Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas
Irish Human Rights and Equality Commission

Declan McCormack
Principal, AI and Digital Regulation Unit
Department of Enterprise, Tourism and Employment
23 Kildare Street
Dublin 2,
D02 TD3024

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**RE: Observations on the draft revised Interpretative Note to support compliance with Article 77 of the EU Artificial Intelligence Act and the Digital Omnibus proposal**

Dear Mr McCormack,

I write further to your recent correspondence with IHREC regarding the role of IHREC and the eight other statutory bodies designated pursuant to Article 77 of EU Artificial Intelligence Act ('AI Act').

We welcome this opportunity to provide observations on the draft revised 'Interpretative Note to Support Compliance with Article 77' in advance of the forthcoming EU AI Board Annex III Subgroup meeting scheduled for 9 December 2025.

The draft Interpretative Note contains some helpful clarifications on the application of the Act, including in relation to mandatory cooperation with Article 77 bodies, broad documentation access, cross-border cooperation and joint investigations with Market Surveillance Authorities ('MSA's). However, several sections risk unduly narrowing the scope and practical effectiveness of Article 77 powers. We have set out our specific observations on these sections in **Appendix 1**.

It is our view that with targeted revisions, the Interpretative Note can materially strengthen the operational reality of Article 77 oversight, and provide clear, predictable and reliable guidance to strengthen human rights and equality protection mechanisms in the AI context. Such revisions would ensure that equality bodies and National Human Rights Institutions ('NHRIs') can promptly and effectively obtain, understand and use documentation provided pursuant to Article 77 of the AI Act to inform use of their supervision and enforcement powers. The revisions would also ensure that MSAs engage fundamental rights expertise appropriately in the enforcement process.

The meeting on 9 December will also provide Member States, including Ireland, with an opportunity to respond to the Digital Omnibus on AI Regulation Proposal. The proposed amendments are proceeding without adequate impact assessment and public consultation and risk the erosion of fundamental rights protections. We have set out preliminary observations on the Digital Omnibus Proposal in **Appendix 2**.

We are particularly concerned that the Digital Omnibus proposal to re-cast Article 77(1) by interposing the MSAs as an intermediary for information access could materially alter the original balance struck in the AI Act. Unless carefully circumscribed, these changes risk creating avoidable friction, delay, and potential refusals at the information-gathering stage, thereby undermining the effectiveness of Article 77 supervision and enforcement. We are advocating for appropriate safeguards around the Digital Omnibus proposals so that the practical use of Article 77 powers is not hindered by procedural gatekeeping by MSAs.

Our positions are informed by our engagement with both the European Network of National Human Rights Institutions ('ENNHRI') and the European Network of Equality Bodies ('EQUINET'). The collective message is clear: Member States, including Ireland, must reject any broad dismantling of human rights protections and freedoms in the areas of digital policy and artificial intelligence and play a leadership role in promoting rights-based governance and ensuring appropriate democratic scrutiny of legal and policy reforms.

Yours sincerely,

**Deirdre Malone**
Director
Irish Human Rights and Equality Commission

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**Appendix 1: Draft revised interpretative note to support compliance with Article 77**

## 1. Scope of applicable Union law under Article 77

We welcome the draft Note's broad interpretation of the scope of applicable Union law under Article 77, including its placement of Union legislation and national implementing measures at the centre of enforceable obligations and recognition that the Charter applies where Member State authorities implement Union law.

Automated decision-making and high-risk AI systems often involve processing personal data, directly engaging EU data protection law. The Law Enforcement Directive (Directive 2016/680), which requires transparency, lawfulness and safeguards for personal data processing for law enforcement purposes, could be relevant where high-risk AI systems are used by police or other competent authorities.

As examples of regimes within the scope of applicable EU law under Article 77, we recommend that the Note expressly identifies the GDPR, Law Enforcement Directive and the equality *acquis*, including the new Standards for Equality Bodies as addressed further below.

