Open Source

Navigating the challenges of new European regulations

Corporate IT Law | Janneke van de Westelaken | January 29, 2026

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Open Source Software and EU Regulations
Introduction

Who am I

- I completed law school in October 2002; graduated from the Catholic University of Tilburg (the Netherlands)

- Immediately after law school, I started my three-year legal traineeship that is the precondition for admittance to the Dutch bar. During the traineeship and as a qualified lawyer, I represented clients in different fields of law

- In 2007 I switched to a law firm that represents companies

- This change made it possible to join the Robert Bosch Group. After five years of working in the Netherlands, I decided to take on a position in the Open Source Expert Team in Stuttgart.

- The desire to be able to keep up with my German colleagues led me to registering for the lawyer's aptitude test.

- Since last year, I am a fully qualified lawyer in Germany too.

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Introduction

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Spoilt for choice

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Spoilt for choice

Reality dawns

Open source'd

A free and open-source licence allows software, data and models to be openly shared and users to freely access, use, modify and redistribute them or modified versions thereof.

The Commission understands access as the right (...) to freely obtain the model* without any payment requirements or other restrictions.

Reasonable safety and security measures (...) may be implemented provided that they do not unfairly discriminate against persons(...). *

* GPAI Guidelines

AI Systems

This Regulation does not apply to AI systems released under free and open-source licences, unless (...).

When dealing with the peculiarities of open source AI system, the legal framework is decisive. The role of the operator - *being manufacturer, distributor, etc.* - is irrelevant,

NB: the exception in art. 25 (4) 2nd sentence AI Act refers to a role, independent of the AI System's license. A third party, is not an operator as defined in the AI Act, however

GPAI Models

The obligations (...), shall not apply to providers of AI models that are released under a free and open-source licence, and (...)

Forasmuch as GPAI models are subject of the assessment it is a specific operator - *the provider* - that is exempted from obligations.

NB: Other than the R&D privilege, the privilege of open source in art 2(12) does *not* apply to GPAI models

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Components, models, systems

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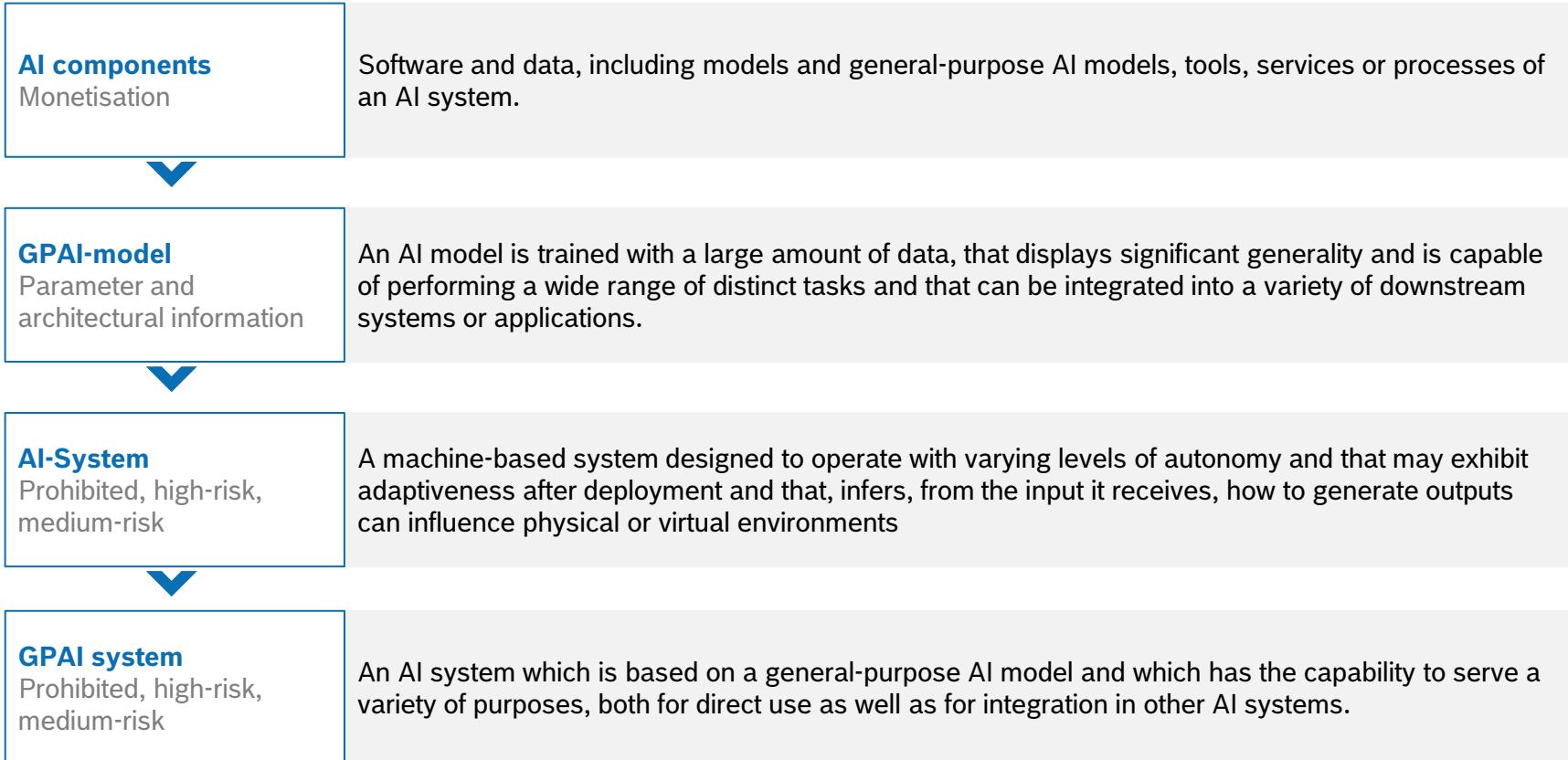
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Components, models, systems

