

Expert Q&A on the competition law issues raised by generative AI

by Practical Law Competition

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An expert Q&A with Airlie Goodman, Aymeric de Moncuit, Daniel Vowden, Hormis Kallarackel, Sarah Wilks and Thomas Buge from Mayer Brown on the key legal issues raised by generative artificial intelligence (AI) tools in the area of competition law.

This Q&A with [Airlie Goodman](#), [Aymeric de Moncuit](#), [Daniel Vowden](#), [Hormis Kallarackel](#), [Sarah Wilks](#) and [Thomas Buge](#) from [Mayer Brown](#) forms part of a series of expert Q&As where Practical Law asked a panel of lawyers for their insights and commentary on the key legal issues, risks and opportunities that generative AI models present in the areas of:

- IP&IT.
- Employment.
- Commercial transactions.
- Data privacy, data protection and ethical issues.
- Public law.

How might AI make markets more competitive?

In many ways, we are only beginning to see the potential of AI. Already, though, it appears likely that AI could make markets more competitive in a plethora of ways through:

- **Enhancing efficiency and innovation.** AI can contribute to automating basic tasks. Examples might include manual data entry, or summarising a large amount of text, or speeding up more complicated issues such as facial recognition. It also has many more sophisticated applications, such as in smart (driverless) cars, thereby lowering costs, and facilitating the development of new products and services.
- **Increasing market transparency and facilitating market entry and access.** AI models require vast amounts of data to be analysed and aggregated, and then they are trained on this and generate new "intelligent" outputs. Although this might be perceived as contributing to the risk of competition problems (see [How might regulators consider businesses in the AI space could risk infringing competition law?](#)), AI might also make data more

accessible and useful, both to those who hold the data, and also to those who might be given access to it. Making information more accessible reduces information asymmetries, which may in turn facilitate a level playing field, and reduce potential barriers to entry (see [Potential behavioural concerns](#)).

- **Reducing human error and exceeding human performance.** Since AI relies on computer-processed data, it offers the potential of avoiding human limitations and errors when processing and interpreting such data. For example, scientists have explained how AI might become very useful for medical imaging, with AI models being able to find cancerous cells and identify cells which look suspicious without any human supervision. Applying these same principles in the competition sphere, business leaders have recently pointed out that AI tools might be used to assist businesses track employees' compliance with antitrust laws, especially in competitively sensitive situations such as collaborations with rivals or during trade association meetings.

These kind of AI benefits might also apply more generally in the competition law sphere, where the tools can be trained to become more "intelligent".

These opportunities created by AI are rapidly changing the way in which businesses work with competitors, consumers and competition agencies. They give rise to new applications, but also potential areas of risks. As the UK Competition and Markets Authority (CMA) has noted, "while AI-powered services may benefit consumers by providing higher quality, lower priced and potentially more personalised products and services, they also have significant scope to facilitate unfair consumer practices" (see [GOV.UK: CMA AI strategic update, 29 April 2024](#)). Businesses should consider any potential risks on the market-specific facts of each case, and adopt proportionate compliance steps as appropriate.

What are the key UK and EU regulations specific to AI that businesses should be aware of in the competition space?

At present, only the EU has implemented specific AI regulation which also applies in the competition space. The EU Artificial Intelligence Act (AI Act) was adopted in May 2024 and is set to come into force on 1 August 2024 (see [Legal update, EU Artificial Intelligence Act published in Official Journal](#)), before applying from February 2025. The AI Act will likely be a key regulatory tool for AI-related markets at an EU level. The EU AI Office, established within the European Commission (Commission) and set to take a key role in implementing the AI Act, is beginning to take shape (see [Legal update, European Commission establishes AI Office](#)). Senior leadership appointments have been announced and some initial indication has been given as to what to expect over the next few months, including with respect to guidance and co-operation with national agencies. The AI Act grants procedural powers to supervisory agencies, such as the examination of evidence and access to relevant data and documents, which may also be transferred to the national competition authorities in the EU member states. These national competition authorities, as well as other stakeholders, will be particularly keen to see how the biggest digital players comply with Article 11 of the AI Act, which imposes an obligation to explain compliance with protections required for fundamental rights. (For further information see [Practice note, EU AI Act](#)).

