

EU Crisis of AI Standardisation under AIA

EU's harmonised standards (HS) under the Artificial Intelligence Act (AIA) will jeopardise fundamental rights (FRs) protection.

European Union's Artificial Intelligence Act (AIA) tasks European standardisation organisations (ESOs) to convert certain AIA norms into harmonised standards (HS) with specific EU law effects. AIA makes it clear that fundamental rights (FRs) underlie AIA norms and they should also play a role in standardisation and the resulting HS. The question addressed in this brief is, how could such HS meaningfully protect FRs underlying the relevant AIA norms.

The research is based on critical evaluation and analysis of relevant legislation, legislative proposals, case law and scholarly publications.

The brief argues that HS will inevitably fail to protect FRs, deepening the already existing crisis of European standardisation and enforcement under AIA. This reduces legal certainty, realization of FRs, and questions AIA's choice to resort to HS for the implementation of its core obligations and requirements, which are tightly connected to the protection of FRs under EU and international law.

The EU Commission's Digital Omnibus AI Proposal does not address the key concerns. It will simplify some requirements and prolong the applicability of key provisions relating to high-risk AI systems due to problems with standardization. In effect, the applicability of AIA will be postponed because standardization has failed.

Companies active in AI field should not expect AI HS in the near future and should be prepared for legal uncertainties even after they will be issued, caused by likely failures to integrate FRs in HS. Public sector bodies responsible for the supervision should prepare for scenarios where conformity with respective AIA obligations and requirements cannot necessarily be proved by demonstrating compliance with HS. The identified FRs problems could namely mean that HS could not be issued even by the extended deadlines of the Commission's Digital Omnibus AI Proposal, or the HS could be rejected by the EU Commission, or it could be subsequently questioned by EU Member States, European Parliament and possibly by other actors before courts. It is also highly uncertain how the Court of Justice of the European Union (CJEU), if confronted with the question, would assess AIA's use of HS in the implementation of key AIA obligations and requirements, which are closely related to FRs.

Technical standards as critical intangible capital for Finnish companies in an era of strategic competition (Standard Edge).

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Introduction

The research is based on critical evaluation and analysis of relevant legislation, legislative proposals, case law and scholarly publications. It reflects preliminary results of its author's broader research project analysing AIA standardisation and FRs.

Data/materials

The brief uses legislation, legislative proposals, scholarly publications and any other available relevant information. The materials have been analysed and evaluated critically to build a picture of major problems and risks.

Results

HS under AIA present novel challenges for European standardisation organisations (ESOs), EU Commission and the protection of FRs in general. AIA is the first legislative instrument using HS and requiring that they reflect and implement the multiple FRs underlying the key AIA obligations and requirements.

Whilst mainstream scholarly response to the inclusion of FRs considerations in standardisation under AIA is to insist on increasing the participation of civil society representatives and human rights experts in standard-setting, I question this proposal. For multiple reasons, the core problems cannot be remedied through increasing the participation of civil society groups and human rights experts in the work of ESOs. Rather than producing an epistemic change whereby civil society representatives and human rights experts could replace or even meaningfully complement engineers in defining the FRs-relevant aspects of HS, engineers will rather emerge as key FRs decision-makers under AIA. Neither can the problems be remedied through increasing the reporting obligations of ESOs. Therefore, standardisation under AIA is or will soon be in existential crisis.

The mainstream recommendation does not recognise the full nature of the underlying problem, which relates not only to a narrow epistemic community of engineers typically responsible for standardisation, but also to ontological differences between standards and FRs as distinct norm types with different systemic, foundational and operational qualities. Therefore, the presumption of conformity with the underlying AIA obligations adherence to HS produces, could prove highly problematic: compliance with HS could shield standard-compliant AI operators from FRs-based liability they could otherwise face. As the resulting HS will cover AIA's core FRs-related requirements and obligations, this could seriously jeopardise AIA's overall FRs conformity. This development likely leads to systemic FRs failures and their

obscuring under formal participation rights, ritualistic FRs reporting, supervision and conformity assessments, as well as the overall rights-based rhetoric of AIA.

