



# The AIA Code of Practice— Opportunities & Challenges

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## Executive Summary:

General-Purpose AI (“GPAI”) has an enormous potential to benefit humankind. But, as a new and cutting-edge technology it is evolving fast, constantly expanding the technological frontiers and challenging traditional regulatory approaches. Consequently, the AI Act relies on a Code of Practice to specify its obligations. Given GPAI’s potential, it is critical to make the Code a success and ensure a broad and effective participation of GPAI providers that have a unique knowledge of this new technology. To that end, the following 10 recommendations shall be considered:

1. Provide an effective incentive for GPAI providers to participate in the self-regulatory process as opposed to relying on their independent inhouse compliance solutions.
2. Prevent a fragmented / contradictory AI framework by ensuring that the Code is closely aligned with emerging international approaches / standards such as the G7 Code of Conduct to the extent permissible under the AI Act.
3. Provide clear and adaptable guidance on the obligations of GPAI providers as foreseen by the AI Act (e.g., provide a clear list of systemic risk domains of GPAI with systemic risks; ensure high procedural safeguards, proportionality, trade secret protection and measures to protect the security and integrity of GPAI models).
4. Avoid addressing issues that are beyond this scope such as trying to interpret and making legal assessments of compliance with Union law on copyright.
5. Where the AI Act provides leeway for a broad range of different compliance measures, align the AIA Code with existing and emerging international approaches and international technical standards.
6. Ensure that determining the right level of granularity is a key consideration in the drafting process, is done on an obligation-by-obligation basis, and takes the utmost account of the GPAI provider’s extensive experience and knowledge.
7. Closely involve GPAI providers in setting the right level of granularity (in particular with respect to technical considerations and best practices).
8. Ensure that the AI Office remains involved in the process of facilitating the drafting of the AIA Code.
9. Ensure that the different roles and responsibilities of GPAI providers and other stakeholders is reflected in the scope / degree of participation in the drafting process.
10. Ensure that the drafting process is organized in a clear and efficient manner with precise milestones and foreseeable rounds of exchanges between the AI Office and the providers of GPAI (e.g., deadlines and meeting frequency during the drafting process should provide representatives involved with adequate time for internal coordination and information gathering). In addition, the AIA Code should not endorse or refer to specific commercial solutions promoted by internal or external stakeholders but rather be focused on finding workable solutions on the basis of the GPAI provider’s experiences and in alignment with the AI Office.

## Introduction

After a long process, the final version of the European Union’s Artificial Intelligence Act (“**AI Act**”) entered into force on 1 August 2024<sup>1</sup>. As the first comprehensive regulation of Artificial Intelligence (“**AI**”) worldwide it has been the focal point for a while. Now, the attention is shifting towards its implementation. In that context, the upcoming AI Act code of practice (“**AIA Code**”), aimed at operationalizing many of the AI Act’s obligations for providers of General-Purpose AI models (“**GPAI**”), will play a crucial role.

As a new and frontier technology, GPAI has enormous potential to benefit humankind. At the same time, GPAI is rapidly evolving and highly technical which is why the EU relies on an AIA Code to specify the obligations. Given GPAI’s vast potential it is crucial to ensure that the AIA Code becomes a success. As the participation in and adherence to the AIA Code is voluntary, the procedure of drawing up the AIA Code and its content need to be attractive to ensure the Code’s success. Otherwise, there is a risk that GPAI providers will not participate and rely on their in-house compliance solutions instead.

The aim of this Paper (“**Paper**”) is to shine the light on important factors that contribute to the AIA Code’s success. To that end, the Paper will embed the AIA Code into the broader framework of the EU’s past use of similar co-regulatory tools to identify relevant experience that should be considered in the current drafting. It will then reflect on three areas that are of crucial importance for ensuring that the AIA Code becomes a success: Ensuring consistency with international emerging approaches and standards, providing legal certainty, and designing the proper drafting process for the Code. Based on these reflections, the Paper makes recommendations aimed at ensuring that the AIA Code becomes industry’s key reference for compliance and a successful tool to meet the AI Act’s objectives.

