

Digital Profiling: Challenges for Equal Opportunities in Online Targeted Employment Advertising

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Abstract Profiling technologies enable companies to target their employment offers only to users with preselected personal features. Drawing from the United States' experience, this article takes a nondiscrimination and data protection law perspective to analyze the practice of digital profiling and targeted employment offer advertising in Europe. As demonstrated by several collective litigation cases brought against Facebook in the United States, digital profiling poses some major risks for equal opportunities in employment access. Strangely enough, this is still undocumented in the nondiscrimination legal field in Europe. In contrast, civil rights lawyers and legal scholars in the United States are relying on nondiscrimination law. We argue that European data protection laws do not offer substantial definition of discrimination. At the same time, nondiscrimination lawyers need to rely on data protection standards to be able to grasp the discriminatory outcomes in online employment advertising. Both legal fields have to work hand in hand on these issues and to learn from legal battles fought abroad.

I. INTRODUCTION

Similar to many other sectors, the marketing industry has been transposed to the online world. Advertisements are omnipresent in any user online experience. They appear in the form of basic banners with static images, texts, floating and flash banners, wallpapers, popup ads, and videos. In this context, numbers matter. Seventy-seven percent of European Union businesses have a website and one out of four has used online advertising.¹

Online advertising is not restricted to offering goods and services. Employment advertising has grown rapidly in the past ten years² and has been available not only on specialized platforms, such as LinkedIn, Opportunity, and Jobcase but also on social networking platforms such as Facebook and search engines such as Google. Companies allege that online employment offers have more advantages compared to analogical methods: they easily reach a wide range of labor-force participants with diverse skills, they have lower costs, and they offer the possibility of targeting potential employees with the traits desired by the company.³ For nondiscrimination lawyers, two key questions arise based on this finding: what are these personal features and what are the effects of the use of targeted advertising on access to employment?

Studies have already shown that the *ad tool* provided by Google makes better-paid job offers appear six times more often to men than to women.⁴ The researchers created identical fake Internet users who self-declared as women or men in their Google accounts. These same fake users visited hundreds of webpages related to employment to make Google ad networking understand that they were looking for a job. Google delivered to the male group ads from a certain company that promised higher wages 1852 times, while this same advertisement was displayed only 318 times to the female group, a finding suggestive of digital profiling and sex discrimination.⁵

In recent years, Facebook was charged in the United States for breaching employment, housing and credit Civil Rights Acts by putting into effect a system of digital profiling and targeting. The platform categorizes its users and implements geographic, ethnic affiliation, age and gender filters to advertise jobs.⁶ Third-party advertisers can manually exclude or include the users who will receive their advertisements based on the users' demographics, interests and behaviors. Demographics, for example, include the

¹ Eurostat, "Internet Advertising of Businesses: Statistics on Usage of Ads", published online, December 2018.

² E. Perry and S. Tyson, "An Analysis of the Use and Success of Online Recruitment Methods in the UK", *Human Resource Management Journal*, vol. 9, n° 3, 2008, p. 258; Y. Melanithiou, "The Use of Social Network Sites as an E-Recruitment Tool", *Journal of Transatlantic Management*, vol. 20, n°1, 2015, p. 32.

³ Melanithiou, note 2, p. 38.

⁴ A. Datta, M.C. Tschantz, A. Datta, "Automated Experiments on Ad Privacy Settings: A Tale of Opacity, Choice and Discrimination", *Proceedings on Privacy Enhancing Technology*, n° 1, 2015, p. 102.

⁵ *Ibid*, p. 93.

⁶ *Onuoha v Facebook, Inc*, No 5:16-cv-06440-EJD (United States District Court. Northern District of California San Jose Division, 7 April 2017); *Bradley v T-Mobile US, Inc*, No 17-cv-07232-BLF (United States District Court. Northern District of California San Jose Division, 4 June 2019); *National Fair Housing Alliance v Facebook, Inc*, No 1:18-cv-02689-JGK (United States District Court. Southern District of New York, 8 August 2018); *Riddick v Facebook, Inc*, No. 3:18-cv-04429 (United States District Court. Northern District of California San Jose Division, 19 March 2019).

users' gender, age, geographic location or multicultural affinity.⁷ These categories are also composed of subcategories, allowing advertisers to target and more precisely reach the users or group of users that they want to get access to.⁸ In the process of targeting, Facebook allows third-party advertisers to target their audiences by using their location, which can be as precise as the country, state/province, city and zip code.⁹ As is well documented, in several cities, zip codes serve as proxies for identifying minority groups not only in the United States but also in Europe.¹⁰

These examples demonstrate that digital profiling poses some major risks for equal opportunities online. Strangely enough, this is less documented in the nondiscrimination legal field in Europe.¹¹ It is striking to note that, contrary to the United States, no case regarding digital profiling and discrimination against candidates in online employment advertising has been, to our knowledge, brought to court in Europe—at least no cases based on nondiscrimination law. Some cases concerning the misuse of data with possible discriminatory outcomes by online targeted advertisements have been investigated and sanctioned by data protection authorities.¹²

With that in mind, this paper aims to assess whether the European Union (EU) legal framework is sufficiently equipped to avoid discrimination by online employment advertising on access to employment. To answer this query, the paper will be structured in three parts. In the first part, we present by what means discrimination may occur in targeting advertisement with employment offers. In the second part, we will focus on how data protection laws address discrimination, and we will briefly mention a few cases that data protection authorities have faced regarding targeted advertising. In the third part, we will review the tools that the European nondiscrimination law provides. We would like to stress that this article does not focus on how nondiscrimination law applies to the process of data driven profiling that implements statistical and algorithmic classifications in the practice of targeted advertising. Our analysis is centered on the step just prior to this. In online targeted advertising, employers have the possibility of choosing the audience they want to reach in very concrete terms. They may select to include or exclude individuals based on their geographic location, gender, age, ethnic origin, among other several possibilities.¹³ This possibility is given by online platforms and other online intermediaries.

Based on the experience in the United States, our purpose is to demonstrate the limitations of data protection and nondiscrimination laws in Europe to tackle discrimination in the context of online targeted advertisements. We argue that, on the

⁷ In the United States, this includes African Americans, Asian Americans, and Hispanic people. See *Onuoha v Facebook Inc.*

⁸ See Facebook business section: Facebook, “How to target Facebook Ads: Refine your advertising to reach the people who matter most to your business” (Facebook 3 May 2021).

⁹ Ibid.

¹⁰ J. Ringelheim and N. Bernard, *Discrimination in Housing*, Luxembourg, Publications Office of the European Union, 2013; S. Arbaci, “(Re)Viewing Ethnic Residential Segregation in Southern European Cities: Housing and Urban Regimes as Mechanisms of Marginalisation”, *Housing Studies*, vol. 23, n 4, 2008, p. 589.