HS issued under AIA inevitably fail to protect the underlying multiple FRs, as HS are either too concrete and inflexible to enable the contextuality and flexibility required of FRs, or too abstract, flexible and imprecise to enable meaningful control of private interpretations by AI actors mostly required to self-assess their conformity with HS. The problem is ontological, related to systemic, foundational and operational differences between FRs and HS as norm types, and cannot be resolved through enriching the epistemic community of engineers traditionally responsible for standardisation work with human rights and civil society representatives. Such mixing could tilt the balance to the other extreme (too little or too much flexibility) or logjam the whole process without resolving any of the underlying problems.

Rather than producing an epistemic change whereby standardisation would in future reflect knowledge of civil society and human rights experts, a different epistemic change could follow whereby engineers replace lawyers as key FRs decision-makers in regulatory areas resorting to HS as a key regulatory instrument, like AIA. Hence, typical scholarly proposals presenting the increase of such epistemic interaction in the production of HS as a solution to the underlying problems — echoing the EU legislature's and Commission's arguments — fail without simultaneously critically examining the whole system and the use of New Legislative Framework and HS for regulatory areas dense with FRs effects, like AIA.

The conversion of AIA norms (read in the light of the underlying FRs) into HS necessarily produces foundational changes in the meaning of the applicable norms. Transforming rights into fixed narrow technical specifications or process steps is by its nature a highly contestable process. Other interests could prevail over rights but the standard could be accepted by the EU Commission as FRs-compliant nevertheless. FRs are abstract optimisation commands and values, requiring case-specific weighing and structured value judgements, whereas HS are 'tick-the-box' technical, process or value descriptions, and must enable implementation and conformance assessment without any weighing or contextual demands. Still, HS reduce the meaning and effects of the covered rights, as conformity with HS removes the possibility to apply directly the covered AIA and underlying FR requirements to the conforming AI actor, thus limiting the role of covered FRs to exceptional instances of rebutting the presumption of conformity, for example where EU member states or the European Parliament challenge the official status of the HS for failing to protect the applicable AIA provision and related FRs.

The [Commission's Digital Omnibus AIA Proposal](#) intends to 'simplify' and postpone certain Artificial Intelligence Act (AIA) rules on high-risk artificial intelligence (AI) systems, as European standardisation organisations (ESOs) could not likely finalise the HS requested by the Commission by the existing deadline of 2 August 2026. EP's amendments would introduce fixed dates for AIA's application, giving ESOs one more year for preparing the HS in case of high-risk AI systems specifically listed in AIA and two years in case of AI systems covered by EU sectorial legislation on safety and

market surveillance pursuant to Article 6(1) and Annex I to AIA. The Proposal and EP's likely amendments would also introduce other significant changes to AIA. The Proposal is a result of US discontent with AIA and EU's failing economic development in AI sector. The Proposal reduces compliance burden by jeopardising even existing FRs protection under AIA. The Proposal does nothing to address the FRs-related problems identified in this brief. It is questionable whether it could help EU innovation and economic development in the AI sector.

Challenges for innovation policy

The development described above challenges innovation policy from many angles. As AIA was originally portrayed as strongly FRs and democracy enshrining, it may prove difficult to take steps back in FRs protection the original AIA provides. But as was argued above, AIA even in its original version was not as FRs-oriented as many scholars have characterized it. This is mainly because the way AIA uses HS in the implementation of its key obligations and requirements, which are tightly connected to multiple FRs. The problems identified could mean delays, uncertainties and the need to resort to alternative ways to demonstrate compliance with AIA. The regulatory landscape will thus not be predictable for the coming years. This will challenge innovation policy on global, European, domestic and company levels.

Proposals for action

At the same time, the developments could open up opportunities in the future. For example, the following four proposals for action could be considered:

- Public authorities should prepare for the uncertainties by devoting resources for inspecting alternative ways to demonstrate compliance with AIA obligations. These alternative ways could be other standards and proof that conformity with them would produce AIA compliant outcomes.
- Uncertainties and disruptive legal developments could open up opportunities for lawyers and engineers having deep expertise in the related questions.
- Ministries responsible for innovation and standardization policies should prepare for the possible scenarios that respective HS will be delayed further, Commission could reject proposed HS, or HS or AIA could be questioned in judicial review before courts, including the CJEU.
- Human rights bodies, institutions and NGOs should devote energy and resources for inspecting and questioning the FRs conformity of HS under AIA.

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