

Ensuring European AI that Protects and Promotes Equality for All

Equinet's recommendations for the trilogues to strengthen the enforcement of non-discrimination in the context of AI

In summary, Equinet is proposing the following changes:

-  **Recital 79** (*amend*)* to refer to the proposed Directives on standards for Equality Bodies
-  **Article 29a** Fundamental rights impact assessment for high-risk AI systems (*adopt amendments by European Parliament*)
-  **Article 52** (*adopt amendments by European Parliament on information rights to enable the shift of the burden of proof*)
-  **Article 59 (4)** (*amend*)* to foresee Equality Bodies building the capacity of supervisory authorities
-  **Article 63 (7)** (*amend*)* to ensure stronger cooperation between supervisory authorities and Equality Bodies
-  **Article 64 (3)(4)** (*amend*)* to clearly ensure access to information for Equality Bodies that is practically useable in their work
-  **Article 65 (2)** (*adopt amendments by European Parliament*) to ensure that Equality Bodies are involved in the process and may require corrective action where a risk of discrimination is identified
-  **Articles 68a** (*amend based on amendments by the European Parliament*)* to ensure that Equality Bodies have clearer rights to be involved in relevant processes before the supervisory authorities
-  **Articles 68b and 68c** (*adopt amendments by European Parliament*) to enhance the procedural rights of those turning to the supervisory authorities

*See appendix for proposed amendments.

Why are improvements necessary?

The AI Act could be a new frontier in the protection of equality in the age of expanding and diversifying AI uses. However, the AIA lacks **clarity and legal certainty in relation to the enforcement of equality and non-discrimination obligations**. This risks to weaken existing protection against discrimination and to undermine the potential of the AIA to protect against discriminatory AI systems.

What improvements are necessary?

Ensure access to justice for rights-holders

Why is this important?

Under EU law Member States have the legal obligation to ensure the provision of independent assistance to victims of discrimination through specialized Equality Bodies. Equality Bodies are a crucial **access to justice mechanism** for those affected by discriminatory AI systems, offering the following comparative advantages:

- **legal advice** and/or **financial assistance** for rights-holders to bring cases to courts
- **free of charge procedure**
- **more readily accessible complaints procedure, with fewer administrative burdens**
- **strategic litigation** and litigation addressing **structural and systemic discrimination** through bringing cases **in their own name, including without identifiable victims**.

How to achieve this?

Clear and accessible information

Technical complexity and the sheer volume of the documentation gathered under the AIA would prevent Equality Bodies from being able to effectively assess and tackle AI-enabled risks to equality and non-discrimination. Ensuring the provision of easily understandable information and the ability to Equality Bodies to rely on technical assistance by supervisory authorities whenever the documentation is not sufficiently clear is crucial both for the legal casework on discrimination and the broader work on promoting equality and preventing discrimination (*amend Article 64(3), lines 5-6 and Article 64(5)*).

Strong mandate, independence and resources

Protection against discrimination under the AIA should reinforce and not interfere with existing institutional protection of equality through Equality Bodies. This could be ensured through safeguards against infringement on the task, power and independence of Equality Bodies through adopting the relevant provision of Recital 79a of the Council's General Approach and including a reference to the proposed Directives on standards for Equality Bodies.

Power to access information for all Equality Bodies across all Member States

Some EU Member States have not given Equality Bodies the power to access information and the current, somewhat unclear, formulation in Article 64(3) opens the door to different levels of protection against discriminatory AI systems across States, thus having the potential of undermining legal certainty and creating an uneven playing field. A clarification in the text that brings the relevant provision in the article in line with the corresponding recital could remedy this.

Harmonized and consistent enforcement of non-discrimination obligations

Why is this important?

In all EU Member States over 30 Equality Bodies already decide on cases and issue sanctions. However, the proposed AIA contains no safeguards to ensure coherence and alignment of decisions by Equality Bodies, on one hand, and by supervisory authorities, on the other hand. In the lack of such alignment, there could be two parallel enforcement mechanisms with divergent or even contradictory findings. Crucially, provisions guaranteeing alignment will improve the reliability and accuracy of discrimination risks' evaluation as they would ensure that the technical expertise of supervisory authorities is complemented with the legal expertise on equality and rich experience with non-discrimination complaints by Equality Bodies.

How to achieve this?

Coherent evaluation and enforcement against discrimination risks

In line with the European Parliament's amendments to *Article 65(2)*, whenever risks to non-discrimination and other fundamental rights are identified, this should trigger: 1) an obligation for supervisory authorities to "inform immediately" and "cooperate fully" with Equality Bodies and other fundamental rights authorities; 2) the ability of Equality Bodies and other fundamental rights authorities to require corrective actions, withdrawal or recall of products by AI operators.

Alignment between decisions by supervisory authorities and Equality Bodies

Include an obligation to consult Equality Bodies in the proceedings on equality and non-discrimination complaints (*amend Art. 68a on the right to lodge a complaint*).

Building the non-discrimination expertise of supervisory authorities

Include a reference to Equality Bodies building the capacity of supervisory authorities (*amend Article 59(4)*).

Stronger cooperation at national level

Ensure regular exchanges and interinstitutional cooperation between the supervisory authorities and Equality Bodies through amending *Article 63(7)*.

Impact of AI uses on equality as a precondition for enforcement

Non-discrimination law is enforced in relation to the uses of AI systems and specifically, their impact on equality. Fundamental rights impact assessments are therefore necessary to identify this impact in a systemic, transparent and consistent manner. The proposed inputs by Equality Bodies during these impact assessments would enhance the effectiveness of equality protection and ensure coherence with non-discrimination law (*adopt new Article 29a*).

Ability of rights-holders affected by AI systems to claim non-discrimination protection

Why is this important?

Under the EU non-discrimination law, rights-holders benefit from specific remedies, such as:

- **Submitting complaints to Equality Bodies and the courts**
- **More favorable requirements on evidence through a reversal of the burden of proof on those perpetrating AI-enabled discrimination**
- **Ability of organizations, including Equality Bodies, to bring cases on their behalf or in their support.**

The lack of remedies for those affected under the AIA will significantly weaken non-discrimination protection against AI systems and may undermine the effectiveness of existing remedies.

How to achieve this?

Information rights for those affected by AI systems to enable reversal of the burden of proof (*adopt amended Article 52 and new Article 68c*).

Ability of Equality Bodies and other public interest organizations to submit complaints to supervisory authorities, in defense of rights-holders and in their own name, including without any identifiable victims (*amend new Art. 68a on the right to lodge a complaint by persons affected by AI systems*).

Ensure the **right to lodge a complaint** and **the right to an effective judicial remedy** against the decisions by supervisory authorities (*keep new Chapter 3a Remedies and in specific, Article 68a and Article 68b*).

Who are we?

Equinet is the European Network of National Equality Bodies. National Equality Bodies are independent public institutions promoting equality and combating discrimination in their countries. Every Member State, and several other countries around Europe, have an obligation under EU law to designate an Equality Body or Bodies to promote equality and combat discrimination. With strong focus on the provision of redress to victims of discrimination, as well as with mandate covering both the private and public sectors, Equality Bodies possess a unique insight into the state of equality and non-discrimination. That knowledge is of utmost importance in the development, monitoring and impact assessments of Artificial Intelligence (AI) systems.