

EUROPEAN COMMISSION – DIRECTORATE GENERAL FOR COMPETITION

Response to the Call for Contribution on Generative AI

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Preliminary observations

1. Although the rise of Artificial intelligence (AI) dates back to the 50's¹, the advent of massive use of artificial intelligence since the launch of ChatGPT by the public in 2022 after a decade of training is reshuffling the cards in the global competitive equilibrium of the Internet and the platform economy. AI models have long been used in the digital economy, but Generative AI is another type, as it has the ability to infer. It is notably because of this ability of inference that GenAI poses difficult challenges in terms of transparency and explainability. This makes a significant difference with algorithms as we know them up to now under antitrust law. This doesn't necessarily mean an upheaval in competitive thinking, whose malleability has enabled it to adapt to a multitude of changes. It does mean, however, that we need to reflect on at least two dimensions: the impact of this technology on competitive analysis, and on enforcement methods in a multijurisdictional context.
2. Most of the recent focus has been on the upstream technology markets, and the recent update by the UK CMA of its initial report on foundational models is a masterpiece² both in terms of substance and form. The CMA has notably conceived one of the clearest figures (figure 3) representing the different levels of the value chain of the markets of GenAI, the upstream and downstream levels. Another remarkable aspect of this report is its crystal clarity on how the market structure is made of at the present time, how vertical integration and relationships matters³ and the extent to which tech conglomerates are well positioned to catch the value and growth of such innovation. It reveals a deep and constructive dialogue with scientists, that is a pre-requisite if enforcers wish to stand ahead of the curve and understand the underlying dynamics.
3. Without prejudice to the importance of upstream markets and in particular the vertical integration of few market players, it is as much important to understand and evaluate the impact of GenAI on the downstream dynamics, yet considering vertical integration, relationships and conglomerate effects and the challenges they pose in terms of antitrust enforcement.
4. GenAI can be factored in the actual EU competition legal framework both in terms of merger control and anti-competitive practices. Yet there are several challenges in terms of enforcement that seem specific to this technology.

¹ McCarthy, N. Rochester, C.E. Shannon, A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence, August 31, 1955.

² CMA, AI Foundation Models Initial Report of September 18, 2023.

³ Google Cloud souhaite collaborer étroitement avec des acteurs majeurs, comme c'est déjà le cas avec Mistral" (journaldunet.com)

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

5. The main components are i) datasets – archive data but also new, fresh, qualitative, relevant, and reliable data, which are as much important ii) immense computing power, iii) cloud infrastructure, iv) human and financial resources.
6. At the very upstream level where primary models are conceived, the market is concentrated around less than 5 market players who have all these 4 strengths and happen to be vertically integrated so they can deploy secondary, tertiary models, integrate them in their ecosystems making it more profitable, more efficient, and more relevant thereby reinforcing their already strong market power vis-à-vis all markets players with whom they interact, to which they also offer some of their products or services.
7. It is indeed on their primary models that new models are created what could be called secondary, tertiary models which are fine tuned and even specialized at some points for intended uses. It is on their cloud that these models are supported and also on their proprietary datasets where applicable. At this level, market players which are a multitude of startups, do not necessarily have all these 4 categories of necessary inputs and this is why they need to partner with stronger market players (Mistral with Google and Microsoft, OpenAi, etc...) for the cloud services and infrastructure, for the datasets that are better than the already much used open web, for their human and financial resources too. At this secondary level, vertical relationships and/or minority shareholdings are crucial and there already exists dependency over whatever input is necessary to industrialize.
8. Most if not all actual LLMs have been trained on the whole open web over the last decade (Common Crawl⁴ for example to mention the most commonly known), and on “proprietary databases” i.e. contents that are either appropriated in a closed platform ecosystem without prejudice to the rights of their holders or those of the latter in their own database (website and app). For example, cold press contents that have been available for free on the open web have certainly been included in the historical training of actual models, but hotter contents too – when available on a platform should the LLM be trained on the data appropriated by this platform. Ultimately, and until opt-out from AI robots’ crawlers by press publishers, it is also likely that their proprietary and IP protected contents have also been used.
9. Although data and content is widely available, now that models and systems have been trained over what is available, there is a major stake in the databases over which current and future models will be trained and fine-tuned or specialized. A data /content that is qualitative, relevant, reliable and recent is likely to become a scarce resource with the development of partnerships and agreements among operators, with limited interoperability, pretextual use of privacy concerns and the data appropriation mechanisms such as the reduction of third party cookies which in turn is likely to increase the value of the “proprietary” databases, notably those appropriated by big tech conglomerates, which are not comparable in their depth and size to any other individual database.
10. In European Law, beyond the IP and neighbouring rights protection, there is a set of important rules protecting Europeans from the exploitation of data as an input, Directive 1996/6 of 11 March 1996 on the legal protection of databases. A press publisher’s set of content, editorial line and user interaction may indeed qualify as a database within the meaning of this Directive.

