

Council of Europe - European Union Technical Support Instrument Project

“Upholding equality and non-discrimination by Equality bodies regarding the use of artificial intelligence (AI) in public administrations”¹

Executive summary of As-is and Gap Analyses Report²

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Public administrations across Europe are increasingly rolling out, or experimenting with, Artificial Intelligence (AI) and/or Automated Decision-making (ADM) systems in a wide spectrum of areas such as policing, law enforcement, migration, welfare and social security, healthcare, education, tax, employment, etc. While the developments stages and projects vary across Europe, algorithmic discrimination is a significant transversal concern, as AI and ADM systems can perpetuate and amplify unfair biases. In public administrations, the development and deployment of AI and ADM systems often respond to concerns such as the rationalisation of decision-making and the efficiency of public spending. Such rationales foreground certain functions and usages of AI and ADM (e.g. fraud detection, optimisation of resource allocation, etc.) which present particular risks of discrimination. **Compliance with fundamental rights, including non-discrimination, must therefore be a *sine qua non* condition for the provision and deployment of AI and ADM systems.**

In Europe, the governance framework has evolved with the adoption of the **Council of Europe Framework Convention on AI** and the **EU AI Act** in 2024, both of which aim *inter alia* to protect fundamental rights and prevent discrimination in AI applications. In addition, **anti-discrimination and data protection legislation** provide important further safeguards. Together, **these legal instruments offer key remedies against algorithmic discrimination, but several challenges remain.**

In **Belgium**, awareness of the impact of AI and ADM systems on non-discrimination, equal treatment and fundamental rights is low among public authorities. When addressing these issues, authorities tend to focus on ethical guidelines rather than legal - fundamental rights - compliance. Focusing on ethics alone is insufficient, as ethics are not fully operational and lack enforceability, unlike the right not to be discriminated against.

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This lack of awareness is compounded by a significant lack of transparency regarding the use of AI and ADM systems in the public sphere. While federal authorities are working to address this through the development of an observatory, transparency is still far from adequate. Consequently, public awareness of potential use of such systems remains low, significantly obstructing access to effective remedies in cases of discrimination. A structured and accessible overview of AI or ADM systems used by all public authorities is urgently needed, along with standardized policies to prevent, mitigate, and remediate fundamental rights impacts. Awareness among various stakeholders should be raised through multiple approaches.

In accordance with the AI Act, effective supervision and broader protection of fundamental rights will necessitate meaningful cooperation between market surveillance authorities and equality bodies. Given the institutional complexity in Belgium, it is urgent that formal agreements be in place to establish this cooperation, ahead of the August 2025 deadline for setting up the oversight structure. Adequate resources must be allocated to equality bodies to ensure their effective participation in the oversight framework, in alignment with the recent EU directives on standards for equality bodies.

In **Finland**, there is no common national register for ADM or AI systems, resulting in a lack of overall awareness of such systems in use. The study found that in the public sector, the use of ADM is perceived to be relatively high while the use of AI remains at a pilot stage. Public authorities' awareness of the discriminatory risks of AI remains arguably low. Awareness of both the AI/ADM systems in use as well as the applicable discriminatory risks should be increased by accelerated collaboration amongst public authorities and other stakeholders, increased allocation/additional resourcing, additional training, as well as the establishment of a standardised approach to assessing fundamental rights risks of these systems.

In **Portugal**, the adoption of AI and ADM by the public administration is relatively new, with major projects and initiatives being announced recently, in a trend driven by the available funding from the Portuguese Recovery and Resilience Plan. As a result, the potential for AI-driven discrimination cases is expected to increase. Portugal could use its relatively recent adoption of these technologies in the public sector as an opportunity to establish a robust framework that ensures a comprehensive understanding of their use in the public sector while promoting best practices.

The adoption of AI systems in public administration is generally viewed with enthusiasm, from an innovation viewpoint, aimed at enhancing efficiency and modernising public services. However, this technological perspective should not overlook the risks of discrimination and gender inequality that these systems may introduce. In this regard, concerns persist regarding the role of fundamental rights bodies excluded from the list of entities under Article 77 of the EU AI Act, including equality bodies, which should also have their competences and resources reassessed in accordance with the new directives on equality bodies to ensure they are adequately equipped to address emerging challenges.

NB: The findings on Belgium, Finland and Portugal are based on desk research and a limited number of interviews with staff from public authorities. They may therefore not fully capture all ongoing initiatives or varying levels of awareness across different institutions.