## 2. Relevance of the Directives on Standards for Equality Bodies and resources for Article 77 bodies

The relevance of the new EU Directives on Standards for Equality Bodies (Directive (EU) 2024/1499 and Directive (EU) 2024/1500) must be reflected in the interpretation of Article 77 and is not currently addressed in the draft Interpretative Note. The Directives require that multi-mandate equality bodies be provided with adequate human, technical and financial resources and independence to perform their tasks effectively. They also require cooperation mechanisms with public and private entities and timely consultation on legislative or policy proposals affecting the mandates and functioning of multi-mandate equality bodies.

We recommend that the Note acknowledge that the Article 77 designation expands the potential scope of action of equality bodies (there are new information rights, involvement in technical testing, and systematic cooperation with MSAs), and that Member States must ensure stable resourcing commensurate with these functions. The ability to exercise any AI Act powers depends on secure and sufficient resources. Furthermore, the Note should encourage formalised cooperation channels between equality bodies (as Article 77 authorities), MSAs, data protection authorities and other relevant regulators, consistent with Article 14 of both Directives.

### 3. Conditions for accessing documentation

As highlighted by ENNHRI and EQUINET, Article 77(1) as enacted contains no "reasoned request" requirement, and the Note should not introduce one by interpretation. Pending any amendment through the Digital Omnibus, the Note should state unambiguously that Article 77(1) requests are not conditional upon extended reasoning and that refusals on the ground of inadequate reasoning are not permissible (provided that a minimum degree of reasoning is provided).

While Article 77(3) requires a "reasoned request" for testing support by MSAs, this should not be interpreted as applying broadly to all documentation access. The requirement for "accessible language and format" indicates the spirit of Article 77 is to facilitate ease of use.

### 4. MSA duties to inform and cooperate; notification triggers and time frames

We note the provisions structuring MSA interactions with Article 77 bodies: Article 73(7), Article 79(2), and Article 82(1). As the draft Note acknowledges, when the relevant provisions are read together, MSAs bear a duty to (i) evaluate risks, (ii) inform the relevant Article 77 bodies when risks are identified or reasonably suspected, and (iii) cooperate closely, including through consultation before taking mitigation action under Article 82.

Although the AI Act does not set explicit time limits in respect of this interaction, "within a reasonable time" must be applied having regard to risk severity, urgency, and the need to preserve the effectiveness of the appropriate remedy.

We recommend that the Note should endorse indicative timelines, for example immediate notification for serious or irreversible risks and short, fixed windows for routine notifications. The Note could make explicit that "immediate" notification under Article 73(7) means same-day or next-working-day transmission, with a short follow-up giving further information at a later point, as necessary. Further, the Note could recommend that national protocols setting maximum response times are put in place as operational standards under the duty of sincere cooperation and good administration.

The Note could also be strengthened to emphasise and ensure that Article 77 bodies receive proactive risk referrals even where MSAs have not yet concluded that there has been non-compliance, so that fundamental rights expertise can inform risk evaluation at the outset. In particular, we recommend that the Note:

- Encourages MSAs to make "no prejudice" early referrals to Article 77 bodies where indications of potential fundamental-rights risks arise, even if the MSA has not yet decided to open a formal Article 79(2) evaluation; and

- Clarifies that such early referrals are advisory and non-determinative, and are without prejudice to investigation of the particular case, confidentiality, and jurisdictional limits.

**5. Accessible language and format under Article 77(1)**

Article 77(1) expressly empowers Article 77 bodies to request and access documentation "in accessible language and format." This is an integral safeguard to the effectiveness of Article 77 and related provisions. Giving access to complex technical documentation that is not legible to legal or human rights experts who are not AI experts could frustrate effective supervision and access to appropriate redress.

We are concerned about the omission of reference in the Note to this important safeguard and recommend that it is addressed to ensure meaningful implementation. It should be expressly recognised that the provision of documentation in accessible language and format must be at the election of the Article 77 body and should include documentation in raw format as required and appropriate to ensure full transparency. The Note should also emphasise that where accessible data is specifically requested, raw data is not acceptable as the format and language must enable the requesting body to use the material effectively for its statutory mandate. Finally, it could encourage good practices and concrete tools for the accessible provision of technical documentation.

