

## DISCRIMINATION IN ONLINE PLATFORMS



# DISCRIMINATION IN ONLINE PLATFORMS

A Comparative Law Approach to Design,  
Intermediation and Data Challenges

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May 2022, Leuven.

## ABBREVIATIONS

ACLU	American Civil Liberties Union
ADA	Americans with Disabilities Act of 1990
ADEA	Age Discrimination in Employment Act of 1967
AHTOP	Association pour un Hébergement et un Tourisme Professionnel
CDA	Communications Decency Act of 1996
CDA	Communications Decency Act of 1996
CFAA	Computer Fraud and Abuse Act
CJEU	Court of Justice of the European Union
CNIL	Commission Nationale de l'Informatique et des Libertés
COE	Council of Europe
COM	Communication
COPPA	Children's Online Privacy Protection Act
CWA	Communications Workers of America
DAA	Digital Advertising Alliance
DFEH	Department of Fair Employment and Housing of the State of California
DMCA	Digital Millennium Copyright Act
DPA	Data Protection Authority
DSA	Digital Services Act
EASA	European Advertising Standards Alliance
ECHR	European Convention on Human Rights
EOCA	Equal Credit Opportunity
EDAA	European Interactive Digital Advertising Alliance
EEOC	US Equal Employment Opportunity Commission
ELCPA	Electronic Communications Privacy Act
ENAR	European Network Against Racism
ERA	Academy of European Law
EU	European Union
FAA	Federal Arbitration Act
FCRA	Fair Credit Reporting Act
FEHA	California Fair Employment and Housing Act
FHA	Fair Housing Act
FIPs	Fair Information Practices
FLSA	Fair Labor Standards Act
FRA	Fundamental Rights Agency

FTC	Federal Trade Commission
GDN	Google Display Network
GDPR	General Data Protection Regulation
GLBA	Gramm-Leach-Bliley Act
HIPPA	Health Insurance Portability and Accountability Act
HUD	United States Department of Housing and Urbanism
IAB	Interactive Advertising Bureau
ICCPR	International Covenant on Civil and Political Rights 1996
ICT	Information Communication Technology
ILO	International Labour Organisation
IP	Internet Protocol Address
IPO	Initial Public Offering
ISP	Internet Service Provider
ITU	International Telecommunication Union
LDH	Ligue des Droits Humains
NAI	Network Advertising Initiative
NFHA	National Fair Housing Alliance
NLRA	National Labor Relations Act
NMWA	National Minimum Wage Act 1998
OBA	Online Behavioral Advertisement
OECD	Organisation for Economic Co-Operation and Development
PII	Personally Identifiable Information
STEM	Science, Technology, engineering, and mathematics
TFEU	Treaty on the Functioning of the European Union
TNC	Transportation Network Company
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
US	United States of America
USC	United States Code
VPPA	Video Privacy Protection Act
WP29	Article 29 Working Party
WRC	Work Relation Commission (Ireland)
WRT	Working Time Regulations 1998



## FOREWORD

This book is the result of Ana's doctoral thesis, which was conducted at the Perelman Centre of the Université libre de Bruxelles (ULB), and updated in her current position at the Center for IT & IP Law (CiTiP) of the KU Leuven. Her research was initially funded by CAPES to whom I am very grateful for providing me with the opportunity to work with Ana. Multiple twists and turns marked this successful doctoral research which began with a complete lockdown of Brussels, following the November 2015 terrorist attacks in Paris, and ended with several confinements and drastic curfews imposed on the civil population in an attempt to contain the Covid-19 pandemic.

It was in this turbulent political and social context that Ana tackled a major challenge, which, at that point, had been overlooked by the legal academic writing in Europe: Mapping how discrimination against protected classes (including gender, ethnic origin, age and sexual orientation) on online platforms were developing, in particular through the design of these platforms. In a judicious way, Ana correlates real occurrences of discrimination against protected classes to three design aspects of online platforms: (1) their aesthetic choices concerning users' protected markers, (2) the design of matching tools that enables users to exclude others with protected aspects from receiving goods, services and work offers, and (3) the design of evaluation systems that facilitates the permanent exclusion of users of protected classes from the system.