## Codes of Practice and Conduct are an Increasingly Popular Policy Instrument in the EU

Codes of Practice and Conduct (“**Codes**”) are an important regulatory instrument in markets driven by new and rapidly evolving technologies. On a high-level, codes are a form of co-regulatory instruments where regulated entities help design the procedures and rules they will be governed by. This process allows the entities to contribute their expertise and practical experience, helps creating workable rules that reflect industry best practices, and supports achieving the regulator’s policy objectives. Codes can therefore provide both the regulator and the regulated entity with the opportunity to develop rules that reflect the technical and operational state of play and, thus, offer an efficient, flexible and practical way of compliance.<sup>2</sup>

This flexibility accounts for the prominence of Codes in the EU’s regulatory approach to digital areas and is not a coincidence. Indeed, established frameworks and concepts are

1 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), OJ L, 2024/1689, 12.7.2024.

2 See for a good overview of the functional and legal dimension of different Codes on an EU level *Carl Vabder Maelen*, *Hardly law or hard law? Investigating the dimensions of functionality and legislation of codes of conduct in recent EU legislation and the normative repercussions thereof*, E.L. Rev. (47) 2022, 752-772.

not always suited for regulating new and quickly evolving technologies. These technologies, and how society interacts with them, raise new and oftentimes difficult questions. As a result, they might require new, flexible and unique regulatory responses. In that context, Codes can be highly effective tools.

The prominence of Codes is palpable when looking back at the past years of the EU's regulatory activities. For example, already before the Digital Services Act ("**DSA**")<sup>3</sup> entered into force, the EU addressed issues on content moderation and disinformation through Codes such as the Code of Conduct on Countering Illegal Hate Speech Online<sup>4</sup> ("**Hate Speech Code**") or the Code of Practice on Disinformation from 2018 ("**Disinformation Code 2018**") and 2022 ("**Disinformation Code 2022**").<sup>5</sup> Other examples can be found in the data space, whether for the free flow of non-personal data in the EU<sup>6</sup> or in the area of protecting privacy such as the General Data Protection Regulation<sup>7</sup> ("**GDPR**") Codes of Conduct ("**GDPR Codes**")<sup>8</sup>.

Past experience with these Codes is ambivalent. On the one hand, they can lead to noticeable benefits and impacts when designed correctly. On the other hand, cumbersome and lengthy processes can also adversely impact their success, increase their cost in terms of resources allocated by companies and deter participants from contributing.

For example, the European Commission's assessment concluded that the Disinformation Code effectively contributed to tackling disinformation on platforms.<sup>9</sup> On the other hand, 6 years after the GDPR entered into force there is only a very limited number of GDPR Codes<sup>10</sup> with limited practical relevance or traction.<sup>11</sup> Legal observers suggested

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3 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, 27.10.2022, p. 1–102.

4 Available here [https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online\\_en](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en). The Code was originally designed and agreed upon in 2016 between the EU Commission and Facebook, Microsoft, Twitter and YouTube. Subsequently, other companies announced their participation. An enhanced Code of Conduct, the "Code of Conduct+", is currently debated, but not yet published.

5 The Code was designed and agreed upon by representatives of online platforms, other tech companies, and actors in the advertising industry in 2018 as the first worldwide code to fight disinformation (available here: <https://digital-strategy.ec.europa.eu/en/library/2018-code-practice-disinformation>). After an update in June 2022, a Strengthened Code of Practice on Disinformation was released (available here <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation>). On that basis, the EU Commission is now considering the recognition as a Code of Conduct under the Digital Services Act.

6 Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union, OJ L 303, 28.11.2018, p. 59–68. Codes of conduct are foreseen as an instrument in the context of the porting of data in Article 6.

7 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88.

8 See Art. 40 GDPR.

9 *European Commission*, Study for the "Assessment of the implementation of the Code of Practice on Disinformation", Final Report, 2020, available here: <https://digital-strategy.ec.europa.eu/en/library/study-assessment-implementation-code-practice-disinformation>. It concludes (*Id.*, at p. 3) "[...] that the Code of Practice has produced positive results".