Including concept

AI components Monetisation	Software and data, including models and general-purpose AI models, tools, services or processes of an AI system.
GPAI-model Parameter and architectural information	An AI model is trained with a large amount of data, that displays significant generality and is capable of performing a wide range of distinct tasks and that can be integrated into a variety of downstream systems or applications.
AI-System Prohibited, high-risk, medium-risk	A machine-based system designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment and that, infers, from the input it receives, how to generate outputs can influence physical or virtual environments
GPAI system Prohibited, high-risk, medium-risk	An AI system which is based on a general-purpose AI model and which has the capability to serve a variety of purposes, both for direct use as well as for integration in other AI systems.

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Components, models, systems

Conditional exemption(s)

AI components Monetisation	AI components that are provided against a price or otherwise monetized should not benefit from the exceptions provided to free and open-source AI components.
GPAI-model Parameter and architectural information	Providers of GPAI-models whose parameters, including the weights, the information on the model architecture, and the information on model usage, are made publicly available should be subject to exceptions as regards the transparency-related requirements imposed on general-purpose AI models, unless they can be considered to present a systemic risk.
AI-System Prohibited, high-risk, medium-risk	This Regulation does not apply to AI systems released under free and open-source licences, unless they are placed on the market or put into service as high-risk AI systems or as an AI system that falls under Article 5 or 50.

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The plain truth

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Rowing back

Since General Purpose AI models constitute a sub-category of AI components, the general exemption for AI components must first be examined. Only after it has been determined that the open source'd GPAI model is not monetized we assess whether the GPAI model meets the criteria for the exceptions related to transparency requirements. Finally, even if these conditions are met, an identified systemic risk can override these considerations and nullify any exemptions.

Monetisation

Against a price or otherwise monetised, including through the provision of technical support or other services, including through a software platform, or the use of personal data should not benefit from the exceptions.

Publicly available

Parameters, including the weights, information on the model architecture, and the on the model usage, are made publicly available. This does not necessarily reveal information data used for training, therefore exception does not concern the summary of training data and copyright compliance.