In the UK, the previous Conservative government viewed AI regulation as an important policy issue. It pursued a range of initiatives, providing particular insight into its likely approach through a response to a 2023 white paper on regulating AI (see [GOV.UK: A pro-innovation approach to AI regulation: government response, 6 February 2024](#)). The main proposals focused on intervening through non-statutory means, with existing regulators stepping up to handle AI, with any new laws only expected further down the line. However, in its manifesto, published before it won the general election in July 2024 and entered into government, the Labour Party declared its intention to introduce separate regulation targeting the development of AI. At the time of writing, the Labour government has yet to expand on this manifesto commitment.

It is also worth noting that there was a Private Members' Bill which made partial progress through the parliamentary process before being dropped. The Artificial Intelligence (Regulation) Bill would have established a new AI authority to handle AI, with its own powers and duties. The Bill was cleared in the

House of Lords in May 2024, but did not complete its progress through the House of Commons before Parliament was prorogued in late May 2024 ahead of the general election in July 2024 (see [UK Parliament: Parliamentary Bills, Artificial Intelligence \(Regulation\) Bill \[HL\]](#) and [Legal update, Artificial Intelligence \(Regulation\) Private Members' Bill not proceeding](#)).

Given the preliminary stage of AI regulation both in the EU and the UK, it is anticipated that, although businesses and regulators will take any AI-specific regulation into consideration, competition-focused regulation will be the main basis for enforcement in this area.

What other regulation (not specific to AI) can affect the competition assessment?

Other regulation applicable to AI and competition in the EU

In the EU, the [Digital Markets Act \(\(EU\) 2022/1925\)](#) (DMA) is a key piece of regulation applying to how the biggest digital players (known as "gatekeepers") provide their respective "core platform services". The DMA does not explicitly refer to AI and no AI foundational models are currently designated as gatekeepers or listed as a core platform service. Nevertheless, recent comments by Commission officials indicate that the question of the DMA's application to AI models is still open, with calls from the European Parliament for the Commission to look into this further (see [European Parliament: Report on competition policy- annual report 2023, Stéphanie Yon-Courtin, 18 December 2023](#)). There are early indications that the Commission might apply the DMA to AI models on the basis that the DMA can reach services that act as a "gateway" between business users and consumers. For example, if AI bots are in effect search engines or app stores, which are listed as core platform services, Commission officials might try to bring them into scope of the existing designations and argue that they should fall under the rules (as suggested by Ana Malheiro, a case handler officer in the European Commission's DMA task force, in April 2024).

Even without express direct application to AI, given that several of the largest players have been designated as gatekeepers under the DMA, this new body of rules will inevitably have an (indirect) impact on how they develop and use AI. In particular, Article 14 of the DMA, which imposes an obligation on gatekeepers to inform the Commission about any intended concentration involving core platform services, any other services in the digital sector, or enabling the collection of data, seems likely to be relevant in the AI sector. More generally, the DMA could be applied in the AI space to:

- Impose limits on the use of data by users across services, such as requiring specific consents by users, and not relying on consent given in one context to use data in another.
- Require fair, reasonable and non-discriminatory (FRAND) access to key inputs such as data, along the lines of FRAND licensing case law development in Europe to date in the pharma and tech sectors.
- Prohibit self-preferencing behaviour, for example, when ranking and indexing services and products. It is interesting to note that the UK CMA seems to be requiring this kind of behaviour even before the UK rules come into force (see [Compute or development of AI](#)).
- Supply the Commission with information that it might then investigate further. For example, included in the many aspects of their businesses in respect of which designated gatekeepers must give the Commission information, are algorithms, data about testing, and explanations about their use. This power could conceivably be used to require explainable (and explanations of) AI systems which are part of core platform services, or at least their foundational methodologies. That said, the more intelligent a model becomes, the more challenging it becomes to explain, and any such requirement risks chilling innovation. Should this information concern the Commission, or information not be provided, the Commission may take further steps.

The Digital Services Act ((EU) 2022/2065) (DSA) may be read as new rules imposing obligations on the largest digital players to mitigate systemic risks that could potentially arise from the use of AI. For example, the DSA prohibits targeted advertising in so far as it differentiates based on protected characteristics, including age, specifically targeting advertisements at children (Article 37).

