence Act, market surveillance authorities shall examine the AI system concerned with regard to compliance with all requirements and obligations laid down in this Ordinance. In doing so, they shall have full access to the training, validation and test data sets used by the providers, including via application programming interfaces (API) or other technical means and tools suitable for remote access, Article 64, paragraph 1 of the Artificial Intelligence Act, and, where necessary for assessing the compliance of the high-risk AI systems with the requirements laid down in section 2 of Title III, shall be granted access to the source code of the AI system upon their reasoned request, paragraph 2.

Building on this basis of investigation, the powers of the market surveillance authority go as far as requiring the actors concerned to take corrective measures, paragraph 2; in case of non-compliance of the system, it has the power to take appropriate provisional restrictive measures to prohibit or restrict the provision of the AI system on its national market, to withdraw the product from the market or to recall it, Article 65, paragraph 5 of the Artificial Intelligence Act. The market surveillance authorities are supported in this by other public bodies with which they can exchange information and initiate investigations. The investigative and, in particular, remedial powers of market surveillance authorities thus go significantly further than those of authorities and public bodies under Article 64 of the Artificial Intelligence Act. The competence of the ADS would be massively expanded and its role in anti-discrimination law significantly strengthened.

According to Article 10, paragraph 2 of Ordinance (EU) 2019/1020, to which Article 63 of the Artificial Intelligence Act refers with regard to AI systems, market surveillance authorities are to be designated by the Member States on their respective territories and notified to the Commission. Accordingly, the national legislator would have to clarify that the ADS is to act as such an authority and communicate this to the Commission.

3.2.2 Supervisory powers of the authorities

In view of the challenges outlined above with regard to the protection against discrimination by ADM systems, the question arises as to the necessity of state supervision. In many cases, checking algorithmic systems for discrimination requires access to the training and test data or even the source code of the system. This applies in particular to individualised offers such as dynamic, personalised pricing, where it will be difficult to detect a disadvantage without insight into the internal data due to the lack of visibility of comparable facts;[271] in the case of self-learning algorithms, access to the training data will be necessary.[272] Such data is usually particularly well protected as business secrets,[273] so that the possibilities of access for private persons and institutions under private law are limited. A supplementation of the protection of individual rights already guaranteed by the AGG by official *supervisory powers* is therefore particularly necessary in the interest of effective preventive protection against discrimination. Data protection law can serve as a model for such a solution.

In European data protection law, the model of state control has been anchored from the beginning,[274] the main function of the European data protection supervisory authority is that of a guardian of fundamental rights.[275] It is designed as a counterbalance to power and information asymmetries between the data processing authority and the data subject, which follow from the characteristics and peculiarities of the regulatory object "data processing". These asymmetries of power and information must be countered by effective external supervision of compliance with data protection regulations.[276]

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271 SVRV, Fn. 129, page 40; Busch Fn. 162, page 53.

272 Hennig-Bodewig, Fn. 162, page 171.

273 Busch, Fn. 162 with reference to the YELP decisions (KG, MMR 2016, 352; OLG Hamburg, MMR 2016, 355) and the Schufa decision (BGH, NJW 2014, 1235); also refer to Podszun/Busch/Hennig-Bodewig, Fn. 162, page 171.

274 In 1970, the world's first data protection law in Hesse already provided for institutionalised data protection supervision, Kibler, Datenschutzaufsicht im europäischen Verbund (Data protection supervision in the European network), 2021, Page 4 f.

275 ECJ, C-518/07, ECLI:EU:C:2010:125, 21 et seq., especially 23 – Commission / Germany; ECJ, C-614/10, ECLI:EU:C:2012:631 – Commission / Austria; ECJ, ECLI:EU:C:2014:237, 47 f. – Commission / Hungary; also refer to Spiecker gen. Döhmann, Fn. 141, page 97 (100 f.); Thomé, Reform der Datenschutzaufsicht (Reform of data protection supervision), 2014, page 68, 121 f.

