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Bauer Media Audio response to the European Commission's call for contributions on Competition in Virtual Worlds and Generative AI

Introduction

Bauer Media Audio (“BMA”) is a leading European commercial radio broadcaster¹ and a long-term investor in world-class digital audio content, service innovation and digital distribution. Through its radio broadcasting activities, BMA makes a significant contribution to society. We keep people up-to-date and well-informed with news and information. We entertain and keep people company when they’re alone or on the move.²

BMA welcomes the opportunity to reply to the European Commission (“the Commission”)’s consultation on “Competition in Virtual Worlds and Generative AI”.³ As with other industries, the audio sector has been disrupted by the increasing use of AI technologies and applications, including generative AI (“GenAI”), including in areas such as content creation, distribution and consumer behaviour. GenAI presents significant opportunities for audio content markets by making production processes more efficient and enhancing journalistic capacity. At the same time, there are multiple risks and challenges, including potential harm to competition.

BMA’s response focuses on the following questions posed by the Commission in its call for contributions:

- Do the vertically integrated companies, which provide several components along the value chain of GenAI systems (including user facing applications and plug-ins), enjoy an advantage compared to other companies?
- Do you expect the emergence of GenAI systems and/or components, including AI models, to trigger the need to adapt EU legal antitrust concepts?

¹ Bauer Media Audio reaches over 61 million weekly listeners, and operates over 150 audio brands in nine European countries. Its brands include Mix Megapol (Sweden), Radio Norge (Norway), RMF (Poland), Radio Expres (Slovakia), The Voice (Denmark), Radio Comercial (Portugal), Radio Nova (Finland) and Newstalk (Ireland).

² BMA is a division of Bauer Media Group - EU transparency register identification No [218282321469-11](#).

³ European Commission (2023). Competition in Virtual Worlds and Generative AI Calls for contributions. Retrieved from: https://competition-policy.ec.europa.eu/document/e727c66a-af77-4014-962a-7c9a36800e2f_en.

- Do you expect the emergence of GenAI systems to trigger the need to adapt EU antitrust investigation tools and practices?⁴

In our response, we explain why vertical integration may affect competition in GenAI (and, more broadly, digital markets), and set out our views on how competition law enforcement should be adapted to the specificities of those markets (**Part I**). We also explain why the enforcement of competition law should be complemented with the effective implementation of instruments that have recently been adopted to address unfair practices and to increase transparency in markets where GenAI providers operate. Such instruments, which may protect competition either directly or indirectly, include the Digital Markets Act⁵ (“DMA”) and the AI Act⁶ (**Part II**).

I. Vertical integration and competition (law) in GenAI

Vertical integration may affect competition in *all* markets where it is present. For example, it facilitates foreclosure of competitors because it allows the vertically integrated firm to engage in self-preferencing or to deny access to a valuable input that is needed to compete effectively. The effects of vertical integration on competition are particularly acute in digital markets, which have a natural tendency to concentration (due to e.g., network effects, data-driven advantages, the ability to reap economies of scale and scope). The GenAI marketplace is no different. For example, a vertically integrated GenAI provider with market power may impose restrictive terms in a partnership agreement that prevents the other party to the agreement from competing effectively with it in a downstream market. As things stand, there is significant vertical integration in GenAI markets; many undertakings operate at two (or more) levels of the supply chain.⁷

However, competition concerns are not restricted to those arising from vertical integration *within* GenAI markets. Several popular GenAI tools are owned or controlled by

⁴ Id., p. 4.

⁵ 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” or “DMA”) [2022] OJ L 265/L.

⁶ Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence and amending certain Union legislative acts (“Artificial Intelligence Act” or “AI Act”), not yet published.

⁷ CMA (2023). AI Foundation Models: Initial Report, paragraph 1.18. Retrieved from: <https://www.gov.uk/government/news/proposed-principles-to-guide-competitive-ai-markets-and-protect-consumers>

powerful firms that (a) are vertically integrated, and (b) offer other digital services. Those firms are present in a range of user-facing markets where GenAI can be embedded, including online shopping, search, and software supply.⁸ This applies to the audio sector too. For example, in September 2023, Amazon announced that it would incorporate GenAI features for users and developers into Alexa.⁹ In addition to Bard and Google Assistant, Google now offers Gemini, a GenAI multi-modal platform that can, *inter alia*, transcribe speech.¹⁰ Such examples illustrate how GenAI can be integrated in services provided by powerful firms that are already vertically integrated. They also point to the (potentially unfair) competitive advantages that new services launched by those firms may enjoy. For example, there is a risk that providers of virtual assistants in a gatekeeping position could potentially employ AI technologies to self-preference their own radio-like services, at the expense of their competitors.

Moreover, as recently noted by the US Federal Trade Commission, GenAI rests on three essential building blocks, namely data (developing GenAI typically requires exceptionally large datasets), talent (developing a GenAI model requires a significant engineering and research workforce with rare skillsets), and significant computational resources (e.g., computers with specialised chips like graphical processing units that can be expensive to operate and maintain).¹¹ Only a handful of companies have access to all of the above.

As a result, vertically integrated firms that provide (a) several components along the value chain of GenAI systems, and (b) other digital services (that may integrate or feed into GenAI tools) may pose significant risks to competition. Those firms may not only foreclose competition in the GenAI marketplace, but they may further affect competition in other markets, including audio. This is attributed to many parameters, including the data-driven advantages they enjoy (allowing them to use data across services), and the ability to discriminate in favour of their own services (by e.g., bundling their new GenAI tools with services they already offer).

⁸ Ibid.