More specifically the DSA:

- Imposes detailed requirements on how the large players who employ algorithms conduct appropriate audits which, for example, consider the implications of how algorithms are designed and work in practice.
- Provides for the creation of a new Centre for Algorithmic Transparency (ECAT), which will support the Commission's supervisory role in the context of the DSA.

The General Data Protection Regulation ((EU) 2016/679) (GDPR) may also potentially be invoked against companies active on AI-related markets, due to the large amount of data processed by AI systems. How AI systems interact with GDPR rights and obligations, such as the granting of end-user consent (Article 6(1)(a) GDPR), and how these systems will implement these

obligations, remains to be clarified. For instance, if an AI system is operated by a company dominant on an AI market that carries out data processing operations without proper consent, enforcers may argue that this could lead to an abuse of a dominant position.

At a member state level, national foreign investment rules might also apply to AI-related transactions. Given the increasing scope of these rules, and the discussions about their reform, this area should be high on the list to watch for tech companies. (For further information on foreign investment regimes in member states, see [Quick Compare Chart, Regulation of Foreign Investment](#).)

Other regulation applicable to AI and competition in the UK

In the UK, the Digital Markets, Competition and Consumer Act (DMCC Act), is expected to come into force in autumn 2024 (having received Royal Assent in May 2024). The DMCC Act will apply additional regulation to firms designated as having "strategic market status" (SMS) on "digital markets" which is distinct from the traditional concept of dominance. See [Legal update, Digital Markets, Competition and Consumers Act: CMA consults on guidance on digital markets competition regime](#).

Whether AI is considered as a "digital market" under the DMCC Act has not been clarified yet, but this legislation is expected to apply in many cases concerning digital markets that may be influenced by AI. For example, in the future, the CMA might gain the power to impose conduct requirements on designated SMS firms, which would create opportunities for third parties needing access to data and technology. In addition, and more broadly, the DMCC Act includes a new specific merger control threshold targeted at "killer acquisitions", which may make it much more difficult for SMS firms to buy innovative start-ups, such as providers of AI-related services. While waiting for the DMCC Act to come into force, the CMA is conducting an initial review of foundational models (FMs). This is largely expected to set the tone for how the CMA handles AI going forward, with "growing concerns" already being flagged (see [GOV.UK: Opening remarks at the American Bar Association \(ABA\) Chair's Showcase on AI Foundation Models, 11 April 2024](#)). Although this is still at a high level, we are likely to see a lot more from the CMA in this space over the next few months.

Although not in the purview of the CMA, it is also worth noting that the National Security and Investment Act 2021 may also apply to control investments and acquisitions in the AI sector, depending on the product or service in question. (For further information, see [Practice note, National Security and Investment Act 2021: overview](#)).

How are competition authorities handling AI and what are the perceived competition law challenges?

Notwithstanding the complexity of AI systems, competition authorities in Europe and the UK are reacting to the rise of AI. Several authorities have shown their desire to intervene in these markets before it is “too late” and have intensified their activity in this space over the past few months. Such activities are transitioning from information-gathering and advocacy-style exercises to bolder steps involving focused investigations into specific market behaviours and players. There is certainly a concern amongst some regulators that if they do not act quickly, the first “winner” risks “taking all” and monopolising the relevant markets. This perceived risk, however, needs to be balanced against chilling investment due to over-enforcement. Indeed, there have been several vocal reminders from the tech community and legal practitioners about the danger of authorities intervening too early, before these markets are properly understood, at the cost of innovation. That said, while the technical specificities of AI systems might require competition authorities to seek to devise new theories of harm, by building on experience in similar matters, this is relatively familiar territory for those authorities who have been active in the digital sector for many years.

The new digital rules explained above, as well as traditional competition rules can be applied, namely Article 101 of the Treaty on the Functioning of the European Union (TFEU) and the UK Chapter I equivalent in the Competition Act 1998 (Competition Act), and Article 102 TFEU and the UK Chapter II equivalent in the Competition Act. Both the Commission and the CMA have applied these rules to what might be seen as early AI issues. For example, in July 2018, the Commission found four consumer electronics manufacturers had infringed competition rules by imposing fixed or minimum resale prices on their online retailers. In this case, complex (“intelligent”) tools monitored the prices, facilitating quick intervention in case of divergence (in particular, price decreases). Similar examples can be found in the UK concerning online pricing behaviour. On the basis of these legal provisions and cases, the competition authorities already have a bank of concepts and theories of harm which they might draw on going forward in the AI sector.