⁴ Mozilla Insights, S. Baack, *Training AI for the price of a sandwich – Common Crawl’s impact on Generative AI*, February 2024.

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.

11. Barriers to entry, beyond the technical skills to build GenAI models or systems, are access to qualitative, relevant, recent, and reliable databases, cloud infrastructures and services, computing power and financial resources. At the present time, as Nvidia CEO recently declared, it is almost possible to build a GenAI solution with no code. Yet, this does not refer to foundational and primary models, and even some of the secondary ones. This can only refer to the most downstream level of deployment to the user, for example the ability for an end-user to create its own gpt as if it was an app, but that is just the tip of the iceberg. Barriers to entry are extremely high, they are of technical, financial, infrastructural nature and scale.
12. The question of barriers to expansion sheds light on two very important features of GenAI conception and deployment – i) the need to combine the 4 above-mentioned strengths to be able to industrialize a model through a user interface (qualitative and reliable databases, computing power, cloud infrastructure and services, human and financial resources), ii) the dependency of most potential innovators on vertical relationships with big tech conglomerates, and likelihood of internalization of innovation through targeted minority shareholding and acquisitions.
13. One likely barrier to expansion for which antitrust have a say is likely through contractual restrictions – exclusivities, absence of interoperability, absence of transparency for example. The more contractual restrictions arise, the more fragmented will the secondary upstream market be and thereby the downstream dynamics be altered. If there is technical skill, expansion can still be limited if no partnership is entered for industrialization – cloud infrastructure and services, access to qualitative databases, computing power. The foundational models developed over the last decade by big tech conglomerates are those on which almost all models and systems are currently built – because, they have been filtered, tailored during ten years without control or boundaries. For this reason and the fact, they enjoy so much market power in several distinct but connected markets (search, app stores, advertising, browsers, etc.), they have the key to arbitrate on which innovation should emerge and when.

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?

14. As the market is not yet mature, funding is a crucial factor of development of GenAI companies. Investments, through partnerships or any other forms, even for a minority share should be carefully looked at by competition authorities.
15. The main drivers of competition we identify at this stage in the market for the development and the provision of AI models are the quality, the power and the diversification of the models and systems – general or specialized. Every day we can observe the release of new models, some of them are characterized by better performances in some domain (as legal-specialized AI models) or for specific tasks or language skills. Quality here refers to an improved ability to contextualize and infer more relevantly and precisely based on the said context.

16. At downstream level, the same competition parameters can be relevant and feed in return improvement and new models. When integrated into a product or service in the downstream market, an integrated AI system can spread new functionalities, capabilities, positive externalities (even environmental – ex for precision farming), thereby creating opportunities to feed new models, which is also why it is interesting for big tech conglomerate to deploy GenAI connecting dots within their ecosystems.

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.