¹¹ See J. Gerards and R. Xenidis, *Algorithmic Discrimination in Europe: Challenges and Opportunities for Gender Equality and Non-Discrimination Law*, Luxembourg, Publications Office of the European Union, 2021; F. Zuiderveen Borgesius, *Discrimination, Artificial Intelligence, and Algorithmic Decision-Making*, Strasbourg, Council of Europe, 2018; S. Wachter, “Affinity Profiling and Discrimination by Association in Online Behavioural Advertising”, *Berkeley Technology Law Journal*, vol. 35, n 2, 2020.

¹² See this paper, in section III.A.

¹³ See the cases referred to in the note 6.

one hand, data protection laws have limited definition of discrimination, which leaves this concept without more substantial content. Particularly, nondiscrimination laws and their construed meaning in the EU have provided specific contexts in which differentiation in treatment based on ethnic origin, gender and other protected grounds are illegal. We argue that not all sorts of differentiations based on protected grounds are illegal in the light of nondiscrimination laws in the European Union. These refined definitions of what amounts to illegal discrimination are not found in data protection laws in the European Union. On the other hand, we consider that nondiscrimination lawyers need to rely on data protection standards to be able to grasp the potential discriminatory outcomes of targeted online employment advertising. In this regard, knowing which kind of data is collected and processed for targeted advertising purposes is fundamental to address discrimination in this practice. In our view, both legal fields have to learn to work hand in hand on these issues.

Concerning the contribution that the nondiscrimination law can provide to the data protection law, we argue, in this paper, that discrimination in online targeted advertising practices can amount to direct discrimination and indirect discrimination, depending on the circumstances of the case. Based on the rulings of the Court of Justice of the European Union (CJEU), the European Union equality legal framework and modern nondiscrimination legal studies, we claim that direct discrimination is neither conditioned to the intention to discriminate against protected classes nor to overt practices.¹⁴ Alternatively, we insist that direct discrimination takes place when one person is treated less favorably than another, or has been or would be in a comparable situation on any protected grounds.¹⁵ In this regard, no proof of intention nor overt discrimination is required. Less favorable treatment is actually demonstrated through what the specialized literature in common law calls the 'but for' test.¹⁶ In this case, illegal direct discrimination is determined by comparing the treatment given to an alleged victim of discrimination and another person in a similar situation who does not have, or is not associated to, a protected ground, including sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Ultimately, we believe that framing discriminatory practices involving targeted advertisement with employment offers as direct discrimination has one main advantage. In European Union law, justifications to direct discrimination are much more restricted than those accepted in cases of indirect discrimination. In the context of employment offers, apart from the special case of ethos-based organizations, only a

¹⁴ In this regard, see F.J. Zuirderveen Borgesius, "Strengthening Legal Protection Against Discrimination by Algorithms and Artificial Intelligence", *The International Journal of Human Rights*, vol. 24, n 10, 2020, 1577; Also, even though Sandra Wachter considers that direct discrimination does not rely on intention, she affirms that in the context of behavioral advertisement, 'direct discrimination is rarer because an advertiser or platform provider is not likely to confess that a protected ground formed the basis for a decision'. See S. Wachter, "Affinity Profiling and Discrimination by Association in Online Behavioral Advertising", *Berkeley Technology Law Journal*, vol. 35, n.2, 2020, p. 386; Moreover, D. J. Dalenberg underlines that 'an important aspect of direct discrimination is that it is most often linked to overt practice. When certain conduct amounts to direct discrimination, it will be obvious since the practice will manifest itself as discrimination', see D.J. Dalenberg, "Preventing Discrimination in the Automated Targeting of Job Advertisements", *Computer Law Security Review*, vol. 34, 2018, p. 620.

¹⁵ See section IV below.

¹⁶ M. Bell, "Direct Discrimination", in D. Schiek, L. Waddington and M Bell (eds), *Non-Discrimination Law*, Hart Publishing, 2007, chapter 2; N. Bamforth, M. Malik and C. O'Cineide, *Discrimination Law: Theory and Context*, Sweet & Maxwell, 2008, p. 237.

defense based on a genuine and determining occupational requirement would be admitted.

II. Digital Profiling and the Online Targeted Advertising Industry

Profiling is generally defined as a method to analyze or predict a ‘natural person’s performance at work, economic situation, health, personal preferences, interests, reliability, behavior, location or movements’.¹⁷ In online targeted advertising, profiling is used to predict internet users’ preferences and interests. Marketing companies commonly develop profiling to determine which products should be advertised to their different clients¹⁸. Supported by profiling methods, companies can deliver their online advertisements based on Internet users’ features, such as gender, ethnic affiliation, age, and geographic location, among other inexhaustible possibilities.

Google, Microsoft, LinkedIn, and Facebook, to cite only a few predominant businesses in the online market, provide advertisers with tools and filters to target in granular detail the audience that they want to reach. In Europe, online platform advertising revenues were predicted to reach 8.7 billion dollars in 2018, with a possible 8.2% growth rate between 2018 and 2022. This number represents approximately 16% of digital advertising in the region.¹⁹ Platforms such as Google, Facebook and LinkedIn make their profits almost exclusively from targeted advertising, which allows them to provide their services entirely free to the users.²⁰

Online targeting is only possible with information about the target. At this point, digital profiling comes into play by aggregating data and finding patterns in Internet users. The kind of data used to constitute profiles range from behavioral online data—including websites visited, articles read, videos watched, apps used, and purchases made, as well as click-through responses to advertisements and communication content, e.g., what people write in e-mails and the terms searched for on search engines—to social demographic data, including sex, age, language, ethnic affiliation, political opinions, and geographic location. The set of behavioral data and social demographic data constitute what the specialized literature calls digital identity.²¹ Among other things, digital identities enable online platforms and interested companies to manage their targeted advertising industry.

¹⁷ General definition provided by the GDPR, art 4 (4). See F. Bosco, “Profiling Technologies and Fundamental Rights and Values: Regulatory Challenges and Perspectives from European Data Protection Authorities”, in S. Gutwirth, R. Leenes, P. de Hert (eds), *Reforming European Data Protection Law*, Springer, 2015, p. 20; M. Hilderbrandt, “Defining Profiling: A New Type of Knowledge?”, in M. Hildebrandt, S. Gutwirth (eds), *Profiling the European Citizen*, Springer, 2008, p. 20.

¹⁸ S.C. Boerman et al., “Online Behavioral Advertising: A Literature Review and Research Agenda”, *Journal of Advertising*, vol. 46, 2017, p. 364; E. G. Smit et al., “Understanding Online Behavioural Advertising: User Knowledge, Privacy Concerns, and Online Coping Behaviour in Europe”, *Computer Human Behavior*, vol. 32, 2014, p.15.

¹⁹ GfK consortium, “Final Report on Behavioural Study on Advertising and Marketing Practices in Online Social Media”, European Commission, June 2018, p. 13.

²⁰ *Ibid*, pp. 20, 24, and 25.