10 So far, only two transnational Codes of Conduct were approved: The European code of conduct submitted by the Cloud Infrastructure Service Providers (CISPE) (see [https://www.edpb.europa.eu/system/files/2021-05/edpb\\_opinion\\_202117\\_cispecode\\_en\\_0.pdf](https://www.edpb.europa.eu/system/files/2021-05/edpb_opinion_202117_cispecode_en_0.pdf)) and the EU Data Protection Code of Conduct for Cloud Service Providers submitted by Scope Europe (see [https://www.edpb.europa.eu/system/files/2021-05/edpb\\_opinion\\_202116\\_eucloudcode\\_en.pdf](https://www.edpb.europa.eu/system/files/2021-05/edpb_opinion_202116_eucloudcode_en.pdf)). In addition, only six national Codes of Conducts were approved (see here [https://www.edpb.europa.eu/our-work-tools/accountability-tools/register-codes-conduct-amendments-and-extensions-art-4011\\_en](https://www.edpb.europa.eu/our-work-tools/accountability-tools/register-codes-conduct-amendments-and-extensions-art-4011_en)).

11 According to a European Commission's Assessment, codes of conducts under the Data Protection Directive "[were] rarely [...] used so far and [were] not considered satisfactory by private stakeholders" (COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A comprehensive approach on personal data protection in the European Union, COM(2010) 609 final, November 4 2010, p. 12). A similarly negative assessment seems to prevail in the academic discussions. *Kamara*, in: *Kuner/Bygrave/Docksey*, The General Data Protection Regulation - Commentary, 2020, p. 720, states that "Despite the encouragement and guidance, the numbers of approved codes of conduct in Member States are negligible".

that the limited success of EU privacy codes<sup>12</sup> may be connected to the significant costs and the burdensome process (sometimes even described as “tortuous”<sup>13</sup>) associated with the adoption of a code.<sup>14</sup> One of the very purposes of this Paper is to propose recommendations that would avoid such a “tortuous” process for AIA Code.

## Relying on Codes Represents Both Opportunities and Challenges

Looking back at the numerous examples of Codes from the past, EU regulators should be mindful that these instruments provide enormous opportunities but also present challenges and can easily turn into a missed opportunity if not designed properly.

This is particularly important in the context of the upcoming AIA Code. Developing an AIA Code is a unique exercise faced with the challenge of addressing the entirely new and frontier technologies of GPAI. GPAI is trained with a large amount of data relying on self-supervision at scale. Because of its generality it can perform a wide range of different tasks and it can be integrated in a variety of downstream systems or applications. Because of its new and frontier nature and the large amount of data necessary to train it the number of companies involved in the development of GPAI is limited<sup>15</sup> which narrows down the potential contributors to the AIA Code. As a result, their input to the drafting of the upcoming AIA Code should be clearly differentiated from the input from other stakeholders by the AI Office.

The Paper will focus on three particular topics by way of example to reflect on key aspects that are highly relevant for the AIA Code’s success: ensuring consistency between the AIA Code and international emerging approaches and standards (I.), providing legal certainty as well as flexibility where needed (II.), and designing the appropriate drafting procedure for the AIA Code (III.). Based on these reflections, the Paper will make recommendations aimed at ensuring that the AIA Code becomes industry’s key reference for compliance and a successful tool to meet the AI Act’s objectives.

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12 This includes both GDPR Codes and Codes of Conduct as foreseen by the GDPR’s predecessor, the Data Protection Directive 95/46/EC.

13 *Douwe Korff*, EC Study on Implementation of Data Protection Directive - comparative summary of national laws, available at <https://gegevensbeschermingsrecht.nl/onewebmedia/douwe.pdf>, at p. 198.

14 *Dennis D. Hirsch*, In search of the holy grail: achieving global privacy rules through sector-based codes of conduct, 74(6) *Ohio St. L. J.*, 1029, 1057 (2013); *Korff*, *supra* note 13.

15 According to Art. 56 AI Act the AIA Code shall aim to cover obligations relevant for two groups of GPAI providers: providers of GPAI (subject to the obligations under Art. 53 AI Act) and providers of GPAI with systemic risk (subject to the additional obligations under Art. 55 AI Act). Based on the criteria for the latter group (see Art. 51 AI Act) this group will be substantially smaller in comparison to the former group. However, the Commission will only publish and keep up to date a list of GPAI providers for the latter group (see Art. 52(6) AI Act).