⁹ See, for instance, Forristar, L. Amazon's Alexa gets new generative AI-powered experiences. Techcrunch, January 9, 2024. Retrieved from: <https://techcrunch.com/2024/01/09/amazons-alexa-gets-new-generative-ai-powered-experiences/>.

¹⁰ See, for instance, Wiggers, K. Google Gemini: Everything you need to know about the new generative AI platform. Techcrunch, February 16, 2024. Retrieved from: <https://techcrunch.com/2024/02/16/what-is-google-gemini-ai/>.

¹¹ Federal Trade Commission (2023). Generative AI Raises Competition Concerns. Retrieved from: <https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/06/generative-ai-raises-competition-concerns>.

Against this backdrop, how should antitrust rules be enforced to protect competition in the markets affected by GenAI tools? The Commission (and other competition authorities and regulators) should *not* follow a hands-off approach until the affected markets “mature”. This was a lesson learnt from the position competition authorities took on the emergence and increasing use of online platforms. As the Commission put in its call for contributions, “it [became] clear in the past that digital markets can be fast moving and innovative, but they may also present certain characteristics (network effects, lack of multi-homing, ‘tipping’), which can result in entrenched market positions and potential harmful competition behaviour that is difficult to address afterwards”.¹²

Competition law is sufficiently flexible to address issues such as those identified by the Commission (e.g., lack of multi-homing), including concerns arising from vertical integration and practices the latter facilitates (e.g., self-preferencing, refusal to grant access to a valuable input). The antitrust decisions the Commission has adopted in recent years, which concern conduct affecting digital markets, illustrate the potential of competition law to adapt to the specific conditions of GenAI markets.

However, they also illustrate some weaknesses of competition law *enforcement*, which should guide the Commission’s decisional practice in GenAI markets. For example, certain antitrust investigations took several years to complete,¹³ which exacerbated the effects of the practice under scrutiny. Moving forward, antitrust investigations in fast-moving markets must be completed in a reasonable timeframe in order to effectively prevent lack of multi-homing, unfair data-driven advantages, etc. Moreover, the Commission should also make use of the full set of tools it has at its disposal in order to improve the enforcement of competition rules. Those tools include **sector inquiries**, which may enable the Commission to gain a solid understanding of how GenAI markets work in practice (and to potentially initiate investigations based on the information it will collect from its fact-finding exercise). The Commission may also **re-visit remedies** made legally binding in antitrust and merger cases in order to ensure that they address concerns in the affected markets, including GenAI (the Commission may e.g., extend the scope of data silos remedies to cover GenAI services).

II. The role of regulation in protecting competition in GenAI

¹² See supra n 1, p. 1. Emphasis added.

¹³ See, for instance, Commission decision of 27 June 2016, Case AT.39740, Google Search (Shopping).

Protecting competition in GenAI markets cannot solely rely on the enforcement of antitrust laws. The EU has adopted (horizontal and/or sector-specific) rules that may safeguard competition in GenAI markets either directly or indirectly. Those include the Digital Markets Act (DMA) and the AI Act.

The DMA has recently started to apply to protect fairness and contestability in digital markets. The DMA establishes several obligations that are relevant to GenAI markets. For example, under Article 5(2), a gatekeeper should not use the data sourced from the service for which it has been designated in order to improve a GenAI tool (unless users grant their consent).

However, the DMA primarily covers core platform services for which an undertaking has been designated as a gatekeeper. [REDACTED]

Another parameter that may promote competition in the GenAI marketplace is the effective protection of copyright. This is because gatekeeper platforms, which have started to integrate GenAI, [REDACTED], compete for users' attention (and, potentially, ad revenues) with copyright owners, [REDACTED]. GenAI tools largely rely on the text and mining of data, which may include content that is protected by copyright. In such cases, under the DSM Copyright Directive, a copyright owner may reserve text and data mining for itself (to the effect that third-party providers, including GenAI tools, may not exploit the work concerned).¹⁴

However, it is difficult to assess whether such reservations are respected by GenAI tools. For this reason, the AI Act, which has recently been adopted to address risks created by AI applications, imposes on GenAI providers the obligation to put in place a policy to identify

¹⁴ See Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92, Article 4.

and respect the reservations of rights expressed by rightholders. Pursuant to the AI Act, “[t]his is necessary to ensure a level playing field [...] where no provider should be able to gain a competitive advantage in the EU market by applying lower copyright standards than those provided in the Union.”¹⁵ The AI Act further establishes an obligation for GenAI providers to draw up and make publicly available “a sufficiently detailed summary” of the content used for training their model.¹⁶ The AI Office, which is entrusted with monitoring compliance with this obligation, should ensure that the summary in question enables rightholders to detect (and take action against) copyright infringements.¹⁷

Alongside regulation, consideration should be given to supporting the upskilling of European businesses’ workforces from an AI standpoint through subsidies, so that these businesses can better compete with gatekeepers that embed GenAI into their services. Such subsidies should be available to licenced radio broadcasters who compete with powerful firms that are vertically integrated and offer competing (unlicensed) radio-like services that embed AI.

III. Conclusions

Protecting competition in GenAI requires an effort that involves the effective implementation and enforcement of different sets of rules. In relation to competition law, the Commission should take stock of lessons learnt from antitrust enforcement in recent years and use the toolkit it already has at its disposal to address concerns arising in GenAI markets. As regards regulatory rules, including recently adopted rules that protect competition either directly or indirectly, the Commission must ensure that those rules are implemented and complied with in an effective manner. [REDACTED]

[REDACTED]. With respect to the AI Act, the implementation of the transparency obligation it establishes must enable rightholders to detect (and take action against) copyright infringements.

¹⁵ AI Act, Recital (60j).

¹⁶ Id., Article 52c (1)(d), Recital (60k).

¹⁷ Id., Recital (60ka).