17. Competition issues arising from the emergence and irrigation of GenAI in the digital economy are multiple and somehow each of them is individually known by European antitrust authorities. But GenAI requires at least to reinforce two parameters: i) the need for a conglomerate approach of antitrust issues in particular the systematic characterization of theories of harm engaging all the market players of the ecosystem, not a siloed sector specific approach, ii) the need to accelerate enforcement with a wider use of interim measures, given that any market where GenAI is deployed (existing or new) is subject to irremediable changes (both exclusionary and exploitative) in a very short period of time (3-6 months).

18. Competition authorities should be very well aware and monitor vertical relationships across the GenAI value chain, not only because there may exclusivities, but also restrictions to interoperability, to the set of data used, and many other parameters which are essential to make a GenAI tool relevant and the list is non limitative.

19. In terms of abuse, it should be borne in mind that while GenAI technologies can facilitate the creation or reinforcement of a dominant position, it is very difficult to characterize it at the present moment at least at upstream levels of the conception of models and systems. Nonetheless, for those players who are among the conceivers of primary foundational models who are big tech conglomerates with already strong market power and dominant in some distinct but connected markets, GenAI may reinforce their dominance and the correlative dependency of other market players.

20. At the same time, GenAI may also help new entrants to enter more traditional digital markets such as those for the production of informational content for example, by enabling the creation of content, without IP and neighbouring rights, thereby disturbing the actual position of press publishers for example, while putting their contents in competition with those generated by GenAI. Where such competition may be distorted by dominant position on distinct but connected markets, for example those of advertising, it may result in abuses of dominant position.

21. Finally, and although the EU has no uniform antitrust rules in this respect, abuse of economic dependency shall be subject to enforcement. Not only does it prove relevant at the time of emergence of new markets and market dynamics because there is no need to characterize dominance on the side of the provider of GenAI but rather to qualify dependency, but also, it is a complementary approach and tool of the same behaviour.

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

22. GenAI components **at upstream level** (infrastructure, services, databases, computing power and resources) may be monetized through :

- Capital : based on a valuation of assets, notably the training database and infrastructures.
- Work : based on the remuneration of the workforces that manage, conceive, build, and train the technology.
- License of rights to use: based on a lump sum or a precise valuation, IP and non-IP protected contents, protection under database Directive.
- Competitive value of the input / vertical integration: the value of a model/system at primary, secondary, tertiary levels for a downstream player with all the features and fine-tuning abilities. It is too early to know exactly how a market player values a foundational model or a secondary model, to build its own.

23. GenAI tools, products and services **at downstream levels** also have a distinct and complementary value that can be monetized. For a search (or answer) engine, a press content has a particular value if it helps answering a user request. The more it is precise, recent, relevant, and reliable, the more value it has for the GenAI tool (see for example how Gemini works). The most commonly known and reputable press publishers around the world have a high probability of being well positioned here to monetize the data inferred through their press contents. But for a specific local request, a specific local content may have more value. There is no uniform way to apprehend the value and monetization of a content/data and its use by GenAI.

24. GenAI will also help those who use it and big tech conglomerates in the first place to value data use for advertising purposes so as to target more precisely and relevantly. At the same time, there are several initiatives that are undergoing, and which aim at reducing the volume of data exchanged among online operators, vs those who are part of a closed ecosystem. In such context, it is likely that GenAI will help optimize the value of data within already closed and powerful ecosystems.

25. Finally, there is value in feedback data. When for example journalists work on software using GenAI tools, they help feed the model by feedback data which in turn help improve the next version. This can be included in work-based value, or as a distinct source of monetization, but for the provider of the GenAI model, particularly if it is a vertically integrated company. This may raise issues if provided in bundle, or for “free”.

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.

26. Yes they do. It is interesting to note that open source is rather considered with reluctance in the US for they are capable of excesses and misuses, while proprietary models are seen more protective. On the contrary, open-source models are viewed with more trust as there is more transparency by

the EU. A question is access to the model and its features, and the corresponding responsibilities that are incurred for the use of such models. The openness of the model is not necessarily what makes it relevant or more likely to succeed. It is the business model that underlies the innovation and the level of control of the reliability of the partners who help build it. A proprietary model will enable choosing certified partners, integrators or service providers.