## I. Ensuring Consistency with International Emerging Approaches and Standards

Providers of GPAI are headquartered in different countries around the world such as the U.S., UK, France, Germany, and the number of providers is rapidly growing.<sup>16</sup> They also offer their services to customers worldwide. Because they operate globally, providers and deployers of AI are already facing a broad range of international and national regulations, codes of conduct, and guiding principles coming from different organizations or bodies. For example:

- In May 2019, the OECD published Recommendations on Artificial Intelligence containing high-level principles for providers and deployers of AI systems.<sup>17</sup>
- In October 2023, the leaders of the G7 released the International Guiding Principles for developing advanced AI systems which provides a set of 11 core principles designed to promote the safe, secure, and trustworthy development and use of AI systems worldwide.<sup>18</sup>
- On the same day, the G7 also released a Code of Conduct that provides guidance for organizations developing the most advanced AI systems.<sup>19</sup>
- In November 2023, cybersecurity authorities of the UK, the U.S., and numerous other jurisdictions published Guidelines for secure AI system development.<sup>20</sup>
- Finally, the Bletchley Declaration agreed by countries attending the AI Safety Summit in November 2023 in the UK<sup>21</sup> and
- President Biden’s Executive Order<sup>22</sup> on AI (and relatedly, the White House Commitments<sup>23</sup>).

International approaches and standards<sup>24</sup> for the development and use of AI systems are emerging and, simultaneously, the state of the art is continuously evolving. In an environment where the rapid worldwide development and use of AI systems meets an emerging national and international regulatory framework, ensuring consistency presents both a great opportunity and a daunting challenge.

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16 See Copenhagen Economics, Generative Artificial Intelligence: The Competitive Landscape – White Paper, February 2024, available here <https://copenhageneconomics.com/wp-content/uploads/2024/03/Copenhagen-Economics-Generative-Artificial-Intelligence-The-Competitive-Landscape.pdf>.

17 OECD, Recommendation of the Council on Artificial Intelligence, OECD/LEGAL/0449, adopted on May 22, 2019, revised on May 3, 2024, available at <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449>.

18 Hiroshima Process International Guiding Principles for Organizations Developing Advanced AI systems, October 30, 2023, available at <https://ec.europa.eu/newsroom/dae/redirection/document/99643>.

19 Hiroshima Process International Code of Conduct for Organizations Developing Advanced AI systems, October 30, 2023, available at <https://ec.europa.eu/newsroom/dae/redirection/document/99641>.

20 Guidelines for secure AI system development, November 27, 2023, available at <https://www.ncsc.gov.uk/files/Guidelines-for-secure-AI-system-development.pdf>.

21 Available at <https://www.gov.uk/government/publications/ai-safety-summit-2023-the-bletchley-declaration/the-bletchley-declaration-by-countries-attending-the-ai-safety-summit-1-2-november-2023>.

22 Executive Order (No. 14110) on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (30 October 2023), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/>.

23 Available at <https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/21/fact-sheet-biden-harris-administration-secures-voluntary-commitments-from-leading-artificial-intelligence-companies-to-manage-the-risks-posed-by-ai/>.

24 For international approaches, see the numerous approaches listed in the text and linked in the preceding footnotes; for international standards see the development of such standards by the International Organization for Standardization.

Regulators worldwide seem aware of the challenge and are working hard to ensure close collaboration and agreement through regular meetings and exchanges.<sup>25</sup> At the same time, it also presents a huge opportunity. Ensuring that the evolving multifaceted regulatory environment is built upon a common set of approaches, rules, and standards will improve legal certainty, allow international AI actors to design and operate their systems on the basis of harmonized approaches and standards throughout the world, and contribute to achieving interoperability. This will not only contribute to achieving the aim of promoting a safe, secure, and trustworthy AI worldwide. It will also ensure that the rapidly growing AI industry and its innovative services are not stifled by fragmented or even contradictory rules. In addition, it's an important prerequisite for EU companies to scale globally.