²¹ S. Watcher, “Normative Challenge of Identification in the Internet of Things: Privacy, Profiling, Discrimination, and the GDP”, *Computer Law Security Review*, vol. 34, 2018, p. 440; S. Rodotà, “Data Protection as a Fundamental Right”, in S. Gutwirth et al. (eds), *Reinventing Data Protection?*, Springer, 2009), p. 82; I. Graef, “Algorithms and Fairness: What Role for Competition Law in Targeting Price Discrimination Towards End Consumers”, *Columbia Journal of European Law*, vol. 24, 2018, p. 558.

Researchers have increasingly focused on understanding how online targeted advertising works and on its consequences in terms of bias and stereotypes.²² To illustrate the problems related to bias and potential illegal discrimination against Internet users, we selected one study related to Facebook. In the EU, researchers found that 73% of Facebook users were labeled with interests linked to their own sensitive and nonsensitive personal data.²³ Among tens of thousands of labels, these included their sex, age, political opinions, religious belief and sexual orientation. These labels aimed exclusively at targeted online advertising. After extensive research, the authors of the study found that Facebook had approximately five million advertisement preferences assigned to more than four thousand Facebook users. These labels or preferences are given based on the information collected by tracking cookies, in addition to social demographic information provided either spontaneously by the users or inferred by Facebook's algorithms.

Specifically, the researchers demonstrated that Facebook commercially exploits very sensitive personal data to target advertisements by running three advertisement campaigns using preferences such as religious beliefs, political opinions and sexual orientation. The researchers were able to specifically target their campaigns to users interested in, among others, Islam, Judaism, Christianity, Buddhism, communism, anarchism, transsexualism or homosexuality. In the end, their ad campaigns reached 26458 users, and they had just spent €35 on the advertisements. The campaigns were related to a travel agency. However, they could have created a campaign to advertise a job offer and only have targeted straight Facebook users, for instance. The possibilities with the five million labels are unlimited. In the study, the researchers were only concerned with the processing of very sensitive data under the terms of the European General Data Protection Regulation (GDPR).²⁴ The study provides a brief insight into how profiling methods will determine the advertisements that Internet users will be able to see.

Profiling and targeting are *per se* discriminatory if discrimination is broadly understood as selecting or distinguishing based on identifiable characteristics.²⁵ In this context, profiling and thus targeting consist of differentiating Internet users to direct to them the most suitable advertisements. Profiling and targeting give advertisers the power to make distinctions based on a number of identifiable characteristics, such as personal interests, age, race, gender, location, and behavior, among others. These forms of differentiations are not necessarily illegal.²⁶

The question to be asked then is when does profiling become illegal discrimination in the context of online targeted advertising? In the European Union, on the one hand,

²² A. Datta et al., "Discrimination in Online Advertising: A Multidisciplinary Inquiry", *Proceedings of Machine Learning Research*, vol. 81, 2018, p.1; L. Sweeney, "Discrimination in Online Ad Delivery", *Communications of the ACM*, vol. 56, n.5, 2013; J.M. Carrascosa et al., "I Always Feel Like Somebody's Watching Me: Measuring Online Behavioural Advertising", *Proceedings of the 11th ACM Conference on Emerging Networking Experiments and Technologies*, vol.13, 2015.

²³ J.G. Cabañas et al., "Facebook Use of Sensitive Data for Advertising in Europe", *arXiv preprint arXiv:1802.05030*, 2018.

²⁴ 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), art 9 (1). (Hereinafter GDPR).

²⁵ S. Fredman, *Discrimination Law*, 2nd ed, Oxford University Press, 2011, chapter 1.

²⁶ See section IV of this paper.

nondiscrimination law provides a strong legal framework that prohibits discrimination across a range of fields and grounds; on the other hand, data protection legislation protects EU citizens against discrimination based on data processing in more general terms. Our purpose here is to show how they can mutually feed one another.

III. Addressing Discrimination in Targeted Advertising: The Intersection of Data Protection Law and Nondiscrimination Law

A. Data Protection Law and Discrimination Issues

The dimension of data protection is a cornerstone of the discussion on illegal discrimination in targeted advertising given that discrimination often happens with the collection and processing of personal data. Discrimination through targeted advertising can be minimized when the law restricts what kind of data can be collected and how and under which circumstances the data can be processed. Protecting personal data is a tradition not only in the European Union but also in the member states of the Council of Europe. In this sense, the European Union recognizes data protection as a fundamental right.²⁷ The Charter of Fundamental Rights of the European Union provides that everyone has the right to the protection of their personal data, and personal data processing is only allowed if the data controller has a legal basis for processing it.²⁸

It is worth noting that the European personal data protection legal framework, in its inception, gave special attention to the risks that processing of personal data poses to privacy. The Data Protection Directive, for instance, mentioned that its objective comprised the protection of ‘the fundamental rights and freedoms of natural persons, and in particular the right to privacy with respect the processing of personal data’²⁹. In this respect, neither the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data nor the European Data Protection Directive specifically warned against the risks involving discrimination against citizens when they had their personal data collected and processed by automated systems.³⁰ This reality has changed in the past years. Other dimensions of the scope of personal data protection have been embraced with much more emphasis. More recently, the term discrimination has been included and highlighted in foundational data protection texts as it is described in the paragraph below.

The updated Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data specifically provides that ‘a risk of discrimination’ may exist when individuals have their sensitive data processed.³¹ In addition, the Council of Europe Guidelines on Artificial Intelligence and Data Protection

²⁷ GDPR, recital (1); The Charter of Fundamental Rights of the European Union, art 8 (1); the Treaty on the Functioning of the European Union (TFEU), art 16 (1). On the right to privacy, see also the Charter of Fundamental Rights of the European Union, art 7; the European Convention on Human Rights, art 8.

²⁸ Charter of Fundamental Rights of the European Union, art. 8 (1) and (2).

²⁹ Article 1, (1), Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and the Free Movement of Such Data, OJ L 281, 23.11.1995 (Hereinafter, Data Protection Directive).

³⁰ The Convention was updated with the adoption of an amending protocol: Protocol CETS No 233. The aim was to reinforce the protection of privacy in the digital environment.

³¹ Convention 108+ for the Protection of Individuals with Regard to the Processing of Personal Data, art 6 (2).

stress the risk of discrimination against individuals posed by automated systems. The guidelines urge AI developers to implement in their systems a human rights by design approach and avoid ‘any potential biases, including unintentional or hidden, and the risk of discrimination’ against data subjects.³² Also, the principle of nondiscrimination is mentioned in the proposal for a regulation laying down harmonized rules on artificial intelligence in the European Union.³³ Ultimately, the General Data Protection Regulation (GDPR) provides that personal data processing, including profiling practices, may represent a risk of discrimination and a risk to the rights and freedoms of natural persons.³⁴ In this regard, the Article 29 Working Party issued guidelines on profiling, stressing that the practice can perpetuate existing stereotypes, social segregation and unjustified discrimination.³⁵

By closely examining the GDPR, one can find that the regulation applies to targeted advertising practices because it includes the collection, storage and processing of personal data, such as data disclosing internet users’ racial or ethnic origin, political opinions, religious beliefs, philosophical beliefs, gender, location data, IP addresses and all sorts of data that allow internet users to be singled out.³⁶ Nevertheless the use of such data is legal for targeted advertising purposes as long as companies meet all the GDPR principles and have legal basis for processing such personal data.

