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LEGAL ANALYSIS ON NON-DISCRIMINATION REGULATION AND REGULATORY GAPS CONCERNING ALGORITHMIC SYSTEMS IN ESTONIA AND LITHUANIA

Project 101144709 — EquiTech - Improving response to risks of discrimination, bias and intolerance in automated decision-making systems to promote equality

The Gender Equality and Equal Treatment Commissioner's Office of Estonia

The Office of the Equal Opportunities Ombudsperson of Lithuania

Ministry of Economic Affairs and Communications of Estonia

Ministry of Justice of Estonia

Tallinn University of Technology

25.11.2024

Co-funded by
the European Union

Contributing partners:

Gender Equality and Equal Treatment Commissioner

Office of the Equal Opportunities Ombudsperson

Republic of Estonia Ministry of Economic Affairs and Communications

Republic of Estonia Ministry of Justice

TAL TECH Department of Law

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ACRONYMS AND ABBREVIATIONS

AI – Artificial Intelligence

AI Act – European Union Artificial Intelligence Act

AI Convention – Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law

ADM systems – Automated Decision-Making Systems

APA – Estonian Administrative Procedure Act

CJEU – Court of Justice of the European Union

CoE – Council of Europe

EOWM Law – Lithuanian Law on Equal Opportunities for Women and Men

ET Law – Lithuanian Law on Equal Treatment

GDPR – General Data Protection Regulation

INTRODUCTION

The increasing use of algorithmic systems is driving a fundamental change in the public sector by automating decision-making and streamlining various administrative tasks. In particular, the deployment of AI is automating processes that were traditionally the domain of human judgment and expertise. The Council of Europe (CoE) has even gone as far as to say that the period that we currently live in will be defined by AI.[1]

Algorithmic systems do not come without challenges. Both the benefits and risks of this shift are already being rigorously analysed by academia, policymakers and other stakeholders, with a focus on maximising potential efficiency gains while addressing the numerous challenges these systems introduce. One of those challenges concerns the impact of algorithmic systems on the legal rights and obligations of individuals, including the right to equality and non-discrimination. Notably, algorithmic systems can perpetuate existing societal inequalities or introduce new biases, especially when algorithms are trained on biased datasets and designed without sufficient attention to fairness. This raises a question of whether the existing legal framework on non-discrimination has the capacity to sufficiently tackle such risks.

To address this question, this study provides a comprehensive mapping of the regulation governing discrimination and bias in algorithmic systems in Estonia and Lithuania, also highlighting potential regulatory gaps that may impede effective action against algorithmic discrimination in the public sector.

The study includes a qualitative legal analysis of the ways non-discrimination laws and sector-specific regulations in Estonia and Lithuania address algorithmic bias. While the risks of algorithmic discrimination are often associated with automated decision-making (ADM) systems, especially those powered by artificial intelligence, the scope of this study is not limited to these specific use cases. Discrimination can arise in various algorithmic systems, even those

[1] Council of Europe (2023). *Human rights by design: future-proofing human rights protection in the era of AI,* p. 5. Retrieved 13 October 2024, from https://rm.coe.int/follow-up-recommendation-on-the-2019-report-human-rights-by-design-fut/1680ab2279.

used for tasks such as fact-finding, communication, data processing, or internal administration. Therefore, the study encompasses algorithmic systems in a general sense, ensuring that all potential forms of algorithmic discrimination are considered, regardless of their specific application or whether they are based on machine learning models, rule-based logic or other types of algorithms. While various parts of the study are relevant to both the private and public sector contexts, it is specifically focused on algorithmic discrimination in the public sector.

The first chapter provides an overview of the EU non-discrimination rules, the GDPR, the AI Act, and the Council of Europe's AI Convention, as these instruments provide critical foundations for national regulations in the area of prevention of algorithmic discrimination. The second and third chapters, respectively, investigate Lithuanian and Estonian regulatory frameworks, mapping the applicable laws and providing an overview of the enforcement mechanisms for ensuring equal treatment in the context of algorithms. Based on the findings, both chapters propose country-specific recommendations for strengthening legal and policy frameworks to better tackle algorithmic discrimination. The recommendations provided may contribute to shaping future policies and regulations for mitigating the risk of algorithmic discrimination and for promoting fairness and transparency in an increasingly automated and data-driven public sector.

I. EU AND INTERNATIONAL REGULATION

1.1. EU Non-Discrimination Laws

The EU has one of the most comprehensive non-discrimination legal frameworks, first enshrining the principle of equality in primary EU law, while also adopting numerous secondary legal instruments.

The Treaty on the European Union[2] makes several references to equality. Article 2 highlights EU values such as human dignity, freedom, democracy, equality, the rule of law and respect for human rights, and equality between women and men. Furthermore, one of the aims of the EU is to combat social exclusion and discrimination, and to 'promote equality between women and men, solidarity between generations and protection of the rights of the child' (Art. 3 (3)).

The Treaty on the Functioning of the European Union[3] provides that the EU aims to eliminate inequalities, and to promote equality, between women and men in all its activities. The Treaty's Article 10 establishes the aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, while Articles 19, 153 and 157 provide for concrete actions that the EU takes to tackle inequalities.

The Charter of Fundamental Rights of the European Union[4], which is always applicable when addressing EU law, must also be highlighted. Title III of the Charter is dedicated to equality, encompassing principles of equality before the law, non-discrimination, cultural, religious and linguistic diversity, equality between women and men, the rights of the child and the elderly, and integration of persons with disabilities.

To ensure the implementation of these primary legal principles, numerous secondary law documents exist. Concerning gender equality, the most relevant for this study are Directives

[2] Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, pp. 13–390.
[3] Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47–390.
[4] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.

2004/113/EC[5], 2006/54/EC[6] and 2010/41/EU[7]. Directive 2004/113/EC covers protection from discrimination in relation to goods and services, Directive 2006/54/EC in matters of employment and occupation, and Directive 2010/41/EU covers self-employed women and men.

In the context of non-discrimination, a central legal instrument is Directive 2000/43/EC[8] which covers the grounds of racial and ethnic origin and the areas of employment (including self-employment), training, education, social protection and advantages, and access to and supply of goods and services. Furthermore, Directive 2000/78/EC[9] covers the grounds of religion or belief, disability, age and sexual orientation but only concerning employment and occupation.

Generally, the aforementioned directives only regulate specific types of discrimination and apply within certain defined areas. This gives some possibilities for fighting against algorithmic discrimination in the cases that the directives cover (for example, ADM systems that directly discriminate against people based on ethnic origin in the course of applying for a job), but it also means the directives have various shortcomings in tackling algorithmic discrimination.

The key shortcoming concerns the scope of these legal acts: there are gaps regarding certain grounds and areas that these EU legal instruments cover. To address this, the European Commission proposed in 2008 the so-called 'horizontal equality directive',[10] but this has remained blocked by the EU Council.[11] The adoption of this directive would ensure the

[5] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, pp. 37–43.
[6] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, pp. 23–36.
[7] Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, 15.7.2010, pp. 1–6.
[8] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, pp. 22–26.
[9] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16–22.
[10] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}, COM/2008/0426 final - CNS 2008/0140.
[11] European Parliament (2024). Anti-discrimination directive. Retrieved 9 July 2024, from https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-anti-discrimination-directive.

implementation of the principle of equal treatment outside the labour market, irrespective of age, disability, sexual orientation or religious belief.

The EU recently adopted Directives (EU) 2024/1499[12] and (EU) 2024/1500[13] on minimum standards for equality bodies. These directives will have to be transposed into the national law of the Member States by 2026. It is expected that this will lead to strengthening of equality bodies in the EU, as these directives were proposed by the European Commission to suppress discrepancies in the implementation of other equality directives caused by different powers granted to different equality bodies in the Member States. Some of the powers for the equality bodies will also be very important when dealing with situations of algorithmic discrimination. For example, Article 10 of each directive foresees litigation powers for equality bodies. Currently, some equality bodies do not have such powers: thus, this will be a useful tool for the equality bodies to fight systematic discrimination. However, it should also be noted that these directives still leave some gaps that are likely to cause differences in implementation and the powers of equality bodies. For example, that same Article 10, in each case, allows Member States to choose between powers of litigation (the right to initiate proceedings on behalf of a victim; the right to participate in proceedings supporting a victim; defence of public interest) and do not require that all of these powers should be granted to the equality body. This means that different countries will choose different approaches, possibly even with differences at the member state level, if the state has multiple equality bodies.

Moreover, from the perspective of substantive law, EU law urgently needs to recognise intersectional discrimination[14] when dealing with AI systems. Algorithmic profiling considers a complex mix of factors; not just single traits like gender or ethnicity.[15] This means

[12] Council Directive (EU) 2024/1499 of 7 May 2024 on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in matters of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and amending Directives 2000/43/EC and 2004/113/EC, OJ L, 2024/1499, 29.5.2024.

[13] Directive (EU) 2024/1500 of the European Parliament and of the Council of 14 May 2024 on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and amending Directives 2006/54/EC and 2010/41/EU, OJ L, 2024/1500, 29.5.2024.

[14] Although the above-mentioned Directives on Standards for Equality Bodies emphasise the need to deal more efficiently with intersectional discrimination.

[15] Gerards, J. & Xenidis, R. (2020). *Algorithmic discrimination in Europe: Challenges and opportunities for gender equality and non-discrimination law*. European Commission. 65-66. https://op.europa.eu/en/publication-detail/-/publication/082f1dbc-821d-11eb-9ac9-01aa75ed71a1.

discrimination might occur based on a unique combination of characteristics, impacting groups such as LGBT+, people with disabilities or ethnic minority women. Existing legal frameworks struggle to address this. The current focus on proving discrimination based on a single trait is insufficient. Algorithmic discrimination requires a legal approach that considers how multiple characteristics can combine to create disadvantages. Recognising intersectionality is crucial to ensure that equality bodies and courts, when applying EU law, can actually rely on the specific concepts recognised.

It is also recognised that the current burden of proof regulation in the equality directives might not be sufficiently efficient when it comes to algorithmic systems, as this potentially disadvantages the victims. Algorithmic systems are opaque, and it might be hard to prove discrimination.[16] Thus, considerations must be given to amendments to the rules governing burden of proof. For example, it might be established that if a company refuses to disclose information about an algorithm or provide information under the AI Act, courts and equality bodies could consider this as evidence of potential discrimination. This would shift the burden of proof to the organisation that created the system or that uses the system to carry out by them. This would incentivise transparency and make it easier for victims to hold organisations accountable for biased AI decisions.

Generally, the EU's non-discrimination framework offers a defence against algorithmic bias. Existing directives prohibit discrimination based on grounds like race, gender and disability. The scope of the directives is sufficiently abstract that it might be possible to apply them to algorithmic systems through interpretation of the law. However, the effectiveness of EU non-discrimination law in the area of algorithmic systems has limitations, as these systems can be challenging, especially regarding their complexity and opaqueness. It is to be hoped that some of these challenges will be addressed in practice when the AI Act comes fully into force. While the EU's current framework is a crucial tool, the adoption of the 'horizontal equality directive' would ensure a more consistent protection from discrimination across member states. Moreover, considerations have to be given to amendments to recognise intersectional

[16] *Ibid.*, 144–145.

discrimination and reconsider whether the burden of proof rules still guarantee the effectiveness of procedures for victims of discrimination.

1.2. Data Protection Regulation

To fully understand the legal framework surrounding algorithmic discrimination, it is also important to take into account the impact of the data protection regulation in Europe. The rise of algorithmic systems, fuelled by vast datasets, presents new forms of potential discrimination. While algorithmic systems offer efficiency and convenience, their reliance, among else, on historical patterns in data can amplify biases. Here, Europe's strong data protection laws emerge as a crucial line of defence. The laws concerning personal data not only empower individuals with control over their personal data, but also equip them with legal tools to challenge discriminatory decisions made by ADM systems.

In this regard, the central legal instrument in the EU is Regulation (EU) 2016/679 (General Data Protection Regulation, GDPR)[17] with supplementary legislation such as Directive (EU) 2016/680[18]. Additionally, the Council of Europe has adopted the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention No 108).[19] These instruments are closely related to the right to private life as recognised in respective legal

[17] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, pp. 1–88.
[18] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, pp. 89–131.
[19] The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. European Treaty Series – No. 108.

systems.[20] For Lithuania and Estonia, these instruments are further supplemented by national law.[21]

Europe's data protection laws have earned a reputation as some of the most comprehensive in the world. The GDPR, for instance, establishes a robust framework for individual privacy. It grants persons clear rights regarding their personal data, including access, rectification, erasure, and restriction of processing. Additionally, the GDPR mandates transparency from organisations that collect and use personal data, requiring them to disclose how data is utilised and with whom it is shared. Compared to other regions, Europe's data protection laws offer a more standardised approach, setting a high bar for data privacy and security. There are several aspects that are useful when dealing with possible situations of algorithmic discrimination that the European data protection laws provide.

Data protection regulation partially helps to solve the problem of the 'black box'—the opaqueness of algorithmic systems where we are aware that the system receives the data, analyses it through complex algorithms, and delivers a decision (result), perhaps on a person's loan eligibility or job application. The GDPR demands that organisations should be able to explain how they use personal data in these automated processes and the data subject is empowered to request such information.

In specific cases, organisations processing personal data are required to carry out data protection impact assessments (DPIA). This is required for systematic and extensive evaluation of personal aspects relating to natural persons based on automated processing, including profiling and processing on a large scale of special categories of data.[22] DPIAs can be used as a proactive measure to identify potential risks of bias and discrimination before they occur. Organisations are forced to consider the impact their ADM systems might have on individuals, evaluate the potential for bias, and outline strategies to mitigate any risks.

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[20] Zuiderveen Borgesius, F. J. (2020). Strengthening legal protection against discrimination by algorithms and artificial intelligence. The International Journal of Human Rights, 24(10), 1578. https://doi.org/10.1080/13642987.2020.1743976.

[21] In Estonia - Personal Data Protection Act, RT I, 04.01.2019, 11, available at https://www.riigiteataja.ee/en/eli/507112023002/consolide; in Lithuania – Law on Legal Protection of Personal Data. *Valstybės žinios*, 1996, 63-1479.

[22] European Data Protection Supervisor (2024). Data Protection Impact Assessment (DPIA). Retrieved 11 July 2024, from https://www.edps.europa.eu/data-protection-impact-assessment-dpia_en.

In light of the fact that algorithmic systems use vast amounts of data, it is relevant that the GDPR establishes the principle of data minimisation (Art. 5(1)(b)). This principle compels organisations to collect and use only the data that is strictly necessary for a specific purpose. By minimising data, it is possible to prevent the accumulation of vast datasets that may contain hidden biases or other information about individuals that is not actually needed by the organisation. This helps to ensure that ADM systems focus on the most relevant factors for decision-making, reducing the chance of discriminatory outcomes. For example, an ADM system that is used to decide on social benefits will be less likely to discriminate in situations where it uses only the data provided rather than the data it also gathers from public sources about the person in question.

It is important to note that Article 22 of the GDPR recognises that 'the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her'. However, there are exceptions, such as when the subject gives explicit consent. The norms related to Article 22 of the GDPR allow for people to demand reconsideration of automated decisions, such as if a bank automatically denies a loan through a website of the bank.[23] This is also relevant to public bodies where the consent of the subject is unlikely. Then additional legislation comes into view which should lay down suitable measures to safeguard the data subject's rights, freedoms and legitimate interests.[24]

Of course, there are shortcomings to the data protection laws, as well. For example, it is noted that Data Protection Authorities that overlook the implementation of data protection laws are overburdened. For example, Lithuania's State Data Protection Inspectorate received 1,230 complaints, provided 2,174 consultations to residents and 1,989 consultations more to organisations and data protection officers in 2023. The Data Protection Inspectorate looked at

[23] Zuiderveen Borgesius, F. J. (2020). Strengthening legal protection against discrimination by algorithms and artificial intelligence. The International Journal of Human Rights, 24(10), 1580. https://doi.org/10.1080/13642987.2020.1743976.

[24] Williams, R. (2021). Rethinking Administrative Law for Algorithmic Decision Making. Oxford Journal of Legal Studies, 42(2), 473. https://doi.org/10.1093/ojls/gqab032.

over 280 law projects, in addition to many lower-power legal act projects.[25] In Estonia, the situation is similar: the Data Protection Inspectorate received 1,068 complaints in 2023.[26]

In general, it can be concluded that Europe's strong data protection laws act as an important – albeit limited – defence against potential discrimination arising from algorithmic systems. The GDPR regulates automated decisions based on personal data, while providing important safeguards through requiring a suitable legal basis and ensuring individuals' transparency as well as a measure of control over their data. However, with the primary focus on protection of privacy and personal life, these rules have a limited impact on the creation of suitable safeguards against algorithmic discrimination. For example, the data protection laws are applicable only to personal data processing, while algorithmic decision-making systems that may have a discriminatory nature do not necessarily involve the processing of personal data. To illustrate, data protection laws do not apply to predictive models, which use aggregated data rather than data that relates to specific persons.[27] However, some of these shortcomings will be addressed through the AI Act.

1.3. EU Artificial Intelligence Act

The EU Artificial Intelligence Act (hereafter the **AI Act**) entered into force on 1 August 2024,[28] creating harmonised rules on the development and use of AI throughout the EU. It establishes a comprehensive framework for ensuring that AI systems are used in ways that are consistent with fundamental rights, including the right to non-discrimination.[29] The AI Act achieves this through a risk-based approach. Most of the Act focuses on AI systems considered high-risk: for

[25] State Data Protection Inspectorate (2024). 2023 metų veiklos ataskaita. Retrieved 11 2024, from https://vdai.lrv.lt/media/viesa/saugykla/2024/3/nLYMpcYmDDQ.pdf.

