



**Raising standards for consumers**

## POSITION PAPER

# The role of standards in meeting consumer needs and expectations of AI in the European Commission proposal for an Artificial Intelligence Act

Regulation laying down harmonised rules on artificial intelligence and amending certain Union legislative acts COM(2021) 206 final, 2021/0106 (COD)



**Contact:** Chiara Giovannini – [cgi@anec.eu](mailto:cgi@anec.eu)



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## KEY POINTS

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- Consumers have concerns about the risks of AI systems and require strong legislative proposals to ensure their fundamental rights are protected and they are protected from harm.
- ANEC welcomes the European Commission's proposal for an AI Act (AIA) however it requires improvements to deliver trusted and safe AI for people.
- Parts of the AIA propose using standardisation based on the New Legislative Framework. This framework is designed for product access in the single market, but raises questions when applied to the domain of AI.
- There are difficulties in transposing fundamental rights and EU values and principles into technical standards from both a substantive and process perspective.
- As currently written, the use of standardisation as proposed in the AI Act is not appropriate for upholding fundamental rights.
- Harmonised standards should not be used to define or apply fundamental rights, legal or ethical principles.
- The use of standards should be limited to defining technical requirements and more detailed and clearer requirements are needed in the AI Act for standards to function as 'technical specifications for repeated or continuous application'.
- Standards which implement technical aspects should be developed with strong consumer and wider societal participation at national and regional level and incorporate consumer needs.

# 1 | CONSUMERS AND AI

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AI-enabled products and services are increasingly part of consumers' lives from daily home devices like smart doorbells to critical services like finance. Consumers are positive about the potential benefits of AI in some applications but at the same time have significant concerns about the impact of AI at an individual and societal level, expressing fears that:

- it will lead to an increase in abuses related to the use of their personal data
- companies are using AI to manipulate their decisions
- governments are using AI to control their citizens
- AI is dangerous because machines can fail
- AI could lead to unfair discrimination against particular individuals or social categories
- it is not clear who is accountable in case AI is not secure or causes harm.<sup>1</sup>

Consumer surveys align with other global macro data on attitudes towards AI which suggest that sentiments about AI technology are ambivalent at best. In many regions of the world, public opinion is divided on the matter of whether AI will be mostly harmful or mostly helpful. In Europe 43% think AI will be harmful and 38% believe it will be helpful.<sup>2</sup>

<sup>1</sup> BEUC multi-country survey of 11,000 consumers in nine European countries (Belgium, Denmark, France, Germany, Italy, Poland, Portugal, Spain, Sweden) in December 2019. <https://www.beuc.eu/publications/survey-consumers-see-potential-artificial-intelligence-raise-serious-concerns/html>

<sup>2</sup> [Global Attitudes towards Artificial Intelligence \(AI\) & Automated Decision Making](#), University of Oxford 2021. Analysis of survey data from the [2019 World Risk Poll](#), published by the Lloyds Register Foundation powered by Gallup, which examines peoples' perceptions of global risks across 142 countries.

## 2 | Consumer expectations and needs in AI legislation

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A multi-country survey by the European consumer organisation BEUC prior to the publication of the AIA, found a widespread lack of trust in authorities to be able to exercise meaningful oversight and a general perception that the existing legal framework offered weak protection. There was support for authorities being able to exercise their powers by, for example, banning hazardous AI. There was also support for legislative intervention in the right to object to or contest a decision of an AI system and that existing consumer protection rights should be better enforced.<sup>3</sup>

Given the negative impacts of AI systems (AIS) in use that we have already seen, and the potential future risks of AI, the widespread take up and acceptance of AI systems within consumers' lives requires a robust regulatory framework that people trust to uphold and enforce their fundamental rights.

<sup>3</sup> BEUC, 2019

### 3 | TECHNICAL STANDARDS AND AI SYSTEMS

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Technical standards are a useful part of a wider regulatory and governance context for AI and are proposed within Title III of the AIA.

Technical standards can deliver the technical robustness, security and interoperability required to meet some elements of consumer AI expectations and needs. However, there are aspects of AI which make it challenging to standardise and where care must be taken in deciding on how standardisation is used.

Firstly, AIS have specific characteristics that make them qualitatively different from previous technological advancements<sup>4</sup> - in particular the fact that they are not static. They continually learn and adapt their outputs meaning there is not a static entity to easily observe or test.

Secondly, technical standards are less effective at dealing with wider structural and ethical dimensions of socio-technical systems like AI. A socio-technical system is one in which sophisticated technologies operate in human contexts, to fulfil human-defined goals. As such, they reflect the values and choices of those who build and use them<sup>5</sup>.