One of the legal basis for processing personal data for targeted advertising is explicit consent.³⁷ In this regard, companies are allowed to ask internet users their explicit consent to use information such as their gender, ethnic origin, age or geographic location to target advertisements based on this data. *A priori*, processing special categories of data, including data revealing racial or ethnic origin or data related to individual’s sexual orientation shall be prohibited.³⁸ However, even for this sort of data, the GDPR provides that it can be processed if individuals give their explicit consent for one or more specified purposes.³⁹ On this basis, companies use such data to targeted advertising in the European Union.

In addition to explicit consent, companies willing to target their advertisements based on internet users’ personal data must also comply with a set of principles set out by the GDPR, notably, the principles of lawfulness, fairness, transparency, legitimacy of purposes, data minimization, accuracy, time storage limitation, integrity and confidentiality.⁴⁰ These principles invite businesses to develop strategies concerning the

³² Consultative Committee of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, Convention 108, “Guidelines on Artificial Intelligence and Data Protection”, Council of Europe, 2019.

³³ Brussels, 21.4.2021 COM (2021) 206 final 2021/0106 (COD), Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts.

³⁴ GDPR, rec 75.

³⁵ Art 29 Data Protection Working Party, WP251rev.01, Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679. Adopted on 3 October 2017. As Last Revised and Adopted on 6 February 2018.

³⁶ GDPR, art 4 (1). This view is also supported by F. Zuiderveen Borgesius, “Singling Out People Without Knowing Their Names: Behavioural Targeting, Pseudonymous Data and the New Data Protection Regulation”, *Computer Law Security Review*, vol. 32, 2016, p. 257.

³⁷ GDPR, art 6 (1) and art 9 (2).

³⁸ GDPR, art 9 (1).

³⁹ GDPR, art 9 (2) (a).

⁴⁰ GDPR, art 5 (1) (b), (c), (d), (e), and (f).

use of individuals' personal data for targeting purposes. In this regard, for instance, transparency obliges companies to disclose what kind of data involving protected aspects are collected. If companies comply with the GDPR principles, individuals who have seen their personal data collected for targeting purposes will be given the possibility to understand what kind of personal data were used for being exposed to certain targeted advertising content. In addition, the principle of fairness is correlated with avoidance of discrimination by the Article 29 Working Party.⁴¹ Fair profiling cannot have a discriminatory outcome by excessively targeting individuals and denying them access to employment opportunities, for instance.

Overall the GDPR and other regulatory data protection initiatives in Europe are no longer silent on the risks of discriminating individuals as a result of profiling practices. By setting a regulatory regime for the way that companies can process data, the GDPR offers potential legal safeguards to prevent unlawful discrimination. Data authorities have also acted by enforcing the principles of data protection laws in the practice of targeted advertising the past few years. In France, Belgium, the Netherlands, Spain and Germany, data protection authorities have investigated and sanctioned Facebook for having proceeded to create a massive compilation of personal data on its users to display targeted advertisements without their knowledge.⁴²

Our argument in this paper is that even if the GDPR makes special room for addressing the risks of discrimination, it does not offer a thick definition of the concept. *Per se*, the regulation and the data protection law field, in general, do not specifically determine what kind of differentiations based on protected grounds are unlawful. It is true that the GDPR stipulates that discriminatory outcomes from profiling practices are not allowed and sparsely provides some grounds of protection. In this regard, the recital 71 of the GDPR highlights that the processing of personal data for profiling should ensure a fair outcome in respect of the data subject. In addition, it should prevent discriminatory effects on natural persons on the basis of their 'racial or ethnic origin, political opinion, religion or beliefs, (...) sexual orientation'. Nevertheless, one should bear in mind that not all sorts of differentiations in treatment based on protected grounds are illegal in the light of nondiscrimination laws. In the context of access to employment, for instance, ethnic origin or race, political opinion, religion or beliefs are protected by the EU equality directives. This means that these aspects must not be used, in principle, as a reason to refuse someone to a certain employment position. However, the EU law provides that in some contexts differentiations based on protected grounds are not illegal, particularly when there is a genuine occupational requirement.⁴³ Concerning differentiations based on ethnic origin and gender in the access to a job position, for instance, authenticity in a dramatic performance should be considered as a genuine requirement that allows the

⁴¹ Article 29 Data Protection Working Party, Guideline on Transparency Under Regulation 2016/679 WP260, November 2017.

⁴² "Common Statement by the Contact Group of the Data Protection Authorities of the Netherlands, France, Spain, Hamburg and Belgium", May 2017. See also the campaign #stopspyingonus which started on 4 June, 2019 in several countries of the European Union, Ligue Des Droits Humains, « La Ligue des Droits Humains et 13 ONG en Europe Déposent Plainte Contre les Techniques Illégales de Publicité en Ligne », LDH, 2019.

⁴³ 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 July 2000 (hereafter Race Equality Directive), Recital 18, art 4; and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 December 2000 (hereinafter Employment Equality Directive), Rec. 23, and art 4.

refusal of a person based on their gender or ethnic origin.⁴⁴ Positive action programs to hire applicants with demographic aspects that are underrepresented in a certain company should also be considered as a justification to differentiate individuals based on aspects such as gender.⁴⁵ Concerning religion, legislation may authorize, with certain conditions, a difference of treatment based on someone's religion by the reason of activities to be carried out within churches and ethos-based organizations.⁴⁶ In the European Union, for decades, the concept of discrimination has been thoroughly debated, stretched, and, in some occasions, limited in nondiscrimination statutory laws and case-law.

With this in mind, we argue that addressing discrimination in targeted advertising in the European Union must also be done through the mobilization of nondiscrimination laws. We understand that the nondiscrimination law field has great contribution in terms of precedents and regulations to the definition of the concept of discrimination present in personal data protection regulations. For us, it is striking to note that even though data protection authorities have already investigated and fined Facebook for illegal targeted advertising with possible discriminatory outcomes none of these cases have been mobilized in the field of nondiscrimination law.⁴⁷ The situation is different in the US, where Facebook was sued in several major cases in which civil rights issues were at stake⁴⁸. Three of these cases concern online employment advertising practices.

B. Framing Targeted Advertising Practices: Litigation in the United States

Over the past fifteen years, Facebook has encouraged users to share their social demographics data, including their age, sex, ethnic affinity, geographical location, education and employment history. Facebook supported its users to explicitly express their political affiliation and interests such as hobbies, sports teams, books, and music. In addition to the information spontaneously declared by users on their personal profiles, behavioral and personal information has been collected and also inferred by the platform. When users interact by sharing articles about particular topics, commenting on actions generated by other users, or participating in groups, they give hints about what they are interested in and how likely they are to engage with certain content.⁴⁹ With that set of information, Facebook profiles its users with innumerable categories. User profiles may be applied in a myriad of ways, including personalizing the user experience by showing relevant stories and targeted advertisements.⁵⁰

The targeting tools put into place by Facebook did not go unnoticed by civil rights lawyers and legal scholars in the United States⁵¹. Between 2016 and 2018, charges of

⁴⁴ Commission v. Germany, ECLI:EU:C:1985:214.