[26] Data Protection Inspectorate (2024). Statistika. Retrieved 11 July 2024, from https://www.aki.ee/meist/teadlikkus/statistika.

[27] See Zuiderveen Borgesius, F. J. (2020). Strengthening legal protection against discrimination by algorithms and artificial intelligence. The International Journal of Human Rights, 24(10), 1581. https://doi.org/10.1080/13642987.2020.1743976.

[28] Regulation (EU) 2024/1689 of the European Parliament and of the Council, 13 June 2024, laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), OJ L, 2024/1689, 12.7.2024, p. 1-144.

[29] As per Art. 1(1) of the AI Act the purpose of the AI Act is, among else, to promote the uptake of human-centric and trustworthy AI, while ensuring a high level of protection of health, safety, fundamental rights against the harmful effects of AI systems.

these systems, the act imposes risk management, data governance, transparency and human oversight requirements to ensure that they operate safely and fairly. Numerous public-sector AI systems would be considered high-risk under the regulation, such as systems used in critical infrastructure, provision of essential services (e.g. granting public benefits or access to public services), use of AI in law enforcement as well as in administration of justice.[30]

Additionally, the Act identifies a small number of AI applications as posing an 'unacceptable risk' and that are outright prohibited, such as AI systems that exploit people's vulnerabilities based on their age, disability or a specific social or economic situation.[31] The Act also addresses specific use-cases like general-purpose models, generative AI systems and chatbots, which have their own tailored regulatory requirements, notably on aspects of transparency. AI systems that do not fall into any of the above categories are considered minimal risk and are largely exempt from regulation under the act (to facilitate innovation in lower-risk areas).

In developing the AI Act, the approach was guided by the ethical principles for AI that were established in the *Ethics Guidelines for Trustworthy AI* developed by the AI High-level Expert Group.[32] One of the ethical principles included 'diversity, non-discrimination and fairness'. As per the recitalof the AI Act, this means that 'AI systems are developed and used in a way that includes diverse actors and promotes equal access, gender equality and cultural diversity, while avoiding discriminatory impacts and unfair biases that are prohibited by Union or national law'.[33] Consequently, in determining which AI systems should be considered high-risk or prohibited, the risks concerning fairness and equality were relevant. For example, the AI Act prohibits most uses of real-time remote biometric identification in public for the purpose of law enforcement because [t]echnical inaccuracies of AI systems intended for the remote biometric identification of natural persons can lead to biased results and entail discriminatory effects. Such possible biased results and discriminatory effects are particularly relevant with regard to age, ethnicity, race, sex or disabilities.[34] Similarly, many AI systems providing social scoring

[30] See Annex III of the AI Act.
[31] Prohibited AI practices are listed in Art. 5 of the AI Act.
[32] Independent High-Level Expert Group on Artificial Intelligence set up by the European Commission (AI HLEG), 'Ethics Guidelines for Trustworthy AI' (2019), 08.04.2019. Retrieved October 13, 2024, from https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai.
[33] AI Act Recital 27.
[34] Art 5(1)(h) of the AI Act and Recital 32.

of natural persons by public or private actors are prohibited, as they may lead to discriminatory outcomes and the exclusion of certain groups.[35] In the context of high-risk systems, certain biometric identification systems and uses of AI in the administration of justice and democratic processes are considered as high-risk systems and subject to further obligations in the AI Act on the grounds that they can lead to biased results and entail discriminatory effects.[36]

The requirements for high-risk AI systems include several provisions that are relevant for mitigating the risk of unequal treatment. First, the act mandates that developers of AI systems ensure that their systems are trained on data that is relevant, representative, and to the best extent possible, free of errors and complete in view of the intended purpose.[37] Its goal is to mitigate possible biases in the datasets that may lead to discrimination.[38] To support this, the AI Act requires implementation of appropriate data governance and management practices, which are relevant to ensure that the datasets for training, validation and testing are of high quality.[39] In fact, the AI Act creates a basis to process special categories of personal data – as a matter of substantial public interest[40] – in order to support bias detection and correction (to the extent that it is strictly necessary and subject to appropriate safeguards in line with the data protection regulations).[41] Furthermore, high-risk systems must also be sufficiently accurate and technically robust. They should be resilient in relation to harmful or otherwise undesirable behaviour that may result from limitations within the systems or the environment in which the systems operate (e.g. errors, faults, inconsistencies, unexpected situations). Among other things, this means that the AI system must minimise erroneous decisions and unfair outputs.[42]

Additionally, the AI Act puts significant emphasis on risk assessment and management throughout the lifecycle of the system. The providers (and in several instances, the deployers)

[35] Art 5(1)(c) of the AI Act and Recital31.
[36] See Recitals 54 and 61 of the AI Act.
[37] Art 10(3) of the AI Act.
[38] See also Recital 67 of the AI Act.
[39] Art 10 of the AI Act.
[40] Within the meaning of Article 9(2) (g) of the GDPR and Article 10(2)(g) of Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union's institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, pp. 39–98.
[41] Art 10(5) of the AI Act.
[42] Art 15 and Recitals 74-75 of the AI Act.

must carry out impact assessments for their AI systems, create technical documentations, log and keep a record of the system's functioning, as well as ensure relevant human oversight to carry out effective post-market monitoring. Having comprehensible information on how high-risk AI systems have been developed and how they perform throughout their lifecycle is essential to identify and address possible issues in regard of fairness and equal treatment.

By establishing these requirements, the AI Act aims to proactively address the potential for discrimination before it occurs, thereby providing a foundation for preventing unfair treatment in AI-driven decisions and other processes. The added transparency these obligations ensure is also critical for enforcement purposes.

Concerning the latter, each Member State will have to establish relevant supervision authorities and governance mechanisms to ensure effective enforcement of the regulation. There is one additional mechanism particularly relevant from the perspective of equality laws – article 77 of the AI Act establishes that public authorities or bodies which supervise or enforce the respect of obligations protecting fundamental rights, including the right to non-discrimination, may request and access documentation created under the AI Act in relation to the use of high-risk AI systems. Where this documentation is insufficient to ascertain whether an infringement of obligations protecting fundamental rights has occurred, the public authority may make a request to the market surveillance authority to organise testing of the high-risk AI system through technical means. This is potentially significant in the context of enforcing non-discrimination law, as it not only allows for a thorough technical investigation into whether AI systems are producing biased or discriminatory outcomes but also empowers equality bodies by providing them with additional tools and authority to demand accountability and transparency in the use of high-risk AI systems.

The AI Act will be directly applicable in all EU Member States, with its provisions entering into force in stages between January 2025 and August 2027. By August 2025, all Member States will have to establish relevant supervision authorities and governance mechanisms to ensure effective enforcement of the regulation. The AI Act represents a significant step forward in addressing the challenges of fairness and non-discrimination in the deployment of AI systems across the EU. The responsible parties would be required to assess and mitigate possible risks before they result in discriminatory outcomes. It thereby ensures that the EU legal framework

not only addresses discrimination *ex-post*, but already in designing, developing and deploying AI systems.

In the context of enforcement, the requirement for transparency and documentation is critical, as it allows for the scrutiny necessary to hold AI providers or deployers accountable and ensure that they uphold the principles of equality. It must be noted, however, that the AI Act's effectiveness in tackling discrimination will largely depend on how well these provisions are implemented and enforced across Member States.

1.4. AI Convention of the Council of Europe

The Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law[43] (hereafter 'the Convention') is a legally binding convention that lays down the basic principles for the development and use of artificial intelligence. The Convention was adopted by the Committee of Ministers of the Council of Europe on 17 May 2024.

The Convention aims to ensure that artificial intelligence systems are fully compatible with human rights, democracy and the rule of law throughout their lifecycle, with a significant emphasis on equality and non-discrimination. In order to achieve this, the Convention sets out certain general principles and obligations to be respected in the design, development and implementation of high-risk AI systems.

Compared to the AI Act, the Convention sets forth more abstract principles and obligations, whereby parties to the Convention (i.e. signatory countries) are required to ensure that the development and provision of AI systems are subject to requirements such as:

- General obligation to ensure the protection of fundamental rights and respect for the principles of democracy and the rule of law throughout the lifecycle of the AI system
- Obligation to ensure the protection of human dignity and human autonomy

[43] Council of Europe: Committee of Ministers, Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, CETS No. 25, 17 May 2024.

- Obligation to ensure appropriate transparency and oversight of AI systems
- Obligation to ensure that, in the event of adverse effects, the AI provider can be held liable
- Obligation to ensure non-discrimination and promotion of equal treatment
- Obligation to ensure privacy and the protection of personal data
- Obligation to ensure the adequate quality, reliability and security of AI systems.

Providers of AI systems must implement risk management throughout the lifecycle of the system, including assessing the potential negative impacts of the system and putting in place measures to prevent or mitigate them. In addition, the AI Convention provides that Parties should assess the need to prohibit or impose a moratorium on certain applications of AI systems if they are deemed incompatible with respect for human rights, the functioning of democracy or the rule of law.

Artificial intelligence systems related to national security and national defence have been excluded from the scope of the Convention, although systems used in the context of national security must nevertheless comply with relevant international law, including rules for the protection of fundamental rights, and respect democratic institutions and processes.[44] The Convention also does not apply to research and development activities in the field of artificial intelligence, except where such testing or similar activities may undermine human rights, democracy and the rule of law.[45]

In the context of equality and non-discrimination, Article 10 of the Convention specifically requires Parties to adopt or maintain measures to ensure that activities within the lifecycle of artificial intelligence systems respect equality, including gender equality, and the prohibition of discrimination, as provided under applicable international and domestic law. The explanatory memorandum further elaborates on the importance of tackling bias at various stages in the AI lifecycle. It emphasises that AI systems must not only avoid treating individuals unfavourably based on protected characteristics but must also actively work to overcome structural and

[44] See Art. 3(2) and (4) of the Convention.
[45] Art. 3(3) of the Convention.

historical inequalities.[46] The memorandum acknowledges the complex nature of AI-related biases, including technical and social biases, and underscores the need for a holistic approach to address these issues. The drafters of the Convention made it clear that parties are expected to take proactive measures to ensure equality in AI systems, considering both existing legal frameworks and the specific challenges posed by AI technologies.[47]

The EU Member States implement the Convention through the EU AI Act. This means that the Convention is unlikely to have significant additional social or legal impact for Estonia and Lithuania, compared to the impact of the already adopted EU AI Act. However, this Convention will become the first legally binding international instrument in the field of artificial intelligence and may also be joined by countries that are not members of the Council of Europe. Among others, the United States, Canada, Japan, Israel, Mexico, Australia, Argentina, Peru and Uruguay are expected to accede to the Convention. The Convention thus has the potential to have a significant impact in promoting greater and more uniform protection of equality rights in the context of AI systems. In particular, it has the potential to set a high standard for the governance of AI systems and harmonise measures that address both overt discrimination and subtler forms of bias embedded in AI systems.

[46] See Explanatory Report to the Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, Council of Europe Treaty Series – No. [225], p. 16-17. Available: https://rm.coe.int/1680afae67.
[47] *Ibid*.

II. LEGAL FRAMEWORK IN LITHUANIA

1. INTRODUCTION

Even though in the EU and Lithuania there is a strong basis for non-discrimination law, we can identify some shortcomings that should be corrected before algorithmic systems become even more widely used.

The EU and CoE have already recognised that AI poses specific challenges that need specific regulation, both adopting legal acts in their respective legal systems to ensure that algorithmic systems comply with the requirements of various human rights standards.

Lithuania is not ignoring AI. Through all the levels of strategic documents, the expansion of AI availability and the influence of AI on virtually all sectors is recognised. The long-term strategy LT2050[48] recognises that the changes could be radical: interpersonal relationships, labour markets, parameters of economic competitiveness, business models, the nature of threats to national and personal security, and governance systems can all be affected. This must be recognised, together with values such as preservation of identity, freedom and equality, respect for human dignity, and justice. All these values will be important to ensure the proper development and regulation of algorithmic systems.

The mid-term strategy document of the National Progress Plan (2021–2030)[49] encourages the incorporation of new technologies, including AI, into various economic activities. A lot of resources are dedicated to ensuring the digitalisation of various processes in the public sector. In the National Progress Plan, the principle of equality for all is recognised as a horizontal principle that must be ensured and integrated into all other areas. For example, together with digitalisation, there are measures following the digital competence improvement of various vulnerable groups and improvement of accessibility of digital spaces.

[48] State Progress Strategy Lithuania's Future Vision, 'Lithuania 2050'. TAR, 2023, 25659.
[49] National Progress Plan for 2021–2030. TAR, 2020, 19293.

Although not formalised at the time of writing this study, Lithuania has the Lithuanian Artificial Intelligence Strategy[50] and Lithuanian Artificial Intelligence Technology Development Action Plan 2023–2026[51]. The strategy emphasises ethical and legal core principles for the development and use of artificial intelligence as well as a responsible approach to data.

Considering that algorithmic systems can repeat and amplify already existing prejudices, it is important that equality bodies can continue to exercise their functions as effectively as they did before, even when facing extra challenges when dealing with algorithmic systems. This could include the problem of the black box, when it is hard to find out how the algorithmic system works and complicates decisions and various aspects of investigating discrimination, like the construction of comparable situations, or the non-existence of a formal complaint when an obvious prejudice exists.

This chapter aims to investigate the current Lithuanian legal system regulating equal opportunities and the work of the Lithuanian equality body, the Office of the Equal Opportunities Ombudsperson, to see if the current legal basis properly enables the ombudsperson to carry out their functions regarding algorithmic systems and if the current regulation is strong enough to enable persons facing possible situations involving algorithmic systems to seek protection of their rights.

[50] Ministry of Economy and Innovation of the Republic of Lithuania & Create Lithuania (2019). Lithuanian Artificial intelligence Strategy: A vision of the Future. Retrieved July 8, 2024, from https://eimin.lrv.lt/media/viesa/saugykla/2024/3/y0Ki-IUyzOM.pdf.

[51] Ministry of Economy and Innovation of the Republic of Lithuania & Create Lithuania (2022). Lithuanian Artificial Intelligence Technology Development Action Plan 2023-2026. Retrieved July 8, 2024, from https://eimin.lrv.lt/media/viesa/saugykla/2024/3/_zM9neRtKwA.pdf.

2. THE EXISTING REGULATION

2.1. The Context of the Constitution

In Lithuania, the principle of equality is a constitutional one. Article 29 of the Constitution of the Republic of Lithuania states that 'All persons shall be equal before the law, courts, and other state institutions and officials.' Also, there should be no restriction of human rights and privileges based on a series of discrimination grounds.[52] It is well established in the case law of the Constitutional Court of the Republic of Lithuania that the list of grounds for discrimination in the article is not exhaustive.[53]

This principle ensures the formal equality of all people. The constitutional principle of equality of persons before the law means the innate right of an individual to be treated equally with others.

In its rulings, the Constitutional Court has held on more than one occasion that this principle should be followed during both the adoption and application of laws.[54] The principle of the equality of the rights of persons is inseparable from the constitutional principle of a state under the rule of law, which is a universal principle of the entire Lithuanian legal system.[55] The prohibition of discrimination is understood as an element of the constitutional protection of human dignity.[56]

Although the Constitutional Court has not yet been called on to analyse cases involving algorithmic systems, it is obvious from its established case law that the principles of equality and non-discrimination must also apply to algorithmic systems. This principle is far-reaching, with consequences in both lawmaking and application of the law; thus, there is no reason to believe that algorithmic systems would not fall under the requirements of these principles.

In Lithuania, the Constitutional Court can decide whether the laws and other acts of the parliament (*Seimas*) conflict with the Constitution, and whether the acts of the President of the

[52] Constitution of the Republic of Lithuania. *Lietuvos aidas*, 1992, 220-0.
[53] LRKT, KT3-N1/2019.
[54] LRKT, 46/2001-48/2001-50/2001-2/2002-6/2002-18/2002.
[55] LRKT, 50/2010.
[56] LRKT, KT-20-I1/2017.

Republic and the Government conflict with the Constitution or laws (Art. 102 of the Constitution). Also, it is worth noting that the Constitutional Court has the power to present conclusions on whether the international treaties of the Republic of Lithuania conflict with the Constitution (Art. 105(3) of the Constitution). This is important because the constitutional provisions in question grant the Constitutional Court the power to strike down any discriminatory regulation. This includes any regulations that are related to algorithmic systems; for example, any future laws enabling the use of algorithmic systems to distribute social benefits but not envisioning proper safeguards to protect fundamental rights.

Moreover, every person has the right to apply to the Constitutional Court, challenging the appropriate legal regulation, if they are faced with a decision that violates their rights and the person in question has exhausted all other means of legal defence (Art. 106(4) of the Constitution). This is an important safeguard ensuring that persons can argue before the Constitutional Court that certain regulations, including those related to algorithmic systems, are not in compliance with the Constitution, including the constitutional principle of equality.

Later in this study, the Law on Equal Treatment[57] (hereafter 'ET Law') and the Law on Equal Opportunities for Women and Men[58] (hereafter 'EOWM Law') are analysed. In both laws, article 1 lists that the laws' purpose is to ensure the implementation of relevant constitutional provisions and principles. Following that, it is further analysed how different norms of laws can affect the future of the implementation of the constitutional principles concerned, especially when investigating possible violations of algorithmic systems.