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?

27. Data is what makes the GenAI model able to infer based on a “context”. Without data, the technology is blind and cannot make proper and relevant inference. The more data is used, the more qualitative, filtered from bias, recent, reliable, fresh, and relevant, the more relevant the GenAI will be.
28. Given that the whole web has already been crawled to train all the foundational models in the last decade, now there is a race for relevant databases – proprietary such as those appropriated by big tech platforms, and fresh new data such as press content. This also explains the rise of new functionalities in devices – secret journal, notes, sensors in all connected devices. These all help better infer an occurrence from a set of other based on reality.

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?

29. Interoperability is what will enable the future digital ecosystems to be usable across devices. GenAI is embedded in an infrastructure, in a cloud, on a device or on an operating system. The more fragmented and non-interoperable GenAI tools are, the more those who control them will enjoy market power and the less users – both business and individual, will be able to make autonomous choices for their intended uses.
30. Cloud-based services for the deployment of AI models, are mainly provided by incumbent firms such as Google, Microsoft, and Amazon. The integration in the existent cloud services could raise some risk of lock-in in incumbent ecosystems and increased dependence of businesses on Big Tech solutions. The Data Act wouldn't be a sufficient response to this concern as the FMs cannot be accessed otherwise, this means that an FM developed by the incumbent could be accessed and deployed only via its cloud services and AI deployment tools. For example, Vertex AI on Google Cloud provides access to Gemini FM and to the tools necessary to deploy it for business purposes in the downstream market (see Build with Gemini).

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.

31. Vertical integration in the sole GenAI value chain is not the only competitive advantage that should be underlined. Companies that possess cloud infrastructure have a significant advantage in developing their own AI models as the costs of training is reduced. Moreover, if they have access to data because of their bi- or multifaced markets, they also benefit from this for the building and training of their own models.
32. Tech conglomerates that are at the heart of ecosystems – cloud infrastructure and services, operating system, browser, search or answer engine, devices, app stores, online advertising services, enjoy unrivalled competitive advantages that they are currently maximizing by creating connections within their ecosystems (gemini for Google, copilot for Microsoft). Connecting the products and services, the dots, within a saif ecosystem, maximizing the value of data, building unrivalled sets of qualitative, fresh and reliable internally appropriated data vs any individual wish to develop GenAI products or services. There is a question of scale, size, precision, targeting, and the question of the obvious ability and incentives to leverage to the benefit of the tech conglomerate to maximize the outcome.

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?

33. It is multifactorial. It can be diversification both in terms of datasets and finalities. It is likely that the process reveals new possible outcomes, which in turn generate new opportunities as a trampoline would do. The rationale lies primarily in diversification as in any other kind of tech conglomerate reflection.
34. Not all innovations can come out from internal R&D even for big tech conglomerates. There are many GenAI projects that have seen lights first in military uses or mixt uses, in the US, in Asia, in Israel, in the UK and in the EU.
35. Behind an investment there are mans and opportunities, interpersonal relationships that make a project more visible than another. Human resources are key – where they are sourced (universities and labs), where the R&D labs are located, funded, and made able to develop innovative technologies.
36. National and European funding of R&D&I research and a flexible State aid policy enforcement on GenAI projects and funding is key to make a startup nation attractive to investors and visible for them.

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?