⁴⁵ Gender Equality Directive, art. 3; Racial Equality Directive, art. 5; Employment Equality Directive, art. 7(1);

⁴⁶ Employment Equality Directive, art 4(2). See *Egenberger v Evangelisches Werk Für Diakonien und Entwicklung eV*, ECLI:EU:C:2018:257.

⁴⁷ See note 42.

⁴⁸ See note 6.

⁴⁹ J. Turow, *The Daily You: How the New Advertising Industry is Defining Your Identity and Your Worth*, Yale University Press, 2011, p.145.

⁵⁰ *Ibid*, 146.

⁵¹ I. Ajunwa, "Age Discrimination by Platforms", *Berkeley Journal of Employment and Labor Law*, vol. 40, 2019; A. Selbst and S. Barocas, "Big Data's Disparate Impact", *California Law Review*, vol. 104, 2016, p. 671.

discrimination and class actions followed one by another were filed against Facebook⁵², seeking declaratory and injunctive relief and monetary damages to redress racial, sex and age discrimination, among other protected grounds, in the access to employment, credit and housing. According to one of the class actions, Facebook provides advertisers three ways of targeting users: companies can select their audience manually, based on desired social demographics; companies can upload their contact lists to target their customers on Facebook; and companies can use their customer information to find people similar to them on the platform with a tool named lookalike.

Those targeting tools enable advertisers to include or exclude users who will have access to advertisements according to the preselected criteria. For instance, one of the criteria available was ethnic or the perceived ethnic origin of the Facebook user. The possibilities in the subcategory section provided to advertisers were, specifically, African American, Asian American, and Hispanic. In one of the class actions, plaintiffs claimed that Facebook, in addition to users' self-declaration, inferred the users' ethnic identities based on their online activity.⁵³

Regarding specifically employment offers, the *Onuoha v Facebook* class action was filed by three representatives on behalf of all African American, Latino, and Asian American Facebook users located in the United States who were interested in receiving jobs opportunities and were denied receiving them by Facebook's targeting policies.⁵⁴ The first representative Suzanne-Juliette Mobley was African American and worked as a community engagement manager. She declared that she resided in New Orleans where more than 70% of the population are African Americans. These three class action representatives were allegedly frequent Facebook users and sought Facebook employment opportunities through advertisements that the platform chose for them to receive. The class action accused employers using the Facebook advertising platform of redlining around a predominantly African American, Latino, and Asian American community to exclude them from receiving advertisements about employment.

In the *Bradley et al v T-Mobile US* case, the class advocated for the rights of older workers to be free of age discrimination in employment advertising, recruitment, and hiring on Facebook in the United States.⁵⁵ According to the complaint, Facebook and other advertisers on the platform frequently excluded older workers from receiving employment and recruiting advertisements on Facebook and thus denied older workers job opportunities. Defendants excluded older workers from receiving job advertisements by especially targeting their employment ads to younger workers via Facebook's ad platform. Among the hundreds of identified companies that allegedly discriminated on the basis of an applicant's age were Facebook, T-Mobile US, Amazon.com and Cox Communications. T-Mobile, for instance, advertised a customer care job position on Facebook for its stores in the US and limited the Facebook users receiving the ad to people 18 to 38 years old. Amazon.com restricted employment ads for part-time jobs to people aged '18 to 54', '18 to 50', '28 to 55' and '22 to 40'.⁵⁶ The advertisements themselves did not require the age limit, but it was possible to know the age restriction

⁵² For the references, see note 6.

⁵³ *Onuoha v Facebook, Inc.*

⁵⁴ The class action also encompassed housing and credit advertisements. In this paper, we will only focus on the employment advertisements.

⁵⁵ *Bradley v T-Mobile US, Inc.*, first amended complaint.

⁵⁶ The class action does not specify the title of all jobs advertised by these companies. *Bradley v T-Mobile US, Inc.*, first amended complaint.

through the option 'Why am I seeing this ad?'. When the user clicked on it, he or she was informed that there 'may be other reasons you're seeing this ad, including that T-Mobile Careers wants to reach people ages 18 to 38 who live or were recently in the United States'.⁵⁷ These companies had expressly excluded older workers from receiving job advertisements and being recruited via Facebook's paid ad platform. As a consequence, they have denied millions of users the opportunity to learn about and obtain employment opportunities.

In the *Spees et al v Facebook's* charge of discrimination, the international labor union Communications Workers of America (CWA) and three female class representatives accused Facebook of targeting and sending employment advertisements and related recruitment and hiring opportunities to male Facebook users 'while excluding female and other nonmale prospective job applicants from receiving the job advertisements and opportunities'.⁵⁸ They alleged that Facebook asks its users to identify their gender when subscribing to the platform. Next, Facebook enables employers' advertising employment opportunities to target users who will receive the advertisement according to their gender with the options: 'all'; 'male' and 'female'.

Regarding employment recruitment, the charge of discrimination and class actions have claimed that Facebook breached, among others, federal statutes, namely, the Title VII of the Civil Rights Act of 1964⁵⁹ and the Age Discrimination in Employment Act of 1967 (ADEA).⁶⁰ These Acts prohibit employers from refusing to hire any qualified individual because of such an individual's race, color, religion, sex, national origin and age over 40.

In March 2019, Facebook settled the cases and excluded protected classes from the filters for employment, credit and housing advertisements in the United States.⁶¹ In addition to several new antidiscrimination policies, the platform compromised and created a separate advertising portal for employment, housing and credit advertising. On this separate portal, gender, age and multicultural affinity would not be among the target options for employment, housing and credit advertisements. In addition, for these specific sectors, targeting by zip code would not be allowed to avoid some protected classes being excluded in segregated cities.

IV. What Role is There for a European Nondiscrimination Law?

A. EU Nondiscrimination Law: A Dynamic Legal Framework

If the lawsuits against Facebook on the matter of target discrimination had taken place in the EU member states, plaintiffs would have been supported by a robust nondiscrimination law framework. What is currently called nondiscrimination law in Europe is a very dynamic and complex legal framework that has only developed fairly recently.⁶² It goes beyond a constitutional clause limited to fostering equality *before* the

⁵⁷ *Bradley v T-Mobile US, Inc*, first amended complaint, 26.

⁵⁸ *Spees et al v Facebook, Inc* (EEOC, September 2018).

⁵⁹ 42 U.S.C. para 2000e-2(a)(1) et seq., (1991).

⁶⁰ 29 U.S.C. para 621 et seq., (1985).

⁶¹ American Civil Liberties Union, "Summary of Settlements Between Civil Rights Advocates and Facebook", ACLU, 19 March 2019.