[57] Law on Equal Treatment. *Valstybės žinios*, 2003, 114-5115.
[58] Law on Equal Opportunities for Women and Men. *Valstybės žinios*, 1998, 112-3100.

2.2. Law on Equal Treatment

2.2.1. Grounds, forms of discrimination and exceptions

It should be noted that the ET Law currently covers these grounds of discrimination: sex, race, nationality, citizenship, language, origin, social status, belief, convictions or views, age, sexual orientation, disability, ethnic origin, or religion. It is understood as an exhaustive list.

Principally, no major issues arise from the current closed list of grounds for discrimination enshrined in the law as these are solved in the practice of the Equal Opportunities Ombudsperson (hereafter 'the Ombudsperson'). For example, even though the law does not list health (status) as a possible ground for discrimination, in practice this is analysed through the lens of disability.[59] Similarly, while skin colour is not explicitly listed, usually these situations will fall under the category of discrimination on grounds of race[60] or gender – under sex.[61]

This means that in cases where there is a possible situation of discrimination caused by an algorithmic system, as long as that falls under at least one of the illegal discrimination grounds recognised by the law (in the broad sense), the Ombudsperson would be able to investigate a complaint. This also applies to other functions of the Ombudsperson: the equality body can carry out their prevention and educational activities, and issue recommendations (Art. 17(2) of ET Law) with no limitations regarding algorithmic systems from the standpoint of discrimination grounds.

However, it should be noted that to ensure the constitutional principles of the legislative framework of systematicity and clarity,[62] the ET Law should expressly list the forbidden grounds of gender, gender expression, sex characteristics, health status, and skin colour. This would ensure that not only would the Ombudsperson, having deep knowledge of the area, see that the ET Law should be applied on these grounds, but it would also be clear to vulnerable groups and those subject to an obligation to maintain equality, like the creators and deployers of algorithmic systems, that they are bound by the principles and norms of the Constitution.

[59] LGK, (19)SN-105)SP-87; LGK, (22)SN-70)SP-49.
[60] LGK, (23)SN-199)SP-21.
[61] LGK, (24)SN-144)SP-63.
[62] LRKT, 21/2003; LRKT, 09/06-30/06-01/07-30/08.

This would ensure that equal opportunities could be applied more systematically. This is relevant in the context of the constitutional principle of equality. As the ET Law's purpose is to implement the constitutional principle of equal opportunities and that principle is understood as not having a closed list of discrimination grounds, we must further discussions on how the ET Law can come to recognise the open-ended list of illegal grounds for discrimination. During these discussions, the exceptions needed must be considered and listed in the ET Law. However, until the ET Law enshrines an open-ended list of illegal grounds for discrimination, the ET Law should be amended to at least list the clearly missing grounds (gender, gender expression, sex characteristics, health status, and skin colour).

Currently, neither the ET Law nor the EOWM Law directly recognises intersectional discrimination, which in the context of algorithmic systems might be useful as a concept. There are considerations that discrimination caused by algorithmic systems will likely fall into the category of intersecting inequalities[63] and not be based on other forms of discrimination. However, as with separate grounds, the Ombudsperson deals with this in practice and thus no major issues arise in cases where investigations need to be carried out on multiple grounds.[64]

It must also be noted that Article 2(9) and Article 3 of the ET Law have a list of exceptions where the law does not apply or certain situations would not be considered direct discrimination in the context of the application of this law (for example, the statutory requirement to know the state language or various statutory rights applied based on citizenship). This means that in these cases the Ombudsperson would not be able to investigate complaints of possible algorithmic system discrimination. However, it should be noted that exceptions are evaluative and thus would still require an analysis and/or an investigation. For example, providing benefits based on age, disability and social status is allowed when it is justified by a legitimate purpose, and this purpose is pursued by appropriate and necessary means, but the Ombudsperson must investigate to collect enough information to decide whether there has been a violation of the principle of equal opportunities.

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[63] Borgesius, F. Z. (2018). *Discrimination, artificial intelligence and algorithmic decision-making*. Council of Europe. 28–29. https://rm.coe.int/discrimination-artificial-intelligence-and-algorithmic-decision-making/1680925d73.

[64] LGK, (24)SN-50)SP-51; LGK, (24)SN-27)SP-42.

Considering the exceptions in the equality laws, a non-normative approach could and should be encouraged in those areas where the equality laws do not apply. This could include developing guidelines, issuing recommendations, and encouraging self-regulation on the use of algorithmic systems, for example, in the activities of religious communities and associations. This would allow these communities to keep their independence and yet also pay the necessary attention to how their actions, related to algorithmic systems, affect their own community and those around them.

2.2.2. Duties of state and municipal institutions and agencies

Article 5 of the ET Law lists a series of duties of state and municipal institutions and agencies. In the context of AI systems, the following are most important.

A duty to ensure that equal rights and treatment are enshrined in all legal acts (Art. 5(1)(1)), which ensures that when regulating algorithmic systems, institutions must pay particular attention to equality. This flows from the constitutional principle of equality discussed above, which poses obligations in lawmaking. Institutions and agencies should ensure that any document regulating algorithmic systems and their development prohibits discrimination and, if it is necessary considering the policy area where the algorithmic system is to be deployed or considering who the algorithmic system might affect, the regulation should foresee adequate safety measures and complaint mechanisms.

Together with **the duty to develop, approve, and implement measures designed to ensure equal treatment** (Art. 5(1)(2)), this ensures that state and municipal institutions and agencies must carry out out specific measures to fight bias in algorithmic systems. This duty of considering the context of algorithmic systems and their regulation could also be interpreted as a requirement to conduct, for example, fundamental rights impact assessments (see Article 27 of the AI Act), create standards for data collection when developing algorithmic systems, etc.

This enables both the Ombudsperson to make recommendations and investigate complaints (but not for laws or Government legal acts that are within the competence of the Constitutional Court) in the general area of lawmaking and law application.

Also, institutions and agencies have **the duty to not discriminate when providing administrative or public services** (Art. 5 (1)(4)). This is a broad and general duty to avoid any

discrimination in situations of such services. This duty is of particular importance to algorithmic systems because these systems are often deployed to provide services and generally are understood as services (see Article 3 of the AI Act). This enables the Ombudsperson to investigate complaints and make recommendations in cases where institutions and agencies decide to use algorithmic systems completely or as a helping tool to provide services such as issuing driver's licenses, registering marriages, transporting passengers, and many others.

Generally, this would also cover situations when algorithmic systems that are used by institutions and agencies harass a person. The duties listed in Article 5 of the ET Law cover the prohibition of harassment and sexual harassment and thus if an algorithmic system is used by an institution and (or) an agency to harass a person, the Ombudsperson could investigate such a complaint. This might not be intentional, for example, when a tax authority uses a chat-bot powered by algorithmic systems to help with questions and answers on tax questions, but the chat-bot oversteps certain limits and generates harassing messages because of the low income and disability of the person asking the questions, instructing the person to 'put more effort' into generating income.

2.2.3. Duties of educational institutions, other education providers as well as higher education and research institutions

Article 6 of the ET Law lists a series of duties of educational institutions, other education providers, as well as higher education and research institutions. In the context of algorithmic systems, the following are most important.

The general **duty to ensure equal conditions when admitting to education providers as well as higher education and research institutions, teaching and educating according to programs of formal and non-formal education implemented therein** (Art. 6(1)(1) means that these institutions, even when using algorithmic systems, must pay attention to the principle of equality. This duty covers the whole process of education, starting from admissions (thus, for example, if admission documents are processed by an algorithmic system), as well as the whole teaching and education process which follows.

Following this, there is also a **duty to ensure equal conditions when assessing learning achievement** (Art. 6(1)(4).

Together, this means that any algorithmic tools used during the teaching and education process must not discriminate (for example, tools used to detect plagiarism must not discriminate against language minorities or cheating detection systems should be able to detect the faces of people with any skin colour[65]). This enables the Ombudsperson to look into the whole process of assessment to see if a person has faced any inequalities on one or more of the discrimination grounds listed in the law.

Similarly, institutions have the **duty to ensure equal conditions when awarding scholarships or granting loans** (Art. 6(1)(2)). Thus, in cases where the aforementioned institutions make decisions on financial questions, the Ombudsperson can investigate possible cases of discrimination, even if the decision was made by an ADM system under the control of the educational institution and (or) algorithmic systems were used by the institution in the process of adopting the decision, even though the final decision was made by a human.

Almost unavoidably, in the future (and, most likely, already in a lot of fields), we will see AI-generated content used in the education and teaching process. The **duty of institutions to ensure that education programs, textbooks, and teaching aids do not contain or promote discrimination** (Art. 6(2)) is relevant. This means that the institutions, even when using AI-generated content, which can be biased because of, for example, training shortcomings or developer bias, must check the material for bias and not use such material if it is identified. In cases where such content is used, the Ombudsperson is entitled to investigate complaints and make recommendations.

2.2.4. Duties of the employer

The ET Law lists the duties of employers in the field of equality. Article 7 lays a strong foundation for promoting fair treatment in the workplace, where the use of algorithmic systems is very likely.

First, the norms of Article 7 tackle possible discriminatory human resources practices. The employer has **duties 1) to apply the same selection criteria and conditions when employing or recruiting to the civil service; 2) to provide equal working and civil service conditions,**

[65] Yoder-Himes, D. R., *et al.* (2022). Racial, skin tone, and sex disparities in automated proctoring software. Frontiers in Education, 7. https://doi.org/10.3389/feduc.2022.881449.

access to improvement of qualifications, vocational training, retraining, acquiring practical work experience, as well as provide equal advantages 3) apply the same criteria for assessing the work of employees and the performance of civil servants; 4) apply the same criteria for dismissal from work and from the civil service; 5) pay equal pay for equal work or for work of equal value.

The ET Law is applicable to the whole life cycle of employment: starting with recruiting, it includes improvement of competencies and possible promotions and demotions, as well as awards for good performance, and finishes at the end of the employment relationship. It is likely that during the cycle a candidate and, later, an employee can face the use of algorithmic systems more than once. For example, a company's human resources department may use an algorithmic system to sort through many applications they receive. Also, such a department may use algorithms to calculate and compare the value of awards they give out for good performance and make decisions to (not) make extra awards to some employees. The ET Law also covers possible situations of harassment, sexual harassment, and instructions to discriminate. In all these cases, the Ombudsperson could investigate complaints of discrimination by algorithmic systems.

There is also one more important and specific **duty – to provide reasonable accommodation and an accessible environment** for employees with disabilities (Art. 7(8)). Evaluation criteria, with an exception listed in the ET Law, should be mentioned: this must not cause a disproportionate burden on the employer. This means that in cases where algorithmic systems are used as part of work (for example, a person with a disability while working must use an algorithmic system to perform their tasks), it is reasonable to expect that the employer will ensure that the algorithmic system is accessible and able to be used by the employee to perform their tasks. Moreover, this is also relevant when the Law on Product and Service Accessibility Requirements,[66] which transposes Directive (EU) 2019/882[67] into national law, comes into force in June 2025. The law in question and the Directive (EU 2019/882 cover various computer hardware systems, terminal equipment, and operating systems, giving more leverage to address

[66] Law on Product and Service Accessibility Requirements. TAR, 2022, 26360.
[67] Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services, OJ L 151, 7.6.2019, pp. 70–115.

accessibility issues when non-accessible equipment is used. The Ombudsperson could investigate a complaint where reasonable accommodation was not provided for a person with a disability regarding an algorithmic system.

2.2.5. Consumer protection

The law lists the duties of sellers, producers of goods, and service providers. They have a **duty to provide consumers with equal access to the same products, goods, and services, including housing, as well as apply equal conditions of payment and guarantees for the same products, goods, and services or for products, goods, and services of equal value** (Art. 8(1)(1)). This duty ensures that the Ombudsperson can investigate situations of discrimination in both relevant cases: 1) when the provision of goods and services use algorithmic systems as part of the process and this causes discrimination (for example, to order food you must use an AI chat bot); 2) situations where the algorithmic system as a service has unequal access and this causes discrimination (for example, you must use a facial recognition module of the system to access the full functionality of the system but this module does not recognise your face because of your skin colour).

More, the law also covers possible situations of harassment, sexual harassment, and instructions to discriminate. Sellers, producers of goods, and service providers have **the duty to ensure that consumers do not experience situations of harassment and sexual harassment and do not face situations resulting from instructions to discriminate** (Art. 8(2). There is no reason to believe that the norms would not cover situations where this kind of discrimination is carried out through algorithmic systems.

As with educational content, already discussed, we will see AI-generated content used to promote products, goods and services. The ET Law has the **duty of sellers, producers of goods, and service providers to ensure that information about products, goods, services, and ads do not express humiliation, contempt, or restriction of rights or would not extend privileges on discrimination grounds and that it would not form public attitudes that these characteristics make a person superior or inferior to another** (Art. 8(1)(2). This means that mentioned subjects, even when using AI-generated content, which can be biased because of, for example, training shortcomings or developer bias, still must check the material for bias and not use such material if it is identified. In cases where such content is used, the Ombudsperson

is entitled to investigate complaints, make recommendations and to oblige advertising operators to terminate the unauthorised advertising and to set time limits and conditions for fulfilling this obligation.

2.2.6. Prohibition of discrimination in organisations and associations

The ET Law establishes a broad prohibition of discrimination in connection with membership of, and involvement in, organisations of employees or employers, or other organisations/associations whose members carry on a particular profession, including the benefits provided by such organisations/associations. This includes protection from harassment, sexual harassment, and situations where there were instructions to discriminate (Art. 9).

Similarly to employees and employers, this broad protection allows the Ombudsperson to investigate any complaints about discrimination caused by algorithmic systems in use by such organisations; for example, in processing membership applications or membership fees.

2.3. Law on Equal Opportunities for Women and Men

Article 1(1) of the EOWM Law lists its purpose as 'to ensure the implementation of equal rights for women and men enshrined in the Constitution of the Republic of Lithuania and to prohibit any type of discrimination on grounds of sex, in particular by reference to marital or family status'. This means that it mostly follows the same logic as the ET Law in relation to the ground of sex. Thus, this section of the study covers only the unique aspects of the EOWM Law.

2.3.1. Social security schemes

Uniquely, the EOWM Law **prohibits discrimination on grounds of sex in social security schemes** (Art. 9). This includes the scope of social security schemes and the conditions of access to them, the obligation to contribute and the calculation of contributions, the calculation of benefits, and the conditions governing the duration and retention of entitlement to benefits. This enables the Ombudsperson to investigate any complaints where discrimination on grounds of sex occurred when social security institutions used algorithmic systems to, for example, calculate benefits or track payments.

Of course, this raises the question of other discrimination grounds and the possible discrimination they might face in social security schemes. While the ET Law does not go as far

as to have special norms on social security schemes, still the duties of state and municipal institutions and agencies to implement equal treatment apply to social security institutions, and any complaints about discrimination in social security schemes and by social security institutions could be analysed through the prism of article 5 of the ET Law (as long as it is not laws or normative Government decisions which could be addressed through the Constitutional Court). Still, it would be more consistent and systematic if the ET Law would analogically recognise discrimination from protection in social security schemes at least for certain grounds because it is clear that some discrimination grounds listed in the ET law should not influence how social security schemes are applied.

2.3.2. Gender balance among directors of big companies

The norms[68] regarding gender balance among directors of big companies are due to go into force on December 1st 2024. The law in question transposes the norms of the Directive (EU) 2022/2381[69] into national law.

As discussed in section 2.2.4, human resources will probably use algorithmic systems to carry out some functions regarding employees. The same applies to directors of companies; companies are likely to use algorithmic systems to help with the selection process of directors.

Companies must inform candidates about the qualification criteria upon which the selection was based, the objective comparative assessment of the candidates under those criteria, and where relevant, the specific considerations exceptionally tilting the balance in favour of a candidate who is not of the underrepresented sex.

Considering that algorithmic systems may be used, companies should disclose the use of such systems and provide information on what kind of impact such use of algorithmic systems might have had on the procedure. This is especially relevant if algorithmic systems are used to

[68] Law Amending the Laws on Equal Opportunities for Women and Men No VIII-947 Articles 1, 2, 9, the Annex of the Law and Supplementing the Law with Articles 61, 111 and 20. TAR, 2024, XXX.
[69] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322, 16.12.2022, pp. 15–80.

compare candidates based on certain criteria that ultimately tilt the balance in favour of one candidate.

In cases where algorithmic systems have possibly discriminated against a candidate, the Ombudsperson will have the ability to investigate such a complaint when the law comes into force.

2.4. Labour Code

The Labour Code[70] has specific norms on gender equality, and non-discrimination (Art. 26), as well as norms prohibiting violence and harassment (Art. 30), which are applicable in a wider context than the harassment norms of the equality laws.

Generally, this enables the State Labour Inspectorate and labour dispute commissions to investigate complaints of discrimination, violence, and harassment in the workplace.

It should be noted that, unlike the ET Law, the Labour Code has a non-exhaustive list of grounds that it protects, leaving the list open with a ban on discrimination based on 'circumstances unrelated to the professional qualities of employees, or on any other statutory grounds' (Art. 26(1)). This means that in the area of employment, if any issues arise and the Ombudsperson would not be able to investigate a complaint on certain grounds, the person facing discrimination could still apply to another body to ensure their rights.

The duties listed in the Labour Code generally follow the same logic as the laws on equality (Art. 26(1–5).