37. GenAI can be factored in the actual EU competition legal framework both in terms of merger control and anti-competitive practices.
38. Investigating Generative artificial intelligence through the lens of competition law requires, as notably pointed out by the revised EU Market Definition Notice⁵ a “forward-looking application of market definition”⁶, to the extent GenAI technologies may lead to effective, rapid, and substantial changes in competitive dynamics. In this exercise, it shall be underlined that “Artificial intelligence” doesn’t refer to a product or a service but rather to a technology which may be used as a service or as an input, integrated either into a product, a service, or a production process⁷.
39. The potential of GenAI to enable, facilitate and accelerate anticompetitive practices is as infinite as its abilities. Somehow, antitrust enforcement is already familiar with many ways to collude with the help, support or through a technology. Works undertaken on algorithmic collusion referring to a: three-fold typology (i) explicit, thresholding prices, quality, or innovation; (ii) hub-and-spoke; (iii) tacit all specific to pricing algorithms⁸ is very instructive. The same goes with the very meaningful works undertaken on tipping markets by the means of data or “infrastructure”: leverage from one market to another, self-preferencing, imposing unfair conditions of use from the start or by changing them later on⁹, refusing to supply which exclusion from the market and long-term harm for the consumers.
40. Notwithstanding the above, it shall be born in mind two very specific features of GenAI. First, GenAI is able to infer, and inference interferes with a systematic process. With an initial set of data, it is very difficult if not impossible to explain the outcome. GenAI does not have a proper self-determination, but it contextualizes and makes inferences. This appears to be an important difference with algorithmic collusion’s analytical framework. Second, GenAI is not fully explainable and transparency obligations if materially workable, will provide very few exploitable information. The EU AI Act¹⁰ in this respect only sets the obligation to provide a summary of the categories of data used to train GenAI models or systems. Although transparency is essential to articulate GenAI with the rights of others, it is unlikely that the categories will help much to explain how GenAI came to a specific outcome and based on what information, to what extent it has been part of its process of inference. This poses an immense challenge in terms of standard of proof for collusion, beyond the questions of Imputability, and this a challenge to both plaintiffs and antitrust enforcers.
41. One major scale difference made by GenAI versus any other technology outbreak experienced, lies in the multiplied rapidity of deployment, the multiplicity yet differentiated harms GenAI can result in, to a diverse range of market players who are part of ecosystems. Such harms can only be appraised in their entirety, complexity, and simultaneity. In the context of GenAI, the ecosystem harm understood as a round approach of all harms generated by an anticompetitive behaviour,

⁵ Commission Notice on the definition of the relevant market for the purpose of the Union competition law, C/2024/1645, para. 21.

⁶ Ibid., para. 16, 55 and 77.

⁷ Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, 2014/C 89/03, para. 20.

⁸ C. Koolen, B. Van den Bosch, “AI and antitrust: between collision and collusion”, in J. De Bruyne, C. Vanleenhove, Artificial intelligence and the law, 2nd ed., Intersentia, 2023, pp. 577 – 621.

⁹ F. Bostoen and N. Petit, *Platform’s Treacherous Turn*, December 2023.

¹⁰ Artificial intelligence act, 24 January 2024, <https://commission.europa.eu/system/files/2024-01/EN%20Artificial%20Intelligence%20in%20the%20European%20Commission.PDF>

simultaneously to all market participants, even in a differentiated manner, is critical to assess. Otherwise, there is not only part of the effects that are left behind but also part of the rationale of such strategy from the defendant's side which may combine exploitative and exclusive effects to pursue business strategies at the longer run.

42. Yet, antitrust rules remain flexible enough to cope with these challenges. Economic studies are being undertaken on ecosystems theories of harms¹¹. In the current landscape, the maturity of both AIAS and AIAPS markets is not yet reached, there are emerging. In the light of recent EU caselaw, the cloud sector inquiry of French NCA¹² or the Portuguese NCA study on GenAI¹³, competition law's plasticity does not need to be demonstrated. Not forecasting smooth enforcement without difficulties and unresolved grey areas, the proactivity of the enforcers and flexibility of notion of abuse are nonetheless advantages. Until now, Big Tech conglomerates have provided food for enforcement and have paved the way including for new typologies of abuses: self-preferencing¹⁴, hindrance of new technology¹⁵, tying and bundling¹⁶, limitations to interoperability¹⁷, circumvention of the law¹⁸, abuse of economic dependency¹⁹.
43. From a merger control perspective, although not every partnership requires review, antitrust enforcers shall have the ability to review those partnerships which do. Quite interestingly, no competition authority has yet reviewed any acquisition of an AI company nor any contractual partnerships under merger control. The partnership between OpenAI and Microsoft which scaled ChatGPT, did not meet the review thresholds as recently confirmed by the German Bundeskartellamt²⁰. The partnership was considered as a merger by the Bundeskartellamt under German law and might now meet the thresholds should Microsoft invest more in OpenAI. Yet it might have been a good candidate for a referral under article 22 EUMR. The partnership between the French Mistral AI and Microsoft raised questions from the EC, it remains to be seen under which ground it may be appraised.
44. Respectfully disagreeing with the Bundeskartellamt on this very single aspect, it appears that European merger control rules allow for such review not only from a jurisdictional perspective in connection with the reloaded doctrine of article 22 EUMR but also as to the qualification of