In that context, the upcoming AIA Code presents an important opportunity for the AI Office and the European Artificial Intelligence Board ("**Board**"). The AI Office is tasked with facilitating the drawing up of the AIA Codes and to assess their adequacy.<sup>26</sup> The Board will contribute and assist in that process.<sup>27</sup> In that capacity, both institutions should consider and reflect these emerging international approaches and standards to the extent possible under the AI Act and as explicitly endorsed by Art. 56(1) AI Act.<sup>28</sup>

**As a result, the Paper recommends:**

1. To provide an effective incentive for GPAI providers to participate in the self-regulatory process (as opposed to their reliance on their independent inhouse compliance solutions).
2. To prevent a fragmented and contradictory AI framework, adverse to the achievement of a harmonized and interoperable framework. To that end, the AIA Code should be closely aligned with emerging international approaches and standards to the extent permissible under the AI Act.

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<sup>25</sup> See, for example, the recent initiation of a technical dialogue between the European AI Office and the U.S. AI Safety Institute aimed at deepening the collaboration on AI and scientific information exchanges between the U.S. and the EU (more information available at <https://www.nist.gov/news-events/news/2024/07/us-ai-safety-institute-and-european-ai-office-hold-technical-dialogue>).

<sup>26</sup> Art. 56(1), (6) AI Act.

<sup>27</sup> Art. 56(2) and 66(c), (e) AI Act.

<sup>28</sup> Art. 56(1) AI Act states in the context of encouraging and facilitating the drawing up of AIA Codes that international approaches *should be taken into account*.

## II. Providing Legal Certainty

Legal certainty<sup>29</sup> as well as proportionality<sup>30</sup> are recognized principles under EU law and they are also crucial factors for ensuring a broad participation of GPAI providers in the Code and its effectiveness.

In the context of the AIA Code, legal certainty is particularly important with regard to the clarity of the scope and contents of the AIA Code. The core challenge for the AIA Code's success will be whether it will stick to a clear focus on core issues and find the right level of granularity while acknowledging that business models and established good practices differ.

### Stick to a Clear Focus on Core Issues

The obligations which the AIA Code aims to address and specify are numerous and complex. For providers of GPAI these include the obligations to (i) draw up and keep up-to-date technical documentation of the model and provide it to the AI Office and national competent authorities upon request, (ii) draw up, keep up-to-date, and make available information to providers who intend to integrate the GPAI into their AI systems, and (iii) put in place a policy to comply with Union law on copyright and related rights.<sup>31</sup>

In addition, providers of GPAI with systemic risk face further obligations such as (i) performing state of the art model evaluation, (ii) assessing and mitigating possible systemic risks at Union level, (iii) serious incident reporting, and (iv) ensuring an adequate level of cybersecurity protection.<sup>32</sup>

These obligations are extremely vague<sup>33</sup> but very important at the same time. Therefore, a decisive factor will be whether the AIA Code is sufficiently focused on the most important and complex obligations as the necessity for legal clarity for providers of GPAI will be particularly high. Relatedly, it's important that the AIA Code does not seek to introduce new obligations that go beyond the letter and the scope of the AI Act. For example, recital 106 of the AI Act foresees that GPAI providers should comply with their obligation to put in place a policy to comply with Union law on copyright and related rights regardless of the jurisdiction in which the copyright-relevant acts underpinning the training of those general-purpose AI models take place. How this extraterritorial claim in the recital with respect to copyright-relevant acts is to be interpreted and whether it can be reconciled with the legally binding text of the AI Act and Union copyright law are separate and complex legal questions that should not be addressed by the AIA Code.<sup>34</sup>

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29 Judgment of the Court (Grand Chamber) of 10 March 2009, C-345/06, *Gottfried Heinrich*, ECLI:EU:C:2009:140, para. 44; *Jérémie van Meerbeek*, *The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust*, E.L. Rev. (41) 2016, 275 – 288. According to the principle of legal certainty, rules should be sufficiently clear for individuals and businesses to know precisely what their rights and obligations are so that they can adjust their behavior accordingly.

30 Judgment of the Court of 17 December 1970, C-11/70, *Internationale Handelsgesellschaft*, EU:C:1970:114.

31 Art. 53(1) AI Act.

32 Art. 55(1) AI Act.

33 Even though they are further specified in the Annexes of the AI Act they are still broad and open to a range of interpretations.

34 See *Paul Goldstein/Christiane Stuetzle/Susan Bischoff*, *Tech & Telecom, Professional Perspective - Copyright Compliance With the EU AI Act—Extraterritorial Traps for the Unwary*, available at <https://www.bloomberglaw.com/external/document/X51QKDK000000/tech-telecom-professional-perspective-copyright-compliance-with->.