It is important to note, however, that in Lithuania an employer with an average number of employees exceeding 50 **must adopt and publish**, in the ways that are customary at the workplace, **measures for ensuring the implementation and monitoring of the application of the principles of equal opportunities policy** (Art. 26(6)). While not a requirement, this is a great way for employers to ensure that the algorithmic systems they use are included in the equal opportunities policy; for example, as one of the measures the employer could foresee by carrying out assessments of the fundamental rights impact of algorithmic systems used by

[70] Labor Code. TAR, 2016, 23709.

human resources. Also, this policy could encompass improvement of competences among employees who deal with algorithmic systems in their work, especially if the employer is responsible for the creation of such systems.

Article 4 of the Law on the State Labour Inspectorate[71] states that the competence of the Inspectorate includes the prevention of violations of normative labour legislation and the control of compliance with the Labour Code and other normative legal acts. This general competence will allow the inspectors to also investigate complaints and carry out investigations on their own initiatives regarding algorithmic systems.

It should be noted, however, that the Law on the State Labour Inspectorate relies on physical inspections (for example, Article 9(1)(1) allows the inspectors to enter the premises of an organisation), and thus there might be situations in which access rights for the inspectors to carry out their functions might not be sufficient to access everything that they need to carry out a full investigation; for example, if the algorithmic system in question is hosted on servers that are not located on the premises of the employer, or even inside of the territory of Lithuania.

Although the inspectors have the right to request all the documentation, evidence, and explanations that they need for investigations (Art. 1(2–3)), to ensure that the State Labour Inspectorate can carry out its duties regarding algorithmic systems, Lithuania should ensure that the Inspectorate is included in the list of institutions of the AI Act under Article 77. The Law on the State Labour Inspectorate should also be reviewed to ensure that inspectors have access to information that might be relevant when investigating IT-related complaints, such as in situations of remote work.

There is no reason to believe that labour dispute commissions could not investigate complaints regarding the use of algorithmic systems in cases that violated an employee's, or even the employer's, rights. In Lithuania, a labour dispute commission is a mandatory institution for hearing labour disputes on the law and for resolution of individual labour disputes and collective labour disputes on the law.

[71] Law on the State Labor Inspectorate. *Valstybės žinios*, 2003, 102-4585.

In 2023, the commissions received 7,427 requests. In 3,479 cases, the commission approved settlement agreements; however, that still leaves a significant number of requests to be analysed. By frequency, most of the disputes were related to salary, dismissal, and (non-pecuniary) damage.[72]

The commission must resolve a labour dispute within one (1) month of the receipt of the application. In individual cases, this term might be extended for one more month. Because complaints based on algorithmic systems might take considerably longer to investigate, it might be useful to review this term to allow the commissions, in cases of violations of rights by algorithmic systems or other complex questions, especially relating to technologies, to be able to extend these investigations for a longer period to ensure their thoroughness.

2.5. Law on Public Administration

The Law on Public Administration[73] establishes the principles of public administration, the areas of public administration, the system of public administration entities, and the basics of organising the administrative procedure. This law is the basis for the right of any individual to appeal against the actions, inaction, and administrative decisions of any public entity.

This law is and will remain the basis on which algorithmic systems will operate when deployed in the public sector. Thus, it is important to note several aspects of this law that will be relevant in those cases.

First, Article 3 of the Law on Public Administration lists several principles of public administration that are relevant when dealing with algorithmic systems. Two in particular should be mentioned:

1. responsibility for decisions made: public entities are responsible for any administrative decisions they make. This principle can easily be applied to algorithmic systems: a public entity using an algorithmic system will be responsible for any administrative decisions made in support of or by the system.

[72] State Labour Inspectorate (2024). DGK statistika. DGK spendimų ir teismų sprendimų apžvalgos. Retrieved July 12, 2024, from https://vdi.lrv.lt/lt/darbo-gincai/apie-dgk/dgk-statistika-dgk-spendimu-ir-teismu-sprendimu-apzvalgos.
[73] Law on Public Administration. *Valstybės žinios,* 1999, 60-1845.

2. prohibition of change for the worse (*non reformatio in peius*): any complaints must be handled in a way that does not make the applicant's situation worse. This will also apply to any decisions made in support or by algorithmic systems.

Also, the article lists principles of the rule of law – completeness, equality, non-abuse of authority, objectivity, proportionality, and transparency among others – which are self-explanatory and yet might also come into question when public entities deal with algorithmic systems. Generally, this allows accountability to be demanded from public entities by requiring them to explain how algorithmic systems are used in decision-making processes and ensure people can understand and challenge ADM-based decisions.

Article 14 of the Law on Public Administration guarantees that decisions of public entities, their actions, or inaction can be challenged. The decision, actions, or inaction can be appealed before the same administrative subject or a higher institution – also to a pre-trial body or an administrative court. This guarantees that any decision, action, or inaction of the public entity can be reviewed; first, this will allow the institution itself to correct the situation and, in case that fails, it will be possible to go further and ask other institutions or courts to intervene.

The ability to appeal administrative decisions made by or in support of algorithmic systems is crucial for ensuring fairness and accountability. Appeal processes allow individuals to challenge these decisions if they believe they have been treated unfairly by an algorithmic system. This protects individuals from arbitrary actions and holds institutions accountable for the algorithmic systems they create and use.

3. ENABLING THE EQUALITY BODY

3.1. Receiving Complaints and Terms

Generally, the ET Law allows each natural person, legal person, or other organisation to file a complaint with the Ombudsperson regarding a violation of equal treatment (Art. 24). While the AI Act, for example, establishes separate market surveillance specifically for AI systems (Art. 74–87), and thus also enables persons facing violations of their rights to complain to the specific market surveillance authorities, this does not in any way limit the authority of the Ombudsperson, as an independent officer, to carry out their functions in the area of equality.

The Ombudsperson, no later than ten working days from receipt of a complaint, must decide to either refuse to examine the complaint or carry out an investigation (Art. 27 of the ET Law).

Also, if the ombudsperson decides to carry out an investigation, the complaint must be examined, and the person or entity who is the subject of the complaint must give a reply within three months from receipt of the complaint. The allowed extension is only one month (Art. 28).

Considered that the current practice shows that investigating discrimination by AI systems takes a lot of resources and a lot of time. For example, when The Netherlands Institute for Human Rights investigated childcare allowance algorithms, their examination of complex data took from 2014 to 2018 to decide whether people faced inequalities.[74] Thus, these kinds of investigations can take considerably more than 4 months to complete.

This might change when equality bodies gain greater competence and confidence when working with algorithmic systems, but for the foreseeable future, the terms listed in the ET Law seem unreasonably short to carry out investigations into complex algorithmic systems, such as investigating data used for training, finding comparable situations, analysing documentation, etc., and the consequences of the use of these systems.

There must be consideration of the change in the norms of the ET Law on the terms for complaints and investigations in the situation of algorithmic systems. This does not mean that

[74] Equinet (2022, November 3). What is the childcare allowance scandal? Retrieved July 8, 2024 from https://equineteurope.org/netherlands-institute-for-human-rights-role-in-the-investigation-of-the-childcare-allowance-scandal.

general terms should be changed – for example, relatively simple situations of obvious discrimination should not take longer than is provided in the ET Law right now – but the Ombudsperson must have enough time to consider all the relevant material, including consultations with experts, before delivering a decision in more complex cases.

3.2. Investigation Powers

The ET Law allows the Ombudsperson to request information, documents, explanations, and other material that are necessary for the performance of their functions. Natural, legal persons and other organisations must provide the relevant information within ten working days (unless another time limit is indicated by the Ombudsperson). This generally ensures that the Ombudsperson can carry out investigations and independent reviews on their own initiative. In cases of obstruction, the Ombudsperson can fine natural persons or the heads of legal persons following the Code on Administrative Offences (Art. 505, 589)[75].

This is also recognised in the AI Act (recital 157), which states that equality bodies should have access to any documentation created under the Article 77(1) and (2) of the AI Act allows national public authorities and bodies to request and access any documentation created or maintained under the regulation. Member States must notify the European Commission about such authorities and bodies. Thus, for the Ombudsperson to continuously carry out their functions effectively, the Ombudsperson must be included in this list.

3.3. Burden of Proof

Both the ET Law and EOWM Law provide that where the applicant establishes factual circumstances from which it may be presumed that there has been discrimination, a presumption shall be made that the fact of discrimination has occurred. The respondent shall have to prove that there has been no breach of the principle of equal treatment (Art. 4).

[75] Code on Administrative Offences. TAR, 2015, 11216.

While the general approach on when discrimination may occur is rather clear, as we can see from the analysis of both ET Law and EOWM Law, who would be responsible for discrimination caused by an algorithmic system is rather a complicated question.

In the case of an algorithmic system, there could be more than one liable party. At least these key points must be considered:

1. Who has designed or created the algorithmic system?
2. Who created the data set that is used within the algorithmic system?
3. Who has placed the algorithmic system on the market?
4. Who is using the algorithmic system in such a way as to give rise to harm?[76]

Currently, the ET Law is constructed in a way that the person bringing the complaint must choose the correct subject who has to prove that the principle of equality was not breached when *prima facie* discrimination is proven (Art. 4). These rules might need to be reviewed, especially per the AI liability directive, which is expected to lay down common rules on the disclosure of evidence on high-risk AI systems and the burden of proof in the case of non-contractual, fault-based civil law claims brought before national courts for damages caused by an AI system, which should be adopted in the near future.[77]

3.4. Decisions, Recommendations and Enforcement

Currently, the ET law provides that the Ombudsperson after carrying out an investigation can decide on one or more of these actions:

1) to forward the examination material to a pre-trial investigation body or a prosecutor if potential indications of a criminal act are identified;
2) to contact the relevant person to propose the termination of the act or omission violating equal treatment;

[76] QC, R. E. & Masters, D. (2020). *Regulating for an Equal AI: a New Role for Equality Bodies*. Equinet. 80. https://equineteurope.org/wp-content/uploads/2020/06/ai_report_digital.pdf.

[77] European Parliament (2024). AI liability directive. Retrieved July 8, 2024 from https://www.europarl.europa.eu/legislative-train/theme-legal-affairs-juri/file-ai-liability-directive.

3) to apply to the relevant person or institution to propose the modification or repeal of an administrative act or a decision (or part thereof) violating equal treatment;

4) to institute proceedings for administrative offenses;

5) to recognise the complaint as unfounded if the violations indicated therein have not been established;

6) to warn of the committed violation;

7) to oblige advertising operators to terminate the unauthorised advertising;

8) to apply to the administrative court requesting to investigate whether an administrative regulatory enactment (or part thereof), an act of general nature adopted by a religious community and association, political party, political organisation or association complies with this Law or the Law of the Republic of Lithuania on Equal Opportunities for Women and Men.

9) propose to the Supreme Commission of Official Ethics to investigate whether a person working in the public service has violated the Law on the Alignment of Public and Private Interests.

This is lacking in several ways. Compared to other ombudspersons in Lithuania, the equal opportunities Ombudsperson lacks certain powers when deciding on a complaint;[78] namely, to:

1) propose to the parliament (*Seimas*) to refer to the Constitutional Court regarding the compliance of legal acts with the Constitution and laws;

2) propose to the prosecutor to apply to the court for the protection of public interest following the procedure established by law.

These powers would be beneficial in the future, and consideration should be given to allowing all ombudspersons in Lithuania the authority to refer a case to the Constitutional Court. This would be useful in cases where algorithmic systems are causing human rights violations or might potentially cause violations and are regulated by normative legal acts that the

[78] Law on the Seimas Ombudspersons. *Valstybės žinios,* 1998, 110-3024.

ombudspersons cannot directly investigate. Thus, the power to refer to the Constitutional Court gives a chance to the ombudspersons to present arguments and formally start a process that may lead to the abolition of certain discriminatory or otherwise unacceptable practices enshrined in law. Of course, this would also have the added benefit of potential use in other situations that are not directly linked to algorithmic systems.

This could be done in two ways. One is the already formalised way that can be used by the *Seimas* ombudspersons: propose to the parliament (*Seimas*) to refer to the Constitutional Court (Art. 19(1)(11) of the Law on the Seimas Ombudspersons) or by amending the Constitution and allowing the ombudspersons to apply to the Constitutional Court directly, which was already under consideration in the parliament when discussions were ongoing regarding the ability for individuals to apply to the Constitutional Court.[79] The ability for the ombudspersons to apply to the Constitutional Court directly would ensure that political discussions do not get in the way of the protection of human rights, including protection from discrimination.

For the second purpose, protection of public interest, this power could be granted either indirectly, as it is with other ombudspersons in Lithuania, or directly as suggested in Directives (EU) 2024/1499[80] and (EU) 2024/1500[81]. Considering that a significant proportion of equality bodies in the EU will receive powers to work in the area of protection of public interest, and that in Lithuania this would not be the first time where the power to protect the public interest is granted outside of the prosecutor's competence, it would be preferable for Lithuania to choose the second option and grant this power directly to the Ombudsperson when transposing the directives on 'equality body standards'. In this way, the Ombudsperson would be able to exercise their functions more independently concerning the protection of public interest and

[79] Draft Act on Amendments to Articles 106 and 107 of the Constitution. TAIS, XIIIP-431(2).
[80] Council Directive (EU) 2024/1499 of 7 May 2024 on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in matters of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and amending Directives 2000/43/EC and 2004/113/EC, OJ L, 2024/1499, 29.5.2024, art 10.
[81] Directive (EU) 2024/1500 of the European Parliament and of the Council of 14 May 2024 on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and amending Directives 2006/54/EC and 2010/41/EU, OJ L, 2024/1500, 29.5.2024, art 10.

choose which cases to pursue. This would not be the case with the indirect version, as the prosecutor could choose not to act on the information received from the Ombudsperson.

3.5. Preventative Role

The ET Law ensures that the Ombudsperson would not only investigate complaints but generally have a wider mandate. As previously mentioned, this also includes the ability to conduct investigations on their own initiative and provide advice on inquiries following the procedure laid down in the ET Law (Art. 17(1)). This ensures that the Ombudsperson could investigate situations of possible discrimination, even though they did not receive a concrete complaint.

It is also important to note that the Ombudsperson can ‘conduct independent investigations relating to discrimination cases and carry out independent situation reviews in respect of discrimination, publish independent reports, issue conclusions and recommendations on any discrimination-related matters concerning the implementation of this Law, as well as submit proposals to state and municipal institutions and agencies on the improvement of legal acts and policy priorities for implementing equal treatment, carry out preventive and educational activities and dissemination of information about the ensuring of equal treatment’. (Art. 17(2).

Generally, in the context of the topic in question, these functions allow the Ombudsperson to issue recommendations for legislation and policy and to publish reviews, reports, and other material relating to algorithmic discrimination.

Moreover, the Ombudsperson can carry out preventive and educational activities and dissemination of information. This allows the Ombudsperson to work preventively and invest resources into blocking the way for possible discrimination, especially in areas where there is a heightened risk. These functions also lay the foundation for the Ombudsperson to join AI regulatory sandboxes in Lithuania to ensure consultations when AI systems are developed in a supporting role to other authorities (Art. 57(4), (6) of the AI Act).

3.6. Cooperation with Other Institutions, Bodies, and Organisations and Participation in the Implementation of the AI Act

Considering the foreseen mechanisms in the AI Act it is important for the Ombudsperson to cooperate with other institutions and bodies to ensure that the functions of the equality body are carried out effectively. The Ombudsperson would probably need to use technical expertise from other areas to ensure that investigations are thorough (for example, data analytics, statistics, IT, etc.). Institutions, like research bodies or regulatory agencies, can provide expertise on AI systems' inner workings, while non-governmental organisations offer valuable insights into potential biases and their impact on different communities. This collaborative approach fosters a comprehensive understanding of the impact on equality, allowing the Ombudsperson to develop targeted solutions and effectively advocate for fair and inclusive algorithmic systems development and deployment.

Currently, the Ombudsperson cooperates with other bodies while carrying out investigations on more of an *ad hoc* basis rather than continues relations with a few exceptions. It is advisable to consider formalising cooperation to strengthen its effectiveness; for example, through more formal cooperation agreements. Formal agreements establish clear lines of communication, outlining how information will be shared, and joint initiatives undertaken. This also allows for a greater possibility of ensuring the investigation into algorithmic systems is completed following the time limits provided in the ET Law. Moreover, the Ombudsperson could consider setting up working groups or similar advisory bodies under the Office of the Ombudsperson, which could further foster cooperation.

The equality body must be seen as a part of the institutional system that is and will be responsible for implementing the AI Act and in general to survey how different algorithmic systems function in Lithuania. While cooperation between the equal opportunities Ombudsperson and other institutions regarding AI is crucial, it is equally important to maintain the Ombudsperson's independence. This independence ensures they can act as an objective voice for those who may be negatively impacted by algorithmic systems.

4. REGULATORY GAPS AND RECOMMENDATIONS

4.1. Gaps in the Regulation

Apart from the gaps already mentioned in the study, there are some more worth mentioning as they encompass the wider reach of the equality laws to be considered, rather than separate smaller issues already discussed.

Considering Article 5 of the ET Law and Article 4 of the EOWM Law (duties for state and municipal institutions and agencies), it must be noted that the Ombudsperson has previously also received complaints regarding the **general administrative functions** of the institutions, and not only when the institution is providing administrative or public services. For example, in June 2024 the Ombudsperson found discrimination when a ministry did not ensure conditions for a person with a disability to participate in a meeting and express his opinion when the person requested to join the meeting remotely.[82] This could also come into question when institutions use certain physical access measures, such as face scanners, to grant access to the premises of the institution when a person wants to deliver documents in person. Thus, it is important to consider amending both the ET Law and the EOWM Law to ensure that the Ombudsperson can investigate complaints that fall under the category of public administration and internal administration as that is understood according to the Law on Public Administration.