In addition, many competition authorities which have both competition and consumer powers could have recourse to consumer law principles to tackle what they see as problematic market behaviour in the AI space. The CMA’s work into online choice architecture is an

example of this, and the CMA also emphasised the importance of consumer law in its recent update to its initial review into AI foundation models.

Considerations for competition authorities

Competition authorities trying to handle AI may consider the need for:

- A joined-up approach. AI is a global issue and the different approaches by competition authorities around the world could make the legislative and regulatory backdrop hard to navigate.
- Rapid action. The Commission has already said that it might have to resort to more frequent use of interim measures in cases concerning AI (as suggested by comments in April 2024 from Olivier Guersent, Director General of the Commission’s Directorate General for Competition). Indeed, the current focus on merger-based intervention might well be due to the overly time-consuming nature of behavioural enforcement which, although potentially understandable from the perspective of needing to intervene and reach decisions quickly, does raise concerns about trying to apply tools to situations they were never intended to apply to, and the potential misuse of these powers.

In light of the above, in February 2024 at a European Parliament event, the European Commissioner for Competition, Margrethe Vestager, urged competition authorities to act quickly and to work with each other on AI and competition (see [European Commission: Making artificial intelligence available to all- how to avoid Big Tech’s monopoly on AI?, 19 February 2024](#)). Current examples include the UK and French competition authorities conducting market studies looking at AI, and the Commission recently issuing two calls for information about virtual reality and generative AI. These fact-finding initiatives all touch on inputs, development and deployment, and show that the authorities are trying to understand how nascent markets work in the AI context, and how the current rules might apply to these markets. One key issue which has emerged is whether several recent agreements concluded between large digital players and generative AI providers potentially raise competition concerns. Some authorities are considering investigating these agreements and, in particular, whether they engage merger control rules (see below How might regulators consider businesses in the AI space could risk infringing competition law?).

In addition to this fact finding, some authorities and legislators have already enacted specific rules aiming to regulate AI (as discussed in What are the key UK and EU regulations specific to AI that businesses should

be aware of in the competition space? and What other regulation (not specific to AI) can affect the competition assessment?). However, for the time being, the traditional competition law rules are mainly being used by regulators to protect competition in AI markets, albeit often with an innovative slant to get “new wine to fit into old bottles”.

Potential behavioural concerns

In terms of the application of behavioural rules to AI, one of the main difficulties for competition authorities is that AI is “intelligent”, meaning that it may be less subject to human oversight than other technologies. This might make regulation and enforcement of traditional behavioural rules based on agreements, or a “meeting of minds”, or deliberate exclusion or exploitation, difficult to apply. Indeed, the unprecedented speed at which AI is developing, as well as how it functions, means that AI may be more elusive than traditional technologies which are programmed to behave in a certain way. For example, AI’s relative autonomy may lead these programmes to unintentionally share commercially sensitive information in breach of the rules on anti-competitive collusion, even if the businesses using them are trained to avoid such risks (see [How might regulators consider businesses in the AI space could risk infringing competition law?](#)).

Another competition law challenge concerning AI relates to the assessment of the market power of businesses providing AI-related services. Such an assessment may prove difficult for competition authorities, partly due to the challenges of defining the relevant market(s), and also due to the strong network effects and high barriers to entry that arguably characterise some technology markets. AI is also a nascent market, and a wide range of AI models are currently being disseminated. It is currently difficult to determine which model (if any) will prevail in the medium and long run, making the competitive assessment even more difficult for competition authorities globally.

Despite these hurdles, the US Department of Justice (DOJ) has recently said that it is closely monitoring the activity of companies it believes may hold significant market power in technology markets, as they continue to develop and make use of AI (see [Office of Public Affairs: Assistant Attorney General Jonathan Kanter delivers remarks at the Promoting Competition in Artificial Intelligence Workshop, 30 May 2024](#)). In particular, the DOJ has voiced concerns about behaviour which involves buying rivals or a key product, creating exclusivity contracts, and removing competitors’ interoperability (this was shown in comments from Susan Athey, the chief economist at the DOJ’s Antitrust Division, in a media interview given in May 2024). The US Federal

Trade Commission (FTC) has expressed similar concerns (see [Federal Trade Commission: Generative AI raises competition concerns, 29 June 2023](#)).

