

REGULATING FOR EUROPEAN AI THAT PROTECTS AND ADVANCES EQUALITY

POSITION PAPER LAYING DOWN
RECOMMENDATIONS AND CORE COMPONENTS
FOR FUTURE EU LEGISLATION ON ARTIFICIAL
INTELLIGENCE



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**This designation is without prejudice to positions on status and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.*

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Objective and Context

The following key recommendations are the building blocks on the present Equinet Position Paper on the forthcoming legislative proposal by the European Commission, which is expected to introduce a risk-based approach to addressing a number of ethical and legal issues raised by AI. The [Inception Impact Assessment](#) of this legislative proposal describes the first specific aim under the proposal's general objective in the following manner: “ [...] (a) to ensure the effective enforcement of rules of existing EU law meant to protect safety and fundamental rights and avoid illegal discrimination by ensuring the relevant documentation for the purposes of private and public enforcement of EU rules.”

Equality is explicitly and prominently addressed as one of the leading human rights concerns related to the impact of AI systems, which the proposed regulation is going to address. The role of equality bodies is expected to be affected, among others ways, by the possible designation of new AI-specific auditing and enforcement mechanisms, which will also exercise their powers with respect to protecting the right to non-discrimination.

Based on the [Equinet Report on AI](#) and on our two submissions to the European Commission's consultation on AI (one targeted and one general), the current recommendations aim to reflect the position of equality bodies on the below two overarching questions, namely:

- How to protect equality in the context of AI-enabled systems
- How to ensure that the role and powers of equality bodies are augmented and effectively taken into account when designing and developing the broader infrastructure of enforcement and redress of rights in the context of AI systems.

This paper should be read in conjunction with Equinet's [ambitions and proposals for EU legislation on equality bodies](#). It views AI systems and their future regulation as part and parcel of a broader discussion on the implications of new technologies and digitalization for equality and non-discrimination, and proposes an equality mainstreaming approach, as an overarching and horizontal requirement, through all recommendations.

Recommendations

I. Equality should be a central consideration in any EU regulation on AI.

By their very nature, AI systems work through mechanisms of exclusion and differentiation, hence presenting disproportionately large risks to the protection of equality. Equality enhances the effectiveness of other fundamental rights, could be a precondition for their enjoyment and its violation by AI systems has a much larger and more systemic detrimental effect on society. This results from the specific nature of AI-enabled technology, which acts on a large scale and in non-transparent and hard to predict ways, allowing harm and breaches of the non-discrimination principle to occur during the entire life cycle of AI development, deployment and use. The risk to the protection of equality that AI systems pose is further exacerbated by the use of these systems for decision-making in several critical spheres of human life, such as employment, education, social security, and law enforcement.

To acknowledge and address the specific and substantive challenges to the non-discrimination principle that AI systems present, the future Artificial Intelligence Act (AIA) should contain explicit references to the protection of equality as a leading fundamental rights concern. This need is all the more pressing due to the fact that AI systems challenge the ability of the existing non-discrimination legal framework to protect against algorithmic discrimination, for example, through allowing unequal treatment alongside algorithmically constituted categories of differentiation which do not fit into the existing legally protected grounds. To remedy these limitations, through incorporating an explicit acknowledgement of non-discrimination as a leading fundamental rights objective of the regulation, the future AIA could provide mechanisms for identifying and redressing the full range of possible AI-enabled discriminatory practices.

II. Establish effective and accessible complaint and redress mechanisms for rights-holders against AI-induced breaches of equality and fundamental rights

The current draft AIA proposes no mechanism for citizens' complaints and for the provision of redress. This is especially problematic in the context of an AI-specific regulation, as denied access to justice for victims is at the heart of the challenge that AI-enabled technologies pose to equality and human rights. To remedy this, the future AIA should contain explicit and clear provisions for individual and collective redress, including effective remedies for algorithmic harm caused by any AI system, regardless of its risk classification. The future Act should also contain effective enabling conditions for exercising the right to redress.

These conditions should include, at a minimum, individual rights to people impacted by AI systems, including the right not to be subject to AI systems not compliant with the future AIA, as well as the right to be provided with an intelligible and accessible explanation for decisions involving the use of an AI system within the scope of the Act.

Related to that, the AIA should include a clear and accessible mechanism for existing fundamental rights regulators, such as equality bodies, as well as for public interest organisations to lodge a

complaint with national supervisory authorities for AI systems which threaten equality and fundamental rights protection, as well as provisions that this complaint triggers an investigation into the system.