The European Court of Justice in the judgment of case No C-356/21 interpreted the Directive 2000/78/EC 'as precluding national legislation which has the effect of excluding, on the basis of the freedom of choice of contracting parties, from the protection against discrimination to be conferred by that directive, the refusal, based on the sexual orientation of a person, to conclude or renew with that person a contract concerning the performance of specific work by that person in the context of the pursuit of a self-employed activity'.[83] Thus, the Directive 2000/78/EC[84] **protects self-employed people from discrimination**. Currently, the ET Law and the EOWM Law do not ensure that self-employed people would have protection from discrimination and

[82] LGK, (24)SN-63)SP-54.
[83] Judgment of the court, 12.1.2023, C-356/21, EU:C:2023:9.
[84] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16–22.

do not directly grant powers to the Ombudsperson to investigate possible cases of discrimination against self-employed people.

The question of discrimination against the self-employed could come into question at many points. For example, self-employed people often use various platforms to access work opportunities (drivers, couriers, short-term service providers, etc.). It is not unusual for these systems to have automated verification mechanisms (such as taking photos to confirm identity for comparison to an ID), which could amount to discrimination in certain cases when they fail to recognise certain faces (for example, because of skin colour or health status) or do not have proper accessibility features in place and thus limit the ability for a person to access job opportunities.

Self-employed people might also face disadvantages when potential clients use algorithmic systems to do background checks or carry out hiring tasks. For example, freelance writers or graphic designers might be denied work because their CVs are refused based on certain criteria, like competing in a women's sports league, that the system finds unacceptable.[85]

Thus, the ET Law and the EOWM Law must cover protection from discrimination for self-employed people both in the context of these people providing services but also in the context of duties of state and municipal institutions and agencies which provide permits, licenses, and other services to the self-employed.

While legal protection from discrimination often focuses on paid workers, **safeguarding volunteers from discrimination** is equally important. Currently, the equality laws do not directly cover volunteering as an area where certain subjects have duties concerning equality. Algorithmic systems like the ones used for volunteer recruitment or project assignments could perpetuate biases based on factors like age, disability, citizenship, and others. Legal protection would ensure fair opportunities for all volunteers, regardless of background. This would also help to foster diversity and inclusion in volunteer work and would allow organisations to avoid missing out on talented individuals.

[85] Dastin, J. (2018). Insight – Amazon scraps secret AI recruiting tool that showed bias against women. Reuters. Retrieved July 8, 2024, from https://www.reuters.com/article/world/insight-amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK0AG.

On 1 July 2024, the new Law on Volunteering[86] entered into force in Lithuania. This law foresees multiple actors that have control and contact with candidates and volunteers; most notably, the coordinating organisation (coordinating long-term volunteering) and the host organisation (the organisation where the volunteer carries out the activities). In the future, the ET Law and the EOWM Law should foresee duties for both actors. Both types of organisations are likely to use algorithmic systems; for example, when reviewing volunteer applications or assigning tasks. Moreover, certain duties must also be foreseen for the organisations for whose benefit voluntary activities are carried out, especially regarding possible instances of harassment and instructions to discriminate. This would ensure that volunteers are fully protected no matter from which of the actors the volunteer might face unfair treatment.

4.2. Recommendations

1. Generally, the equality laws of Lithuania enable the Lithuanian equality body to investigate possible cases of algorithmic discrimination, carry out independent investigations and reviews, and issue recommendations. This encompasses all the areas listed in equality laws, including activities of state and municipal institutions and agencies, education, employee relations, consumer protection, and others.

2. Even though most of the time these are solved in practice, the ET Law should be supplemented by additional discrimination grounds of gender, gender expression, sex characteristics, health status, and skin colour to ensure robust protection of diverse people, and discussions should be facilitated to ensure progress towards the ET Law recognising a non-exhaustive list of prohibited grounds for discrimination, as understood within the Constitution and many international human rights treaties.

3. Considering the exceptions that exist in the equality laws, both the equality body and policymakers in respective policy areas should encourage religious communities and associations and other organisations to self-regulate regarding algorithmic systems and

[86] Law on Volunteering, *Valstybės žinios,* 2011, 86-4142.

the prevention of discrimination. This would help to promote the responsible use of algorithmic systems.

4. Taking into account that the ET Law does not cover protection from discrimination in social security schemes like the EOWM Law, it would be useful to systematically review these laws, analysing the needs and possibilities, and also include norms relating to protection from discrimination in social security schemes in the ET Law for some protected grounds, especially knowing that algorithmic systems are likely to be used in the area of social security.

5. The Labour Code presents a great opportunity to mainstream equality in algorithmic systems through the equality measures that employers must adopt and publish. These could include fundamental rights impact assessments of algorithmic systems and training for employees who create and use algorithmic systems in their daily work.

6. While both the State Labour Inspectorate and the labour dispute commissions are enabled to carry out their functions regarding algorithmic systems, the Law on the State Labour Inspectorate should be reviewed to ensure that the inspectors can access all the needed information when investigating algorithmic systems. This must also encompass the inclusion of the State Labour Inspectorate in the list provided by Article 77 of the AI Act.

7. Consideration should be given to the terms that the labour dispute commissions face when analysing complaints. The current term of one month with the possibility of extension by one more month might not be enough to carry out investigations in cases where algorithmic systems possibly violated a person’s rights.

8. The Law on Public Administration provides a good basis for the responsibility of public bodies and ensures that persons facing possible violations of their rights due to the decisions of public bodies, their actions or inactions can challenge them and seek redress.

9. As with labour dispute commissions, the terms in the ET Law should be reconsidered to enable the Ombudsperson to thoroughly investigate complaints and other cases of

discrimination by an algorithmic system . This does not mean that general terms that apply to relatively simple situations of discrimination should be changed, but the Ombudsperson must have enough time to consider all the relevant material.

10. Similarly to the State Labour Inspectorate, the equality body must be included in the list provided by Article 77 of the AI Act to be able to access the needed documentation and information under the regulation.

11. In the future, it might be useful to reconsider the burden of proof and liability norms in the equality laws considering that now the person presenting a complaint must choose the correct responding subject from the start. This will not always be possible in cases of algorithmic system discrimination because of lack of knowledge and the opacity of the systems themselves. It is advisable to wait to see the final form of the AI liability directive before considering amendments to the norms of burden of proof and liability.

12. The effectiveness of the mandate of the equality body would be improved if the equality body was granted additional powers, as is the case with other ombudspersons in Lithuania. First, the Ombudsperson should be enabled to refer to the Constitutional Court regarding the compliance of legal acts with the Constitution and laws. This is especially relevant in cases where the Ombudsperson cannot investigate specific normative legal acts. This could be done in two ways: either granting the Ombudsperson the ability to propose to the parliament (*Seimas*) that the case should be referred to the Constitutional Court or granting the right for the Ombudsperson to apply directly to the Constitutional Court, thus avoiding any possible political interference. Furthermore, the Ombudsperson should have the authority to apply to the court for the protection of public interest: Lithuania should choose to grant this power to the Ombudsperson when transposing Directives (EU) 2024/1499 and (EU) 2024/1500 into national law. These powers are also relevant to other ombudspersons in Lithuania, so granting them to all ombudspersons would strengthen human rights protection in Lithuania in areas other than equality.

13. Lithuanian institutions that will be responsible for regulatory sandboxes which must be established under the AI Act ought to consider including the equality body in the activities

of these sandboxes. Furthermore, when designing the algorithms for activity of the regulatory sandboxes, the authorities must consider the independence of the equality body and other ombudspersons.

14. The Ombudsperson could consider strengthening the cooperation of the equality body with other responsible institutions participating in the surveillance of algorithmic systems and experts in the area to be able to more effectively gather the required information and expertise when faced with investigations on possible discrimination by algorithmic system. Formalising these relations with formal cooperation agreements might help to promote efficiency.

15. The equality laws have considerable gaps that must be addressed as soon as possible. First, the equality laws currently do not directly cover the duties of public entities regarding general administrative functions and thus, in some cases, discrimination might occur when public entities carry out functions of public and internal administration. The equality laws should foresee duties to state and municipal institutions and agencies in the areas of public and internal administration.

16. Even after the judgment in case No C-356/21 of the European Court of Justice, the equality laws still do not cover the protection of self-employed people from discrimination. Both the ET Law and the EOWM Law should contain norms ensuring that self-employed people are protected.

17. Similarly, there is a gap in legislation regarding volunteers. Currently, the equality laws do not foresee the protection of people who carry out volunteering activities. Both the ET Law and the EOWM Law should foresee equality duties for coordinating organisations, host organisations and organisations for whose benefit voluntary activities are carried out.

III. LEGAL FRAMEWORK IN ESTONIA

1. THE EXISTING REGULATION

1.1. Introduction

This chapter delves into the legal and regulatory framework in Estonia that addresses algorithmic discrimination, with a focus on the public sector. Estonia has generally been regarded as a pioneer in public sector digital innovation. Indeed, 99% of Estonian public services are accessible online, indicating that algorithmic solutions are prevalent in most public procedures. Furthermore, Estonia has adopted more than 140 AI-based solutions in the public sector over the last few years.[87] As per the Government's digital policies, Estonia remains ambitious in further automating public decision-making and services in order to improve efficiency, reduce the administrative burden and enhance accessibility.[88]

The Estonian non-discrimination laws are strongly shaped by the international and EU legal framework. Estonia ratified the European Convention on Human Rights in 1996, which established anti-discrimination obligations.[89] Furthermore, Estonia has joined the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities and the Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence. The applicable EU legal framework on non-discrimination has been outlined in Chapter I above.

While the broader context of European and international regulations that are described above offers an important regulatory foundation, Estonia's legal instruments play a critical role in shaping the country's approach to equality and non-discrimination in algorithmic decision-making. Existing equality laws in Estonia apply to the use of algorithmic systems; however

[87] See examples of AI use-cases in Estonian public sector here: https://www.kratid.ee/en/ai-use-cases.
[88] See below section 1.8. of this chapter.
[89] European Convention on Human Rights. RT II 1996, 11, 34. https://www.riigiteataja.ee/akt/13073654. Article 14 of this convention establishes the prohibition of discrimination.

they do not specifically refer to it. The section below will outline the key regulations which ought to ensure the principle of equality and non-discrimination in the context of algorithmic discrimination in the public sector.

At the foundation of the Estonian non-discrimination framework is the **Estonian Constitution**, which enacts the constitutional prohibition of discrimination and guarantees equality before the law. Beyond this, there are two key legal acts – the **Equal Treatment Act** and the **Gender Equality Act** – which establish the framework for what constitutes discriminatory (i.e. unlawful) behaviour. In the future this framework is likely to be recast through a new Gender Equality and Equal Opportunities Act, replacing both laws. As a draft Act has already been proposed, the mapping below also looks at the changes this amendment is likely to bring about. The overview will also consider the **Employment Contracts Act**, which incorporates numerous anti-discrimination principles within the employment context. In the context of the public sector, public procedure is regulated by the **Administrative Procedure Act**, which also applies to the use of algorithmic systems and creates a certain standard for ensuring fairness and transparent in public sector.

The chapter will also examine the enforcement mechanisms available to individuals who believe they have been subject to algorithmic discrimination. This includes a review of the adjudication process, the burden of proof, remedies available, and the role of public institutions such as equality bodies in enforcing these rights. The final section of the chapter highlights existing regulatory gaps and offers recommendations for strengthening the legal framework to address emerging challenges related to algorithmic discrimination in Estonia.

1.2. Constitution of the Republic of Estonia

The general principle of equality is established in § 12 of the Constitution of the Republic of Estonia, which states the following:

> *Everyone is equal before the law. No one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other beliefs, property or social status, or on other grounds.*

The article furthermore prohibits incitement of hatred:

> *The incitement of national, racial, religious or political hatred, violence or discrimination shall be prohibited and punishable by law. The incitement of hatred, violence or discrimination between social strata shall also be prohibited and punishable by law.*

The principle of equal treatment enshrined in the law protects the equal from unequal treatment and the unequal from being treated the same.[90] Failure to respect this principle amounts to discrimination where there are no objective, reasonable and legally purposeful reasons for unequal treatment. Thus, not all unequal treatment is necessarily unlawful.[91]

The phrase 'on other grounds' in § 12 has been interpreted by the Supreme Court to mean that the list of grounds for discrimination is not limited to those explicitly mentioned in § 12, but is rather an open-ended list.[92] For example, disability, field of work and age may be among the other grounds not explicitly mentioned in § 12 of the Constitution but based on which discrimination could occur.[93] Furthermore, the general principle of equality extends to all domains[94] – clearly also meaning that it applies to algorithmic discrimination.

The prohibition of discrimination laid down in § 12 of the Constitution does not directly apply in relations between private persons. This, however, does not necessarily mean that private persons are free to discriminate – rather, a private individual is bound by § 12 of the Constitution through § 19 of the Constitution which establishes that '*In exercising his or her rights and freedoms and fulfilling his or her duties, everyone must respect and consider the rights and freedoms of others, and must observe the law'*. In order to realise that, the Estonian lawmaker has enacted The Gender Equality Act and the Equal Treatment Act which, among other things, applies to private-law relationships.

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[90] RKPJKo 03.04.2002, 3-4-1-2-02, section 17.
[91] See also Kivioja, A., Muller, K., Oja L. (2020). Põhiseadus § 12 Comments, section 6. – Ü. Madise jt (Editor). Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. 5., täiend. vlj. Tartu: sihtasutus Iuridicum.
[92] RKPJKo 01.10.2007, 3-4-1-14-07, section 13.
[93] Meiorg, M., Grossthal, K. (2022). Võrdse kohtlemise seadus, Käsiraamat. Tallinn, p. 16. For example, the Supreme Court has considered discrimination based on field of work (RKHKo 20.10.2008, 3-3-1-42-08, section 25) and based on age (RKÜKo 07.06.2011, 3-4-1-12-10, section 33; RKPJKo 01.10.2007, 3-4-1-14-07, section 15).
[94] RKPJKo 01.10.2007, 3-4-1-14-07, section 13.

The Estonian Supreme Court has provided some interpretation of the principle of equality that is also relevant in the context of automating public sector tasks through algorithmic systems:

1) § 12 imposes an obligation to apply the law equally to all persons. According to the Supreme Court, this means 'first and foremost equality in the application of the law, and its meaning lies in the requirement to apply the laws in force impartially and equally to all persons'.[95]

As many of the key use-cases for public sector algorithmic systems relate to applying the law in concrete circumstances, this constitutional requirement presumes a certain robustness for the algorithmic systems used – i.e., it must be ensured that these systems are designed to apply laws consistently in *all* situations.

2) The Supreme Court has also repeatedly clarified that it is not a violation of the right to equality if the state does not rectify in favour of a person an error that it has made in the case of another person.[96]

Consequently, a programming error in the algorithm benefitting a person (a rather regular occurrence) does not give a right to similar beneficial treatment in future cases or by other people.

3) Even if § 12 does not explicitly state so, it also imposes an obligation to comply with the principle of equal treatment when drafting and enacting laws.[97]

Accordingly, should (for example) generative AI solutions be integrated into the process of drafting a legal act or algorithmic systems used to identify an optimal legislative solution (e.g. assessing impacts), the principle of equality must be considered throughout.

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[95] RKPJKo 03.04.2002, 3-4-1-2-02, section 16; nt ka RKKKo 08.10.2015, 3-1-1-68-15, section 15. See also Põhiseadus Comments § 12 section 10.
[96] RKPJKo 04.10.2017, 5-17-22/10, p. 93 and RKHKo 27.11.2006, 3-3-1-59-06, p. 12. See also PS Comments § 12 section 10.
[97] Põhiseadus § 12 Comments, section 11; RKPJKo 01.10.2007, 3-4-1-14-07, section 13; RKPJKo 30.09.2008, 3-4-1-8-08 ; RKPJKo 20.03.2006, 3-4-1-33-05, section 26.

4) § 12 may also apply, if discrimination does not occur on the basis of a single ground, but rather, a person is treated differently on the basis of a number of co-existing or intertwined characteristics.

In the context of algorithmic discrimination, this is a rather important aspect. Many commentators have pointed out the 'intersectional' character of algorithmic discrimination, which refers to the way in which different forms of discrimination intersect and compound one another, leading to unique and often more severe forms of disadvantage.[98] This principle ensures that courts are able to take into account such intersectional character.

5) Legal equality does not necessarily mean that substantive or real equality has been achieved. For example, everyone has the right to apply for public sector jobs, but this equality is undermined if job postings are only online, limiting opportunities to those without internet access.[99]

This is a fundamental consideration in the context of automating public services. Automation can enhance access to services and streamline processes, making public sector interactions more efficient and widely accessible. However, it also presents challenges in ensuring these benefits are distributed equitably. Even basic digitalisation of public services and benefits creates a question of equality from the perspective of those lacking access to digital devices and the internet. Ensuring real equality thus means that automated systems are designed to be inclusive, transparent, and adaptable to the current capabilities of individuals.