**As a result, we recommend that the AIA Code focuses on:**

3. Providing clear and adaptable guidance on the obligations of GPAI providers as foreseen by the AI Act (e.g., in line with international practice and with a view to enhance legal certainty, provide a clear list of systemic risk domains of GPAI with systemic risks; ensure high procedural safeguards, proportionality, trade secret protection and measures to protect the security and integrity of GPAI models).
4. Avoiding to address issues that are beyond this scope, such as trying to interpret and making legal assessments of compliance with Union law on copyright and related rights.
5. Where the AI Act provides leeway for a broad range of different compliance measures, align the AIA Code with existing and emerging international approaches and international technical standards as mentioned above.

**Ensure the Right Level of Granularity**

Finding the right balance on the AIA Code's level of granularity will be a difficult task as two challenges appear particularly daunting: the risk of an over-prescriptive code and the risk of an obsolete code.

Limiting the AIA Code to a very high-level description without concrete guidance on operational measures will affect the effectiveness and practical useability of the AIA Code. At the same time, an AIA Code that is too detailed might also be unhelpful and will create other risks.

First, by providing too granular specifications the AIA Code would risk not taking the different interests and operational settings of the GPAI providers into account. Therefore, they would limit the opportunity to implement measures in a way that would be most efficient and tailored to their specific case.

Second, and in particular with respect to a new and quickly changing and evolving technology like AI, the granular specifications might risk becoming quickly outdated and impractical, making it necessary to update the AIA Code on a too frequent basis. This, in turn, would undermine legal certainty and lead to an increase in the administrative costs incurred by the participants and the relevant EU institutions.

Lastly, the right level of granularity will depend on several factors, such as the type of obligation (e.g., obligations related to technical requirements vs. obligations related to risk mitigating measures), which is an important point to consider in the drafting process.

**As a result, the following recommendations should be taken into account:**

6. Determining the right level of granularity should be a key consideration in the drafting process. It should be done on an obligation-by-obligation basis and take the utmost account of the GPAI provider's extensive experience and knowledge.
7. Ensuring the close involvement of GPAI providers in setting the right level of granularity (in particular with respect to technical considerations and best practices) will be critical.

### III. Designing the Proper Drafting Process for the AIA Code

According to Art. 56(1) AI Act the AI Office is tasked with facilitating the process of drawing up the AIA Codes at Union level. There are three particular points that are of key importance to lay the foundation for the AIA Code to become an effective and successful tool.

#### **Make The AI Office the Main Facilitator of the Drawing Up of the AIA Code**

First, it is vital that the AI Office will lead and facilitate the process of drawing up the AIA Code in accordance with the explicit mandate provided in Art. 56(1) AI Act. Second, as the Board has a crucial role to play in ensuring that the AIA Code covers the relevant obligations and contents it should also be closely involved in the drafting process.<sup>35</sup> On the basis of the clear legislative decision to have the AI Office as a primary facilitator and the Board as an important contributor<sup>36</sup>, outsourcing any of these crucial tasks to external third parties, as this has been the case in the past<sup>37</sup>, requires additional considerations. Indeed, these third parties are neither directly accountable nor mandated under the AI Act. This is also important as it will be up to the AI Office to implement and enforce these rules.<sup>38</sup>

#### **Ensure the Appropriate Consultation of GPAI Providers**

A second and crucial factor will be whether the different levels of participation of the GPAI providers on the one hand and other stakeholders on the other hand will be taken into account in practice as clearly foreseen by the AI Act.

Indeed, Art. 56(3) AI Act clearly differentiates between both groups. While GPAI providers may be “invited” by the AI Office to “participate in the drawing-up” of the AIA Codes, other stakeholders may only “support” the process. In that context it is important to offer other stakeholders the opportunity to provide their input and for the AI Office to consider this input. However, the legislative design clearly indicates that GPAI providers should be afforded with a stronger position in the process of drawing up the AIA Codes. This legislative decision should be reflected in both the opportunities offered to GPAI providers to provide their input and the weight given to the input received.

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35 See Art. 56(2) and Art. 56(3) AI Act, mandating the Board to ensure that the Codes (i) cover the obligations provided for in Articles 53 and 54 AI Act and (ii) clearly set out specific objectives, commitments or measures, etc.