The performance and outcome of an AIS depends not only on its technical components, but on decisions about who uses the technology for what purpose, in what context. These decisions have the potential to involve and impact on fundamental rights.

Take the example of a system designed to differentiate between customers on characteristics and behaviours. This could be used to offer lower prices in real time to those who need them, or to exclude them from their service entirely. Designing and developing this AIS requires making decisions on several things that could impact on fundamental rights: whether age, gender, ethnicity or proxies for these are used to define their income level and profile them; when it is appropriate to apply it; what is considered fair in terms of price differentiation, and what impact that will have on their economic and consumer rights.

<sup>4</sup> AI Act Impact Assessment, SWD/2021/84 final

<sup>5</sup> The Council of Europe, 2021: Artificial intelligence, human rights, democracy, and the rule of law: a primer.

## 4 | TECHNICAL STANDARDS AND AI SYSTEMS

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Legal requirements for AIS are proposed in the AIA, those relevant for harmonised technical standard are found in Title III High Risk Systems. High-risk AIS fall into two categories – those that form a safety element of product already covered by harmonised legislation in the EU (such as a medical device) or those referred to in Annex III such as biometric identification, access to essential public services, law enforcement or employment.

The current AIA proposal relies heavily on the development and application of harmonised (technical) standards by the manufacturers of an AI system. Manufacturers of high-risk AIS are incentivised to apply these standards as they bring with them a presumption of conformity under Article 40. Article 43 provides a further incentive as providers of an AI system who have applied harmonised standards will be able to carry out a self-assessment and not rely on third party assessment.

The New Approach of 1985 and the later New Legislative Framework which combined top level requirements with the development of (and compliance with) more detailed harmonised standards spearheaded this approach with the purpose of facilitating market access. This approach has been key to building the Single Market for Goods in the EU. However, a regulatory tool designed to facilitate market access has major limitations in its ability to protect the fundamental rights of consumers in the domain of AI.

## 5 | ROLE OF PRIVATE STANDARDS BODIES IN THE AIA

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As the AIA is currently written, the private standards bodies who produce standards would be in the position of interpreting how the legal requirements for high-risk AIS set out in Title III should be applied. These include requirements for data and data governance (Art. 10), transparency (Art. 13) and human oversight (Art. 14) that would be applied AIS posing a high risk to health, safety and fundamental rights in number of applications, products and sectors as set out in Annex III. As an example, under the current proposal, technical standards would define what type of biases are prohibited and how they should be mitigated under (Art. 10 (2) f)).

It is not the role of standards to interpret legal requirements but that of a democratic legislative procedure. Technical standards must not go beyond the implementation of mere technical aspects and enter in areas of public policy and law which require a certain level of interpretation.

## 6 | CHALLENGES OF THE EUROPEAN AND INTERNATIONAL STANDARDISATION PROCESS

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In addition to the challenges of standardising a technology such as AI and moving the interpretation of legal requirements related to fundamental rights out of the democratic legislative procedure, the nature and processes of private standards bodies has raised concerns.

Both the National Standards Bodies (NSBs) that make up European Standards Organisations (ESOs) and the ESOs themselves are private bodies. NSBs have high levels of industry presence and inconsistent, but generally low levels of societal stakeholder participation and influence. In ESOs, civil society and consumers' interests are not sufficiently represented and their influence is limited due to a lack of resources and expertise at the national level, and a decision-making process based on the national delegation principle. Therefore, the role of standards within the AIA as currently written places a great deal of regulatory development in the hands of private bodies with a lack of democratic accountability<sup>6</sup>.

This has been recognised by an Advocate-General from the Court of Justice of the European Union has already referred to standardisation as "legislative delegation in favour of a private standardisation body".<sup>7</sup>

As we are in the presence of a double delegation of powers (from the co-legislators to the Commission and then from the Commission to the European Standardisation Organisations) in the field of fundamental rights, it is essential that the AI Act clearly ringfences the conditions under which such delegations take place.

Finally, from the European perspective, the increasing trend towards setting single, globally-relevant technical standards is encouraging a convergence between European and international standards.

Given the primacy of international standardisation over the regional, the consequence is that more standards for application within Europe are being drafted or revised at international level. However, the participation of consumers and civil society is even more limited in international standardisation discussions, while there is a strong participation of countries that do not share European values and principles, especially in AI standardisation.

<sup>6</sup> Martin Ebers, Standardizing AI – The Case of the European Commission's Proposal for an Artificial Intelligence Act, in: Larry A. DiMatteo/Michel Cannarsa/Cristina Poncibò (eds.), *The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics*, pending for publication, 22 pages, Cambridge University Press 2022.