Moreover, for several years now, competition authorities in Europe have expressed concern over large companies processing vast amounts of personal data and information without necessarily having proper consumer consent. These authorities have found this behaviour to be abusive in a digital market context, and similar theories of harm could be brought against companies in the AI space. Possibly more fundamentally, given the need for increased computing power and specific technology for AI to work (for example, in chips), and the kind of cases the Commission has brought to date in sectors where there is heavy reliance on a specific input, companies upstream from those developing AI models should take care to comply with competition rules (see [Article, AI challenges in competition law: how are regulators responding?](#)).

Mergers

The way in which the traditional merger control rules should apply to transactions in the AI sector is currently a hot topic, and extremely important in practice as leaders at financial and investment firms see mergers and acquisitions as a key strategy to expand their AI platforms. Many AI businesses currently have turnover or market shares well below the jurisdictional thresholds required to trigger national or EU merger rules. However, they sometimes operate across several markets (reflecting the ecosystem set-up of digital markets) and national boundaries, and in close partnership with some of the biggest players. Indeed, AI businesses often need to work alongside bigger tech players to access the scale of investments required to bring their new technology to market, to regulate the use of data which is covered by intellectual property rights, and access infrastructure support more generally. Competition authorities around the world seem to be developing their approaches to the potential application of the merger control rules in this partnership context:

- The Commission has conducted a long period of fact-finding to decide whether partnerships between AI start-ups and bigger players entail a change of control for the purposes of the EU Merger Regulation (Regulation 139/2004 on the control of concentrations between undertakings (OJ 2004 L24/1)) (EUMR) (as shown in comments made to the media by Margrethe Vestager on 16 June 2024). Although, for the time being, the Commission seems content with the idea that the partnerships it has looked at so far do not involve an acquisition of control for EUMR purposes, it has made clear that “the story is not over. We will keep monitoring the relationships between all the

key players in this fast-moving sector” (see [European Commission: Speech by EVP Margrethe Vestager at the European Commission workshop “Competition in Virtual Worlds and Generative AI”, 28 June 2024](#)). The Commission now seems to be focusing on the exclusive nature of the arrangements between big tech players and smaller AI start-ups, and their practices in terms of employees, so called “acqui-hires,” where one company acquires another mainly for its talent. The Commission has stated it “will make sure these practices don’t slip through our merger control rules if they basically lead to a concentration”.

- The CMA has given some idea as to what it looks at in these situations in its decision in the Mistral AI and Microsoft partnership deal, where it decided that the grounds for control had not been met (as it did not consider that Microsoft had the ability to influence materially Mistral’s commercial policy on the facts). It is, however, still looking at these kinds of issues in other partnership cases (which may involve different potential sources of influence). The CMA’s ongoing work in the AI sector using its wider market study powers, will add to this (see [GOV.UK: CMA seeks views on AI partnerships and other arrangements, 24 April 2024](#)). The reform of UK competition law might make it easier for the CMA to assert jurisdiction over these kinds of situations in the future (see [How might regulators consider businesses in the AI space could risk infringing competition law?](#)).
- In 2023, the FTC ordered five companies to provide information about certain recent investments and partnerships with generative AI companies, to determine whether these could impede competition via the distortion of innovation and undermining fair competition. The FTC’s questions addressed expectations of exclusivity, rights to board seats, or other mechanisms to influence business strategy or the direction of innovation.

More broadly, the ongoing uncertainty about the competence of EU national competition authorities and the Commission to review below-jurisdiction mergers under Article 22 of the EUMR only adds to these challenges (see [Legal update, Advocate General Opinion on appeals against General Court judgment dismissing action against European Commission decision to accept Article 22 referral of Illumina’s proposed acquisition of GRAIL \(ECJ\)](#)).

Learning from the work done to date, and the challenges competition authorities believe they might encounter when looking into AI, there have recently been a number of calls from both national competition authorities and the Commission, to gain new and “better” tools to handle AI. In particular, a number of jurisdictions such as France and Germany have been arguing in favour of a market investigation style tool, which would allow them to look at, and intervene in, markets in a more holistic manner than currently possible in a behavioural

or merger control framework. At present, there are no concrete proposals for this at the EU level, but in the UK, the CMA is making active use of its market review tools while waiting for the DMCC Act to come into force. For example, the CMA’s market investigation into the cloud sector includes consideration of “the potential impact of AI on how competition works in the cloud services market” (see [GOV.UK: CMA launches market investigation into cloud services, 5 October 2023](#)).