6) As per the Estonian Supreme Court 'the state is not prohibited from using legal methods to eliminate or mitigate factual inequalities arising from legal equality. In some cases, it is even mandatory'.[100]

Related to the previously described notion of 'real equality', the state should, in some cases, have a positive obligation to eliminate or mitigate factual inequalities. In this light, it can be

[98] See Gerards, J. and Xenidis, R. (2021). 'Algorithmic discrimination in Europe – Challenges and opportunities for gender equality and non-discrimination law'. European Commission: Directorate-General for Justice and Consumers, Publications Office, p. 65-66. Retrieved 13 October 2024 from https://data.europa.eu/doi/10.2838/544956.

[99] RKPJKo 03.04.2002, 3-4-1-2-02, section 17; RKPJKo 26.09.2007, 3-4-1-12-07, section 19; RKPJKo 01.10.2007, 3-4-1-14-07, section 13.

[100] RKHKo 20.10.2008, 3-3-1-42-08, section 27.

argued that introducing automation into the administrative decisions or actions that impact the rights or obligations of individuals should, in relevant cases, require proactive steps to retain or improve equality for specific groups of people.

1.3. Equal Treatment Act

The Equal Treatment Act was adopted on 11 December 2008, and entered into force on 1 January 2009. It covers discrimination based on various characteristics (such as gender, race, nationality, age and disability). The purpose of the Equal Treatment Act is to ensure that all people are protected from discrimination and that their rights are equally safeguarded.

The Act primarily applies to the labour market, education, social protection, healthcare, and the availability of goods and services. This means that the Act covers activities in both the public and private sectors that may affect individuals' rights and obligations in these areas. However, there are some exceptions, such as the areas of family and private life, which are not covered by the Act.

The central principle of the Act is that all people must be treated equally, regardless of their gender, race, colour, nationality, religion, beliefs, age, disability, sexual orientation and, in some cases, other characteristics. This means that everyone must have equal access to employment, education, healthcare, and other services without the risk of discrimination.

At the same time, different characteristics are protected under the Equal Treatment Act to varying degrees. Discrimination based on a person's nationality (ethnicity), race, or colour is prohibited in employment, in the establishment of working conditions, in remuneration, in termination of contracts, in vocational training, in professional organisation membership, in social welfare and healthcare, in education, and in the availability of goods and services offered to the public.

Discrimination based on a person's religion or beliefs, age, disability, or sexual orientation is prohibited in employment, in the establishment of working conditions, in remuneration, in termination of contracts, and in vocational training or professional organisation membership.

Additionally, the Act requires adherence to the principle of equal treatment in employment relationships based on unmentioned characteristics, particularly in the fulfilment of family obligations, social status, the representation of employees' interests, or membership in employee associations, due to language skills or military service obligations.

The Act prohibits all forms of discrimination, including direct and indirect discrimination, as well as harassment and the giving of instructions to discriminate. Discrimination is defined as a situation where a person is treated unfavourably due to their personal characteristics, which are legally protected. Indirect discrimination occurs when an apparently neutral provision or practice actually places a certain group of people at a disadvantage.

The Act obliges both public and private sector employers, educational institutions, healthcare providers, goods and services providers, and other individuals and organisations to adhere to the principle of equal treatment and to avoid discrimination. All individuals and legal entities operating in areas regulated by the Act are required to comply.

All obligated parties must take measures to prevent discrimination and ensure equal treatment for everyone. This also includes the obligation to create suitable working and service conditions that consider the needs and rights of different people. Additionally, employers and service providers must ensure that the policies and practices they establish do not discriminate against anyone and that all people have equal access to services and employment opportunities.

In summary, the Equal Treatment Act is an important tool in Estonia for ensuring that all people are protected from discrimination and that they have equal opportunities and rights. The Act establishes clear rules that help prevent and reduce discrimination in society and promote the principle of equal treatment.

1.4. Gender Equality Act

The Gender Equality Act was adopted on 7 April 2004, and entered into force on 1 May 2004. The purpose of this law is to promote equality between women and men and to combat gender discrimination. It complements and supports the Equal Treatment Act but specifically focuses on gender equality issues.

The Gender Equality Act undertakes to ensure equal rights and opportunities for women and men in all areas of society. This includes promoting gender balance and preventing and eliminating gender discrimination. The Act focuses on combating both direct and indirect discrimination based on gender. It applies to all areas of life, including the labour market, education, public services, social protection, and other key areas where gender discrimination may occur, except the private sphere, where the guarantee of gender equality is not regulated by law. The Gender Equality Act obliges both public sector institutions and private sector employers, educational institutions, healthcare providers, and other organisations to observe and promote gender equality and implement relevant measures.

The level of gender equality is measured by comparing the situation of two social groups – women and men – in different areas of life. For example, gender inequalities manifest themselves in different levels of participation of women and men in decision-making processes, different status in the labour market and economy, different responsibilities in family life, different educational choices, different access to resources, including time, information, networks, etc. Gender inequalities are also reflected in different levels of participation in decision-making processes.[101]

The main obligations arising from the Act are as follows:

1. Prevention and avoidance of discrimination: employers and other obligated parties must take measures to avoid direct and indirect discrimination based on gender. This includes the obligation to ensure that job offers, positions, and promotion opportunities are equally accessible to both men and women.

2. Promotion of gender equality: employers and public sector institutions are required to promote gender equality in their policies and activities. For example, they should ensure equal employment and salary policies within organisations and provide equal career and educational opportunities for men and women.

[101] Meiorg, Grossthal, (2022), p. 12.

3. Gender equality action plan: employers with more than 30 employees must develop and implement a gender equality action plan to promote equal opportunities for women and men within the organisation.

4. Prohibition of harassment and sexual harassment: the Act prohibits gender-based harassment and sexual harassment in the workplace and other areas of life. Employers and other obligated parties must ensure that such situations do not occur in their organisations and take measures if harassment does occur.

The obligations outlined in the act extend to public sector algorithms. Authorities utilising algorithms must therefore ensure that these systems are used in a way that aligns with the general goals and obligations of the Act. This is rather significant as algorithmic decision-making, particularly when relying on historical data, may inadvertently encode gender-based stereotypes and biases, leading to unequal outcomes for men and women. Together with the Equal Treatment Act, this Act helps ensure that Estonia is a discrimination-free, safe, and fair society where all people have equal opportunities to realise their potential.

Compliance with the Act is monitored and advised by several national authorities, including the Gender Equality and Equal Treatment Commissioner, who provides assistance and advice in resolving discrimination cases and intervenes if necessary.

1.5. Draft Gender Equality and Equal Opportunities Act

1.5.1. General Overview

In light of some of the limitations of the Equal Treatment Act and the Gender Equality Act, Estonia is currently in the process of enacting a new law – the Gender Equality and Equal Opportunities Act – to replace both previous Acts.[102] As per its Explanatory Memorandum, the aim of the draft Act is to ensure the promotion of gender equality as a fundamental human right and a universal good in all areas of society, the removal of social barriers to equal opportunities for minorities and equal treatment of persons on the basis of the characteristics protected by the

[102] Soolise võrdsuse ja võrdsete võimaluste seaduse eelnõu, 03.05.2024, proposed by Ministry of Economic Affairs and Communication (hereafter 'the **draft Act**'). Available at: https://eelnoud.valitsus.ee/main/mount/docList/389a2753-fc8e-4e10-9912-469b6fc2acf8.

European Convention on Human Rights.[103] It effectively consolidates the protection and promotion duties of equality rights into one act to improve legal protection and clarity.

The draft Act abolishes the hierarchy of application based on protected characteristics – the new Act will apply to all protected characteristics in all areas of society, except family and private life. Similarly to § 12 of the Constitution, the list of protected grounds is left open.

The amendment will have a significant impact on the protection of religion or belief, age, disability and sexual orientation, for which the Equal Treatment Act only provides protection in the area of employment and vocational training.[104] In addition, the draft Act extends the scope of protection in the work context.[105]

Special attention will be paid to promoting equal opportunities for people with disabilities. Various public institutions, as well as providers of goods or services and employers, are obliged to take measures to prevent discrimination against persons with disabilities and to create equal opportunities for them to exercise their rights and freedoms. Thus, the current draft Act would extend the non-discrimination obligations of private entities.

The proposal also extends the powers of the Gender Equality and Equal Treatment Commissioner to ensure that more people have better access to help in cases of discrimination.

If enacted, the draft Act is set to enter into force on 1 January 2026.[106] The aim is to allow sufficient time after the adoption of the act to raise the awareness of the new regulation among the obliged persons, to develop supporting tools (where necessary) and to give sufficient preparation time for the obligated persons.

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[103] Soolise võrdsuse ja võrdsete võimaluste seaduse eelnõu seletuskiri, 03.05.2024 (hereafter 'the **Explanatory Memorandum**.' Available at: https://eelnoud.valitsus.ee/main/mount/docList/389a2753-fc8e-4e10-9912-469b6fc2acf8.

[104] As an example, the Explanatory Memorandum explains that a large proportion of potential cases of discrimination on the grounds of disability and sexual orientation take place outside the field of employment, and it is these minorities who may be more vulnerable to, and affected by, problems of access to education and publicly provided goods and services – see the Explanatory Memorandum, p. 4.

[105] See §§ 15–19 of the draft Act.

[106] § 46 of the draft Act.

1.5.2. Impact of the draft Act on algorithmic discrimination

Particularly relevant for this study is the fact that the draft Act explicitly establishes algorithmic discrimination as a form of discrimination. It defines algorithmic discrimination as a situation '*where a person is subjected to a decision based partly or wholly on the output of an automated system which causes or facilitates an unjustified difference in treatment or has an adverse effect on a person on the basis of a protected characteristic'*. [107]

While algorithmic discrimination would still be unlawful without establishing an explicit prohibition, the more impactful element of the draft Act is a concrete obligation for state and local authorities to ensure that *'the algorithmic system they use is designed and developed with due regard to the principle of equal treatment and the objectives of gender equality and equal opportunities, and that its use does not adversely affect persons on the basis of protected characteristics or perpetuate or exacerbate social inequalities based on protected characteristics'*.[108] This new obligation seems to signify a certain shift from merely holding authorities accountable for discriminatory outcomes to requiring proactive measures to integrate anti-discrimination safeguards during the development and design phases of algorithms. By embedding these principles early in the process, the law aims to prevent discriminatory biases from taking root, akin to the logic of the AI Act. Indeed, the Explanatory Memorandum explains that in order to fulfil this commitment, it would be appropriate to:

- consider the representativeness of machine-readable datasets,
- exclude data that are discriminatory,
- carry out regular testing of the system,
- involve representatives of different social groups in its design, development and testing,
- in sectoral policymaking (for example) carry out an impact analysis on the risk of discrimination and bias, and
- commission external audits.[109]

[107] Subsection 3 of § 6 of the draft Act.
[108] Subsection 7 of § 9 of the Draft Act .
[109] Explanatory Memorandum, p. 21.

The draft Act also stresses that in light of the growing use of algorithmic solutions, the public authority must consider and integrate the algorithmic aspect into its commitment to continuously promote equality.

1.6. Employment Contracts Act

Employment relations are highly relevant in the context of algorithmic discrimination, since algorithms are increasingly used in processes such as recruitment, task allocation and performance assessment.

Employment relations are mostly regulated through the Employment Contracts Act. Concerning equal treatment, the Act establishes that employers must ensure the protection of employees against discrimination, follow the principle of equal treatment and promote equality in accordance with the Equal Treatment Act and Gender Equality Act.[110] These laws, therefore, also determine the grounds and general scope of discrimination. It should, however, be noted that while, as a general rule, the Equal Treatment Act prohibits discrimination only on specific grounds, then in the context of employment relations it protects equal treatment also on grounds of characteristics that are not specified in the Equal Treatment Act.[111] Thus, possible grounds of discrimination include (among else) family-related duties, social status, representation of the interests of employees or membership in an organisation of employees, level of language proficiency or duty to serve in defence forces.[112] Discrimination in employment relations is prohibited when concluding an employment contract, appointment or election to office, establishment of conditions for access to employment, working conditions, giving instructions, remuneration, termination or cancellation of employment contracts or contracts for the provision of services, release from office.[113]

In the context of gender equality, the Gender Equality Act establishes, in addition to the general prohibition of direct and indirect discrimination, also more detailed situations that are considered discriminatory in employment.[114] Such situations concern, among others,

[110] § 3 of the the Employment Contracts Act. RT I 2009, 5, 35.
[111] Subsection 3 of § 2 of the Equal Treatment Act. RT I 2008, 56, 315.
[112] *Ibid.*
[113] Subsections 1 and 2 of § 2 of the Equal Treatment Act.
[114] § 6.of the Gender Equality Act. RT I 2004, 27, 181.

recruitment, promotion, sending for training, imposing conditions of employment, imposing conditions for remuneration, providing benefits, management of work, allocation of work tasks, imposing working conditions, gender and sexual harassment, etc.

The Employment Contracts Act additionally states that in cases of extraordinary cancellation of employment contract by an employer, it must take into account the principle of equal treatment.[115] Furthermore, an employer may not cancel an employment contract on the grounds that the employee requested flexible working conditions provided for in the Gender Equality Act.[116]

Once the new Gender Equality and Equal Opportunities Act enters into force, the Employment Contracts Act will be amended and refer to the clauses of the new act when determining discrimination in employment relationships. On this note, the draft Act proposes more comprehensive grounds of discrimination, as well as certain further obligations in the context of the employment relationship. Among other things, it proposes a concrete obligation whereby employers must – actively, systematically and purposefully – promote gender equality and equal opportunities.[117] It further establishes numerous practices that would be considered discriminatory, such as where selection criteria during recruitment, task assignment and conditions for granting and receiving remuneration or benefits would be carried out in an unequal manner.[118]

Once the draft Act enters in force, the legal framework to tackle algorithmic discrimination in employment relations will be broadly comprehensive:

- The grounds for discrimination would be open and refer to an extensive set of concrete examples of discrimination.
- The employer will be required to undertake promotional activities that will also apply to algorithmic decision-making, supervision or other systems that may cause discrimination.

[115] Subsection 4 of § 89 of the Employment Contracts Act.
[116] Clause 7 of subsection 1 of § 92 of the Employment Contracts Act.
[117] § 11of the draft Act.
[118] § 15 of the draft Act § 15.

- The employer must provide oversight on equality measures and data, creating transparency, including regarding the impact of the algorithmic systems.

While the Estonian law does not – neither currently nor after the enactment of the draft Act – establish proactive obligations to audit or mitigate discrimination in private sector algorithmic systems, it should be noted that various AI systems used for employment, employee management, and access to self-employment are considered high-risk uses as per the AI Act, which regulates the development and use of such systems.[119] This ensures that high-risk uses of AI in employment relations must have sufficient data quality, integrate risk management and take other relevant measures that, among other things, mitigate the risk of algorithmic discrimination.

1.7. Administrative Procedure Act

Part of the legal framework for protecting equality in public sector algorithmic systems is the Estonian Administrative Procedure Act (hereafter referred to as 'the **APA'**), which sets out the rules and principles of administrative procedures.[120] Public authorities must abide by the APA in issuing administrative decisions and in taking administrative measures, including where these are conducted through algorithmic systems.

Under the APA, administrative acts must be lawful[121] – among other things, they must comply with the rules on non-discrimination elaborated above. Similarly, in carrying out administrative measures, the administrative authority is explicitly required to observe the principle of equal treatment.[122]

Furthermore, as APA codifies principles of good administration and due process, it has a key role in ensuring important safeguards in protecting people's rights. Notably, an administrative act impacting the rights or obligations of individuals must be clear and unambiguous[123] and include written reasoning.[124] This frames the transparency and explainability requirement,

[119] See Annex III of the AI Act and Chapter I of this analysis.
[120] Administrative Procedure Act. RT I 2001, 58, 354.
[121] § 54 of the Administrative Procedure Act.
[122] Subsection 2 of § 107 of the Administrative Procedure Act.
[123] Subsection 1of § 55 of the Administrative Procedure Act.
[124] Subsection 1of § 56 of the Administrative Procedure Act.

while the APA also obliges public authorities to grant the persons concerned the right to express their opinion and allow decisions to be contested.[125] Consequently, where ADM systems are used in the context of administrative decisions or measures, the APA provides a framework to ensure that the automated decision will be carried out with sufficient transparency and provide explanations to enable the addressees of the automated decision to assess whether the decision was lawful, including in terms of the principle of equality. This allows meaningful human participation in public procedure and helps to prevent arbitrary state violations in algorithmic decision-making.[126] Thus, the APA has an important role in guaranteeing the necessary principles of due process to promote fairness and ensure accountability for wrongdoings.

The Estonian Government is in the early process of enacting additional specific rules for automating administrative acts and measures. This could further elaborate the standard for ensuring pertinent transparency requirements for sufficiently assessing possible discriminatory behaviour within the algorithmic systems.

1.8. The Government AI and Data Policies

This subsection briefly assesses the Estonian Government AI and data policies in the context of protecting the principle of equality. While these policies are not part of the regulatory framework, they do inform the way the question of algorithmic fairness is integrated into Estonian digital policies and what non-regulatory steps the government may take in order to promote and facilitate fairness in algorithmic systems.

Two key digital policy documents are the Estonia 2035 Development Strategy[127] and Estonia's Digital Agenda *2030*[128]. The overarching aim of both is to move consistently towards a smart, caring, collaborative and innovative society. Digitalisation and adoption of new technologies are considered as key measures for achieving this.