<sup>7</sup> Opinion of Advocate General Campos Sanchez-Bordona in Case C-613/14 James Elliott Construction Limited v. Irish Asphalt Limited, EU: C:2016:63.

## 7 | RECOMMENDATIONS

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The use of standardisation as proposed in the AI Act needs to be reconsidered given how sensitive and critical AI is to our society, and to the fundamental rights of individuals. Given these considerations and the difficulties in regulating and standardising AI, it is sensible to apply the precautionary principle in considering standardisation options. Therefore, ANEC recommends that:

- Harmonised standards are only applied to the aspects of high-risk applications that do not involve delegation/interpretation of decisions within areas of health, safety, fundamental rights and consumer protection.
- More detailed and clearer requirements are developed so that standards can function as 'technical specifications for repeated or continuous application' (as defined in Art 2.1 Regulation 1025/2012 on European Standardisation)
- Harmonised standards must not be used to define or apply fundamental rights, legal or ethical principles. Their use should be limited to implement technical aspects (see 8 below). In this regard, a standard should, for example, not be used to determine what types of biases are prohibited under Art. 10 (2) f). Instead, the AI Act must include more detailed rules about the requirements applicable to 'high-risk AI', including rules on discrimination.
- As standards will play an important role to detail the essential requirements listed in the AI Act, the governance system of the standardisation process must be changed significantly. Consumer organisations must be systematically involved in standardisation. Public authorities must also provide the political and financial frameworks that permit the participation of all stakeholders – including consumers and broader societal interests. A general change of the standardisation process cannot be done overnight, but new Articles should be added to the AI Act to cater for such participation.
- Given that public authorities have also withdrawn from many standardisation activities to the detriment of the public interest, we call on authorities to become more engaged in standardisation and support consumer participation in it.

## 8 | INCORPORATING CONSUMER NEEDS INTO TECHNICAL AND PROCEDURAL STANDARDS IN AIA

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In technical and procedural areas appropriate for technical standards in the AIA, we propose the following examples of how consumer needs can be included:

### **Quality management** (Art. 17)

Quality management systems can take a holistic approach to ensuring that a range of consumer protection and customer service issues are addressed, alongside the technical capacities of AI system. This can give consumers more control over the system and the ability to get things put right. In context of AIA this could involve:

- Objection processes: plan, design, develop, implement and maintain effective and efficient objection processes with clear timelines, prompt response and effective remedies; have governance arrangements with senior level responsibility for managing objections.
- Dispute resolution: Set up and manage efficient complaints-handling systems that recognises needs of all consumers, and deal with complaints and manage dispute resolution effectively; easy access to complaints and dispute resolution process; complaints and dispute resolution dealt with promptly; governance arrangements with senior level responsibility for complaints.

### **Cybersecurity** (Art. 15)

The personal information and personally identifiable information in use in AI systems increases the cybersecurity risks. Standards can address consumer requirements for the security of stored, transmitted or processed data throughout its life cycle:

- Technical requirements such as secure authentication and security updates, incident management and abuse alerts, encryption etc.
- Organisational requirements such as information on product security status and support, expected product lifetime etc.<sup>89</sup>

### **Record-keeping** (Art. 12)

The automatic recording of events whilst an AI is operating is helpful for traceability and compliance. Standards content to address consumer needs and expectations:

- Transparency and openness, interoperability.
- Machine readable to enable external scrutiny.

### **Technical Documentation** (Art. 11)

Standards content to address consumer needs and expectations:

<sup>8</sup> BEUC Regulating AI to protect the consumer, Position Paper on the AI Act, 2021 with chapter on standards authored by ANEC

<sup>9</sup> ANEC, Cybersecurity requirements for connected consumer product standards, 2021

- Technical documentation is produced before the system is put on the market, and is kept up to date.
- Technical documentation should clearly relate and be understandable for compliance requirements.
- Technical documentation includes impact and risk assessment.



ANEC is the European consumer voice in standardisation, defending consumer interests in the processes of technical standardisation and the use of standards, as well as related legislation and public policies.

ANEC was established in 1995 as an international non-profit association under Belgian law and is open to the representation of national consumer organisations in 34 countries.

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*Raising standards for consumers*

European association for the coordination of consumer representation in standardisation aisbl

Rue d’Arlon 80 – 4th Floor  
B-1040 Brussels, Belgium

- +32 2 743 24 70
- @anectweet
- anec@anec.eu
- www.anec.eu

EC Register of Interest Representatives:  
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