

Competition in Virtual Worlds and Generative AI European Commission - Calls for contributions

(Deadline for contributions: from 09.01.2024 to 11.03.2024)

Competition in Generative AI EUROCINEMA contribution

EUROCINEMA represents producers of the cinematographic and audiovisual industry. EUROCINEMA is based in Brussels.

1) What are the main components (i.e., inputs) necessary to build, train, deploy and distribute generative AI systems? Please explain the importance of these components

To train a qualitative and trustworthy generative AI system (GenAI system), it is necessary to:

- Have access only to legally accessible data sets of editorialized and/or copyrighted contents that have not been opted out (notably by a machine-readable system) by one of the rightholders.
- These data sets should include reliable and authoritative metadata and interoperable identification standards which describe and identify the content that is mined for training purposes.
- There must be a clear template completed with the information necessary to the rightholders abiding by the rules of the AI act (see recitals 52c and its recitals)

To deploy and distribute trustworthy generative AI systems:

- It is necessary to make sure that the content generated (outputs) are not infringing a copyright (Article 17 of Directive 2019/790 on DSM Copyright for the OCSSP (Online Content Sharing Service Platforms), if applicable, and article 6 for the DSA¹)
- There must be an internal policy of the deployer making sure that the rightholders have the capacity to register a complaint on the use of their data in the training and the output generated.

¹ DSA REGULATION (EU) 2022/2065 - Article 6 - Hosting

"1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, the service provider shall not be liable for the information stored at the request of a recipient of the service, on condition that the provider:

(a) does not have actual knowledge of illegal activity or illegal content and as regards claims for damages is not aware of facts or circumstances from which the illegal activity or illegal content is apparent; or

(b) upon obtaining such knowledge or awareness acts expeditiously to remove or to disable access to the illegal content.

2. Paragraph 1 shall not apply where the recipient of the service is acting under the authority or the control of the provider.

3. Paragraph 1 shall not apply with respect to the liability under consumer protection law of online platforms that allow consumers to conclude distance contracts with traders, where such an online platform presents the specific item of information or otherwise enables the specific transaction at issue in a way that would lead an average consumer to believe that the information, or the product or service that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control.

4. This Article shall not affect the possibility for a judicial or administrative authority, in accordance with a Member State's legal system, to require the service provider to terminate or prevent an infringement."

2) What are the main barriers to entry and expansion for the provision, distribution or integration of generative AI systems and/or components, including AI models? Please indicate to which components they relate.

Not concerned as representative of audiovisual producers.

3) What are the main drivers of competition (i.e., the elements that make a company a successful player) for the provision, distribution or integration of generative AI systems and/or components, including AI models?

As producers, we believe that it is key to have reliable and legal inputs. For this to happen, the data on which the system is trained must be authorized (legal and not opted out, should article 4 of the Copyright Directive 2019 apply).

As for the output, it is necessary to implement a labeling (with watermarking) that marks the productions made by AI systems to distinguish them from the one produced by human beings. This is the key to the trustworthiness of the system as well as for copyright protection issues (only works created with human intervention should benefit from copyright protection).

4) Which competition issues will likely emerge for the provision, distribution or integration of generative AI systems and/or components, including AI models? Please indicate to which components they relate.

A. **The competition concerns** we are up to are the following:

- the big tech companies are contributing to a closed eco-system by setting standards which will lead to entry barriers for the new entrant.
- this will lead to a concentration of the market.
- there is a lack of transparency (including following the AI Act which is a great progress but nonetheless not enough satisfactory). This is a major hurdle to the implementation of article 4 of the 2019 Copyright directive on opt-out, should this article apply to Generative AI systems. Indeed, we need to know what data and which works are subject to crawling and mining. In addition, the opt-out needs to be checked in case of infringement. Copyright must be abode by.
- the synthetic contents produced are in competition with the human's being productions. Purely synthetic contents should not benefit from copyright protection.

B. **Why transparency?** It is needed for the following major reasons:

- the auditability is an answer to information asymmetry.
- it helps to prove a damage and to exercise a right.

C. **Asymmetries:**

We note the following asymmetries that affect the market:

- General considerations:
 - o very few players hold the key to industrializing the sector notably because of the necessary investments². Only the big companies have:
 - The mastering of the equipment
 - The capacity to train on a massive amount of data
 - The computing power necessary to produce high-performance results.

