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<u>Consultation on competition in generative AI</u>

News Media Europe (NME) is the voice of the progressive news media industry in Europe, representing over 2,700 news brands, online and in print, on radio and TV.

Following the recent political agreement on the AI Act, the EU must turn its attention to several issues that remain beyond the scope of the Act. Importantly, this includes questions about the application of competition policy to AI systems.

NME has published a [roadmap](#) identifying efforts required beyond the AI Act. The roadmap endorses principles to promote responsible AI.

<u>Introduction</u>

The rise of Generative Artificial Intelligence (GAI) brings uniquely exciting opportunities that the media sector embraces. Innovations such as GAI already play a role in helping news media inform the public and develop new services. We expect that such technologies will unlock important growth opportunities for our industry.

The sound application of competition law to GAI systems is crucial to unlock the creative and innovative potential of the media industry. Publishers are adopting different GAI strategies at different speeds, based on their needs and capabilities. This is mainly because many publishers are SMEs, and so while some are developing their own GAI solutions, others are looking to create new partnerships to facilitate access to new technologies.

At any rate, it is in the greatest of interests of press publishers to have a market for GAI where competition thrives. Unfortunately, our sector is very concerned that the market is already tipping and about the lack of appropriate regulation. In our view, it is abundantly clear that GAI services require specific anti-trust scrutiny and, if needed, inclusion in the scope of the Digital Markets Act.

This contribution provides observations on GAI systems and:

1) Drivers of competition
2) The exploitation of journalistic content
3) Interaction between competition and copyright laws
4) Risks of disintermediation
5) Risk of market tipping and merits of the DMA approach
6) "Strategic partnerships" as a gatekeeper tool
7) Adaptation of antitrust concepts

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1

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1) Drivers of competition

Understanding the main components and inputs necessary to build, train, deploy and distribute GAI systems offers a useful starting point. The activities required to essentially place a GAI on the market are significant and complex and the overview below does not aim to cover this exhaustively.

Overview of inputs necessary to build, train, deploy and distribute a GAI

- Building GAI: the creation of a system architecture design, tuning of hyperparameters, development of advanced algorithms[1], creation of a data storage and management infrastructure, setting up of computational resources for subsequent training.

- Training GAI: the selection or collection of a training dataset for AI models, the pre-processing of the training dataset, the selection of advanced algorithms to train model capabilities, defining of loss functions, training initialisation followed by iterative repetitions of loss computation and backpropagation processes, model validation and evaluation, application regularisation techniques.

- Deploying GAI: the use of integration tools into other applications or systems, use of a model export format, selecting a deployment platform such as cloud service, development of an API, setting up monitoring and logging functions, implementing scaling policies for server load balancing.

- Distributing GAI: the use of dedicated application programming interfaces and website, concluding licensing agreements, preparing user documentation, creation of usage policies and relevant terms and conditions.

The non-exhaustive overview presented above reflects the understanding that many factors can influence the success of GAI systems. At first sight, this could suggest that there may be multiple dimensions along which competition takes place. However, actual competition is more likely to be limited at best. This is because the market has almost certainly already tipped and entrenched the position of a handful of undertakings.

The GAI value-chain reveals that some dimensions of competition between GAI systems are more important than others because they involve resources that effectively cannot be reasonably replicated or only with unreasonable difficulty due to economic, legal and technical obstacles. At the same time access to such resources is necessary to enable new entrants to contest the market position of incumbents and to thereby deliver effective competition.

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[1] eg. Generative Adversarial Networks (GANs), Variational Autoencoders (VAEs), Transformers, Recurrent Neural Networks (RNNs) and Long Short-Term Memory (LSTM) Networks, Attention Mechanisms, Markov Chain Monte Carlo (MCMC) methods.

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2

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In practice, GAI systems are typically not subject to exclusive ownership or control. While some GAI providers develop proprietary models or have exclusive access to specific versions of these systems, the underlying technology and techniques are now often open source. This non-exclusivity allows multiple entities to develop and use GAI systems.

However, GAI systems still exhibit a very high degree of rivalry in their usage due to limitations on the computational resources required to train and run these models effectively. As such, there can be competition for computational resources, in particular to train large-scale models, which indicates that there are in all likelihood high barriers to entry.

Accordingly, important main drivers of competition between GAI systems can observed:

1) Technological capabilities: Companies that develop advanced models need data scientists, data engineers, and other specialists to develop the relevant systems and train models. For the most advanced or popular GAIs, this requires significant computational resources at scale that only a limited set of companies globally can provide. This involves both the need for large-scale computing power and for large-scale storage of information.