**6. 'Close involvement' under Article 77(3)**

Article 77(3) provides that where documentation is "insufficient to ascertain" whether an infringement of obligations under Union law protecting fundamental rights has occurred, the Article 77 body may make a "reasoned request" to the MSA to organise testing; the MSA shall organise testing "with the close involvement" of the Article 77 body and within a "reasonable time."

The Note frames "close involvement" as prior consultation on the test plan, sharing detailed outputs, and having a designated point of contact in the Article 77 body during testing. Close involvement, according to the Note, also requires sharing of results and conclusions with the Article 77 body, subject to Article 78 confidentiality. It defines "reasonable time" by reference to urgency, complexity and MSA capacity.

Close involvement must mean involvement beyond mere cursory consultation and is necessary to ensure that the testing methodology addresses the fundamental rights issue under investigation. We are recommending that the Note clarifies that the concept of "close involvement" is construed to include engagement at each stage of the process.

The "reasonable time" standard should also be tied to the risk severity and the likely impact on affected people. We are proposing that the draft Note should include indicative outer limits and a fast-track system for urgent risks.

With regard to the insufficiency threshold, documentation should be deemed to be insufficient where factual elements necessary to assess infringement (for example, data provenance, representativeness, post-deployment monitoring results, error-rate distributions by protected characteristics etc.) are missing, unclear, inconsistent or not provided in accessible form. The Note should expressly link the assessment of insufficiency to the accessibility requirement under Article 77(1), where documentation has been requested in accessible language and format. Inaccessible documentation is, by definition, insufficient for the purposes of Article 77(3).

### 7. Direct contact between Article 77 bodies and operators

We note that Article 77, as it currently stands, does not preclude a designated body from engaging directly with operators (providers or deployers) where that engagement is within its national mandate.

We recommend that the Note clarify that Article 77(1) confers an autonomous right of access to documentation "created or maintained under this Regulation" which can be exercised by direct contact with operators where this is consistent with the national powers of the Article 77 body. It should also clarify that parallel cooperation with the MSA is not a legal precondition for exercising access, which can be done by way of direct contact with the operator.

### 8. Cooperation between Article 77 bodies

The Note does not set out cooperation mechanisms among Article 77 bodies themselves, which is particularly relevant for Ireland given the multi-body model adopted in Ireland and other Member States. Without clear channels of cooperation, there is a real risk of duplicative requests from Article 77 bodies to operators/MSAs, and/or a risk of inaction and delay where the issue raised engages the mandate of more than one body.

We recommend that the Note promotes cooperation arrangements to foster the smooth operation of the legal duties under the AI Act in practice, while also respecting the individual mandates of the relevant bodies and confidentiality requirements. In particular, the Note could recommend that Member States implement a single, structured national gateway for standardised Article 77 notifications and cooperation to be established through the designated market surveillance architecture and single point of contact. There should be a

process to ensure sharing with all relevant bodies and a focused dissemination of the relevant information.

### 9. The effect of confidentiality provisions

We note that Article 77 bodies do not have direct access to restricted sections of the EU database. We are of the view that the Note should recommend that MSAs, as a recommended national cooperation protocol, provide sufficiently detailed summaries or redacted material from restricted sections of the EU database to enable Article 77 bodies to perform their mandates, subject to Article 78(3) consultation duties. The Note could also provide that where disputes arise, Article 77 bodies may seek court directions or similar legal instruction where necessary to balance confidentiality against rights to information.

### 10. Reciprocity of rights and powers

We are of the view that the draft Note's discussion of reciprocity could be refined, to avoid giving any inaccurate impression that the outcome would result in Article 77 bodies taking on general AI enforcement powers. The concept of reciprocity should focus on mutual assistance obligations, seamless cooperation and information flows to ensure coherent application of the discrete regulatory mandates of MSAs and Article 77 bodies.