Critical issues in the uptake of AI and ADM systems and major gaps in the existing legal landscape include:

- **Neutrality and cost-efficiency narratives obfuscating important questions** regarding which **functions** AI and ADM systems should fulfil (e.g. fraud detection vs facilitating access to systemically underclaimed rights and public services) and the real cost of deployment once compliant with fundamental rights obligations.
- **A generalised lack of transparency and meaningful information on the use of these systems by public authorities**, which makes it difficult to monitor their impact on equality and discrimination. Without mandatory reporting obligations, it is difficult for oversight bodies, researchers, and affected individuals to assess whether AI-driven or (semi-)automated decisions comply with anti-discrimination laws. Although the AI Act and the Framework Convention on AI will address this lack of transparency, difficulties will persist. For instance, registration obligations are limited to high-risk systems and exceptions exist.
- **Access to justice** is undermined by information and power asymmetries between deployers of AI and ADM systems and individuals and groups affected by them. Victims of algorithmic discrimination often struggle to identify and obtain evidence of discriminatory practices, making it difficult to challenge AI-driven or (semi-)automated decisions. While existing procedural rules on the shifting of the burden of proof in case of presumptions of discrimination facilitate victims' task, the evidentiary threshold might still be too high for victims in a context of algorithmic opacity. In other terms, individuals might not be able to avail of existing legal remedies.
- **Enforcement of existing and future provisions** might be compromised by existing **legal and institutional gaps**. For instance, European anti-discrimination legislation does not explicitly recognise **forms of discrimination** that might be particularly pervasive in automated decision-making, such as intersectional and systemic discrimination. Existing legal restrictions on the **collection of equality data** might also curtail possibilities to effectively investigate algorithmic discrimination and promote equality in the use of AI and ADM systems. While the enforcement of AI regulations relies on institutional cooperation between equality bodies and other relevant bodies such as market surveillance authorities, **cooperation templates, participation channels and representation mechanisms will need to be enhanced and strengthened**.
- **De-risking strategies:** legal uncertainties regarding the interpretation of the definitions and scope of AI and high-risk systems might be used by industry providers to market their systems outside of the requirements of the EU AI Act. Such practices should be subjected to effective public scrutiny.
- **Standardisation:** the creation of harmonised AI standards will help providers of high-risk systems comply with the requirements of the EU AI Act but their compatibility with fundamental rights legislation and non-discrimination law seems uncertain. Interpreting those standards in light of non-discrimination obligations and assessing their compliance is of prime importance but will be a difficult task that will require a certain degree of technical expertise.

Several key measures to address the risks of discrimination in AI and ADM systems and improve (the enforcement of) governance frameworks could be adopted:

- **Establishing or strengthening prevention, monitoring, awareness-raising and training requirements** is key to deploying AI and ADM systems that are compliant with fundamental rights legislation. These could include, for example, training and awareness-raising measures towards public administrations developing or deploying AI or ADM systems, and rules on testing, auditing and monitoring of such systems in public procurement processes.
- **Extending legal obligations for transparency.** For example, registration obligations in a public database could be extended beyond high-risk systems and existing exceptions to publicity should be implemented narrowly. Public authorities deploying high-impact automated systems (e.g. leading to individual decisions or enabling mass surveillance practices) could be required to notify national parliaments.
- **Reviewing anti-discrimination laws to facilitate access to justice and effective redress.** The conceptual toolkit of non-discrimination law should be reviewed and extended to facilitate the recognition of forms of discrimination that are particularly likely to arise in the context of AI and ADM systems, such as intersectional and systemic discrimination. Power and information asymmetries should be addressed through adapted procedural rules, in particular those pertaining to the sharing of the burden of proof. Arguably, victims' difficulties in establishing presumptions of algorithmic discrimination should lead to further lowering the evidentiary threshold for establishing *prima facie* cases. Barriers to access to justice could also be addressed through reviewing rules on collective actions, for example through recognising class actions. The collection of equality data should also be facilitated to support effective redress mechanisms.
- **Strengthening the capacities, resources and institutional participation of equality bodies** is key to facilitating the enforcement of anti-discrimination laws in relation to AI and ADM systems. The new EU standards on equality bodies, in particular concerning their competences and resources, should be transposed in light of these new challenges. Resource allocation should enable equality bodies to fulfil their new functions (e.g. if designated under Article 77 of the EU AI Act), including by developing appropriate expertise. Equality bodies and fundamental rights supervision authorities should be able to fully participate and be represented within the governance framework established by the newly adopted European AI regulations (e.g. European AI Board, AI Office, Scientific Panel of Independent Experts). Cooperation mechanisms should enable multi-stakeholder cooperation, e.g. with market surveillance authorities.

Equality bodies have a crucial role to play in the monitoring and enforcement of anti-discrimination provisions in AI and ADM applications. Thus, equality bodies are encouraged to:

- **Advocate for their inclusion** under the list of national fundamental rights supervision authorities designated **under Article 77** of the EU AI Act.
- **Use their right to access information** (Article 77(1) AIA) to probe AI and ADM systems for potential biases and discriminatory impact.
- **Leverage supervisory powers under the AI Act**, in particular by requesting and participating in the **testing** of high-risk AI systems.
- **Establish robust cooperation mechanisms** amongst themselves, with market surveillance authorities, bodies possessing complementary expertise (data protection agencies, consumer protection offices, media supervision authorities, etc.) and relevant third parties (researchers, CSOs...). Cooperation can help them face the challenge of expertise and resources.
- **Leverage their expertise and right to participate in public consultations to influence future reforms and policies** in order to shape future AI regulations and policies and their enforcement.
- **Raise awareness on algorithmic discrimination** within public administrations, the private sector and the general population.