How might regulators consider businesses in the AI space could risk infringing competition law?

As a preliminary point, businesses in this space can be structured and operate very differently from each other, and so individual businesses require bespoke risk assessments. For example, the risks for an open source “pure player”, will be quite different from those applicable to closed models and any compliance policies should be tailored accordingly.

A useful framework for considering how businesses in the AI space might risk infringing competition law is to note how the market works, and then consider risks on each level. Some regulators are using the following three layers or levels for their analysis of AI markets:

- Input level: upstream with computing power, data, people, and level of investment used as inputs.
- Compute or development level: the AI model using the resources in the input layer to create a bot.
- Output level: employing the AI model developed in the development level in the market.

These different steps are all related, in an ecosystem which is constantly evolving. Regulators might believe that competition concerns could be triggered at any of the three levels, or potentially as a result of behaviour on one level impacting another.

Input level

The key technological inputs for building an AI model, such as data, chips, and storage, are required in massive quantities and a lot of computing power is needed to gather and process a large amount of data. As a result, enforcers could try to argue that businesses which supply essential AI inputs might be abusing their market power if they engage in rebates, predatory pricing, tying arrangements, or self-preferencing. Strong points might be raised against any such attempt, given firstly, the inherent challenges of proving dominance (not just a strong market position) in abuse cases, and moreover, the potentially pro-competitive nature of the behaviour in question.

Compute or development of AI

The computational resources and processes that allow AI companies to process data, train the model and then generate new content, is referred to often as “compute”. Elina Ponte from the FTC commented in May 2024 that this is an extremely expensive activity, requiring specific hardware including supercomputers and computers with specialised chips such as graphical processing units, which regularly need upgrading. Competition authorities have prioritised perceived concerns about access to, and the use of, both technology and data in the development and roll-out of the AI model. In particular, competition authorities believe that data access is absolutely key and are concerned as to the extent to which firms with less access to the requisite training data can still be active in the market. Some authorities seem concerned about exclusive access to this data. It is important however to note other relevant factors in this debate, such as the need to prevent free riding and the importance of protecting creative works.

Although some enforcers seem keen to argue that the way a company develops, or indeed uses, AI should not reinforce a strong position, for example using AI to limit access by competitors, or by programming the algorithm to prefer the company’s own products and services (that is, self-preferencing), any such notion should be placed in a wider market context where, for example, the most innovative companies can reap the fair rewards of their investments and keep making their models ever more intelligent, to the benefit of consumers.

Output

As mentioned above, in Potential behavioural concerns, through generating intelligence, AI models might give rise to collusion-based concerns. Competition authorities might consider that businesses using AI algorithms may facilitate collusion by:

- Making information sharing easier. There might be a risk that AI makes it easier to share (and therefore find out about) sensitive information such as pricing. Competition authorities could associate this with price-signalling behaviour or even price fixing, although training models not to use information from competitively sensitive sources, or of a competitively sensitive nature, would seem to reduce this risk.
- Monitoring competitors’ behaviour. It is legitimate for businesses to react to market conditions and adjust their pricing based on publicly available market information. In some circumstances, competition authorities may be concerned by the possibility that price parallelism displayed between firms in a particular market is the product of some form of tacit collusion between those firms. It is possible that such concerns on the part of competition authorities

may be heightened through the increased use of AI programmes to monitor market conditions and pricing behaviour. However, a competition authority would likely need to work hard to establish a robust theory of harm in such circumstances, assuming pricing information is genuinely in the public domain.

- Co-ordinating pricing strategies. Competition authorities might also believe that collusion might occur when businesses use the same AI system, which then co-ordinates competitively sensitive parameters, especially prices. This is known as a “hub-and-spoke” structure, where a “hub” (that is, a vertical participant) facilitates the co-ordination of competition between the “spokes” (that is, horizontal participants), without any direct horizontal contact between the latter, at least in Europe and the UK. Authorities might attempt to analyse AI structures in this paradigm on the theory that the technology could potentially enable participants to exchange commercially sensitive information without communicating with each other.