### 11. Cross-border cooperation

We note that Article 77 does not create a dedicated cross-border cooperation procedure for designated bodies. However, there is no barrier to cross-border cooperation among Article 77 bodies, in parallel with and coordinated through, MSA-led mechanisms where a deployer's or provider's activities span multiple jurisdictions. Therefore, the Note should clarify the following:

- The Board and the AI Office can facilitate exchange of best practice, issue recommendations and contribute to guidance. Joint investigations at EU level are an MSA instrument, with coordination support from the AI Office;
- Cross-border cooperation should not delay urgent national protective action by MSAs where an AI system presents risks, including to fundamental rights. Article 77 engagement should proceed in parallel as the AI Act envisages.

**Appendix 2: Digital Omnibus on AI Regulation Proposal**

We note that the Digital Omnibus propose to amend Article 77 of the AI Act. The proposed changes include an update to the heading of Article 77; amendment to Article 77(1) to route access to "information or documentation" through the MSA, rather than directly from operators; insertion of Article 77(1a) to impose an express duty on MSAs to grant access; and insertion of Article 77(1b) to codify close cooperation/mutual assistance.

We welcome the proposed expansion of the scope of engagement of Article 77 bodies noting the proposed removal of the requirement that the matter relate to the use of high-risk AI systems referred to in Annex III. Several issues arise however, and we share the concerns of ENNHRI and EQUINET on the Digital Omnibus proposal specifically in relation to:

**1. Preserve AI System Registration Requirements**

Articles 6(3) and 6(4) of the EU AI Act allow providers to claim certain AI systems are not high-risk if they perform limited tasks. Article 49(2) requires these providers to register such systems in a public EU database before deployment, creating transparency about which AI systems are being used. Article 1(14) of the Digital Omnibus on AI proposes deletion of Article 49(2).

*Recommendation:*

- *Reject deletion of Article 49(2) and maintain full text of Article 6(4).*

Without the registration requirement in Article 49(2), there's no way to verify whether providers are correctly claiming exemptions from safety rules. This minimal documentation creates essential public accountability and prevents misuse of the Article 6(3) exemption.

**2. Safeguard Powers of Article 77 Fundamental Rights Bodies**

Article 77 of the AI Act grants national public authorities protecting fundamental rights, including designated NHRIs, equality bodies, and data protection authorities, power to request information without specifying limits on who they can request it from (Article 77(1)); request testing of high-risk systems (Article 77(3)); and cooperate with MSAs when rights are at risk (Article 79(2)).

Article 1(26) of the Digital Omnibus on AI proposes amendments that would only allow Article 77 bodies to access information through MSAs, which prevents them from requesting directly from providers and deployers. Such amendments, if instituted, would interpose the MSA as a gatekeeper for all access, and risks creating an unnecessary layer and potential block to

effective fundamental rights regulation. This, in turn, risks bureaucratic delays and complexities, poses a significant burden on MSAs' capacity and risks information filtering, thereby undermining the independence and effectiveness of Article 77 bodies. It also introduces conditional language that may limit access and requires Article 77 bodies to cooperate closely and provide mutual assistance to MSAs.

*Recommendations:*

- *Maintain Article 77 bodies' direct information access powers from providers and deployers, rather than forcing them to work only through MSAs.*
- *Ensure that language in the amended Article is clear and does not limit access.*
- *Ensure that the mutual cooperation obligation does not dilute the authority of Art 77 bodies.*

### 3. Maintain High-Risk AI System Timeline

Chapter III, Section 2 of the AI Act establishes mandatory requirements for high-risk AI systems including risk management, data governance, transparency, human oversight, and cybersecurity. These protections were scheduled to apply from 2 August 2026.

Article 1(31) of the Digital Omnibus on AI proposes amendments that would delay these protections until the Commission confirms support measures are available, or until December 2027 or August 2028. This would allow high-risk AI systems to operate for years without fundamental safety and rights protections, creating immediate risks of discrimination, system failures, cyberattacks, and inability to prevent harm.

*Recommendation:*

- *Reject conditional implementation of Chapter III requirements and maintain the 2 August 2026 deadline.*

### 4. Protect GDPR Personal Data Protections

Article 4(1) GDPR defines personal data broadly as information relating to identifiable persons. Article 13 requires companies to inform people when collecting their data. Article 33(1) requires reporting data breaches to supervisory authorities within 72 hours if they pose risk to people's rights.