At the time of her research, the issue of discrimination against protected classes in online platforms, due to their design, had mainly attracted the attention of scholars in United States business schools, despite the fact that the transition of entire economic sectors to online platforms had already created several challenges for the respect of fundamental rights and, more particularly, for the principle of equality and non-discrimination in the European Union. To fill this gap, this research covers both European Union law and the federal law of the United States. This comparison with the United States is essential to draw lessons from litigation that did not yet exist in Europe. Moreover, the comparative approach is essential for a better understanding of the windows of opportunity offered by the sources of convergence and divergence of non-discrimination laws, the liability regime of Internet Service Providers, and the data protection legal framework, in both legal systems.

This book relies on a problem-based approach, dear to the *École de Bruxelles*.<sup>1</sup> In order to consider the stakes of businesses and end-users' discrimination against protected classes, three distinct sectors are investigated in depth: the housing, advertisement and labor markets. These three case studies are structured in the following titles: *Online Housing and Accommodation Markets: The Crossroads of Intermediary Liability and Antidiscrimination Law*; *Online Advertising Markets: Widespread Data Collection and Unequal Access to Employment, Goods and Services*; and *Online Labor Markets: Performance Evaluation and Discriminatory Termination of Platform Workers*.

The research shows the incompleteness and partial inadequacy of existing legislation at the European Union and at the United States federal level. It outlines how the regulatory framework that applies to online intermediaries deepens existing inequalities. Moreover, it calls for a structural approach to the mechanisms of discrimination in online platforms.

Ana offers an innovative comparative law perspective of what is now recognized as a global problem: inequality in the platform economy. She does not stop with this observation. She argues that the fight against discrimination in online platforms requires a novel model of co-regulation, given that self-regulation has proven powerless to address inequality in these online markets. She also identifies specific issues that require regulatory changes. To this end, three regulatory requirements are convincingly presented: transparency (disclosure of processes potentially resulting in discrimination), fairness (fair procedures to tackle discriminatory decisions) and business cooperation (between platforms and national equality bodies). Since then, some of these suggestions have been on the table of the European legislator with the AI package and the proposal for a Digital Services Act. The latter establishes an extensive regulatory framework for the accountability and transparency duties of major online platforms operating in the European Union, including additional obligations to very large online platforms to address systemic risks, such as discrimination. Ana included these important developments in her research and kept up her book with the times that she partly anticipated.

Meanwhile, a few cases relating to the effects of digital governance of platforms on the topic of equal treatment have finally been decided by national courts and data protection authorities of European Union member states.<sup>2</sup>

<sup>1</sup> See Frédéric Audren, Benoît Frydman, Nathan Genicot (eds), *La Naissance de l'École de Bruxelles* (EUB 2022); Benoît Frydman, Gregory Lewkowicz (eds), *Le Droit selon l'École de Bruxelles* (EUB 2022).

<sup>2</sup> See, for instance, Court of Bologna (1st Instance, Labour Section), *Filcams CGIL Bologna & al. c. Deliveroo Italia SRL*, 12 December 2020, Case no. 2949/2019; Court of Amsterdam (1st Instance, Private Law Section), *Uber BV*, 24 February 2021, Case no. C/13/69010 / HA ZA 21-81; Italian Data Protection Authority (Garante per la protezione dei dati personali – GPDP), *Injunction Order against Foodinho s.r.l.*, 10 June 2021, Case no. 9675440; Italian Data Protection Authority (GPDP), *Injunction Order against Deliveroo Italy s.r.l.*, 22 July 2021, Case no. 9685994.

These cases concern restrictions on access to employment due to automated discrimination. The analysis of these cases alongside those of United States cases confirms the many obstacles to effective implementation of European non-discrimination law, significantly when automated decisions are opaque and evidence is unavailable. In this regard, the rules on the sharing of the burden of proof, which imply bringing forward a set of facts establishing a prima facie case of discrimination, are powerless to remove the numerous barriers to accessing evidence (lack of transparency, algorithm black box, business secrecy and intellectual property, scattering of platform workers, etc.). Ultimately, these cases show the extent to which personal data protection law offers valuable resources to challenge discriminatory automated decisions.<sup>3</sup>

Ana's research anticipated these types of jurisprudential developments. Her book is an extremely valuable resource for understanding the origins of these disciplinary shifts and their current challenges.

Brussels, June 2022.

Isabelle RORIVE

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<sup>3</sup> On these case law developments, see Robin Médard-Inghilterra, "Les droit des données personnelles au secours du droit de la non-discrimination? Stratégies et enjeux du contentieux des plateformes", in *Les droits et libertés face aux transformations technologiques, Actes du colloque organisé par l'Université de Bordeaux* from 8–10 December 2021, in press, to be published in 2022.



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