



Position Paper

of the German Bar Association prepared by the
Committee on IT Law

on the Public Consultation on Commission
Guidelines to Clarify the Scope of the General-
purpose AI Rules in the AI Act

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Introduction

The introduction provides a clear overview of the background of the guidelines (Section 1), their contents (Section 2), and the critical importance of the definition of a general-purpose AI model (GPAI model) under Article 3(63) AI Act (Section 3).

The feedback begins with Section 3.1.1, where the AI Office interprets specific terms.

I. Suggestions related to the Consultation questionnaire

Section 3.1.1 – Conditions for Sufficient Generality and Capabilities

The AI Office emphasizes that an exhaustive list of use cases for GPAI models is not feasible. Instead, it proposes technical criteria to identify such models, focusing in particular on their capability to generate text and/or images and the threshold of training compute ($\geq 10^{22}$ FLOP) as a decisive factor for classification as a GPAI model.

In reference to Recital 98, the AI Office discusses how to interpret “large amounts of data” in the training process, suggesting a shift from the amount of data to a proxy metric—training compute—derived from the number of parameters and training samples. A precise measurement of model size and training data is not considered necessary.

Open Question / Suggestion:

The guidelines state:

“Models that cannot generate text and/or images may be considered general-purpose AI models if they have a level of generality and capabilities comparable to such models.”

This raises the question of how comparability is to be assessed across domains—e.g., a model designed for object detection. How can "generality" be determined in a domain-agnostic manner?

Moreover, recent models (e.g., DeepSeek) demonstrate similar capabilities with significantly lower compute than legacy GPAI models like GPT-4.

Section 3.1.2 – Distinction Between Models and Model Versions

This section addresses when a model revision results in a "new model" versus a "new version" of an existing one. It applies only to revisions made by the original provider; downstream changes are covered in Section 3.2.2.

The key concept is the "large pre-training run." As per Recital 97, a model becomes new if the modification requires at least one-third of the original training compute.

This distinction is particularly relevant for obligations such as updating copyright compliance summaries under Article 53(1)(c) AI Act—only required for new models.

Documentation duties under Article 53(1)(a) and (b) must be updated for all versions.

Summaries of training data under Article 53(1)(d) must also be updated as appropriate, with further specification expected in the Commission's training data template. Risk assessments for systemic risks (Article 51(1)) may be addressed in the Code of Practice.

Suggestion:

The rationale behind the one-third compute threshold is clear. However, it may not accurately reflect significant capability changes or increased copyright risks when new, high-risk data sources are introduced with relatively little additional compute. A combination of quantitative (compute) and qualitative (capability) criteria may be more appropriate. The training data template may offer further clarity here.

Section 3.2 – Concept of a Provider

This section interprets the term "provider" under Article 3(3) AI Act. To avoid fragmented definitions across documents, examples illustrate how provider roles may be distributed in the context of GPAI models.

Examples 4 and 5 raise questions, such as when a company develops a GPAI model outside the EU, and another entity modifies and makes it available in the EU. The

example implies that the original developer becomes a provider within the EU, even if unaware of the downstream use.

Open Question:

Does this interpretation expand the AI Act's scope to include global developers whose models are later modified and placed on the EU market? Is this consistent with legal certainty?

Although Article 2(1)(c) grants the AI Act broad extraterritorial reach, clarity on how a provider's status is affected by downstream modifications would be welcome.

Section 3.2.2 – When a Downstream Actor Becomes a Provider Through Modification

This section addresses responsibility allocation along the value chain. According to Recital 109, obligations should only apply to the part modified or fine-tuned by a downstream actor. Fine-tuning is considered a form of modification.

Only modifications that significantly impact provider obligations shall trigger a change in provider status. For models posing systemic risks, the modifier becomes a provider only if the systemic risk is significantly changed.

The threshold remains the same as in Section 3.1.2: if modification uses $\geq 1/3$ of original training compute. This implies material changes in model behavior, generality, and capability, and likely also in training data—triggering copyright and transparency obligations.

Also discussed:

If a model originally or through modification reaches $\geq 10^{25}$ FLOP in total compute, downstream modifiers must fulfill all provider obligations, not just those relating to the modification.

Though the Commission states such cases are not yet known, it wishes to proactively address them.

Suggestion:

The threshold assumes a correlation between compute and model capability. While reasonable, it may overlook highly capable models trained with much less compute

(e.g., DeepSeek). Consider including qualitative evaluations (functionality, real-world applicability) in such cases.