2) Data acquisition and quality: Ensuring that GAIs use high-quality data – and therefore high-quality content – is crucial to ensure high-quality outputs. Companies with access to comprehensive datasets can produce better AI outputs while mitigating bias, improving accuracy and consistency, and making more effective use of data enrichment techniques, thus improving overall performance.

3) Preferential access to gatekeeper services: Preferential access can lead to a uniquely important first-mover advantage because of positive feedback loops and an exclusive integration into gatekeeper application interfaces providing access to significant user base that bring exclusive scalability data advantages. Industry partnerships concluded with gatekeepers can also replicate this dynamic, for example through exclusivity agreements or other practices with similar effects.

4) User personalisation and integration: GAIs that can provide personalised recommendations to enhance user experience based on access to user information, and to learn to do this better by doing it, are likely to achieve a higher performance. This is why the impact of preferential access to a highly scalable user base such as that of gatekeepers is so important.

2) The exploitation of journalistic content

In the previous section, the role of data acquisition and quality as one of the main drivers of competition between GAI systems is briefly outlined. This section provides more depth and nuance to clarify the role of data and of journalistic content in delivering quality GAI systems.

High-quality data sets ensure that GAIs can generate accurate and varied outputs. Quality data sets influence the performance of GAI in several ways:

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3

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1) Bias mitigation: High-quality data ensures that the training dataset is representative and unbiased. Biased data can lead to biased models, perpetuating and amplifying existing biases within generative AI outputs. Such bias can in real life replicate social harms relating to race, gender, disabilities, age, and so on.

2) Accuracy and Consistency: Rich and diverse data that is error-free allows GAI systems to generate more accurate and contextually relevant outputs in response to user prompts. This is particularly important to ensure the uptake of such tools through reliability and trustworthiness, as well as to combat disinformation.

3) Data Enrichment: By using high-quality sets, GAI systems can enhance the quality of generated outputs by predicting missing or incomplete attributes when needed. This process known as data enrichment contributes to a more comprehensive and refined dataset that can increase the performance of GAI systems.

It is equally important to understand how GAI systems use data or content. Much of the policy debate is concerned with the use of data for pre-training and training purposes, for example looking at the transparency provisions envisaged in the AI Act concerning General Purpose AI systems.

In addition to such use cases, GAI systems also frequently use data and therefore content that is not necessarily used for training purposes as a response to user queries. GAI systems essentially do this by generating a response to a query while simultaneously scrapping the web in real time to surface relevant information which can be integrated in the generated output.

It is necessary to delineate such use cases to capture the underlying transfer of value between publishers and GAI providers. The value of journalistic content lies to a large extent in its "newsworthiness" and perhaps less in the specific sequence and choice of words and syntax used. Unfortunately, the EU's AI Act fails to recognise this reality and limits its transparency obligations to training and pre-training data.

Turning to what constitutes high-quality data sets for GAI systems it has become common knowledge that these systems work with companies that have basically scrapped the entirety of the internet and without appropriate licenses to do so. Such companies focus on websites that appear to display more reliable content, notably professional media producing high-quality materials such as news articles, books and research papers.

In this context, journalistic content is particularly valuable for GAI systems in many ways which cannot be comprehensively covered in this consultation. In summary, GAI systems can use news websites to retrieve up-to-date information on a wide range of issues related to current events, keeping the language models informed about recent developments.

Journalistic content also undergoes editorial review and fact-checking processes in line with established deontological practice, making it a reliable source of information. GAI systems can therefore use this content to verify facts, debunk misinformation and improve their own

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4

accuracy. In addition, journalistic content also provides meaningful context in which to situate and analyse current events, allowing GAI systems to provide better background information.

More broadly speaking, journalistic content will also help GAI providers to better weigh ethical considerations and to improve bias recognition in generating content in response to user prompts. This allows them to engage better in conversations about current events, politics, economics and so on. Understanding these dynamics highlights the importance of regulatory mechanisms capable of capturing transfers of value between publishers and GAI providers.

3) Interaction between competition law and copyright laws

It follows that a significant amount of content used by GAI systems is copyright protected. Such use must therefore comply with relevant copyright laws which determine when authorisation by rightsholders is required or how exceptions may apply.