276 Spiecker gen. Döhmann, Fn. 141, page 97 (104 et seq.).

Data protection law and anti-discrimination law overlap in their protective purposes – and as far as the protection against discrimination by ADM systems is concerned, also in their scope of application. The object and purpose of data protection law is the protection of the fundamental rights and freedoms of natural persons (including the equality rights under Articles 20, 21 and 23 of the CFR and Article 3 of the GG) in connection with the processing of personal data, Article 1, paragraph 2 of the GDPR. The protection against discrimination therefore falls within the remit of data protection supervisory authorities insofar as it is related to the processing of personal data. This will regularly be the case with the use of algorithmic systems vis-à-vis an individual.[277] However, the subject matter of data protection law is *the processing operation* and not *an algorithm or software* that contains numerous data processing operations. If an algorithm processes personal data, the data protection supervisory authority can check, for example, whether the controllers have correctly assessed the risk of discrimination and have taken appropriate technical and organisational measures to reduce it in accordance with Article 25, paragraph 1 of the GDPR; or whether, contrary to Article 22, paragraph 1 of the GDPR, a decision based exclusively on automated processing has been taken without consent or a legal basis from paragraph 2. For this purpose, the authority also has corresponding information powers vis-à-vis the controller pursuant to Article 58, paragraph 1, point e of the GDPR. However, the data protection supervisory authority is not authorised to investigate developers or users as to whether an algorithm or software contains discriminatory *biases* or has made a discriminatory decision towards a data subject in a specific case.

However, it is precisely such a supervisory function that is necessary because of the considerable risks of the use of ADM systems and the difficulty of enforcing the law. Consequently, **official supervisory powers should be introduced specifically with regard to algorithm-based disadvantages caused by ADM systems**, which go beyond the already existing powers of the data protection supervisory authority. Such specific powers of supervision over algorithmic systems could either be conferred on data protection supervisory authorities on a supplementary basis,[278] or they can be transferred to another specialised

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277 Refer to the processing of personal data by artificial intelligence systems, Spiecker gen. Döhmann, AI and Data Protection, in: DiMatteo/Poncibò/Cannarsa, Handbook of Artificial Intelligence – Global Perspectives on Law and Ethics, page 133.

278 According to the SVRV, Fn. 129, page 76, this would be politically difficult to implement in view of the competences of the states.

authority – such as the ADS. In this context, the demand is also made that cartel law must be more closely interlinked with consumer law and that the Federal Cartel Office be given supervisory powers over the digital economy.[279]

Wherever regulatory oversight is assigned, if it is to be effective, it must have the necessary rights of access and information required to review algorithmic systems, i.e. it must be able to demand access to a system's training and control data and source code if necessary, and it must have sufficient resources to adequately fulfil its task.[280] Only if the ADS can also deploy the necessary human and material resources can it exercise its powers effectively. Additional confidentiality obligations can take into account the interest of the users to protect their business secrets even in this case.

With a corresponding extension of its competences,[281] however, the ADS is particularly suitable as a supervisory authority due to its special expertise in anti-discrimination law and its role as a contact point for the entities affected by discrimination.

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279 Refer to the concept of a digital agency for Germany based on models from the UK, USA and the Netherlands SVRV, Fn. 129, page 71 et seq.; critically Körber, Das Bundeskartellamt auf dem Weg zur Digitalagentur? (The Federal Cartel Office on its way to becoming a digital agency?), WuW 2018, 173; allgemeiner zur Einbindung des BKartA in den Verbraucherschutz (general information on the involvement of the BKartA in consumer protection), Podszun/Busch/Hennig-Bodewig, Fn. 129.

280 Refer to the comments on investigation rights under the Artificial Intelligence Act 3.2.1.6.

281 See above 3.2.1.

3.2.3   Self-regulatory measures on the part of users

The obligation of users of ADM systems to submit to regulatory measures with regard to quality and transparency standards, compliance with which is not controlled by the state but by private parties, could be a means of improving legal protection against disadvantageous decisions by ADM systems that protects the business interests of the users and is thus less intervention-intensive. Such self-regulatory measures are well-known means of improving compliance and preventing enforcement deficits, especially in the area of technology regulation, whereby different regulatory areas provide for different measures or designs of self-regulatory measures.