⁶² E. Bribosia and I. Rorive, "Anti-Discrimination Law in the Global Age", *European Journal of Human Rights*, vol. 1, n , 2015, pp. 3-10.

law, as it looks not only at equality *in* the law but also at structural inequalities whereby some forms of inequalities are embedded in social structures, for instance, because they are based on institutionalized conceptions of gender differences or because they reflect an ethnostratification of the labor market. Nondiscrimination law in Europe also goes beyond a vertical dimension of the relationship between the state/government and individuals to embrace a horizontal dimension that includes relationships between individuals. This implies that nondiscrimination law limits the contractual freedom of individuals who are, to a large extent, not allowed to rely on some characteristics such as gender, race, age, sexual orientation, disability or religion when choosing their contracting party.

In Europe, the right to equality and nondiscrimination has remarkably expanded over the last twenty years, most notably since the entry into force of the Amsterdam Treaty in 1999, which confers power to the European Union (EU) to legislate to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.⁶³ For once, EU law has been the driving force behind a major human rights development. Both normative EU instruments such as EU directives and judgments handed down by the Court of Justice of the European Union (CJEU) have been instrumental in this expansion.⁶⁴ Over the last fifteen years, the European Court of Human Rights (ECtHR) has also performed a more systematic control of the nondiscrimination principle that is enshrined in article 14 of the European Convention on Human Rights. In doing so, it has often been inspired by the case law of the CJEU. At the same time, the European Committee for Social Rights is increasingly called upon to rule on the nondiscrimination clause enclosed in the European Charter of Social Rights.⁶⁵

In the employment field, EU nondiscrimination law provides the most robust and comprehensive set of rules in Europe through the mediation of several directives.⁶⁶ Three of them are of particular relevance for our analysis: (1) the Gender Equality Directive, which covers not only discrimination based on sex but also discrimination arising from the gender reassignment of a person⁶⁷; (2) the Race Equality Directive, which concerns discrimination based on race and ethnic origin⁶⁸; and (3) the Employment Equality Directive, which relates to discrimination based on religion or belief, disability, age or sexual orientation.⁶⁹ All of these directives were transposed to the domestic law of the 27 EU member states. To a large extent, national laws are in accordance with these EU

⁶³ Treaty of the European Community (hereafter TEC), art 13, now enshrined in the Treaty on the Functioning of the European Union (hereafter TFUE), art 19.

⁶⁴ M. Bell, "The Principle of Equal Treatment: Widening and Deepening", in P. Craig and G.D. Búrca (eds), *The Evolution of EU Law*, 2nd, Oxford University Press, 2011, pp. 611-639.

⁶⁵ On these different developments, see E. Bribosia and I. Rorive, "Equality and Non-Discrimination: Column 2014", *European Journal of Human Rights*, 2014, p. 205; E. Bribosia and I. Rorive, "Equality and Non-Discrimination: Column 2016", *European Journal of Human Rights*, 2016, p. 254; E. Bribosia and I. Rorive, "Equality and Non-Discrimination: Column 2017", *European Journal of Human Rights*, 2017, p. 191; E. Bribosia and I. Rorive, "Equality and Non-Discrimination: Column 2018", *European Journal of Human Rights*, 2018, p. 126.

⁶⁶ M. Bell, *Anti-Discrimination Law and the European Union*, Oxford University Press, 2002; E. Ellis and P. Watson, *EU Anti-Discrimination Law*, Oxford University Press, 2012, pp. 273-327; European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-Discrimination Law*, FRA, 2018, pp. 113-121.

⁶⁷ Gender Equality Directive, recital (3).

⁶⁸ Race Equality Directive, art 1.

⁶⁹ Employment Equality Directive, art 1.

directives⁷⁰ and if not, national courts should set them aside according to the principle of the primacy of EU law.⁷¹ In addition, the principle of direct effect enables individuals to invoke a European provision directly before national courts, provided that certain conditions are complied with.⁷² Given this reality, the Equality directives and their construed meaning provided by the CJEU might serve as a general guidance to what amounts to illegal discrimination in the practice of targeted advertising for employment.

The scope of application of the Gender Equality Directive, the Race Equality Directive and the Employment Equality Directive explicitly covers access to employment,⁷³ which has been interpreted widely by the CJEU. It applies to a person seeking employment⁷⁴ and includes the selection criteria of that employment as well as the recruitment conditions.⁷⁵ Access to job advertisements inherently falls under the EU notion of access to employment and it is not controversial anymore that an identified victim is not required.⁷⁶

Discrimination occurs in many ways, not merely deliberately. The meaning of discrimination within this EU equality law framework goes far beyond basic forms of discrimination that are based on an explicit intention. The equality directives prohibit direct discrimination, indirect discrimination, denial of reasonable accommodation to people with disabilities, instruction to discriminate and harassment. In the framework of this paper, direct and indirect discriminations are addressed. Instruction to discriminate could also be relevant to the extent that companies advertising employment offers require online platforms to exclude protected classes from receiving them.⁷⁷

B. Direct Discrimination or the ‘But For’ Test

⁷⁰ I. Chopin et al., *A Comparative Analysis of Non-Discrimination Law in Europe*, Luxembourg, European Commission, 2019; A. Timmer, L. Senden, *A Comparative Analysis of Gender Equality Law in Europe*, Luxembourg, European Commission, 2019.

⁷¹ This principle was firstly developed by the CJEU in the seminal case *Costa v Enel*, ECLI:EU:C:1964:66.

⁷² For a detailed analysis of the conditions that EU provisions must fulfill to have direct effect, see C. Barnard and S. Peers, *European Union Law*, Oxford University Press, 2017, pp. 146-155.

⁷³ Gender Equality Directive, art 1; Race Equality Directive, art 3.1; Employment Equality Directive, art 3.1.

⁷⁴ Note that the emerging ‘abuse of rights’ doctrine developed in the *Kratzer* case is limited to ‘a situation in which a person who in making an application for a post does not seek to obtain that post but seeks only the formal status of applicant with the sole purpose of seeking compensation’. *Nils-Johannes Kratzer v R+V Allgemeine Versicherung AG*, ECLI:EU:C:2016:604.

⁷⁵ See, for instance, *Meyers v Chief Adjudication Officer*, ECLI:EU:C:1995:247 (sex discrimination—recruitment conditions extend to factors that influence a person’s decision as to whether to accept a job offer); *Draehmpaehl v Urania Immobilienservice OHG*, ECLI:EU:C:1997:208 (sex discrimination—job advertisement requested female applicants); *Galina Meister v Speech Design Carrier Systems GmbH*, ECLI:EU:C:2012:217 (discrimination based on sex, age or ethnic origin—applicant not selected for an interview); *European Commission v. Kingdom of Belgium*, ECLI:EU:C:2015:63; *Mario Vital Pérez v Ayuntamiento de Oviedo*, ECLI:EU:C:2014:2371.