Mergers

As mentioned above (see Mergers), businesses active in the AI space should bear in mind the potential for a creative application of merger control rules even in situations where these are not normally triggered. For instance, acquisitions of potential or actual competitors, or downstream or upstream players, by dominant firms in this sector could trigger merger inquiries. More generally, the acquisition of “too much” market power in a more traditional sense might attract the interest of competition authorities.

Looking at the competition authorities’ actions to date, they seem to be currently prioritising use of their merger control powers over other competition enforcement tools to intervene in AI markets. Businesses, however, should prepare for authorities trying to intervene on other legal bases. Indeed, the CMA has said that it will ensure that it is using the full range of its powers to make sure those markets are underpinned by fair, open, and effective competition, as well as strong consumer protection (see [GOV.UK: CMA seeks views on AI partnerships and other arrangements, 24 April 2024](#)).

What competition-related claims might the use of AI give rise to in the private enforcement area?

Private enforcement actions are brought by private parties, such as competitors and consumers, to seek damages or injunctions for alleged infringements of competition law. Private enforcement can be divided between “follow-on” actions that rely on a prior

finding of a competition infringement by a regulator, and “standalone” actions where the claimant has to establish the competition infringement, as well as damage and causation. In the AI context, a number of private claims might arise, most likely in the EU or the UK national courts.

Claims from consumers or competitors could track enforcers’ potential theories of harm (see Potential behavioural concerns), alleging that a firm’s use of AI technologies resulted in consumer harm or anti-competitive effects, such as reduced product quality or consumer choice or lack of access.

Claims related to pricing (such as price fixing) could be brought on behalf of consumers and competitors, and may allege that AI-powered bidding algorithms enable collusion or manipulation of prices or bids, thereby leading to higher prices or reduced competition. Uniform prices allegedly set by algorithms could not only affect competitors, but also end-users. This could create a significant potential source of claimants for collective actions, due to the large number of users across numerous jurisdictions likely to be affected by such collusion. AI tools can also be used to assist book building and marketing by claimant firms.

The litigation of these claims may also lead to the courts (or the UK, member state, or EU legislature) addressing certain open questions of liability for such AI-related anti-competitive conduct. For example, to what extent can companies who have developed AI technologies be held liable for anti-competitive conduct in which their tool is involved, but which they did not directly control?

Any claimants will most likely face the same challenges as competition authorities in proving competition law infringements in the AI sector, such as providing evidence of infringements in technically complex cases (such as proving hub-and-spoke cartel behaviour). Another route for claimants to seek redress for damages caused by the alleged behaviour of technology companies in the AI space may be issuing proceedings against gatekeeper or SMS firms in national courts for a breach of statutory requirements imposed by the new EU digital rules (the DMA or DSA) or the DMCC Act in the UK.

What should businesses be aware of about how competition authorities might use AI in their investigations?

While AI will pose new, complex challenges for competition authorities, the authorities may also leverage AI in various ways to enhance the efficiency of their investigations. Many competition authorities, such as the CMA, have invested heavily in recent years in setting up advanced data capabilities, and this trend looks set to continue in the AI space. Indeed, the CEO of the CMA, Sarah Cardell, recently said that it is considering how AI can be beneficially introduced into its internal ways of working, not just in its studies and investigations. Specifically for the CMA and the UK’s voluntary merger regime, one of the first uses we might see of AI in this context is for detecting unnotified mergers.

The following specific uses of AI may be made by competition authorities:

- Behavioural analytics. AI could be used to help competition authorities understand market dynamics and consumer behaviour more comprehensively.
- Compliance monitoring. Data regarding companies’ behaviour could be used by competition authorities to monitor more effectively compliance by businesses with remedies or commitments imposed upon them.

Notwithstanding these possible uses of AI, competition agencies will remain largely dependent on their staff for the foreseeable future. As per the recent comments from Lina Khan, the Chair of the FTC, competition agencies carry out detailed investigatory and legal work. While they are, and will continue, incorporating technological developments in the way they work, “we are not at a place where we can let people go and have AI writing the complaints” (from Lina Khan’s comments at a hearing by the US House Appropriations Subcommittee on Financial Services and General Government on 15 May 2024).

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