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Equinet's feedback to the European Commission's Proposal for a Regulation on Artificial Intelligence (AI) Systems

The European Network of Equality Bodies, Equinet, is the largest network of national public institutions on equality law and policy in the European Union, connecting 49 national equality bodies specialised in the enforcement and provision of redress under national non-discrimination legislation in the EU and the broader EU neighbourhood (36 European countries are currently represented in Equinet's membership). Equinet's mission and work naturally position it as an active stakeholder in shaping the evolving European law and policy at the intersections of AI-driven technologies, on one hand, and equality and non-discrimination, on the other hand.

Equinet welcomes the opportunity to provide comments on the European Commission's Proposal for a Regulation on Artificial Intelligence (AI) systems. Equinet further wishes to reiterate its support for this legislative initiative as a timely and valuable opportunity to ensure that the EU becomes the global leader in regulating for AI-enabled technologies that protect and advance fundamental rights, societal wellbeing and the environment.

Equality is explicitly and prominently addressed as one of the leading fundamental rights concerns related to the impact of AI systems, which the proposed regulation is going to address. Yet, the current text of the Proposal for an AI Regulation provides insufficient guarantees—especially, in the parts on **monitoring, compliance and enforcement** — that AI-induced harm on the fundamental right to non-discrimination can be effectively identified, prevented or remedied.

The below key recommendations, which are further elaborated and developed in a forthcoming Equinet Position Paper on AI and Equality (please check Equinet's website in the beginning of fall 2021), seek to provide specific and actionable guidance on how the current proposal on AI can be strengthened to ensure effective regulatory safeguards for equality in the context of AI systems. These recommendations are not exhaustive and focus mainly on two overarching themes:

1) **victim-centered approach**, ensuring participatory, accessible and inclusive complaints and redress mechanisms under the future Regulation for those whose fundamental rights are affected or at risk of being affected by AI-enabled technologies;

2) more robust, well-coordinated and ultimately, **more effective enforcement at both national and European levels** through explicit and increased involvement of existing "supervision and enforcement authorities" in the fundamental rights fields, such as national

equality bodies, alongside with other sectoral and supervisory bodies (both national and EU level).

The below recommendations are based on Equinet's Report on AI , Equinet's two submissions to the European Commission's consultation on the White Paper on AI (one targeted and one general) and on Equinet's ongoing engagement on the topic of AI and equality. Crucially, these recommendations should be read in conjunction with Equinet's ambitions and proposals for EU legislation on equality bodies. In this context, the recommendations reflect a view of AI systems and their future regulation in the EU as part and parcel of a broader discussion on the implications of new technologies and digitalization for equality and non-discrimination, and accordingly propose an **equality mainstreaming approach**, as an overarching and horizontal requirement, to be introduced by the future EU Regulation on AI for the entire life cycle of AI development, deployment and use.

These are the key aspects Equinet recommends to be incorporated in any future EU Regulation on AI:

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

By its very nature, AI systems work through mechanisms of exclusions and differentiation, and hence present disproportionately large risk 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, as well as from its decision-making function in several spheres of human life (employment, education, social security, law enforcement, etc.).

2. Enable equality mainstreaming through the entire life cycle of AI development, deployment and use.

Equinet proposes a two-pronged approach to equality mainstreaming in AI, consisting of mainstreaming equality considerations through both "the ecosystem of excellence" (i.e. financial investment, education and R&D infrastructure) and "ecosystem of trust" (legal and policy regulation).

With the below points, we focus on the implications of an equality mainstreaming approach for the future EU Regulation on AI and thus elaborate the content of the present recommendation:

a)   Place stronger emphasis on strengthening of skills and education on equality of both developers and users of AI systems, and potential victims of AI-enabled discrimination.

On the "demand side" (i.e. the victims of AI-enabled discrimination and those interacting with AI systems on the receiving end), this would mean requiring increased and sustained

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investment in 1) digital literacy for those who are affected by AI and 2) developing increased rights awareness and rights education among those affected by AI systems in order to encourage a victim-led recourse to justice.

On the "supply side", EC's regulatory proposal on AI should emphasize the building of knowledge on applicable equality laws and equality-based good practice standards, so that developers and deployers of AI are trained on understanding the implications of equality and human rights legal standards for their work and learn how to build and deploy AI systems, which are compliant with these standards. Equality bodies could be key "educators" for AI actors on the "supply side" in both the private and public sector.

b) Address the financing of Research & Development and scientific innovation, which underpin and enable AI development.