⁷⁶ *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, ECLI:EU:C:2008:397; *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, ECLI:EU:C:2013:275; N.H. c. Associazione Avvocatura per i diritti LGBTI - Rete Lenford, ECLI:EU:C:2020:289. See E. Bribosia and I. Rorive, “Arrêt Associazione Avvocatura per i diritti LGBTI: déclarations publiques à caractère discriminatoire et liberté d’expression des employeurs. Les paroles ont des ailes et peuvent être sources de discriminations”, *Journal de Droit Européen*, vol. 8, n 4, 2020.

⁷⁷ R. Xenidis, “Two Round Holes and a Square Peg: An Alternative Test for Algorithmic Discrimination in EU Equality Law” (forthcoming).

Direct discrimination occurs ‘where one person is treated less favorably than another is, has been or would be treated in a comparable situation’, on the basis of any of the prohibited grounds such as sex, racial or ethnic origin, religion, disability, age or sexual orientation.⁷⁸ Less favorable treatment is determined by a comparison between the alleged victim and another person in a similar situation who does not possess the protected characteristic. This is usually labeled the ‘but for’ test. For instance, with respect to the recent study that has shown that the ad tool provided by Google makes better paid job offers appear six times more often to men than to women,⁷⁹ we could say: but for being a woman, she would have received the job offer. In this case, only a defense based on a genuine and determining occupational requirement would be admitted.

Such an exception operates only ‘in very limited circumstances’.⁸⁰ The exception has to be linked to the ‘nature of the particular occupational activities concerned’,⁸¹ for instance, hiring a woman in a fashion show to model women’s clothes. These circumstances might also be related to ‘the context in which [the particular occupational activities] are carried out’.⁸² In any case, a test of proportionality should assess whether the occupational requirement is genuine and determining. In other words, its objective should be legitimate, and the requirement should be proportionate considering this objective.

The genuine and determining occupational requirement is not an exception that is confined to direct discrimination based on sex. It also applies to direct differences in treatment based on race or ethnic origin, disability, sexual orientation, religion or belief and age. Only regarding religion or belief and age does EU law allow for additional exceptions. Regarding religion and belief, this is limited to churches and ethos-based organizations.⁸³ Concerning age, the Employment Equality Directive allows age discrimination that pursues ‘legitimate employment policy, labor market and vocational training objectives’, provided that the proportionality test is met.⁸⁴ A nonexhaustive list of examples for when differential treatment may be justified is also provided, such as ‘fixing of minimum conditions of age, professional experience or seniority in service for access to employment’.⁸⁵ For instance, in *Abercrombie & Fitch Italia Srl*, the CJEU ruled that a provision for automatic dismissal on attaining the age of 25 did not constitute unlawful age discrimination since it pursued a legitimate aim of employment and labor

⁷⁸ Race Equality Directive, art 2, para 2 (a); Employment Equality Directive, art 2, para 2 (a); Gender Equality Directive, art 2, para 1 (a).

⁷⁹ Datta et al., note 22, p. 102.

⁸⁰ Race Equality Directive, recital 18; Employment Equality Directive, recital 23. See also Gender Equality Directive, recital 19.

⁸¹ Gender Equality Directive, art 14, para 2. See also Race Equality Directive, art 4 and Employment Equality Directive, art 4, para 1.

⁸² See the review of the CJEU case-law in the European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-Discrimination Law*, note 66, pp. 97-102.

⁸³ Employment Equality Directive, art. 4, para 2. The CJEU interpreted the scope of this provision in a restrictive manner in *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, EU:C:2018:257; *I.R. c. J.Q.*, EU:C:2018:696. E. Bribosia and I. Rorive, “Equality and Non-Discrimination: Column 2019”, *European Journal of Human Rights*, n 2, 2019.

⁸⁴ Employment Equality Directive, art. 6, para 1.

⁸⁵ Employment Equality Directive, art 6, para 1 (b).

market policy, and the means laid down for the attainment of that objective were appropriate and necessary.⁸⁶

The *Feryn* case,⁸⁷ decided in 2008 by the CJEU, has been widely commented on in Europe in the search for a better understanding of the scope of direct discrimination. The case involved an application by the Belgian national equality body, which claimed that the Feryn company had pursued a discriminatory recruitment policy. It all started when a journalist contacted the Feryn company about large advertisements placed along a motorway to find garage door fitters. The head of the company stated publicly in the media that he was not hiring people of Moroccan origin because his clients did not want them. In a preliminary ruling, the CJEU decided that direct discrimination might result from a public statement made by an employer, which is likely to dissuade certain candidates from submitting their candidature. This case is highly relevant to understanding what could amount to illegal discrimination in online targeted job advertising. Most importantly, it points to the fact that job advertising should be covered by the EU nondiscrimination law. In the case, the potential employer had alleged that 'there was no proof nor was there a presumption that a person had applied for a job and had not been employed as a result of this ethnic origin'. The CJEU reacted to this claim by holding that public statements dissuading employees of a certain ethnic or racial origin are sufficient for 'presumption of the existence of a recruitment policy which is directly discriminatory'. In such contexts, employers should prove that there was no breach of the principle of nondiscrimination. They can do so by proving that the recruitment practice does not correspond to their public statements.

It is true that online targeted ads with employment offers potentially aiming to exclude internet users with a certain ethnic origin or gender do not have overt preferences. There is no public statement. These ads do not explicitly state a preference for a person with certain traits. However, they may deliberately exclude persons with protected demographic aspects from receiving employment offers. This was the case presented by the lawsuits against Facebook in the United States. In our view, the exclusion of protected classes, especially persons from minority groups, is a strong sign of presumption of a direct discriminatory recruitment policy. Adapting the lawsuit against Facebook to the European context, what could possibly justify the exclusion of persons identified as Moroccans from receiving employment offers on Facebook? The exclusion of such protected ground is presumably discriminatory. In this case, the employer would have to prove that such exclusion does not reflect in discrimination in his or her recruitment practice. This view is aligned to the ultimate aim of the race equality directive: 'foster conditions for a socially inclusive labor market'. Excluding protected classes from receiving employment offers do not seem to be aligned with the promotion of an inclusive labor market.⁸⁸ Moreover, the CJEU held that the existence of such discrimination does not depend on the identification of a victim. In other words, the fact that there was no evidence pointing to the fact that a person had applied for a job and had not been employed as a result of his or her ethnic origin was irrelevant when determining the existence of direct discrimination in *Feryn*. This is relevant for targeted

⁸⁶ *Abercrombie & Fitch Italia Srl v Antonino Bordonaro*, ECLI:EU:C:2017:566. For more examples, see the European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-Discrimination Law*, note 66, pp. 103-108.

⁸⁷ *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, ECLI:EU:C:2008:397.

⁸⁸ Race Equality Directive, Recital 8.

advertising, considering it may be difficult to prove that an internet user with a certain protected demographic aspect excluded from an employment offer actually applied for it.