Section 3.3 – Placing GPAI Models on the Market

Recital 97 clarifies that placing on the market may occur via libraries, APIs, direct downloads, or physical copies.

It is emphasized that obligations for AI systems and GPAI models apply cumulatively unless the model is used exclusively internally (cf. Recital 97).

To avoid fragmentation, examples merely illustrate model commercialization and overlap with Recital 97, reiterating that integration into an AI system (web app, product, or service) constitutes placing on the market.

The Blue Guide is referenced for further clarification.

No suggestion.

Section 3.3.2 – Open Source Exceptions

The AI Act also applies to GPAI models released under open-source licenses.

However, Recital 102 emphasizes the economic importance of open software, data, and models—hence exceptions in Articles 53(2) and 54(6) exist.

The guidelines clarify these exceptions do not apply to models with systemic risks.

Criteria for open-source licenses largely reiterate Recitals 102 and 103.

Suggestion:

Include practical examples (e.g., “LLaMA”) to distinguish open licensing from true open source. Many models allow free usage but restrict modifications or do not disclose full documentation.

Section 3.4 – Calculating Training Compute

Section 3.4 outlines how providers should calculate compute thresholds under Articles 51, 52, and 53. Two estimation methods are described: hardware-based and architecture-based.

Recital 111 affirms that compute used to improve model capabilities must be included.

Research-only compute is excluded.

Notably, page 15 addresses difficulties in estimating compute, particularly when synthetic data are used—especially when sourced from third parties. In such cases, "reasonable estimates" are permissible.

Suggestion:

Synthetic data may not be the only complicating factor. Cloud infrastructure or non-technical actors modifying models can also hinder accurate compute tracking. Clarification is needed.

Open Questions:

The distinction between development and improvement remains vague. Estimating compute for synthetic data or shared infrastructure can be complex. "Reasonable estimates" are a pragmatic solution, but more guidance is needed.

Regarding notification obligations under Article 52(1), providers usually know compute costs before training begins. Hence, advance planning is expected.

Unclear:

Why is the compute estimation timing before the "large pre-training run" explicitly mentioned again?

To demonstrate systemic risk, the Commission expects:

- Compute amount (in FLOP, two significant figures)
→ *What exactly is meant by "two significant figures"?*
- Description of estimation method, including any approximations
→ *Why not reference the hardware- or architecture-based methods already outlined?*

II. Further suggestions going beyond the Consultation questionnaire

Section 3.5 – Transitional Provisions

Per Article 111(3) AI Act, GPAI models placed on the market before 2 August 2025 are exempt from compliance until 2 August 2027.

Clarifications include: retraining is not required, even if proving copyright compliance or training data details may be challenging. Providers must justify such limitations.

→ *Unclear: How and to whom must these difficulties be explained? Is proactive outreach to the AI Office required?*

The section also usefully distinguishes:

- Between models fully trained vs. in training on 2 August 2025
- Between GPAI models and those with systemic risks
- Advises proactive communication with the Commission

→ *Unclear: How should this proactive engagement be initiated?*

Suggestion:

More guidance on contacting the AI Office and addressing documentation gaps would be helpful.

Section 3.6 – Code of Practice

Signatories to the Code of Practice (CoP) benefit from greater trust by the AI Office. Non-signatories must demonstrate comparable safeguards (e.g., via a GAP analysis) and expect more information requests.

The Commission may also consider adherence to the CoP when imposing fines.

Suggestion:

Make clear that adherence to the CoP is voluntary. Avoid implying a de facto obligation beyond what is legally mandated.

Supervision and Enforcement of GPAI Model Obligations

The AI Office expects "close informal cooperation" and "proactive reporting" from providers of GPAI models with systemic risks.

Suggestion:

While enforcement powers (Articles 91–93 AI Act) are clearly referenced, the legal basis for these informal cooperation expectations remains unspecified.

Mailing List

Europe

European Commission

- Directorate-General Justice and Consumers
- Directorate-General Communication Networks, Content and Technology

European Parliament

- Committee on Internal Market and Consumer Protection
- Committee on Legal Affairs

Council of the European Union

Ständige Vertretung der Bundesrepublik Deutschland bei der EU

Justizreferenten der Landesvertretungen

Council of Bars and Law Societies of Europe (CCBE)