² See FT "Microsoft's and Google's AI plans clouded by concerns of rising costs. Tech giants tout new tools that will need significant investment as the technology takes hold" (31.01.2024) <https://www.ft.com/content/a062df1d-aaf5-4604-8f97-4444170482f2>

- The big companies are contracting agreements (like Microsoft and Open Ai for instance) and even though they don't have cross-participations, they agree (contractual agreements).
 - These oligopolies are surrounded on the market by a wide range of startups (eco-system) where you can deplore self-preferencing, tied sales, infringement of RGPD, unfair contractual relationships (discriminatory, not transparent etc..)
 - Abuse of dominant position: notwithstanding the foregoing, the SMEs depend on these big companies (there services embedded into the SME's services or the results of the GenAI models themselves). Therefore, we can consider that these dominant oligopolies are distorting competition on the market through two possible mechanisms:
 - Creating or reinforcing their dominant positions
 - Accentuating the economic dependance of economic operators that are using the oligopolies' services, or which are embedding the oligopolies' services into theirs.
 - Relevant market: regarding the definition of what is a relevant market to assess the anti-competitive behaviors, it is necessary to have a two folded analysis:
 - An analysis of the upstream (where the technology is based)
 - An analysis of the downstream where the AI is used as a service OR where the AI technology is used to upgrade an existing service (SGE of Google for instance). Indeed, AI is modifying the functioning of existing services. For instance, when the AI, for a research tool, is suggesting the answer rather than a link to a website.
- Anti-competitive agreement should be notified as concentration operation to be notified to the Commission:
- The cross-participation agreements between oligopolies (or not) can be a threat to the development of an EU GenAI market.
 - The threats could be the following:
 - The creation of professional organization representing the GenAI providers that define the standards applicable to the sector. These standards are not interoperable and create a lock-in effect.
 - The signature of exclusive agreements and partnerships that lead to a consolidation of the sector (ex: agreement between Microsoft and Mistral). Could we consider that these exclusive agreements represent notifiable concentration operations³? Same idea for the agreement between Open AI and Microsoft.
- Lucrative competitive fault:
- the GenAI providers, on which depend many SMEs to provide their services, define when they intend to abide by the law and the price, they are ready to pay for its non-compliance. Indeed, if the producers are using GenAI systems for their production

³ See Article 22 of the COUNCIL REGULATION (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation): <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139>

whereas they are responsible for the copyright respect, they will decide when and how much they are ready to pay for that⁴.

- We do not believe that this is acceptable that a competitive fault be lucrative.
- Indeed, some damages will never be compensated in the AI Act: the damages linked the training period, the damages for the deterioration of competitive conditions in terms of content visibility.

5) How will generative AI systems and/or components, including AI models likely be monetised, and which components will likely capture most of this monetization?

As an organization of audiovisual producers, we do not monetize the use of the Generative AI systems. However, we do intend to monetize the use of the copyrighted content and associated data regarding the works we produce and own. The audiovisual works are collective works with authors and performers.

In the case of opting out of our catalogues (should it apply here), we want to retain the option of being compensated either through a collective payment or through an agreement with the GenAI providers.

The question remains as to whether it is indeed possible to opt out since the **transparency** foreseen **into the AI Act** is:

- **Too narrow:**
 - the training period is out of scope with no obligation to keep the metadata related to the copyrighted data and
 - the GenAI systems out of the market are not concerned.
- And the “sufficiently detailed summary” is a **quite vague notion**.

The **role of the Commission will be key** on this issue:

- To **negotiate the template** to be fulfilled by the GenAI providers.
- To **define an interoperable and standardized opt-out system** that will gather all the initiatives sector by sector. The role of the EUIPO could be key on this point.
- For the agreements between the rightsholders and the GenAI providers, the Commission must put in place tools, impartial industry surveys.

6) Do open-source generative AI systems and/or components, including AI models compete effectively with proprietary AI generative systems and/or components? Please elaborate on your answer.

EUROCINEMA is not the right organization to answer this question. However, it has to be noticed that once reaching a certain size and becoming commercial, all AI Gen software companies initially based exclusively on not-for-profit foundation or research models are abandoning open source systems and/or components (or limiting them to their “basic” offers) in order to adopt proprietary

⁴ See the NYT court trial : <https://www.ft.com/content/1cc0c759-946c-41c8-ae0e-b2d8c4c09586?desktop=true&segmentId=7c8f09b9-9b61-4fbb-9430-9208a9e233c8#myft.notification:daily-email:content> : Financial Times March 4th 2024 : “The news organisation, which is seeking billions of dollars in damages, claimed the two groups had sought “to free-ride on The Times’s massive investment in its journalism by using it to build substitutive products without permission or payment”.

systems and/or components for there more developed models (see for instance Open AI and, more recently, Mistral AI).