¹¹ M. Bisceglia, J. Tirole, *Fair gatekeeping in digital ecosystems*, TSE Working Paper, n. 1452, June 2023.

¹² ADLC (French NCA), Opinion 23-A-08 of 29 June 2023 on competition in the cloud sector.

¹³ AdC (Portuguese NCA), *Issues Paper: Competition and Generative artificial intelligence*, November 2023.

¹⁴ Case AT.39740 (Google Search (Shopping)), EC decision of June 27, 2017, C(2017) 4444 final; and GCEU, 10 November 2021, Google and Alphabet v Commission (Google Shopping), T-612/17, ECLI:EU:T:2021:763.

¹⁵ Case AT.40099 (Google Android), EC decision of July 18, 2018, C(2018) 4761 final; and GCEU, 14 September 2022, Google and Alphabet v Commission (Google Android), T-604/18, ECLI:EU:T:2022:541.

¹⁶ EC, Press Release of 27.07.2023, Antitrust: Commission opens investigation into possible anticompetitive practices by Microsoft regarding Teams; see also Case COMP/C-3/39.530 (Microsoft (Tying)), EC decision of December 16, 2009, and Case COMP/C-3/37.792 (Microsoft), EC Decision of March 24, 2004.

¹⁷ ADLC (French NCA), Decision 21-D-11 of June 07, 2021, regarding practices implemented in the online advertising sector (Google AdTech).

¹⁸ ADLC (French NCA), Decision 20-MC-01 of April 09, 2020, on requests for interim measures by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale and others and Agence France; and Decision 21-D-17 of July 12, 2021, on compliance with the injunctions issued against Google in Decision 20-MC-01 of 9 April 2020.

¹⁹ AGCM (Italian NCA), Press Release of 04.04.2023, A559 - ICA: probe started for abuse of economic dependence by Meta towards SIAE. See also: C. Hu, U. Valenza, Dazi Avocats, The Italian Administrative Court of Lazio dismisses the appeal brought by a Big Tech company against the Competition Authority's interim measure order in an abuse of economic dependence case (SIAE / META), 30 October 2023, e-Competitions October 2023, Art. N° 116509.

²⁰ Bundeskartellamt, Press Release of 15.11.2023, Cooperation between Microsoft and OpenAI currently not subject to merger control.
https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/15_11_2023_Microsoft_OpenAI.html

concentration in substance. Here, it is interesting to dig into the past with a renewed eye, for there are fertile grounds for reference²¹.