Some providers of GAI systems have already criticised copyright law as creating barriers to market entry and hindering competition because the cost of acquiring a large and high-quality dataset could be unreasonable for smaller market participants and new entrants, whereas in comparison it could be relatively insignificant for incumbent technology providers.

It is crucial that such reasoning is not endorsed as the inherent restraint on competition created by intellectual property rights is legitimate and fully justified by other overriding policy goals, such as the protection of the right to property and encouraging innovation and creativity, which must accordingly take precedence.

Recent policy developments in jurisdictions such as Japan and Singapore where public authorities have essentially exempted GAI providers from the need to obtain authorisations from rightsholders for the exploitation of intellectual property should be viewed with great concern. One reason for this is that this kind of approach creates a race-to-the-bottom for the protection of intellectual property.

From a competition perspective, doing away with the need for GAI providers to acquire licenses and authorisations from rightsholders also eliminates an important parameter of competition which instead could and should be encouraged to promote healthy competition between GAI providers.

Much to the contrary, the EU should seek to foster a market for the licensing of intellectual property rights to GAI providers and to thereby create a new dimension along which competition takes place. In that context, a level playing field between all types of AI models (eg. general purpose vs. specialised, open source and proprietary) and their use cases (eg. commercial vs non-profit as part of a public-private partnership) needs to be guaranteed.

In doing so, the EU should encourage negotiation frameworks that are compliant with competition law and which can account for differences in bargaining power, such as the possibility of making use of collective management organisations by rightsholders. This is particularly important since collective management organisations also help create many other efficiencies for the market as a whole.

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5

A good example is the Netherlands where press publishers are partnering with Utrecht University to propose a so-called Dutch ChatGPT. Another project for a Norwegian ChatGPT is also ongoing between publishers and Trondheim University in Norway. Such projects have the potential to foster healthy competition in the interest of media sustainability and pluralism. It is hoped that larger, global AI providers will take note of this approach and compete for licenses.

Furthermore, competition authorities should closely monitor the ability of rightsholders to accordingly reach licensing agreements with larger providers of GAI systems and intervene where necessary. The Commission should consider the significant competition problems that have emerged in the framework of copyright negotiations for the press publishers right between news publishers and big tech, for example in France, Germany and Spain.

By way of context, there is a global consensus among publishers about the very serious concerns linked to the exploitation of content by GAI providers which is taking place at an unprecedented scale and without authorisation from rightsholders. This is leading to litigations in several countries, notably in the US where there is a stronger culture of litigation and where the New York Times is suing OpenAI and Microsoft.

Such lawsuits are usually grounded in copyright law rather than competition law. In the US the discussion concerns whether the exploitation of copyright content amounts to "fair use" in accordance with US case law. In the EU, the discussion instead revolves around if and how the Copyright Directive's "text-and-data mining exemptions" should apply.

While we do not seek to discuss the best regulatory approach for the EU in matters of copyright law in this contribution, it is relevant to stress that the EU's text-and-data mining system which is based on the exercise of opt-outs by rightsholders also has a negative effect on competition.

The reason for this is that GAI systems have by now for many years scrapped the content of news publishers who until recently were unaware of this. By now most European publishers have prohibited such use but in practice this no longer makes any difference, and the practical relevance of opt-outs has become questionable at best given the market realities that publishers face.

GAI systems have by now already been developed, deployed and integrated within other platform services such as search engines. The consequence of this is that there is now a major cost for publishers associated with opting out from text-and-data mining which can be summarised as losing visibility, prominence and performance in search rankings and GAI prompts across all platform services.

Furthermore, the deep imbalance in bargaining power that publishers face in negotiating licensing deals in the context of the press publishers' right is repeating itself with GAI systems. Whereas many GAI providers are unavoidable trading partner with incomparably superior bargaining power, GAI providers can easily do away with a few publishers exercising their right to opt out from text-and-data mining.

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EU Transparency Register ID: 577812220311-81

6

Moreover, GAI providers have at any rate have also ignored the reservation of rights and exercise of text-and-data mining opt-out by news publishers in the past. This deliberate conduct continues at present and there is little that publishers can do to prevent this due to limited resources and the difficulty involved in communicating with these companies, let alone making them comply with the law.

Instead, GAI providers seek to impose on news publishers specific ways of exercising opt-outs by making use of lines of codes developed by GAI providers. For context, this approach is not in any way a requirement under the Copyright Directive which is not prescriptive in that regard, and which makes it clear that the use of terms and conditions is sufficient to exercise an opt-out from text-and-data mining.