7) What is the role of data and what are its relevant characteristics for the provision of generative AI systems and/or components, including AI models?

See question 1.1 above.

8) What is the role of interoperability in the provision of generative AI systems and/or components, including AI models? Is the lack of interoperability between components a risk to effective competition?

See above. Yes, the lack of interoperability between GenAI components is a risk to effective competition, as it favors a “winner takes all” situation for those who gather first all necessary data and computing power within proprietary systems and/or components.

9) Do the vertically integrated companies, which provide several components along the value chain of generative AI systems (including user facing applications and plug-ins), enjoy an advantage compared to other companies? Please elaborate on your answer.

Yes, see above.

10) What is the rationale of the investments and/or acquisitions of large companies in small providers of generative AI systems and/or components, including AI models? How will they affect competition?

See above.

11) Do you expect the emergence of generative AI systems and/or components, including AI models to trigger the need to adapt EU legal antitrust concepts?

- A. **Partnership:** As explained above, we trust that only partnership with the US big companies will allow us to innovate in this field of activity. The amount of data needed to operate, and the power of calculation require huge investments that an EU company cannot afford. Partnerships are therefore the key to success along with strong ex-ante regulation and ex-post competition rules.
- B. **DMA:** The DMA is a first strong step, but we need to make sure that it *includes the new gatekeepers* that are Open AI, Google Bard or SGE⁵. Besides, the DMA only covers big intermediaries in the market but does not cover the GenAI systems used by a company⁶.
- C. **TDM exception:** In addition, the use by the GenAI systems of the TDM exception (article 4 of the Copyright directive⁷) needs to be accompanied by the Commission through **guidelines**,

⁵ Google Search Generative Experience.

⁶ As explained above, there may be a situation where a GenAI system is trained and used within a company without being within the scope of the AI Act. This training is used to generate content without the consent of the rights holders.

⁷ Directive (EU) 2019/790 17 April 2019 on copyright and related rights in the Digital Single Market: Article 4 - Exception or limitation for text and data mining.

interoperable metadata, and a common template for the transparency of the summary of the data used⁸. These guidelines and code of practice⁹ must be mandatory¹⁰.

As for the output, the **content generated, the watermarking obligations** (transparency of the deepfakes) provided in article 52 of the AI Act should be implemented through common and/or interoperable standards¹¹.

Finally, **collective actions must be facilitated**¹² by EU law and **exequatur agreements** should be sought so that we can have a swift digital implementation of the EU court decision against the US companies we are dealing with¹³.

12) Do you expect the emergence of generative AI systems to trigger the need to adapt EU
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See above.

⁸ See article 52.1.d) of the AI Act: "(d) draw up and make publicly available a sufficiently detailed summary about the content used for training of the general-purpose AI model, according to a template provided by the AI Office."

⁹ See article 52e) of the AI Act

¹⁰ See Recital 60t of the AI Act that provides that in case no Code of Practice is agreed upon, an alternative solution must be found: **(60t)** *The Codes of Practice should represent a central tool for the proper compliance with the obligations foreseen under this Regulation for providers of general-purpose AI models. Providers should be able to rely on Codes of Practice to demonstrate compliance with the obligations. By means of implementing acts, the Commission may decide to approve a code of practice and give it a general validity within the Union, or, alternatively, to provide common rules for the implementation of the relevant obligations, if, by the time the Regulation becomes applicable, a Code of Practice cannot be finalised or is not deemed adequate by the AI Office. Once a harmonised standard is published and assessed as suitable to cover the relevant obligations by the AI Office, the compliance with a European harmonised standard should grant providers the presumption of conformity. Providers of general-purpose AI models should furthermore be able to demonstrate compliance using **alternative adequate means**, if codes of practice or harmonized standards are not available, or they choose not to rely on those."*

¹¹ See EP Briefing on Generative AI and watermarking (December 2023)

[https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/757583/EPRS_BRI\(2023\)757583_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/757583/EPRS_BRI(2023)757583_EN.pdf)

¹² See Alexandra Bensamoun's article on anti-competitive behaviors "Intelligence artificielle : pour l'émergence d'un écosystème européen éthique et compétitif" LA SEMAINE JURIDIQUE - ÉDITION GÉNÉRALE - N° 3 - 22 JANVIER 2024 - © LEXISNEXIS SA

¹³ See Eurocinema's note on that topic "EC Public consultation on the protection and enforcement of intellectual property rights in third countries EUROKINEMA's contribution" (13.11.2020)