[125] Most notable in this regard are §§ 55, 56, and 40 of the APA.
[126] Ebers, M., Trasberg, H. (2023). Due Process, Fair Trial, Transparency, and Explainability, p. 117. In: Ebers, M., Tupay, P.K. (eds) *Artificial Intelligence and Machine Learning Powered Public Service Delivery in Estonia. Data Science, Machine Intelligence, and Law*, vol 2 (pp. 103-128). Springer, Cham. https://doi.org/10.1007/978-3-031-19667-6_6.
[127] Available here: https://valitsus.ee/en/estonia-2035-development-strategy/strategy/strategic-goals.
[128] Available here: https://mkm.ee/en/e-state-and-connectivity/digital-agenda-2030.

A concrete action plan is established in the 2024–2026 AI Action Plan and the 2024–2025 Data Action Plan.[129] While centred around creating an innovative and knowledge-based economic and public sector, they also put significant emphasis on the trustworthy and human-centric use of the technology. Indeed, one of the goals stated in the AI Action Plan is *'ensuring that digital solutions are secure, ensure the protection of people's rights and maintain public trust in Estonia's digital state'*.[130] The two action plans set out a number of concrete activities to achieve this, such as:

- providing standards and guidance for assessing the impacts of algorithmic solutions;
- developing and offering an algorithmic transparency standard for public sector algorithms;
- providing training to institutions on the lawful and human-centric use of AI;
- providing regulatory sandbox and other support services for testing algorithmic solutions in a controlled manner, ensuring they meet fairness and other standards before wide-scale implementation.

This analysis and other deliverables created under the Equitech project are also considered as part of the activities of the AI Action Plan.

Meanwhile, the Data Action Plan promotes responsible data management, which among other things should better safeguard that the data used for algorithmic systems and more generally in public sector processes is of high quality and unbiased.

As a result of these initiatives, both private and public authorities are expected to be better equipped with the knowledge and skills necessary to implement measures that ensure the integrity of algorithmic systems while mitigating potential risks. Given their cross-sectoral application, these measures are also designed to address and reduce the risk of algorithmic discrimination. In practical terms, continuous efforts will be needed to ensure that these policies remain adaptable to emerging technological challenges, as well as ensure that they sufficiently focus on promoting fairness and equality in public sector algorithms and data processing.

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[129] AI Action Plan, available at: https://www.kratid.ee/_files/ugd/7df26f_21000a2dd36c4a66a30eea97563370a3.pdf. Data Action Plan, available at https://www.mkm.ee/sites/default/files/documents/2024-02/Andmete%20tegevuskava%202024-2025.pdf.
[130] AI Action Plan, p. 52.

2. ENFORCEMENT OF RIGHTS IN CASES OF DISCRIMINATION

This chapter provides an overview of the legal framework in Estonia on enforcing individuals' rights in cases of discrimination. There are a number of institutions and enforcement mechanisms that can be utilised to address such cases. The chapter will first look at resolving discrimination cases through the courts and the labour dispute committee. It will thereafter provide an overview of the role of the two main public institutions protecting equality rights; the Chancellor of Justice and the Gender Equality and Equal Treatment Commissioner.

2.1. Adjudication

Discrimination disputes can be resolved by a court or a labour dispute committee. Victims of discrimination can file a lawsuit in civil or administrative court, depending on the private or public nature of the infringement. In cases of employment discrimination, individuals can turn to the labour dispute committee, which can mediate and adjudicate disputes between employees and employers. However, in practice many discriminatory uses of public sector algorithms would be considered unlawful actions performed by the public authority in the course of exercising executive authority. In such cases, the proceeding falls within the competence of the administrative court.[131] The court can provide remedies such as compensation for damages and orders to stop discriminatory practices.

It should be noted that some discriminatory behaviours may be considered criminal offences, such as incitement of hatred[132] and certain violations of equality.[133] For such acts of discrimination, individuals can report to the police and seek prosecution under the Penal Code.

[131] See the Code of Administrative Court Procedure. RT I, 23.02.2011, 3.
[132] This includes activities which publicly incite to hatred, violence or discrimination on the basis of protected characteristics if this results in danger to the life, health or property of a person – see § 151 of the Penal Code. RT I 2001, 61, 364.
[133] This includes unlawful restriction of the rights of a person or granting of unlawful preferences to a person on the basis of his or her protected characteristics – see § 152 of the Penal Code.

2.2. Burden of Proof

One element that plays a crucial role in the effective enforcement of equality rights, particularly when dealing with complex and often opaque algorithmic systems, is the allocation of the burden of proof in cases of discrimination.

The burden of proof is allocated differently depending on whether the matter is adjudicated as a civil, administrative or criminal proceeding. In civil court, as well as the labour dispute committee, neither the plaintiff nor the respondent has to prove that the victim of discrimination belongs to a certain protected group. The burden of proof of discrimination is shared between the two sides – the plaintiff must set out the facts on the basis of which it can be presumed that discrimination has occurred. Once such a presumption exists, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. If the respondent refuses to provide proof, such refusal is deemed to be equivalent to acknowledgement of discrimination.[134]

In the context of algorithmic discrimination, such shared burden of proof is particularly important: typically, in order to understand whether the system may take into account discriminatory parameters or otherwise lead to discriminatory outcomes, it is relevant to review the functioning of a system, requiring thorough information and, potentially, access to the source code, data or documentation from the respondent. This necessity arises because algorithmic processes are often complex and opaque, and without access to the underlying mechanisms, it is challenging to determine whether discrimination has occurred. Therefore, the enforcement mechanisms must be robust enough to ensure disclosure of such information.

It should be noted that in administrative cases, a judicial review will be carried out during the proceeding to identify infringement. The court should ensure, through its own action, that facts material to disposing of the case are ascertained; where necessary, it may obtain evidence itself, or may require the parties to produce it.[135] During this process, the public authority may similarly be required to disclose relevant information about the functioning of the algorithm.

[134] See § 8 of the Equal Treatment Act and § 4 of the Gender Equality Act.
[135] Subsection 4 of § 2 of the Code of Administrative Court Procedure.

2.3. Remedies

If the rights of a person are violated due to discrimination, he or she may demand that discrimination be discontinued and compensation be paid for the damages caused.[136] The compensation for damages may include compensation for both material damages as well as non-patrimonial damages caused by the violation.[137] Upon determination of the amount of compensation, a court or a labour dispute committee shall take into account, among other things, the scope, duration and nature of discrimination.

2.4. Public and Private Institutions Protecting Equality Rights

In addition to adjudication, there are several public institutions protecting fundamental rights, including the equality rights.

Notably, the **Gender Equality and Equal Treatment Commissioner** (hereafter referred to as the Commissioner) is an independent and impartial institution in Estonia, tasked with promoting equality and combating discrimination. The Commissioner operates independently, providing advice to individuals experiencing discrimination. The key obligations of the Commissioner include the following:

- Promoting equality: the Commissioner works to raise general awareness on equality issues, offers recommendations for improving legislation and policies, and helps promote equality and diversity in both the public and private sectors.
- Advising and raising awareness: the Commissioner provides legal advice and consultations to both individuals and organisations to help them understand and apply the principles of equality. They assist employers and other institutions in developing policies that promote equality and prevent discrimination.
- Receiving and resolving complaints: the Commissioner plays a central role in resolving cases of discrimination, offering legal advice to those who feel they have been discriminated against based on gender or other protected characteristics.

[136] Subsection 1 of §24 of the Equal Treatment and subsection1 of § 13 of the Gender Equality Act.
[137] Subsection 3 of §24 of the Equal Treatment Act and subsection 2 of § 13 of the Gender Equality Act.

The role of the Commissioner in the context of oversight and complaint resolution is as follows:

1. Receiving complaints: if a person feels they have been discriminated against, they can file a complaint with the Commissioner. The Commissioner carries out an initial assessment to determine whether the described situation falls within the Commissioner's competence and whether there is sufficient basis to initiate an investigation.

2. Investigation: if the complaint is deemed relevant, the Commissioner initiates an investigation of the case. This involves gathering facts, hearing the parties involved, and collecting necessary documents and evidence. The Commissioner collaborates with the complainant, the alleged discriminator, and other relevant institutions as needed to gather the required information and determine whether discrimination has occurred.

3. Concluding the proceeding: based on the investigation, the Commissioner decides if discrimination has occurred. Upon finding that discrimination may have occurred, the Commissioner issues an official public opinion or provides recommendations and proposals for improving the situation. The Commissioner may recommend actions to stop the discrimination and prevent future occurrences. While the Commissioner cannot directly impose sanctions or fines, they may suggest compensation for the victim.

4. Follow-up actions and monitoring: the Commissioner may monitor whether their recommendations and directives are being implemented and take further action if discrimination has not ceased or if the situation has not improved. If the complainant is dissatisfied with the Commissioner's decision or seeks compensation, they may take the case to court. The Commissioner can provide the court with their opinion on the matter.

The new draft Act[138] would increase the Commissioner's competence to investigate and give expert opinions on discrimination cases. The Commissioner's opinion enables the complainant to decide on the next steps to be taken and to obtain support in defending their rights.[139] In addition to the extension of the scope of application – which directly affects the Commissioner's competences – and the extension of the list of protected grounds, the Commissioner would, for

[138] See section 1.5. of this chapter.
[139] The Explanatory Memorandum, page 4.

example, be given the power to take a person to court, with his or her consent and on his or her behalf, in order to defend his or her rights.[140]

In addition to the Commissioner, the **Chancellor of Justice** can settle possible discrimination disputes through conciliation.[141] In administrative procedure matters – and most of the algorithmic decisions by a public authority qualify as such – the Chancellor of Justice may also conduct a supervision procedure to check whether the authority has acted in compliance with the principle of equal treatment.[142] The Chancellor of Justice may provide criticism, suggestions, express their opinion in other ways or make proposals for elimination of the violation.

Finally, there are also **non-governmental organisations** such as the Estonian Human Rights Centre,[143] which promotes and monitors human rights in Estonia as well as offering various resources and guidance, including legal assistance in discrimination cases.

[140] *Ibid.*
[141] § 19 of the Chancellor of Justice Act. RT I 1999, 29, 406.
[142] §§ 33-35[4] of the Chancellor of Justice Act,
[143] Website of the organisation: https://humanrights.ee/en/.

3. REGULATORY GAPS AND RECOMMENDATIONS

3.1. Regulation in the Context

Based on the above mapping, there are various regulatory mechanisms that, jointly, are intended to safeguard the principle of equality and non-discrimination in using ADM systems and other algorithmic solutions in the public sector:

- The emerging **EU AI Act** represents a significant new trend in regulatory approaches and seeks to address some of the gaps that may exist in current national frameworks by imposing very specific *ex ante* obligations to proactively assess and mitigate risks during the development and deployment of AI systems. It creates a systematic and standardised approach for conducting impact assessments, ensuring high-quality and unbiased datasets, and implementing governance structures that monitor AI systems throughout their lifecycle. These requirements are designed to ensure that algorithmic systems, particularly those used in high-risk areas like law enforcement, are developed and operated in ways that are fair, transparent, and aligned with fundamental rights. The **Draft Gender Equality and Equal Opportunities Act** also proposes an *ex ante* risk mitigation approach for public sector algorithmic systems in general.
- Once the algorithmic system is operational and used within administrative proceedings, it is subject to the **Administrative Procedure Act** which sets forth procedural and transparency requirements in issuing administrative acts and undertaking administrative measures. The APA requires that administrative procedure must adhere to the principles of equality and proportionality. It also ensures that individuals have a right to be informed and receive explanations on (algorithmic) decisions and are granted other procedural rights, including the right to provide an opinion and challenge decisions that may be biased or unfair.
- As for what constitutes discrimination, the foundational prohibition and the principle guaranteeing equality before the law arises from the **Estonian Constitution**. Building on this, the **Equal Treatment Act** and the **Gender Equality Act** provide more detailed legal definitions and obligations, specifically addressing various forms of discrimination, including those based on race, gender, age, and disability. These acts establish clear prohibitions against discriminatory practices and outline the

responsibilities of public and, in some cases, private entities to uphold these principles. Additionally, the **Employment Contracts Act** incorporates these anti-discrimination principles within the employment context, ensuring that equal treatment is maintained in workplaces and providing legal mechanisms for addressing violations.

- **In terms of enforcement**, the Equal Treatment Act and the Gender Equality Act grant individuals the right to seek redress in cases where they believe they have been subjected to discrimination, establish a shared burden of proof and codify the role of the Gender Equality and Equal Treatment Commissioner in helping with possible discrimination cases. Furthermore, the APA establishes transparency requirements for the administrative procedure and provides mechanisms for individuals to contest possible discriminatory algorithmic decisions. Additionally, the AI Act establishes administrative penalties for non-compliance, including where the quality of datasets or the algorithm results in biased outcomes or where the risk of discrimination is not sufficiently addressed.

This framework emphasises both preventive measures and reactive remedies, thus creating a multi-layered approach to address algorithmic bias and discrimination. Yet, in practice, numerous regulatory challenges remain. Below, four key challenges are identified:

1. The intersectional character of algorithmic discrimination
2. Lack of transparency for ensuring effective enforcement in cases of algorithmic discrimination
3. Difficulty in codifying and measuring what constitutes algorithmic fairness
4. Insufficient risk management obligations in developing and operating algorithms.

3.2. Regulatory Challenges

The intersectional character of algorithmic discrimination

The scope of discrimination that can be addressed through the above regulations may not fully encompass all potential biases, especially as AI systems evolve and new forms of discrimination emerge. A notable issue discussed in literature arises with the intersectional character of discrimination. This concept refers to the way in which different forms of discrimination intersect and compound one another, leading to unique and often more severe forms of

disadvantage.[144] The issue of the intersectional character of discrimination is particularly significant in the context of algorithms. For example, an AI system used in healthcare might disproportionately underdiagnose conditions for older women of certain ethnic backgrounds, due to both age-related and ethnic biases in the data, resulting in a compounded disadvantage that neither age nor ethnicity alone would explain. This intersectionality – where gender and ethnicity combine to create unique disadvantages – demonstrates that algorithms can perpetuate and amplify existing inequalities.

Such compounding effects make it important to consider intersectionality in the development and regulation of algorithmic systems. Indeed, it has sparked a debate in literature about whether a static list of prohibited grounds for discrimination is sufficient to identify unfair treatment that may limit the realisation of basic human rights.[145] The EU law does not preclude the CJEU from considering intersectional discrimination, but the Court has not yet fully addressed or developed its approach to this issue.[146]

The challenge of transparency in enforcing equality rights

One of the major challenges emerges from the fact that there is often a lack of transparency in algorithmic decision-making processes, particularly given the opaque nature of many AI systems. The ability of individuals to fully understand which conditions or parameters determined a decision – and whether any of those may have been driven by discriminatory logic – is often limited. This leads to a significant obstacle in achieving effective enforcement. For example, if an algorithm used by a job recruitment platform systematically filters out resumes that contain certain cultural references or names associated with particular ethnic groups, the affected applicants may not be aware that their applications were rejected based on such criteria, making it difficult to prove discrimination and seek redress.

[144] See Gerards and Xenidis, (2021), pp. 65-66. Available at: https://data.europa.eu/doi/10.2838/544956.
[145] Ibid, pp. 141–142. See also Weerts, H., Xenidis, R., Tarissan, F., Olsen, H. P., and Pechenizkiy, M. (2023). 'Algorithmic Unfairness through the Lens of EU Non-Discrimination Law: Or Why the Law is not a Decision Tree'. In 2023 ACM Conference on Fairness, Accountability, and Transparency (FAccT '23). https://doi.org/10.1145/3593013.3594044. See also Weerts *et al.*
[146] See Weerts *et al.* (2023).

For the individual, their ability to effectively challenge discriminatory practices hinges on their access to information about how a decision was made. Consequently, ensuring that algorithmic systems are transparent and that their decision-making processes are accessible for review is essential for upholding the principle of equality. This raises a question of whether the Estonian law provides sufficient procedural means to tackle opacity in discrimination cases involving algorithmic systems.

In the context of administrative decisions and measures, the Administrative Procedure Act requires authorities to ensure that their decision-making processes, including those automated by algorithms, are transparent and administrative decisions sufficiently explained.[147] In administrative court proceedings, the court can oblige the authorities to provide all relevant data and information for assessment of possible discrimination.[148] In civil cases, where an infringement proceeding has started, the concept of shared burden of proof is an important measure. It ensures that once a plaintiff presents facts that suggest discrimination may have occurred, it is the responsibility of the respondent to prove that no discrimination took place. This shift is crucial in cases involving complex algorithmic systems, where the plaintiff may not have direct access to the internal workings of the algorithm.

Yet, such measures have a limited impact in solving the issue. In many cases, it will be difficult to even identify that a possible discrimination may have occurred.[149] Even if the suspicion arises, discrimination cases involving algorithmic systems can take a long time to resolve, which can discourage individuals from even pursuing claims. The technical nature of these cases also makes them complex, requiring expert analysis and auditing, which can be costly. If the algorithmic systems in question are not well-documented or if the respondent fails to provide thorough information, it becomes exceedingly difficult to assess these systems effectively. The matter is further complicated if the algorithmic systems use AI components, particularly those utilising machine learning models, which often operate as 'black boxes'. Even their creators may not fully understand or explain how they reached a particular output. As a

[147] See section 1.7 of this chapter.
[148] Subsection 4 of § 2 of the Code of Administrative Court Procedure.
[149] See Wachter, S., Mittelstadt, B., Russell, C. (2020). 'Why Fairness Cannot Be Automated: Bridging the Gap Between EU Non-Discrimination Law and AI'. Computer Law & Security Review 41: 105567, p. 10. http://dx.doi.org/10.2139/ssrn.3547922. .

result, it may remain difficult to identify or provide any evidence of discrimination, even if the standard of evidence is rather low.