36 While the AI Act did not foresee an explicit involvement of the European Commission in the drafting process, it has a vital role to play. This is because it is only the Commission that may, by way of an implementing act, approve a code of practice to give it a general validity within the Union (Art. 56(6) AI Act). Such a validity within the entire Union contributes to the code’s attractiveness, and thus its success. Therefore, an active collaboration between the Commission and the GPAI providers is important for the code’s success as well.

37 The European Commission has relied on third parties in the past to facilitate the development of soft-law instruments. For example, it has relied on a university professor as a “broker” in the context of facilitating the design of the Disinformation Code (see here [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_3664](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3664)). However, as opposed to the Disinformation Code the AIA Code and the facilitation of its drawing up by the AI Office are explicitly regulated by the EU legislator in Art. 56(1) AI Act, resulting in a different situation and requirements.

38 According to Art. 56(5) AI Act the AI Office shall aim to ensure that participants to the codes of practice report regularly to it on the implementation of the commitments and the measures taken and their outcomes. According to Art. 56(6) AI Act the AI Office shall regularly monitor and evaluate the achievement of the objectives of the codes of practices by the participants and their contribution to the proper application of the AI Act. According to Art. 75 AI Act, the AI Office is responsible for controlling GPAI.

This clear distinction in the law reflects two core considerations. First, it ensures an alignment between the roles and responsibilities under the AI Act and the strength of the position in the drafting process. As the AIA Code aims at specifying *GPAI providers'* responsibilities and obligations and as it will be them who need to comply with the AIA Code, they are afforded with a stronger position. Second, it ensures that the experience and knowledge with this new and quickly evolving technology are sufficiently reflected in the AIA Code, which is an important condition for its success. Because the AI Act is the first comprehensive worldwide regulation of AI and as the AI Office was only recently formed, it may require further development of its expertise to fully articulate the necessary details for GPAI compliance.<sup>39</sup> In contrast, providers of GPAI have a broad and thorough understanding of their technology and are best situated to provide input on workable and effective implementing rules.

### **Set Efficient and Clear Procedure and Timing**

Lastly, the success of the AIA Code will depend on the clarity and effectiveness of the drafting procedure. Past experiences with other Codes on an EU level have shown that the design of and adherence to a transparent and structured drafting procedure and clear timelines are important contributors to a successful code.<sup>40</sup>

More specifically, the agenda and timelines for meetings between the AI Office and stakeholders and the related submissions of stakeholder's input should be communicated clearly, allow for sufficient time to prepare, and offer the opportunity to follow up on the input provided. These factors will be of paramount importance in the context of the AIA Code because the EU legislator foresees the very ambitious deadline for the AIA Codes to be finalized by May 2, 2025<sup>41</sup> and the operational deadline for the drafting process is set to be at the end of March, 2025<sup>42</sup>.

### **As a result, the following recommendations should be considered to ensure:**

8. That the AI Office remains involved in the process of facilitating the drafting of the AIA Code.
9. That the different roles and responsibilities of providers of GPAI and other stakeholders is reflected in the scope and degree of participation in the drafting process.
10. That the drafting process is organized in a clear and efficient manner with precise milestones and foreseeable rounds of exchanges between the AI Office and the providers of GPAI (e.g., deadlines and meeting frequency during the drafting process should provide representatives involved adequate time for internal coordination and information gathering). In addition, the AIA Code should not endorse or refer to specific commercial solutions promoted by internal or external stakeholders but rather be focused on finding workable solutions on the basis of the GPAI provider's experiences and in alignment with the AI Office.

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<sup>39</sup> The AI Office was only established in May 2024 with a substantial portion of its planned 140 employees not yet recruited. Its first meeting was scheduled only for the end of June 2024 (see here: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_24\\_2982](https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2982)).

<sup>40</sup> See for the criticism of the lengthy processes in the context of the GDPR Codes in the introduction and *supra* note 14.

<sup>41</sup> Art. 56(9) AI Act.

<sup>42</sup> See for the timeline proposed by the AI Office here <https://digital-strategy.ec.europa.eu/en/news/ai-act-participate-drawing-first-general-purpose-ai-code-practice>.