The involvement of equality bodies, through a legal obligation to be consulted by national supervisory authorities under the proposed Act, would strengthen redress possibilities under the future AIA and ensure complementarity and reinforcement of impact between the new AI-specific redress mechanism and existing specialised non-discrimination redress mechanisms such as equality bodies. Through their focus on support and advise to individual victims of discrimination, including through handling complaints and litigation work, national equality bodies are uniquely well-positioned to contribute to the provision of redress against AI-induced breaches of equality.

III. Apply a fundamental rights-based approach to defining “harm” and “risk”, not one rooted in product safety models.

Article 7 of the current Proposal defines adverse impact and harm in a way that is rather unclear and without sufficient alignment with existing equality and fundamental rights legislation in the EU. The classification of an AI system as high-risk is based exclusively on existing product safety legislation and accordingly, does not reflect the unique nature of harm that results from fundamental rights violations. Protection against high-risk products from the perspective of consumer safety is not the same as protection against high-risk products from the perspective of their impact on fundamental rights. The legal safeguards for these distinct risks (product safety vs. fundamental rights) should be differentiated accordingly by the future EU AIA, with equality and fundamental rights receiving stricter and enhanced protection through more and more demanding mandatory requirements. The process of risk assessment, which will lead to a determination about the applicable requirements, should involve impacted groups and communities and this mandatory participation should be explicitly stipulated in the text of the future AIA.

Any regulatory definition and categorization of “harm” for the purpose of protecting equality and human rights should be grounded in a broader and more inclusive understanding of harm — one that takes into account the immaterial, as well as societal and collective, nature of harm when it comes to equality and human rights.

IV. Require ex ante and ex post equality impact assessments for the entire life cycle of AI systems.

Risk prediction and risk detection through mandatory equality impact assessments should happen for AI systems, which uses show evident discrimination risks, during the entire life cycle of AI development, deployment and use. This would enable a preventive and proactive approach to equality protection, thereby precluding that individuals and/or entire communities are turned into victims by these systems. Given the intrinsic significance of equality and its horizontal reach in relation to other human rights, its protection through mandatory ex ante and ex post impact assessments should involve third parties and not be solely entrusted to the developers and users of AI systems.

A compelling rationale for making equality impact assessments mandatory in the context of AI systems is also given by the existing General Data Protection Regulation. Article 35 (3)(a) of the GDPR requires Data Protection Impact Assessments for all machine learning systems, and since these systems constitute one of the prominent categories of AI-enabled technologies, if EU's future Act on AI doesn't require mandatory impact assessments, this could lead to fragmented and inconsistent protection against AI-induced risks to equality and human rights. To preclude this and also in order to ensure legal certainty, the future AIA should create a requirement for ex ante and ex post equality impact assessments for the entire life cycle of AI systems, which is aligned with and takes into account the results of data protection impact assessments under the GDPR.

V. Assign mandatory and enforceable 'equality duties' to all AI developers and users.

Equality mainstreaming is enshrined as a legal duty in Articles 8 and 10 of the Treaty of the Functioning of the EU and has been established as a priority in EU's recent policy agenda through the setting up of a dedicated Task Force on Equality, specifically tasked to mainstream equality in all EU policies. 'Equality Duties'¹— defined as positive legal obligations to promote equality and prevent discrimination, going beyond the general obligation to refrain from discrimination—are an essential tool for equality mainstreaming. Equality duties will complement the effect of equality impact assessments by creating obligations for AI developers and users to proactively monitor the effects on equality of the AI systems they develop and/or use as well as of their own institutional practices through recruiting and promoting a diverse workforce, which develops and/or uses these AI systems.

The proposed regulation on AI should prioritize — in its desired impact and, consequently, in the choice of suggested means for achieving this impact — the prevention of equality and human rights violations by AI systems. To this end, clear 'equality duties' should be assigned to AI owners and creators, including safeguards that these duties can be effectively enforced and the capacity to issue effective, proportionate and dissuasive sanctions.