Financing of R&D and scientific innovation can be addressed, at the level of regulating the design and development of AI systems as these stages in the life cycle of AI systems are most immediately and most directly reliant upon scientific advances and innovation.

Regulatory control over the EU financing of the development of AI systems should also include clear and enforceable funding conditionalities, based on equality and human rights considerations, for the receipt of EU finances by science and R&D projects, which enable the further development of AI systems. In practice, this means that finance for research and innovation in AI should only go for uses which provenly have no negative implications for equality. For effectively and sustainably preventing the financing of the development of AI systems, which are not equality compliant, the proposed regulation on AI will, of course, have to rely on complementarities with a range of (existing and planned) laws, policies and financial instruments of the EU focused on digital rights.

3. 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 of product 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 Regulation on AI, with fundamental rights receiving stricter and enhanced protection through more and more demanding mandatory requirements, including possible bans on a wider range of AI uses which pose risk to fundamental rights.

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4. Require equality and human rights impact assessments for all AI systems.

Risk prediction and risk detection should happen for **all AI systems during the entire life cycle of AI development, deployment and use** and not only for those pre-defined as "high risk" **–** in order to enable a **preventive** and proactive approach to equality and human rights protection. In this context, the main objective of mandatory equality and human rights impact assessments should be to preclude potential violations of equality and human rights by AI-enabled systems, thereby avoiding that individuals and/or entire communities are turned into victims by these systems. A compelling rationale for making equality and human rights impact assessments mandatory in the context of AI systems is also given by the existing General Data Protection Regulation. Article 35 of the GDPR requires Data Protection Impact Assessments for all "new technologies, and since AI systems are, by definition, one of the most prominent categories of "new technologies", there is no reason why the European Commission should choose an approach for regulating AI, which is at odds with its data protection regulation. This will imperil both legal certainty and, most importantly, fail to offer adequate protection against AI-induced risks to equality and human rights.

5. Assign mandatory and enforceable 'equality duties' to all AI owners and creators.

'Equality Duties' will complement the effect of equality and human rights impact assessments and thereby strengthen the prevention of equality and human rights violations by 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. For the purpose of advancing equality and non-discrimination in the context of possible AI-induced threats, **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.**

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

Only once risks are clearly identified and assessed through mandatory impact assessment, should regulatory measures based on risk differentiation of risk (e.g. level of oversight, sizes and types of sanctions and compensation) be introduced by the proposed legislation. For example, the EC regulatory proposal on AI could allow approaches on monitoring, redress and sanctions to be differentiated according to level of risk.

7. Make national-level enforcement effective through the mandatory designation of national fundamental rights regulators, including equality bodies, as national competent authorities under the future AI Regulation.

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 both protect fundamental rights and prevent their infringement compared to national regulators, whose mandate is not focused on fundamental rights.

Therefore, the involvement of these bodies in monitoring and enforcing the obligations under the regulatory proposal should be ensured through their explicit mention as national competent authorities and through an explicit requirement that they have the powers and resources to intervene in case AI systems generate risks on fundamental rights.

In specific, the designation of equality bodies as the national competent authorities would ensure a more harmonized regulatory approach across EU jurisdictions, as ex ante compliance checks by AI providers cannot substitute for the need of an ex post legal assessment whether a given AI-enabled product or service has breached national non-discrimination law, and equality bodies are uniquely well-positioned to make such an assessment. Furthermore, this will contribute to the consistent interpretation of existing national human rights law provisions, including those on equality and non-discrimination, as different national sectoral regulators will be better coordinate and more effectively divide shared work with respect to monitoring, verifying compliance and enforcement under the future EU Regulation on AI.

8. Equality bodies should be a the first-point-of-reference for making the legal assessment of whether a given AI system constitute breach of national equality law

The future EU Regulation on AI should clarify the specific roles and institutional division of labor between multiple relevant national supervisory and enforcement authorities, including market surveillance authorities, data protection authorities and existing fundamental rights regulators such as equality bodies. The current Proposal does not provide a clear structure for differentiating and coordinating the respective supervision and enforcement tasks of the multiple national regulators, which have to be involved to ensure effective implementation of this 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

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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 confusing, duplication of labor and inter-institutional completion, ultimately weakening the enforcement of the future Regulation.

9. Establish effective and accessible complaints and redress mechanisms for rights-holders against AI-induced breaches of equality and other fundamental rights

The current draft AI Regulation 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.

The involvement of equality bodies, as part of the structure of national supervisory authorities under the proposed regulation, could remedy this. Equality bodies have extensive experience supporting and advising victims of discrimination, including through the handling complaints and litigation work.

10. 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.