Moreover, relying on ethnic categories or deliberately using proxies for the same purpose, such as zip codes in places where housing is highly segregated, amounts to prohibited direct discrimination, unless a genuine and determining requirement might be established.⁸⁹ In this case, if employers exclude individuals from a certain geographic area of a city from receiving their employment advertisement, they may be directly discriminating against individuals based on their ethnic origin. Especially if the geographic area has an overrepresentation of individuals with an ethnic minority background. The overrepresentation and concentration of certain minority groups in certain neighborhoods are a reality in several European cities. In addition, direct discrimination might also occur by association when people are being discriminated against because they are associated with the main target of the perpetrator's prejudice.⁹⁰ In the groundbreaking *CHEZ* case, the CJEU decided that all the people of a district are victims of race discrimination as soon as the practice of a powerful electricity company, CHEZ, of placing meters out of reach only in Roma districts is based on grounds of the Roman origin of the district's majority.⁹¹ Through this approach, the Court defeated CHEZ's attempt to require that applicants prove that they belong to a protected class. The accurate test is whether there is discrimination based on a prohibited ground and whether this discrimination affects the claimant. If we apply this in the online context, we see that one can be a victim of illegal discrimination also because of an inaccurate digital profiling.

C. Indirect Discrimination and Substantive Equality

Indirect discrimination 'shall be taken to occur where an apparently neutral provision, criterion or practice would put persons [with a protected characteristic] at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.⁹²

The main idea behind indirect discrimination is that to achieve substantive equality, one might have to treat people who are in a different situation differently. To do so, the focus is on the effects of a rule or a practice when taking into account everyday social realities. For instance, forbidding animals in a shopping mall, apparently a neutral provision, will disadvantage blind people who need a guide dog to walk safely. Looking at the effects of an apparent neutral provision is powerful in practice, as it allows the disclosure of pre-existing inequalities. In Europe, the CJEU forged, in part,⁹³ the concept of indirect discrimination in equal pay cases where women part-time employees were

⁸⁹ M. Bell, "Direct Discrimination", in D. Schiek, L. Waddington and M. Bell (eds), *Non-Discrimination Law*, Hart Publishing, 2007, pp. 185 & sq.

⁹⁰ The CJEU forged the concept of discrimination by association in *S. Coleman v Attridge Law and Steve Law*, EU:C:2008:415.

⁹¹ *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, ECLI:EU:C:2015:480.

⁹² Race Equality Directive, art. 2, § 2 (b); Employment Equality Directive, art 2, para 2 (b); Gender Equality Directive, art. 2, para 1 (b).

⁹³ With respect to discrimination of European nationals, see *O'Flynn v Adjudication Officer*, ECLI:EU:C:1996:206.

paid less than full-time employees who were more commonly men.⁹⁴ Indirect discrimination was linked to the reversal of the burden of proof device in a directive adopted in 1997, which was the first to formalize this concept for sex discrimination generally and relied on a disparate impact approach.⁹⁵

Today, the use of statistics is not necessary to point to potential indirect discrimination, but it might be very useful to rely on statistics when they are available, provided that they are 'reliable and significant'.⁹⁶ The intrinsically suspect measure test might also indicate differential treatment and lead to the reversal of the burden of proof. For instance, a job advertisement that specifies that all candidates must have Belgian qualifications could lead to indirect racial discrimination because anyone educated outside of Belgium cannot apply for this position. It would be the burden of the employer to prove that there is a legitimate aim why they need applicants with Belgian qualifications and that this requirement is appropriate and necessary to achieve that aim. In the case of employment-targeted advertising, employers who target users who speak a specific language within the boundaries of an EU country could indirectly discriminate individuals who do not speak it. Depending on the circumstances, when the suspect measure is taken because of the protected ground, the discrimination could be said to be direct.⁹⁷

V. Conclusion

In this paper, we argue that EU data protection law provides fundamental standards for seizing discriminatory outcomes in targeted online employment advertising. The GDPR explicitly provides that profiling used in targeted advertising shall meet fair informational principles to prevent discrimination. The principles of lawfulness, fairness, transparency, legitimacy of purposes, data minimization, accuracy, time storage limitation, integrity and confidentiality are fundamental for addressing discrimination in profiling practices and thus targeted advertising. They allow Internet users in particular and legal actors in general to be aware of what kind of personal data are used and for what specific purposes. In this case, advertisers have the legal obligation to disclose when they process personal data, such as age, gender and ethnic origin, among others, to target advertisements to certain Internet users, for instance. Although the GDPR offers a strong regulatory regime for guiding how companies can process personal data to avoid discrimination, it is insufficiently equipped to address discrimination on its own, as it lacks a thick definition of discrimination. In this sense, EU data protection laws need to be construed in light of nondiscrimination laws.

However, it is striking to note the extent to which equality legal scholars in Europe do not pay much attention to targeted employment advertising. Academic papers on the topic are scarce. Equality bodies are also largely silent on the issue. In addition, to our knowledge, no case regarding the topic has mobilized nondiscrimination laws before national courts. The practice of online employment targeted advertising based on

⁹⁴ See, for instance *J.P. Jenkins v Kingsgate (Clothing Productions) Ltd*, ECLI:EU:C:1981:80; *Bilka-Kaufhaus GmbH v Weber von Hartz*, ECLI:EU:C:1986:204.

⁹⁵ See art 2, para 2 of the then Burden of Proof Directive (97/80, OJ [1998] L 14/6).

⁹⁶ On these conditions, see the topical *Nicole Seymour-Smith and Laura Perez*, ECLI:EU:C:1999:60.

⁹⁷ *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, ECLI:EU:C:2015:480.

protected grounds has been demonstrated by collective litigation in the United States, by several studies conducted by experts in the United States and Europe, and ultimately by European data protection authorities. Targeted advertisements based on protected grounds exist in Europe beyond any doubt.

In this regard, we argue that EU nondiscrimination laws are equipped to address discrimination in employment targeted advertising. From a complex legal framework on employment equality and nondiscrimination, two bottom line rules clearly emerge. On the one hand, some grounds, i.e., sex, pregnancy, maternity and gender reassignment, race and ethnic origin, sexual orientation, disability, religion or belief, and age cannot be taken into account when advertising a job offer, except in very specific circumstances that are enshrined in the directives and ruled by the CJEU as a genuine and determining occupational requirement. On the other hand, when some hiring practices have a detrimental effect or a disparate impact on people who share one of these grounds, that practice might be discriminatory unless the employer can rely on a legitimate aim that fulfils the proportionality test.

This legal framework applies online and should address the major shift that employer recruiting practices have undergone. Concerns about biased recruitment online and disregard towards equal opportunities are now strongly documented. These concerns are threefold. First, targeted online recruitment gives employers the means to rely on a protected characteristic to exclude potential job applicants from their targeted group. Second, targeted online recruitment allows employers to rely on attributes that appear to be neutral at face value but that are closely linked to protected characteristics. Third, profiling technologies are likely to reinforce existing biases, as they rely on data that reflect a job market where unequal treatment is common. Given this reality, learning from the civil rights battles in the United States is an opportunity for the renewal of the European approach to online targeted advertising, which is centered on data protection and which tends to disregard the very robust European antidiscrimination legal framework.

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