45. Under merger control rules, shares or assets are the most common means of acquisition of control, together with shareholder's agreements under certain conditions²². Yet, European merger rules have always allowed control to be acquired by other means. Such is the case when contractual relationships lead to a form of control over management and resources with an equivalent effect. The right to use an asset for example may confer control from a merger control perspective²³. Joint control may even be characterized if both the owner of the assets and the company controlling the management enjoy veto rights over strategic business decisions²⁴.
46. The Commission has even had the occasion to consider the rights conferred by a licence agreement as sufficient on their own to qualify control²⁵. More generally, economic relationships can qualify as such when they amount to long term relationships, for example very long-term supply agreements or credits provided by suppliers or customers, together with structural links. In a 1991's decision²⁶, Renault was notably found to exercise decisive influence in Heuliez through an indirect minority stake and an exclusive procurement agreement for the past 10 years. The Commission also found that the existence of a loan which can be converted into shareholding may qualify as a mean of control²⁷. The Coca Cola Company was found to exercise decisive influence over one of its bottlers because of a long-term bottling agreement²⁸.
47. To meet EU requirements, the acquisition of control also needs to be perennial. Only a structural change on the market for a very long duration may fall within the scope of a concentration. This shall not be confused with the fact that the underlying agreements may be of a defined duration, provided they are renewable. In its Decision General Electric / Agfa²⁹, the Commission determined that a structural change may result from organizational contracts under national company law and business lease agreements that give the acquiring company control over the management and resources of the acquired entity notwithstanding the circumstance that property rights and shares are not transferred. An exclusive agreement whereby GE acquire all of Agfa non-destructive testing (NDT) film's needs, and where Agfa undertakes to supply NDT films to GE only, was considered a concentration.
48. This being underlined, the Bundeskartellamt mentions in its press release that while assessing Microsoft and OpenAI relationships, it found that "Microsoft had already secured its influence on OpenAI at an early stage, starting with an investment of one billion US dollars in 2019. At the time, the investment was already part of a wider partnership allowing Microsoft to access the technologies developed by OpenAI. As their cooperation progressed, both companies further deepened their partnership. In January 2023, Microsoft decided to provide another considerable

²¹ A special credit is here made to N. Levy, *European Merger Control Law: A Guide to the Merger Regulation*, LexisNexis, 2010 (ed.) and Mr Nicholas Levy for its inestimable work.

²² Exchange of debt equity shareholdings – see Case No COMP/M.6600 (AAEC/ Entero/ BMC Investments) EC decision of August 3, 2013, para 7-8, acquisition of de facto sole control following a share buyback program, which given recent annual shareholders meeting would have been sufficient to secure the required majority of votes to exert a decisive influence – Case COMP/M.6957 (IF P&C/ TopDanmark), EC decision of September 23, 2013, para 4-5.

²³ Case COMP/M.2816 (Ernst & Young France / Andersen France), EC decision of September 5, 2002, para. 23-25.

²⁴ Case COMP/M.3858 (Lehman Brothers/ SCG/ Starwood/ Le Meridien), EC decision of July 20, 2005, paras 8-9.

²⁵ EC, Press Release IP/99/344 of 25.05.1999, Commissioner Van Miert welcomes Coca-Cola's decision to drop its acquisition of Schweppes in continental Europe (Case IV/M.1395).

²⁶ Case IV/M.92 (RVI/ VBC/ Heuliez), EC decision of June 3, 1991, para. 4.

²⁷ Case IV/M.625 (Nordic Capital/ Transpool), EC decision of August 23, 1995, para 16-17.

²⁸ Case IV/M.794 (Coca-Cola/Amalgamated Beverages GB), EC decision of January 22, 1997, para 5-15.

²⁹ Case COMP/M.3136 (General Electric Company/Agfa NDT), EC Decision of December 5, 2003, para 7-12.

contribution by making a multi-billion-dollar investment in OpenAI. At the same time, the contractual basis for their cooperation was further developed in the interests of both companies”.

49. Having regard to the EU old yet unrebutted decisional practice, there is a case for considering that the partnership is concentrative. Whether it is reportable under EU thresholds is another question, but an answer may nonetheless be found in the reloaded article 22 EUMR doctrine where there is room for review by the European Commission, even if national thresholds are not met, for concentrations that pose a great competition challenge due to innovation and technology outbreak.
50. In terms of substantive assessment, it is likely that there is even more room for a conglomerate approach to transactions involving AI, or AI targeted services. Not only will it presumably require an approach of all the immediate ecosystems impacted, but also, the relevance and importance of such AI technology, input, or AI service in itself, but also in what it unlocks in terms of economic opportunities. GenAI may for example generate content in competition with content publishers, but it can also make it more visible, degrade the visibility of other, reinforce the amount of data collected from users, and thereby reinforce the ability to leverage this advantage and convert it into advertising revenues, and audience measurement. There are chains of consequences to one purposive AI technology, which scale and risk also strongly depend on the market player who acquires control over it.
51. For this reason, it is relevant that in the EU, article 14 of the Digital Market Act ³⁰(DMA) imposes on gatekeepers an obligation to inform the Commission on any intended concentration. However, there is a big stake in defining what a concentration means, this is also why it is useful to reflect on the past decisional practice of the European Commission to figure out the type of “intended concentration” gatekeepers will have to declare. Another big stake lies in whether gatekeepers will have to declare intended concentration only involving those services where they have been designated gatekeeper on. In such case, Microsoft would not have for example to declare its investments in OpenAI to the extent Microsoft is not considered a gatekeeper on search, browser, cloud.

