

Sensitive data, AI discrimination and the GDPR

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How can AI discriminate

- AI reinforces existing inequalities
- Example: Breeze



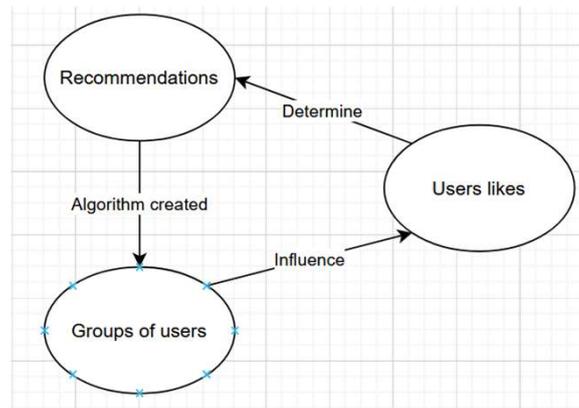
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Dating-app Breeze mag (en moet) algoritme aanpassen om discriminatie te voorkomen

Nieuwsbericht | 06-09-2023 | 06:09

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Breeze feedback loop



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Why AI developers need data on protected characteristics

- Cannot test for specific groups without data
- Proxy attributes “hide” correlations

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Example: Dutch education agency

- AI system based on: age, education or distance
- *Age, education or distance* ‘hide’ ethnicity
- Test: predict ethnicity with (combinations of) age, education or distance

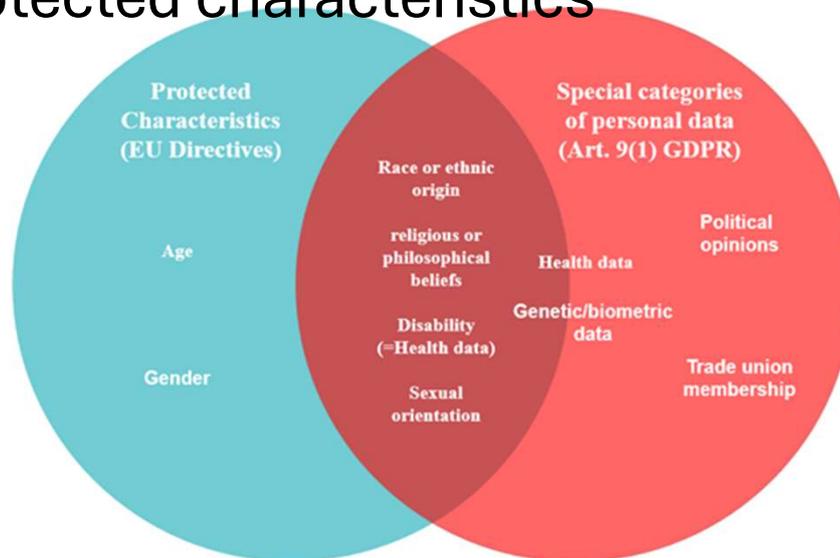
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The problem: Art. 9(1) GDPR

- GDPR forbids processing data revealing special categories of data
- Unless...

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Overlap between special categories and protected characteristics



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Art. 9 GDPR

- In principle: collection/use is banned
- Two types of exceptions
 - Consent
 - “Union or member state law”
- Exceptions **limitative** and **narrow**

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Art. 9(2)(a) GDPR: Consent

- Freely given?
- Awkward for companies to ask?
- What if too many data subjects refuse?

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Other options Art. 9(2) GDPR

- (b) Legal obligation in employment, social security and social protection law
- (f) legal claim (Court)
- (g) substantial public interest
- (j) archiving purposes, research, statistical purposes

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More details



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Comment

Using sensitive data to prevent
discrimination by artificial intelligence:
Does the GDPR need a new exception?

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New exception: Art. 10(5) AI Act

- Art. 10 AI Act: Developers (providers) **must** test training, testing and evaluation datasets
- Art. 10(5) AI Act: Exception for obligation
- Exception specifies Art. 9(2)(g) GDPR

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Only in high-risk contexts

5. To the extent that it is strictly necessary for the purpose of ensuring bias detection and correction in relation to the high-risk AI systems in accordance with paragraph (2), points (f) and (g) of this Article, the providers of such systems may exceptionally process special categories of personal data, subject to appropriate safeguards for the fundamental rights and freedoms of natural persons. In addition to the provisions set out in Regulations (EU) 2016/679 and (EU) 2018/1725 and Directive (EU) 2016/680, all the following conditions must be met in order for such processing to occur:

(a) the bias detection and correction cannot be effectively fulfilled by processing other data, including synthetic or anonymised data;

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Aim: correct biases

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“Strictly necessary”

1. Refers to proportionality
2. Refers to purpose limitation
3. Refers to accountability

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3 controversial points

1. What biases are bad?
2. What can a developer do?
3. Is it worth it?

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More details



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Using sensitive data to de-bias AI systems: Article 10(5) of the EU AI act

Marvin van Bekkum

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Practical consequence

B L O O M S B U R Y



Bloomsbury Diversity, Equity and Inclusion Author Survey

5. What is your ethnicity?

- Asian or Asian British - Indian
- Asian or Asian British - Pakistani
- Asian or Asian British - Bangladeshi
- Asian or Asian British - Chinese
- Asian or Asian British - Any other Asian background

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Is the clash between these rights new?

- 2013: Scholars foresaw possible clash
- Offline context: statistics, employment, ...
- AI context: Weighing of arguments different, measures immature

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Take-away

- Many arguments for and against an exception
- Article 10(5) AI Act raises questions about balancing act
- Fundamental rights to privacy and non-discrimination can clash

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Thank you!

- **We'd love to chat if you have questions or suggestions!**

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