*Recommendations: Reject three weakening amendments to the GDPR:*

- *Article 4(1) - Definition of personal data: Proposed changes under Article 3(1) of the Digital Omnibus would introduce a relative and subjective concept where data isn't "personal" if one company can't identify someone, even if others could, creating enforcement gaps and pseudonymisation loopholes.*

- *Article 13(4) - Transparency obligations: New exemptions under Article 3(5) of the Digital Omnibus would let companies avoid informing people about data collection based on vague "reasonable grounds to assume" people already know, replacing clear accountability standards with subjective assumption.*

- *Article 33(1) - Breach notification: Amendments under Article 3(8) of the Digital Omnibus raises the threshold from "risk" to "high risk" when controllers must report breaches to supervisory authorities which would hide many harmful incidents from regulators, weakening oversight and early detection.*

These changes reduce accountability, weaken oversight, depart from other EU rules and caselaw, and make it harder for people to exercise their data rights.

**5. Maintain Human Oversight Requirements**

Article 22 GDPR prohibits fully automated decision-making with legal or significant effects except for limited derogations. Currently, fully automated decisions are only permitted for contracts if necessary, meaning when human review is not a reasonable alternative.

Amendments under Article 3(7) of the Digital Omnibus would allow companies to use fully automated decision-making even when human review is feasible, simply because the decision relates to entering into or performing a contract (employment, housing, credit). This normalises bias-prone algorithms without justification, particularly harming vulnerable groups already facing discrimination in these areas.

*Recommendation:*

- *Reject changes to Article 22 that remove the necessity test for automated decisions relating to contracts.*

**6. Limit Collection of Sensitive Personal Data**

Article 10(5) of the AI Act currently provides a legal basis to allow processing of special categories of personal data (race, religion, sexual orientation, health, political views) for bias detection and correction only in high-risk AI systems.

Under Article 1(5) of the Digital Omnibus on AI, a new Article 4a has been inserted which would allow any AI developer and deployer, not just those working with high-risk systems, to process sensitive data for "bias detection." This vastly expands who can access protected information, normalises mass collection of sensitive characteristics, and enables broader profiling and surveillance with weak enforcement safeguards.

*Recommendation:*

- *Reject new Article 4a which would replace Article 10(5) and expand sensitive data processing to all AI systems and to both providers and deployers.*

**7. Protect Inferred Sensitive Data**

Article 9 GDPR protects special category data (sexual orientation, political opinions, religious beliefs, etc.) and generally prohibits its processing. This protection currently applies whether you explicitly share such data or whether it's inferred from your behaviour, for example, purchasing history or liking online content.

Amendments under Article 3(3) of the Digital Omnibus would exclude data inferred by algorithms, removing protection precisely where algorithmic discrimination occurs most. AI systems routinely infer sensitive traits from website visits, purchase patterns, and social media activity. Eliminating protection for inferred data legitimises profiling based on sensitive characteristics, with serious implications for privacy, equality, and democracy.

*Recommendation:*

- *Reject limiting Article 9 protection to only explicitly revealed sensitive data.*

**8. Prevent Weakening of AI Literacy Requirements**

Article 4 of the EU AI Act currently imposes a binding obligation on all providers and deployers of AI systems to ensure AI literacy among their staff. This means companies developing or using AI must train employees to understand the systems, their risks, limitations, and impact on fundamental rights.

Article 1(4) of the Digital Omnibus on AI states the European Commission and Member States shall merely "encourage" companies to ensure AI literacy, rather than requiring it. The explanatory memorandum that accompanies the Digital Omnibus for AI explains that this amendment transforms the obligation for providers and deployers of AI systems regarding AI literacy to an obligation on the European Commission and the Member States to foster AI literacy. This shift places the responsibility, albeit in a significantly weakened form through a

weak promotional obligation, onto the public sector while giving private companies broad discretion over staff training, increasing the likelihood of misuse, weak governance, and AI-enabled discrimination in high-impact areas such as hiring, benefits administration, and public services.

*Recommendation:*

- *Reject the proposed amendment to Article 4 that would replace mandatory requirements for developers and deployers with encouragement by state authorities and the European Commission.*