

# MULTI-STAKEHOLDER CONSULTATION FOR COMMISSION GUIDELINES ON THE APPLICATION OF THE DEFINITION OF AN AI SYSTEM AND THE PROHIBITED AI PRACTICES ESTABLISHED IN THE AI ACT

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**Question#1 of the Survey:** Based on [Article 3\(1\)](#) and [Recital 12](#) AI Act, what elements of the definition of an AI system, in particular, require further clarification in addition to the guidance already provided in Recital 12?

**Draft feedback:**

AI typically involves dynamic, learning-based, non-deterministic processes (e.g., machine learning or deep learning), whereas traditional systems rely on static, deterministic, hard-coded rules. Without explicitly requiring learning capabilities, traditional software might be wrongly included as they can also:

- function autonomously once deployed
- process inputs to produce outputs based on predefined rules or logic (though through deterministic, rule-based approaches)
- influence physical or virtual environments even if they rely on deterministic programming rather than adaptive or learning-based AI methods.

In order to distinguish AI systems from 'simpler traditional software systems or programming approaches', phrases like "varying levels of autonomy", "adaptiveness", and "inference" must be clarified to indicate that they involve learning from data or adjusting behavior dynamically based on new information post-deployment.

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**Question#3 of the Survey:** Taking into account the provisions of the AI Act, what elements of the prohibition of harmful manipulation and deception do you think require further clarification in the Commission guidelines?

**Draft feedback:** It is unclear what constitutes a "subliminal technique." Does it include subtle nudges like content personalization in data-driven marketing? The line between acceptable persuasion and manipulation must be explicitly defined, as many marketing techniques aim to influence behavior. According to the ICC Code, acceptable persuasion uses transparent, ethical strategies to inform and engage consumers, enabling choices aligned with their preferences. It respects autonomy through truthful information, clear disclosures, and genuine value. Manipulation, by

contrast, intentionally exploits cognitive biases or vulnerabilities through deceptive, coercive, or exploitative tactics, distorting consumers' behavior. The Commission should clarify that "material distortion" involves deceptive or coercive tactics causing significant harm, while ethical marketing respects autonomy, fosters trust, supports informed decisions, and benefits individuals with personalized, relevant, timely, and cost-effective offers. In addition, in all cases any prohibited practice must require intent or gross negligence. The unintended harmful consequence on a single person where the organization is acting in good faith should not by itself be a criterion for the given practice to fall under the list of prohibited practices. The test must be objective and not linked specifically to an effect affecting a single individual. See comments on "significant harm" under Q6.

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**Question#6 of the Survey:** Taking into account the provisions of the AI Act, what elements of the prohibition of harmful exploitation of vulnerabilities do you think require further clarification in the Commission guidelines?

**Draft feedback:** On the concept of "significant harm", a very high threshold must apply for prohibited practices in terms of likelihood (harm has already occurred or is very likely to occur) and in terms of level of impact (very significant). Because of this high threshold, these practices are probably already criminally punished in national laws. Coherence with recital 29 of the AI Act must be maintained so that standard and lawful data-driven marketing practices, which are already subject to extensive legislations (GDPR, EPD, UCPD, etc.) are out of the scope of the list of prohibited practices. In addition, coherence with the AI Act risk classification is key in particular with high-risk use cases. It would not be acceptable for instance to have a business practice considered as perfectly legitimate as part of the high-risk category but having the advertisement or the promotion of the same business practice prohibited. On "vulnerabilities," a future-proof approach is vital to avoid subjective interpretations. Misaligned definitions risk legal uncertainty, making it harder for businesses and authorities to apply rules fairly. The definition should align with UCPD, focusing on characteristics like age or credulity and a trader's reasonable ability to foresee vulnerabilities.

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**Question#9 of the Survey:** Taking into account the provisions of the AI Act, what elements of the prohibition of social scoring do you think require further clarification in the Commission guidelines?

**Draft feedback:** Legitimate and lawful AI based marketing and advertising segmentation and classification as well as legitimate and lawful AI based human resources management practices should be clearly excluded from the scope of the prohibition.

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**Question#12 of the Survey:** Taking into account the provisions of the AI Act, what elements of the prohibition of harmful manipulation and deception do you think require further clarification in the Commission guidelines?

**Draft feedback:** Legitimate and lawful AI based profiling for the purpose of fraud prevention and management should be clearly excluded from the prohibition.