12) Do you expect the emergence of generative AI systems to trigger the need to adapt EU antitrust investigation tools and practices?

52. There can't be relevant enforcement if there is a misunderstanding of the technology and its use at different levels of the value chain. There is indeed a critical need to map the players, the technologies, their role and evolution over the last two years, the current uses of AI and their short-term potential (12-24 months) in certain targeted industries: shopping, advertising, and press publishing. In addition, there is a critical need to create a dialogue with new antitrust resources in AI engineering, mathematicians. Lawyers and economists, even traditional data scientists if not familiar with GenAI are threatened by the so called “Fear of missing out” and for legitimate reasons.
53. On February 22, 2024, the US Department of Justice named a Chief AI officer³¹, “to advise the Attorney General and Justice Department leadership and collaborate with components across the

³⁰ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265, 12.10.2022, p. 1–66.

³¹ DOJ Press release of 22.02.2024, Attorney General Merrick B. Garland Designates Jonathan Mayer to Serve as the Justice Department's First Chief Science and Technology Advisor and Chief AI Officer.

Department on complex issues requiring technical expertise, including on matters relating to cybersecurity, artificial intelligence, and other areas of emerging technology. Mayer will also spearhead the Department's technological capacity-building efforts, including by advising on recruiting technical talent to ensure the Department has the expertise and is equipped to meet the challenges ahead". This appointment is one step forward in this path. This is a very strong message from the US to the world of antitrust enforcement and AI management.

54. Even with such steps, GenAI pose some new challenges, for example the standard of proof and even before that the ability for an authority or a plaintiff to prove an anticompetitive practice. The black boxes phenomenon is likely to be amplified with the use of GenAI. A very interesting idea implemented by Italy, is the introduction of a rebuttable presumption mechanism conceived to reinforce the Italian legal framework of abuse of economic dependency. Under the actual regime, the condition of economic dependence is presumed, until proven otherwise, when a company uses the intermediary services of a digital platform that plays a key role in reaching end users, including in terms of network effects or data availability. This is however of rebuttable presumption, so it becomes up to the platform who has the information, to prove the contrary. The mechanism has been used by the Italian competition authority against Meta in the case of Italian remuneration of collective societies³².
55. As for the tools, GenAI poses even more critical timing issues than those previously known in digital ecosystems. Beyond being extremely important, detrimental effects are to be irreparable. Antitrust enforcers who have the ability to order interim measures might see here a critical need to do so, to preserve competition while instructing cases in substance. There might be a case for softening the standard of proof at EU level, in the EU Regulation 1/2003 to enable where relevant issuing interim measures at least to enable for the next 10 years, the ability to call for a Commission preventive action to preserve competition in the context of practices implemented through GenAI.

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³² AGCM (Italian NCA), Press Release of 21.04.2023, A559 - Antitrust: the ICA orders Meta to resume negotiations with SIAE. Musical works available again on Facebook e Instagram. See also: C. Hu, U. Valenza, The Italian Administrative Court of Lazio dismisses the appeal brought by a Big Tech company against the Competition Authority's interim measure order in an abuse of economic dependence case (SIAE / META), 30 october 2023, e-Competitions October 2023, Art. N° 116509.