¹ Equinet's work on the equality mainstreaming practices of equality bodies in Europe, namely "[Compendium of Good Practices in Equality Mainstreaming](#)" (2021) and '[Making Europe More Equal: A Legal Duty?](#)' (2016), identified three main categories of statutory equality duties in place in Europe: 1) Preventive duties are statutory duties on organisations (public and private) to take measures to prevent discrimination, harassment or sexual harassment in employment or in the provision of goods and services. 2) Institutional duties are statutory duties on organisations (public and private) to promote equality for employees or for people accessing their services. 3) Mainstreaming duties require public authorities to have due regard to the need to promote equality in carrying out their functions, including legislating, budgeting, regulating, and policy making. Equality duties with respect to the development and use of AI systems should encompass all **three types of duties**—**preventive** (public and private duty-holders), **institutional** (public and private duty-holders) and **mainstreaming** (public duty-holders as a minimum).

VI. Make risk differentiation only possible after a mandatory equality and human rights impact assessment.

Mandatory impact assessments — both ex ante and ex post — should be the basis for determining risk levels. Those impacted by AI systems should be consulted and otherwise involved in the design, development and use of impact assessments. Only once risks have been clearly identified and assessed through mandatory ex ante and ex post impact assessments, should measures based on risk differentiation (e.g. level of oversight, sizes and types of sanctions and compensation) be enabled under the future Artificial Intelligence Act. For example, the future Act could allow approaches on monitoring, redress and sanctions to be modulated according to levels of risk identified based on recurrent impact assessments.

VII. Make national-level enforcement effective through an obligation of national supervisory authorities under the future AI Regulation to consult with equality bodies and other national fundamental rights regulators

If one of the key objectives of the proposed Regulation on AI is to protect against the potential negative impact of AI systems on fundamental rights, then market surveillance authorities alone or in collaboration with other national sectoral regulators outside of the fundamental rights area are not sufficient to ensure effective ex post enforcement of the regulation in the field of fundamental rights.

Specialized public bodies focused on monitoring and enforcing fundamental rights, including equality bodies, are better equipped to protect those rights compared to other national regulators, whose mandate is not focused on fundamental rights. Therefore, national equality bodies should be consulted whenever enforcement of the future AI Regulation is related to protecting the principle of equality and the right to non-discrimination.

To ensure consistent and robust enforcement of the future AIA within and across EU jurisdictions, the future Act should create and clarify the specific roles and institutional division of labour between multiple relevant national supervisory and enforcement authorities, including market surveillance authorities, data protection authorities, equality bodies and other existing fundamental rights regulators. The current Proposal does not provide a clear structure for differentiating and coordinating the respective supervision and enforcement tasks of the multiple relevant national regulators, whose participation is required to ensure effective implementation of the future horizontal regulation.

The only explicit mention of cooperation between existing national supervision and enforcement authorities is limited to the following two references: 1) the power to request and access any documentation maintained following this regulation; 2) where needed, request market surveillance authorities to organize testing of the high-risk AI system through technical means. This opens the door to potential confusion, duplication of labor and inter-institutional completion, ultimately weakening the enforcement of the future Regulation.

VIII. Make the establishment and secure and adequate resourcing of national and European-level cooperation mechanisms between the different bodies involved in its enforcement mandatory.

There needs to be national governance structure on AI in the form of a framework for cooperation of national competent authorities under the proposed AI Regulation in order to enable their collaboration and develop needed capacity. Equality bodies are key partners in the enforcement of national human rights legislation, and as such, they should be part of this national governance framework.

AI systems have a complex nature and cross-sectoral use. This means that protecting equality from AI-related threats requires active collaboration and several partnerships, and therefore, the national supervisory authorities suggested by the EU's Proposal on AI cannot and should not work in silos.

Thus, the future EU regulation on AI has a key role to play in encouraging governments to establish the necessary institutional structures, which enable — on a regular and sustainable basis — these crucial partnerships and connections.

Equality bodies are key partners in its enforcement and as such, they should be connected to specialized AI oversight and monitoring bodies, as well as to other regulators, which partake in enforcing the proposed regulation at the national level.

As highlighted by [Equinet Report on AI](#) and by the accompanying document [Summary and Framework for Action for Equality Bodies](#), AI systems have a complex nature and cross-sectoral use. This means that protecting equality from AI-related threats requires active collaboration and several partnerships. National equality bodies need to work with national and regional authorities as well as with actors typically considered non-traditional for the equality field. These may include, for example, sectoral regulators such as Data Protection Authorities and Consumer Protection Authorities, computer and data scientists and engineers, within both the private sector, academia, digital rights NGOs and standardization bodies. The EU has a key role to play in creating an enabling institutional environment for establishing — on a regular and sustainable basis — these crucial partnerships and connections.