Systemic risk

Has high impact capabilities evaluated on the basis of appropriate technical tools and methodologies, including indicators and benchmarks, or based on a decision of the Commission. A presumption exists if the cumulative amount of computation is greater than 10^{25} flops.

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Our own cigar?

Transparency

General-purpose AI models released under free and open-source licences should be considered to ensure high levels of transparency and openness *if* their parameters, including the weights, the information on the model architecture, and the information on model usage are made publicly available.

Therefore these models should be subject to exceptions as regards the transparency-related requirements imposed on general-purpose AI models *.

*unless monetized // unless systemic risk

Copyright

The release of general-purpose AI models under free and open-source licence does not necessarily reveal substantial information on the data set used for the training or fine-tuning of the model and on how compliance of copyright law was thereby ensured.

Therefore the exception provided for general-purpose AI models from compliance with the transparency-related requirements should not concern the obligation to produce a summary about the content used for model training and the obligation to put in place a policy to comply with Union copyright law

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Assessment - AI Models

- Exemption for providers of GPAI models
  - Exempted from fulfilment of 53 (1) point a and b and 54 AI Act:
    - Open source'd AI models whose
    - parameters, including the weights, the information on the model architecture, and model usage, are publicly available
- Excluded from exemption
  - Hence 53 (1) point a and b and 54 AI Act must be complied with
    - AI models that constitute a systemic risk, or
    - AI models that are monetised - (against a price or otherwise)
- Exception to the exclusion
  - Notwithstanding the previous 53 (1) point a and b and 54 AI Act must not be complied with when
    - AI-Models are monetised through the use of personal data for reasons *exclusively* for improving security, compatibility or interoperability of the software *and* do not constitute a systemic risk, or
    - AI-Models are monetised through the use of personal data in transactions between microenterprises *and* do not constitute a systemic risk

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OSS Exemption AI Act

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Risk categorisation - AI Systems

Article 2 (12) AI Act - Scope

This Regulation does not apply to AI systems released under free and open-source licences, unless they are placed on the market or put into service as high-risk AI systems or as an AI system that falls under Article 5 or 50.

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OSS Exemption AI Act

Risk categorisation - AI Systems

Unacceptable-risk Article 5 AI Act	**High-risk systems** Article 6ff AI Act	**Limited-risk systems** Article 50 AI Act	**Low Risk** -
Regardless of the license being open source or not, the AI Act considers certain practices in the AI field to have an unacceptable risk. These practices are generally forbidden. The aim of these prohibitions is to ensure that AI technologies are not used in manipulative or harmful ways.	High-risk AI systems should only be placed on the Union market, put into service or used if they comply with certain mandatory requirements. The license under which the high-risk AI system is offered is irrelevant.	AI systems, although not classified as high-risk AI, which nevertheless pose a certain risk when used, are the AI systems with a limited risk. Even though these AI models might be made available under an open source license, limited-risk systems must comply with the provisions in Article 50 AI Act.	AI systems that do not fall into the aforementioned risk classes are not subject to any specific restriction of the AI Act and can in principle be used freely.
No OSS Exemption	**No OSS Exemption**	**No OSS Exemption**	**„OSS Exemption" Article 4 AI Act**

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OSS Exemption AI Act

Risk categorisation - AI Systems

Article 4 AI Literacy

Providers and deployers of AI systems shall take measures to ensure, to their best extent, a sufficient level of AI literacy of their staff and other persons dealing with the operation and use of AI systems on their behalf, taking into account their technical knowledge, experience, education and training and the context the AI systems are to be used in, and considering the persons or groups of persons on whom the AI systems are to be used.