By doing this, GAI providers make it more difficult for news publishers to exercise their rights and to opt-out since this operation must be repeated for every single GAI provider. This is not realistic since there are hundreds if not thousands of GAI providers constantly crawling the entirety of the internet in the rapidly changing digital marketplace. This also deliberately ignores the valid reservation of rights exercised by news publishers on their websites, often expressed through their terms and conditions.

The burden placed on publishers by this logic is completely unfair and unreasonable. Instead, the burden of recognising a reservation of rights should lie with GAI providers and their partners, not with publishers. Overall, it is highly concerning that large GAI providers such as Google and OpenAI, back by Microsoft, can unilaterally make and impose rules with no regard for other market participants.

This development should notably be examined in light of the *European Super League* ruling of the ECJ which issues guidance related to the regulatory powers of dominant undertakings acting as hybrid market players, notably where there are significant conflicts of interests requiring attention in the application of anti-trust rules.

4) Risk of disintermediation

The rapid rise of GAI systems is creating serious concerns about disintermediation of press publishers from their audiences and about the lack of regulatory framework capable of capturing the underlying transfer of value between publishers and GAI systems.

Press publishers have already been subject to a similar wave of disintermediation over the past two decades with the rise of search engines. The consequences have been devastating for the economic well-being of the sector and its ability to pursue its economic activities under favourable conditions.

To the contrary, the sector has contracted over a prolonged period resulting in lower media plurality and job and economic losses. This trend has kept in pace with the monopolisation of digital advertising markets by tech giants and is no coincidence.

It is expected that the uptake of GAI tools will grow over time and that consumers will increasingly seek to access information through AI tools of any kind, as is now often the case with search engines. In this case, the long-term trend may have less to do with the merits of the different products and more to do with overriding shifting user habits and new ways of accessing information in the age of AI.

Here and across other specific use cases relevant to other sectors, there is a need for promoting greater scrutiny of AI-generated content to prevent unfair competition with articles written by professional journalists. The sector is concerned that GAIs could further lead to a heightened competition between publishers who are genuinely committed to producing valuable articles to inform citizens in line with deontological practice and GAI providers with little to no adherence to journalistic values.

In competition terms, there is a problem of growing substitutability between the products and services of gatekeepers and of news publishers. As the services of gatekeepers increasingly integrate GAI-powered answers in response to user prompts, for example as part of a search engine, the generated answer can act as a substitute for search results.

It follows that in such cases, the generated answers also have a substitution effect on the content of publishers as users will no longer click on the publisher links or only do so much less. The result of this is lost traffic and advertising revenues for publishers and, more importantly, a structurally driven redirection of advertiser spending in the market towards GAI-powered platforms.

The consequences of disintermediation are serious as it means that the intermediary who plays a merely passive role that is often very limited in the actual creation of value assumes the structural role of a gatekeeper who can engage in the conduct of a rent-seeking monopolist and act independently of the competitive pressures upstream in the value chain.

In practice, disintermediation undermines the ability of publishers to monetise their content as the "attention" is captured by an intermediary who is in turn able to carry out the monetisation for itself, which in turn reduces the ability of publishers to finance the content that they produce, for example through advertising – initiating a self-reinforcing cycle of economic precarity.

It must be stressed that the significant risks outline above regarding the further disintermediation of publishers from their audiences, and therefore the emergence of negative effects on competition, is also facilitated by the deliberate disregard of GAI providers for obtaining rightsholder authorisation for the use of copyright protected works.

Therefore, where possible, competition enforcement should seek to support other EU policies such as copyright law, to prevent that harms to the sector can materialise based on the misuse of intermediation power.

5) Market tipping and merits of the DMA approach

In light of the actual level of competition between GAI systems discussed across the previous sections, market tipping is already ongoing or has already taken place. At any rate, the consequences of this in digital markets are well-known to create structural economic bottlenecks and inefficiencies that competition law is slow to tackle on a case-by-case basis.

The recognition of the same problem in the case of other services identified as core platform services under the DMA has justified an ex-ante regulatory approach. The rationale is indeed that this helps tackle scale advantages and excessive intermediation power. It is therefore relevant to discuss the possible regulation of GAI systems under the DMA approach.

Meanwhile, even if GAI systems are not currently regulated as a CPS under the DMA, they can fall within the scope of the rules provided that they are integrated within other designated CPS eg. search engine or social network. We expect that very soon virtually all the CPSs of gatekeepers will be GAI-powered in one way or another.