- **Conformity assessment procedures** are a variant of a self-regulatory measure. On the one hand, these can be designed as internal control procedures, as in the Artificial Intelligence Act in Articles 19, paragraphs 1 and 43 of the Artificial Intelligence Act, in which users of an ADM system assess and evaluate the quality management and technical documentation themselves.[282] However, it is also possible for the conformity assessment to be carried out by third parties, such as state-notified bodies.[283] A conformity assessment could have an external effect through a marking or a declaration.
- Another measure of self-regulation could be **certifications**, as they are legally provided for in data protection law in particular. In contrast to the Artificial Intelligence Act, which subjects users to a form of mandatory conformity assessment, data protection law provides for a voluntary certification procedure in Article 42 of the GDPR. It involves a comprehensive data protection review of the processing operations and is thus significantly more intrusive. On the other hand, certification has a verification and guarantee function with regard to compliance with certain legal requirements in the event of an official control.[284] In data protection law, certification bodies are also subject to public control, but here in the form of accreditation by the supervisory authorities, see Article 43 of the GDPR.

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282 Ebert/Spiecker gen. Döhmann, Fn. 187, page 1191.

283 Refer to Article 19, paragraphs 1, 48, 49 of Artificial Intelligence Act Ebert/Spiecker gen. Döhmann, Fn. 187, page 1191.

284 Müllmann/Spiecker gen. Döhmann, Extra DSGVO nulla salus (No salvation outside GDPR)? On the admissibility of non-accredited data protection seals according to Article 42 f. GDPR, DVBl 2022, pages 208, 211.

- **Quality management systems** can also ensure compliance with legal and technical requirements or documentation and transparency obligations. Within the framework of such a system, mandatory written rules, procedures and instructions regarding different aspects of the system can be established and their compliance documented. This also puts the users of such systems in a position to quickly recognise deviations from processes and requirements and implement countermeasures.

- Finally, the establishment of technical standards is also a special form of self-regulation, especially in view of their emergence. Established technical standards can be referred to within the framework of legal rules. By using undefined legal terms, such as "state of the art", it is possible for the legislature to define a variable level of security that can react flexibly to technical innovations and changed threat situations. The content of the requirements for the security to be guaranteed by law is then usually determined by using technical and organisational standards, such as DIN or ISO standards.[285] The standards are developed by industry representatives as members of the national or international standardisation organisations. While this ensures that practicable and relevant requirements are developed and formulated, there is also the danger that the rule-making process is determined unilaterally by large players or that too low a level is set with a one-sided direction of interest. Through the participation of public actors – such as the ADS – either already in the development or also in the later determination of the adequacy of standards, there is the possibility of the state exerting influence as well as an anticipatory suitability test. It is also possible, however, for an authority to specify a catalogue of requirements, as for example in the case of Section 11, paragraph 1a, sentence 2 of the Energy Industry Act (EnWG). Environmental law, with semi-governmental standards developed by expert committees[286] or the procedure for identifying the best available technology known as the "Seville Process"[287] also knows possibilities for the binding incorporation of government standards developed by experts, which could also be used in the (self-)regulation of ADM systems.

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285 Hoffmann/Müllmann, Das Standardsetzungsmodell des IT-Sicherheitsrechts im Kontext kritischer Infrastrukturen, Die Verwaltung (The standardisation model of the IT security right in the context of critical infrastructures, the management) 55 (2022), Book 4, forthcoming.

286 Refer to Hoffmann/Müllmann, Fn. 285.

287 Refer to Hoffmann/Müllmann, Fn. 285.

The establishment of measures for self-regulation in the context of the use of ADM systems seems both helpful and sensible.

As shown, numerous tested and established instruments can be used to regulate the technology. The scope of application and the reach of these measures would have to be broadly defined in view of the importance of protection against discrimination. Against this background, for example, the establishment of a system with binding certifications by state-accredited bodies is preferable to measures with few objectifying components such as self-assessments and evaluations. If standards are referred to by the law, it should also be ensured that these are also subject to state control or approval to a certain extent in order to take account of the concerns about the concept of self-regulation.[288] This should also apply to the inclusion of codes of conduct.

288 See above 2.5.2.

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