Equinet Member Equality Bodies

ALBANIA

Commissioner for the Protection from Discrimination
www.kmd.al

AUSTRIA

Austrian Disability Ombudsman
www.behindertenanwalt.gov.at

AUSTRIA

Ombud for Equal Treatment
www.gleichbehandlungsanwaltschaft.gov.at

BELGIUM

Institute for the Equality of Women and Men
www.igvm-iefh.belgium.be

BELGIUM

Unia (Interfederal Centre for Equal Opportunities)
www.unia.be

BOSNIA AND HERZEGOVINA

Institution of Human Rights Ombudsman of Bosnia and Herzegovina
www.ombudsmen.gov.ba

BULGARIA

Commission for Protection against Discrimination
www.kzd-nondiscrimination.com

CROATIA

Office of the Ombudsman
www.ombudsman.hr

CROATIA

Ombudsperson for Gender Equality
www.prs.hr

CROATIA

Ombudswoman for Persons with Disabilities
www.posi.hr

CYPRUS

Commissioner for Administration and Human Rights (Ombudsman)
www.ombudsman.gov.cy

CZECH REPUBLIC

Public Defender of Rights
www.ochrance.cz

DENMARK

Danish Institute for Human Rights
www.humanrights.dk

ESTONIA

Gender Equality and Equal Treatment Commissioner
www.volinik.ee

FINLAND

Non-Discrimination Ombudsman
www.syrjinta.fi

FINLAND

Ombudsman for Equality
www.tasa-arvo.fi

FRANCE

Defender of Rights
www.defenseurdesdroits.fr

GEORGIA

Public Defender of Georgia (Ombudsman)
www.ombudsman.ge

GERMANY

Federal Anti-Discrimination Agency
www.antidiskriminierungsstelle.de

GREECE

Greek Ombudsman
www.synigoros.gr

HUNGARY

Office of the Commissioner for Fundamental Rights
www.ajbh.hu

IRELAND

Irish Human Rights and Equality Commission
www.ihrec.ie

ITALY

National Office against Racial Discrimination - UNAR
www.unar.it

KOSOVO*

Ombudsperson Institution
www.oik-rks.org

LATVIA

Office of the Ombudsman
www.tiesibsargs.lv

LITHUANIA

Office of the Equal Opportunities Ombudsperson
www.lygybe.lt

LUXEMBURG

Centre for Equal Treatment
www.cet.lu

MALTA

Commission for the Rights of Persons with Disability
www.crpdp.org.mt

MALTA

National Commission for the Promotion of Equality
www.equality.gov.mt

MOLDOVA

Council on Preventing and Eliminating Discrimination and Ensuring Equality
www.egalitate.md

MONTENEGRO

Protector of Human Rights and Freedoms (Ombudsman)
www.ombudsman.co.me

NETHERLANDS

Netherlands Institute for Human Rights
www.mensenrechten.nl

NORTH MACEDONIA

Commission for Prevention and Protection against Discrimination
www.kszd.mk

NORWAY

Equality and Anti-Discrimination Ombud
www.ldo.no

POLAND

Commissioner for Human Rights
www.rpo.gov.pl

PORTUGAL

Commission for Citizenship and Gender Equality
www.cig.gov.pt

PORTUGAL

Commission for Equality in Labour and Employment
www.cite.gov.pt

PORTUGAL

High Commission for Migration
www.acm.gov.pt

ROMANIA

National Council for Combating Discrimination
www.cncd.ro

SERBIA

Commissioner for Protection of Equality
www.ravnopravnost.gov.rs

SLOVAKIA

Slovak National Centre for Human Rights
www.snslp.sk

SLOVENIA

Advocate of the Principle of Equality
www.zagovornik.si

SPAIN

Council for the Elimination of Ethnic or Racial Discrimination
www.igualdadynodiscriminacion.igualdad.gob.es

SPAIN

Institute of Women
www.inmujer.es

SWEDEN

Equality Ombudsman
www.do.se

UNITED KINGDOM - GREAT BRITAIN

Equality and Human Rights Commission
www.equalityhumanrights.com

UNITED KINGDOM - NORTHERN IRELAND

Equality Commission for Northern Ireland
www.equalityni.org

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