To be clear, the discussion that needs to take place is whether a market investigation should be launched under the DMA to determine whether the standalone GAI systems of gatekeepers, or those that are deployed through them, should become an full category of CPS in their own right. The market investigation should consider issues related to contestability and unfair trading practices, including when it comes to the conclusion of copyright licenses.

One argument supporting the inclusion of GAI systems in the scope of the DMA is that gatekeepers are already in possession of huge troves of proprietary data on which train GAI systems. As such, they may already be in possession of a serious data advantage at scale that may be difficult for competitors to match based on the merits of their product. Here, the limitations imposed by the DMA on the cross-used of data across CPS could limit tipping.

Another argument in favour is that inclusion in the scope of the DMA could trigger mandatory notifications to competition authorities about acquisitions that otherwise would trigger no scrutiny. As discussed in the next section, such acquisitions can be hugely consequential for competition in and for the market even where they only involve a minority of shares and otherwise no formal control of the company acquired.

6) "Strategic partnerships" as a gatekeeper tool

Strategic partnerships between gatekeepers and successful GAI startups are increasingly popular. Such forms of collaboration have become a favourite vehicle of gatekeepers, who can avoid unwanted regulatory attention from acquisitions, and of new GAI entrants who see potential for growth and to establish themselves.

The partnerships concluded by Microsoft with OpenAI and Mistral respectively are typical examples of this. Other gatekeepers such as Google, Apple and Amazon also have concluded comparable partnerships which despite receiving less attention also raise equally important questions regarding the underlying motives and power dynamics at play.

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9

In a nutshell, these partnerships involve gatekeepers giving GAI providers access to financing, unrivalled scalability, computing resources and to additional data at an early stage, while GAI providers give gatekeepers more knowledge resources, early access to the latest cutting-edge technology and an insurance policy against shortcomings in their own proprietary GAI systems.

For these reasons, the rationale of such agreements is fundamentally about further entrenching the market position of gatekeepers. As such, these partnerships can be characterised by their anti-competitive intent. Consequently, their net effect on competition is highly likely to be negative in multiple aspects, meaning that such agreements should come under much greater scrutiny than they currently are.

It is critical to ascertain as part of such scrutiny to what extent gatekeepers exercise effective control over new GAI players over time. When gatekeepers own not only important stakes in such GAI startups but also provide them with financing and the computational resources required to place GAI products on the market, there are legitimate doubts about whether there is effectively any difference between an acquisition and a "strategic partnership".

The next European Commission should therefore launch a market investigation for the designation of GAI systems as a gatekeeper CPS under the DMA together with a sector inquiry into GAI systems, which should include a focus on early acquisitions and "strategic partnerships" to inform enforcement, in cooperation with the newly established EU AI Office.

In addition, such an inquiry by competition authorities should also investigate how GAI impacts competition in important markets for content creators and rightsholders, including but not limited to search engines and online advertising. These markets are of major importance because they allow content creators and rightsholders to ensure access and visibility to their content and to monetise and invest further in said content.

7) Adaptation of antitrust concepts

Two antitrust concepts that are likely to require attention are the notions of self-preferencing and of discrimination, or rather of the need for fair, reasonable and non-discriminatory conditions. Both concepts are to some extent addressed in the DMA because they are indeed recurrent problems in the commercial practices of gatekeepers.

By seeking to control the upstream resources of the GAI value-chain, gatekeepers control not only the underlying infrastructure but also the modelling of foundational models and of general purpose AI systems, including GAIs. This makes them the gatekeepers for all other specialised applications, including within GAI systems.

Accordingly, they are in a position to engage in self-preferencing under various forms, for example by affording greater visibility across their other CPS to their own downstream applications and products. Alternatively, gatekeepers could also engage in indirect self-preferencing and afford greater visibility to other downstream GAIs that make use of their proprietary AI systems upstream.

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10

In this context, other problematic conduct that may arise includes anti-competitive tying, bundling and refusal to deal or exclusive dealing in vertically integrated products and services. Discrimination in the supply of GAI services and the conditions thereof could also be used by gatekeepers to entrench their position and exclude potential competitors.

For these reasons, the use of FRAND terms to dealings by certain GAI providers should be considered favourably. In cases of "strategic partnerships" which have the practical effect of entrenching the position of existing gatekeepers, FRAND access to resources of the GAI startup could be envisaged to prevent exclusionary conduct from harming competitors.

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11