Challenges with determining and measuring fairness

While prohibition of discrimination is an outcome-oriented measure – infringement occurs where a decision or action leads to unjustified unequal treatment – there is increasing focus on establishing *ex ante* requirements to assess risks and introduce measures already within the process of developing and using algorithmic systems in order to prevent discriminatory outcomes. Notably, the AI Act establishes a requirement whereby training, validation, and testing datasets shall be relevant, representative, free of errors to the greatest extent possible, and complete in view of the intended purpose.[150] This must be supported by quality and risk management processes. Furthermore, the draft Gender Equality and Equal Opportunities Act imposes an obligation on public authorities to ensure that the algorithmic system they use is designed and developed with due regard to the principle of equal treatment and the objectives of gender equality and equal opportunities. In this context, legal compliance is determined based on whether the authority introduced suitable processes to understand what discrimination risks might exist in its system and introduced measures to mitigate such risks.

While it is a positive regulatory development, determining the actual substance and the extent of these requirements is extremely challenging. One of the issues concerns the question of how to actually determine what is fair/equal in establishing the parameters and decision logic of the systems.[151] Various standards and benchmarks have been developed to measure fairness but with limited effectiveness.[152] While ideally the benchmark for fairness should arise from the law, this just is not the case.[153] Non-discrimination law can fulfil very different social functions – including 'the recognition of historical injustices and disadvantaged social groups, the

[150] See Art. 10 of the AI Act.
[151] See Hacker, P. (2018). 'Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies Against Algorithmic Discrimination Under EU Law'. 55 Common Market Law Review 1143-1186 (2018), pp. 33–34. https://ssrn.com/abstract=3164973.
[152] See Wachter *et al*. (2020).
[153] On this note see Wachter *et al.* (2020), p. 4 – 'A clear gap exists between statistical measures of fairness and the context-sensitive, often intuitive and ambiguous discrimination metrics and evidential requirements used by the Court.'

(re)distribution of valuable goods and opportunities, the protection of dignity and autonomy, the accommodation of different lifestyles, and the facilitation of access to, and participation in, central social institutions such as the market, labour, education, healthcare'.[154] In different contexts, *equality* can thus mean different things, and is impacted also by ongoing socio-economic developments. This makes the notion of equality a very dynamic concept, which is very hard to capture in a clear benchmark or a technical standard that the algorithm could follow.

It is evident that no single fairness metric can universally satisfy all fairness conditions due to assumptions about what constitutes fair treatment. As Weerts *et al.* put it, 'while many fairness metrics have taken inspiration from non-discrimination law, legal compliance cannot translate into a single threshold or fairness metric. Rather, fulfilling the requirements of non-discrimination law demands reflecting explicitly on the normative goal of legal and technical fairness interventions'.[155] Subsequently, Weerts *et al* suggest that meaningfully answering the question of how to measure fairness in algorithmic systems requires moving beyond merely asking what should be equal but, rather, asking what is the correct distribution of burdens and benefits in a specific situation.[156] This matter is yet to be sufficiently addressed by the legislative framework.

Insufficient risk management obligations in developing and operating algorithms

Currently, a notable gap in the legal framework is the lack of specific obligations to address bias and discrimination risks proactively within the design, development, and operational stages of algorithmic systems.

The AI Act will partially solve this issue; its obligations to introduce a risk management process through the lifecycle of the AI system requires ensuring oversight as well as determining measures for tackling possible biases and other risks. Yet, the scope of the AI Act itself is rather narrow, meaning that many algorithmic solutions used in the public sector would not be obliged

[154] See Hacker *et al.* (2018), p. 34.
[155] Weerts *et al.* (2023)., p. 10.
[156] Ibid.

to follow these requirements. The existing non-discrimination laws also do not establish concrete requirements to integrate similar processes into the development or deployment of public sector algorithms. Meanwhile, it is evident that many public sector algorithmic systems outside the scope of the AI Act also pose risks concerning equality and non-discrimination. For example, algorithms allocating social welfare benefits to individuals might not be AI-based, and thus fall outside the scope of the AI Act, despite posing an evident discrimination risk if they are inadvertently programmed to favour applicants from certain socio-economic backgrounds. It is essential that this regulatory gap should be addressed to ensure that all public sector algorithmic systems are developed and operated with robust safeguards against discrimination and bias.

3.3. Recommendations

Based on the mapping of the regulatory framework and the challenges identified, we outline several policy recommendations to better safeguard the principle of equality and non-discrimination in using algorithmic systems in public sector.

Using algorithmic systems to enhance equality

In light of the discrimination risks that emerge with AI systems, the simultaneous potential of using algorithmic solutions to combat discrimination has perhaps been underestimated. The potential exists, both in the context of increasing the fairness of decisions and in improving the quality of enforcement. As for the former, considering the fact that algorithmic systems enable the human factor to be removed, along with the biases of particular individuals, and considering that algorithmic systems *could* be designed with a transparent and well audited logic trail, then algorithmic systems are potentially well suited for reducing bias and discrimination in public procedures.

In the context of law enforcement, AI systems have significant potential to be used for detecting patterns of inequality or monitor compliance.[157] According to Gerards and Xanidis, ‘risks of algorithmic discrimination can only be identified if patterns of social exclusion and disadvantage are known, this presupposes that such structural patterns of discrimination and

[157] See also the conclusions by Hecker (2018), p. 35.

inequality are researched, analysed, and widely exposed'.[158] AI systems – being particularly well suited for pattern recognition – thus pose great potential for identifying and understanding otherwise hidden forms of discrimination.

Accordingly, in developing Estonia's digital as well as gender equality and non-discrimination policies, greater emphasis could be placed on the positive potential of technology and on harnessing its capabilities to proactively advance equality and non-discrimination in public sector decision-making, alongside addressing the associated risks.

Ensuring that intersectional discrimination is prohibited

As explained above, the concept of intersectional discrimination refers to a situation where two characteristics in combination – such as gender and race – exacerbate bias in algorithmic systems. To tackle this issue, an open-ended list of protected grounds has been considered as a useful measure.[159] In the Estonian context, the current Equal Treatment Act provides a closed set of protected grounds. However, this is expected to change as the Draft Gender Equality and Equal Opportunities Act proposes an approach whereby the list of protected grounds would be open, extending the protection to all areas of society, except family and private life. Furthermore, the Draft Act proposes to explicitly extend the notion of discrimination to intersectional discrimination.[160] If enacted, this approach would pave the way for allowing the Courts to efficiently address intersectional algorithmic discrimination.

Utilising the concept of 'instruction to discriminate' in the context of algorithmic systems supporting decision-making

Gerards and Xenidis propose that there is a useful concept established in the EU non-discrimination laws – the concept of 'instruction to discriminate' – that would be suitable to tackle situations where algorithmic systems are used.[161] It refers to the notion that the process

[158] Gerards and Xenidis, (2021), p. 147.
[159] Ibid., p. 141–142.
[160] Clause 2 of subsection 6 of § 6 of the draft Act 6.
[161] Gerards and Xenidis, (2021), p. 143.

of giving an instruction to discriminate itself is a form of discrimination. Indeed, the Estonian non-discrimination laws also prohibit giving instruction to discriminate.[162]

This is particularly relevant in light of the fact that we are seeing public sector decisions and administrative procedures increasingly informed or steered by algorithmic solutions (increasingly so due to the emergence of AI). Even if the decision itself is taken by a human official, the suggestions provided by the algorithm can be considered as 'instructions' for making a decision.[163] While the Estonian public authorities must, in any case, comply with the principle of equality and non-discrimination, the prohibition of giving discriminatory instructions would be relevant for bringing accountability into the process of forming the decision by automated means. Considering there is significant evidence from behavioral psychology indicating that various cognitive biases – such as anchoring and automation bias – make humans inclined to trust and follow the suggestions by an algorithm,[164] then addressing the biases in decision support systems potentially holds a significant value. Therefore, utilising the 'instruction to discriminate' concept can be a relevant legal tool to mitigate discriminatory algorithms, even where these systems are used as support, rather than as decision-making systems.

A broader implementation of risk management requirements

While the AI Act has an important role in imposing obligations to proactively assess and mitigate risks during the development as well as post-deployment of AI systems, its scope is rather narrow. This means that many algorithmic solutions used in the public sector would not be obligated to follow these requirements.

Meanwhile, it is evident that many public sector algorithmic systems outside of the scope of the AI Act also pose risks concerning equality and non-discrimination. To address this gap,

[162] Subsection 5 of § 3 of the Equal Treatment Act and subsection 1 of § 5 of the Gender Equality Act.
[163] Gerards and Xenidis, (2021), p. 143.
[164] Such cognitive biases condition the user towards believing the prediction when there is no other tangible metric available for assessing a fair outcome. The science behind such heuristics is most famous from the theorising of Tversky, A. and Kahneman, D. (1974). 'Judgment under Uncertainty: Heuristics and Biases'. Science, New Series, Vol. 185, No. 4157, pp. 1124–1131. See also Chen, D., L. (2019). 'Machine Learning and the Rule of Law'. In Michael A. Livermore and Daniel N. Rockmore (eds), *Law as Data*, Santa Fe Institute Press.

certain risk management requirements could be considered for these systems more broadly – possibly established in the equality laws or the Administrative Procedure Act. This might include introducing an obligation to conduct an *ex ante* impact assessment, as well as measures such as routine audits to monitor and address issues of bias and fairness that may emerge over time. Such amendments would ensure a consistent approach to non-discrimination across different types of algorithmic systems used in the public sector.

On this note, the proposal in the Draft Gender Equality and Equal Opportunities Act whereby public authorities must ensure that *'the algorithmic system they use is designed and developed with due regard to the principle of equal treatment and the objectives of gender equality and equal opportunities'* and that its use *'does not adversely affect persons on the basis of protected characteristics or perpetuate or exacerbate social inequalities based on protected characteristics*'[165] is a positive development, albeit the clause could benefit from the requirement being concretised further, to ensure greater clarity on the specific obligations within the risk management process.

Enforcement and compliance support

One challenging task in addressing the risk of algorithmic discrimination is organising effective enforcement and governance of these systems. There are a few recommendations to consider.

First, the AI Act requires Estonia to determine a market supervision authority and equip it with the necessary competences and resources. The competent authority will also have to provide an AI regulatory sandbox that would support the development and use of AI solutions, among other things, to ensure the non-discrimination of these systems.[166]

Already in developing these structures and capacities, specific attention should be given to aspects relevant for ensuring equality. Among those is developing a cohesive approach on how to foster strong cooperation between the market supervision authority and the Commissioner (as well as the Chancellor of Justice, where relevant) that:

[165] Subsection 7 of § 9 of the draft Act.
[166] See AI Act, Chapters VI and VII.

1) leverages the strengths of each body,
2) ensures that matters relating to non-discrimination are duly considered, while
3) avoiding unnecessary duplication of competences in the authorities.

Article 77 of the AI Act, in any case, presumes a role for the authorities in protecting fundamental rights and their cooperation with the authorities supervising AI. However, achieving genuine and effective cooperation presumes a conscious approach.

Furthermore, the governance framework that will be introduced for high-risk AI systems could be extended beyond the scope of the AI Act. It has been established above that many public sector algorithmic systems outside the scope of the AI Act also pose risks concerning equality and non-discrimination. The structures that are developed to provide regulatory sandbox and other governance or compliance measures for the AI Act could also be used to support *ex ante* risk management in other public sector algorithmic systems. This may be invaluable, considering that the equality bodies or other authorities focused on equality rights would have limited resources to develop technical expertise for providing significant assistance on matters of data management and bias mitigation. In particular, a sandbox for public sector algorithmic systems could be a useful measure to ensure the lawfulness and trustworthiness of highly impactful systems. Yet, disseminating technical standards or best practices for tackling biases in data and algorithms is also an aspect where the authorities responsible for AI and data governance could support the authorities responsible for equality rights.

Enhancing transparency

As established above, a significant challenge arises from the lack of transparency in algorithmic decision-making processes, especially due to the inherently opaque nature of AI systems. Individuals often face difficulties in fully understanding the factors or parameters that influenced a particular decision, making it challenging to determine whether any discriminatory grounds were applied. This opacity presents a substantial barrier to ensuring effective enforcement in cases where discrimination may occur.

Quite a few policy measures have been suggested to address this challenge. One of these is the introduction of algorithmic transparency requirements, whereby authorities must disclose

which algorithmic systems are being used in public administration, how they function and what impact they have on decision-making or administrative procedures.[167] The explainability requirements arising from the Administrative Procedure Act could also be further tailored for cases of algorithmic decision-making,[168] while certain documentation and logging requirements would allow better post-market monitoring and assist judicial review in cases of possible infringements. Measures such as procurement standards on how to increase transparency and explainability of algorithmic systems would also be helpful in this regard.

Furthermore, it has been emphasised that human beings who work with algorithms should be 'given the knowledge and tools to comprehend and interact with AI systems to a satisfactory degree and, where possible, be enabled to reasonably self-assess or challenge the system.'[169] Adding technical competences and ensuring necessary resources among administrative authorities, market supervisors and institutions protecting fundamental rights would help these entities better monitor and intervene in cases where algorithmic systems might lead to biased or discriminatory outcomes. Such capacity-building measures would not only improve the ability of these institutions to detect and address algorithmic discrimination but would also empower individuals to challenge decisions more effectively, knowing that they can rely on oversight bodies equipped to investigate claims.

[167] E.g. the Estonian AI Action Plan foresees introducing an algorithmic transparency standard that would provide an overview of algorithmic solutions in public sector and their principles of operation. See: https://www.mkm.ee/media/10157/download.

[168] On the feasible legal standard to achieve explainability within algorithmic decisions see: Olsen, H. P., Slosser, J. L., Hildebrandt, T. T. (2020). 'What's in the Box? The Legal Requirement to Explain Computationally Aided Decision-Making in Public Administration'. Constitutional Challenges in the Algorithmic Society. University of Copenhagen Faculty of Law Research Paper No. 2020-97. https://ssrn.com/abstract=3580128. See also Borgesius, F. J. Z. (2020). 'Strengthening legal protection against discrimination by algorithms and artificial intelligence'. The International Journal of Human Rights, 24:10, 1572-1593, p. 1583. https://doi.org/10.1080/13642987.2020.1743976. Borgesius also explains that for actual intelligibility of the system, mere access to and examination of the code is often insufficient, but requires a more thorough approach.

[169] AI HLEG (2019), 'Ethics Guidelines for Trustworthy AI', p. 16.

CONCLUSIONS

This study provided an examination of the legal frameworks surrounding discrimination and bias in ADM and other algorithmic systems in Estonia and Lithuania, mapping out the relevant national regulations, including constitutional protections, anti-discrimination laws, administrative procedures and policies.

In general, it can be observed that the Estonian and Lithuanian legal frameworks surrounding algorithmic discrimination, as well as the legal challenges, are relatively similar. The existing legal structures are mostly quite robust in terms of formal non-discrimination laws and equality protections, ensuring that algorithmic discrimination falls within the scope of the regulation. But there are similar areas in both countries where the legal framework should evolve in order to adapt to the new challenges posed by algorithmic systems. Based on the analysis of both Estonia and Lithuania, several common challenges and regulatory gaps related to algorithmic discrimination emerge.

First, both countries need to consider clarifying and extending the **scope of what constitutes discrimination** to effectively address the challenges posed by algorithmic systems. In particular, moving towards a wider or non-exhaustive list of protected grounds (something already proposed in the relevant Estonian draft Act) would allow for greater flexibility in recognising new forms of discrimination. Such an approach would ensure that the law remains adaptable to various forms of bias in the evolving digital landscape that may not yet be fully understood or anticipated. Additionally, both countries should place greater emphasis on recognising and addressing the intersectional nature of discrimination – where multiple factors, such as race, gender, and socio-economic status, compound to create unique forms of disadvantage. This intersectionality is particularly relevant in the context of algorithms, where the compounding effects of various biases can be amplified by opaque and complex algorithms.

Another shared challenge is the **lack of transparency** in algorithmic systems, which significantly hinders the enforcement of equality rights. In both countries, it is difficult for individuals to assess whether a decision was discriminatory due to limited access to the inner workings of the algorithm. Lack of transparency complicates the enforcement process, making it hard for victims to gather the necessary evidence. Both legal systems recognise the issue; for

example, there are measures in place such as shared burden-of-proof. Yet, the existing laws provide little in terms of actually addressing the underlying issue of opacity in the algorithmic processes.

The analysis of both countries acknowledges the need for **stronger enforcement mechanisms** to address algorithmic discrimination. They highlight the importance of empowering authorities protecting fundamental rights, such as equality bodies and ombudspersons, to access algorithmic systems and investigate potential cases of discrimination. Ensuring that these authorities have the necessary technical competencies and resources is a common priority in both regulatory frameworks. Similarly, both analyses highlight the importance of enhancing institutional cooperation to ensure adequate oversight. Among other things, this might include involving authorities protecting fundamental rights in the governance of the AI Act, such as in supervision procedures or in providing regulatory sandboxes.

It was also identified that there are **insufficient *ex ante* risk management requirements** in place. The AI Act imposes certain obligations on high-risk AI systems, but many public sector algorithms fall outside its scope. Both Estonia and Lithuania must consider whether to expand their non-discrimination laws or administrative laws to require broader risk management and impact assessment procedures for public sector algorithms.