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Summary

AI components	**1**	Providers of high-risk AI systems and third parties providing components for those high-risk AI system must conclude a written agreement as per article 25 AI Act. Following article 25(4) AI Act, this obligation does not apply to providers of open source'd - non-monetised - components other then open source'd GPAI-models.
AI-models (*documentation*)	**2**	If the conditions set forth in article 53(1)(a) and (b) AI Act are met, providers of open source'd general-purpose AI models are exempted from the information and documentation requirements as set out in article 53(1)(a) and (b) AI Act.
AI-models (*representative*)	**3**	If the conditions set forth in article 54(6) AI Act are met, providers established in third countries, that place an open source'd general-purpose AI model on the market, are exempted from the obligation to designate an authorised representative established in the Union before placing an AI model on the markets.
AI systems	**4**	The provision of unacceptable-risk, high-risk or limited-risk AI systems under a free and open source license does not exempt the provider from obligations under the AI Act. Article 4 AI act is not applicable to low-risk open source'd AI systems, hence towards providers of low-risk AI systems article 4 AI Act is not enforceable.

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Q&A

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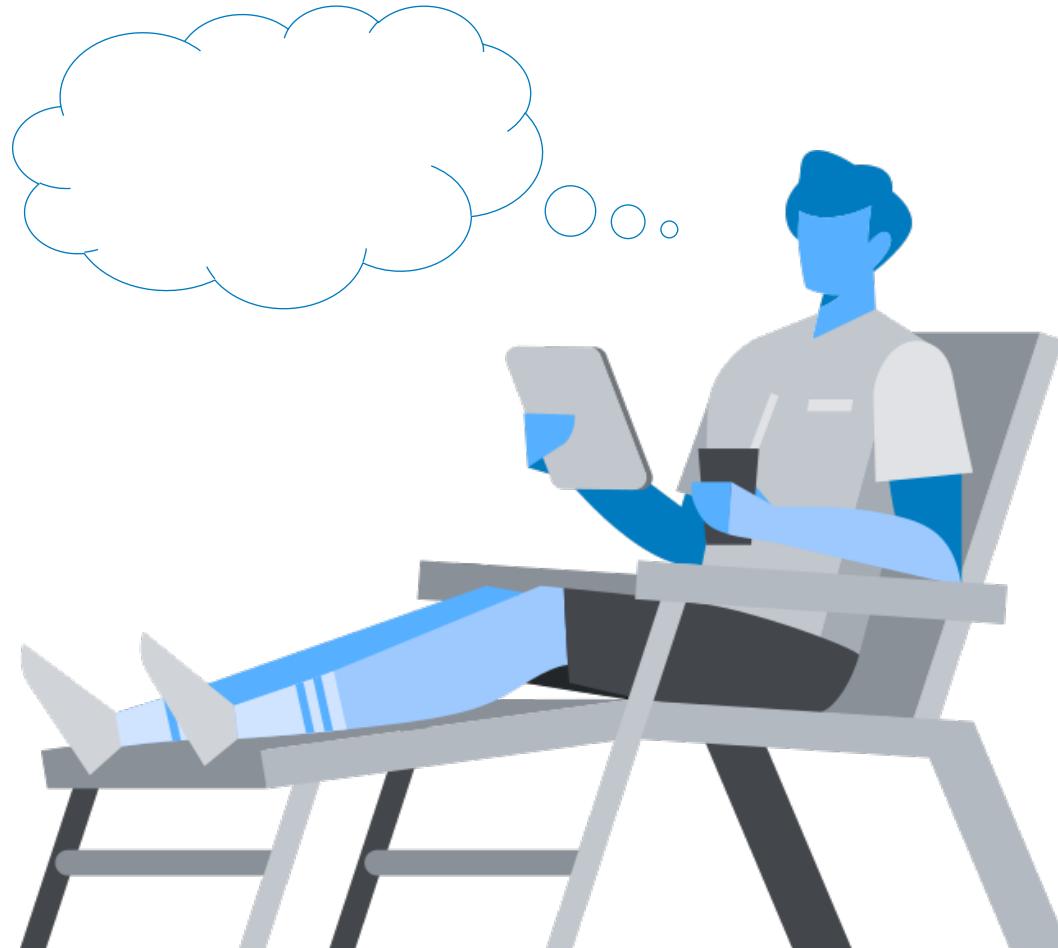
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Q&A

Navigating drifting sands

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Thank you

Navigating trough the changing European Regulations

Janneke van de Westelaken

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