

tivos para a aplicação do direito da concorrência. As autoridades da concorrência, as empresas e os tribunais devem considerar as especificidades de cada caso concreto e ponderar os aspetos pró-competitivos inerentes à utilização destes algoritmos, para que não sejam adotadas soluções e correções excessivamente onerosas e prejudiciais à inovação e ao bem-estar do consumidor.

REGULATING AI - COMPETITION LAW AND DATA PROTECTION CHALLENGES

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ABSTRACT: The fast paced development of AI presents regulatory challenges across jurisdictions in terms of merger control, restrictive practices, data protection and unfair practices in general. The EU's reply to these challenges, further to the applicable general rules, has been the setting up of ex ante regulation, as the DMA, DSA and the AI Act, whose effectiveness remains to be proven.

KEYWORDS: Competition law, AI, algorithms, data protection, DMA, DSA, AI Act, GDPR.

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1. Introduction

Artificial Intelligence (“AI”) is, in general terms, the ability of a digital computer or computer-controlled robot to perform tasks commonly associated with intelligent beings and the term is frequently applied to the project of developing systems with the intellectual processes characteristic of humans, such as the ability to reason, discover meaning, generalize, or learn from past experience⁷⁸.

Since their development, in the 1940s, computers have been programmed to carry out very complex tasks, from mathematical calculations to playing chess, but the level of AI development in the last few years and its application in tools as diverse as medical diagnosis, computer search engines, voice or handwriting recognition and, increasingly, popular chatbots, has placed AI at the center of many economic, ethical and legal discussions.

Indeed, in 2024, AI software corresponded to a 136 billion

dollars market, evolving from around 50 billion in 2022 and less than 20 billion in 2020⁷⁹. The generative AI chatbot ChatGPT alone has gained over 100 million users two months after its launch, at the end of 2022, becoming the fastest-growing consumer software application in history (as a reference, it took TikTok about nine months after its global launch to reach 100 million users and Instagram took around 2 years to reach the same milestone) and competing products as Gemini, Claude, Llama, Ernie, and Grok were subsequently launched⁸⁰.

This exponential expansion has led to the multiplication of regulatory initiatives in the European Union (“EU”) that we will summarize in this article: on one hand, competition law initiatives *stricto sensu* and, on the other, the approval of *ex ante* regulation of the digital space.

⁷⁸ Please refer to <https://hai.stanford.edu/sites/default/files/2020-09/AI-Definitions-HAI.pdf> or <https://oecd.ai/en/work/definition>

⁷⁹ CHENNUPATI, ANANDKUMAR (2024). *The evolution of AI: What does the future hold in the next two years*. In *World Journal of Advanced Engineering Technology and Sciences*, vol. 12, n.º 01, pp. 022–028.

⁸⁰ Please refer to <https://www.reuters.com/technology/chatgpt-sets-record-fastest-growing-user-base-analyst-note-2023-02-01/>.

2. Competition Developments in the EU

From a competition point of view, the AI collusion debate has been reopened. It should be noted that pricing algorithms - *i.e.*, computer rules and processes designed to optimise the price for a product or services based on market conditions, competitor prices, demand fluctuations, and customer behaviour to automatically adjust prices - which generated a significant, yet highly inconsequential, frenzy in the competition world, 10 years ago, already included AI

Currently, large language models, or LLMs, that are powering generative artificial intelligence tools, opened a new era in the field of algorithmic pricing, as they offer a cheap and effective tool for designing pricing recommendations, as minimal technical expertise is required and proprietary data is not necessary, unlike most other pricing algorithms, what will likely make automatic price adjustments more “democratic” and accessible to small and medium sized undertakings⁸¹.

⁸¹ COHEN, SPITTLE and ROYER, “Assessing Algorithmic Versus Generative AI

Academic research into retail petrol prices in Germany and certain hotel room and rental cases in the US suggests that the use of the same pricing software by competitors represents the biggest threat, being susceptible of hub-and-spoke collusion. However, the closest investigation that one might find in relation to alleged hub-and-spoke algorithmic collusion is the EU *Eturas* case. Indeed, as the *Eturas* booking platform limited the discounts of the travel agencies using the platform to a maximum of 3%, the EU Court of Justice ruled that knowledge of the full terms of the 3% (which included the assumption that all travel agencies would be subject to the same restriction) could amount to a tacit agreement. Even though Commissioner VESTAGER proclaimed, then, that companies cannot escape responsibility by hiding behind a computer program and that businesses can ensure anti-trust compliance by design, algorithmic collusion proved, in general, very hard to detect⁸².

Pricing Tools”, Analysis Group, Inc. Law360.

⁸² An example of a pricing algorithm that facilitated an explicit collusive agreement may be found in the UK’s

In the US, AI, in the form of pricing algorithms, has recently reemerged in court litigation as a tool for coordination. A series of lawsuits concerning RealPage, a platform helping landlords to set their prices, claims the existence of an AI-enabled price-fixing conspiracy. According to these lawsuits, 30 to 60% of multifamily-building units are priced using RealPage and, apparently, landlords are recruiting their competitors to use the service.

This litigation is evocative of the Spanish case *Proptech*, which showed how real estate agencies, using a multiple listing system, allegedly colluded to set the minimum fees that they would apply for property sales and rentals⁸³.

The plaintiffs suing RealPage argue that this tool has enabled landlords to raise rents in concert. RealPage disputes this alle-

Topkins US and GB Eye Trod UK case. The investigation revealed that online poster retailers were using simple pricing algorithms in the context of a horizontal cartel among retailers to coordinate their prices on Amazon.

⁸³ Resolución Proptech (S/0003/20) of 25 November 2021, available at https://www.cnmc.es/sites/default/files/3831141_0.pdf.

gation, claiming that it simply offers “*bespoke pricing recommendations*” and does not have the power to set prices.

Subsequently, the Department of Justice, together with the Attorneys General of North Carolina, California, Colorado, Connecticut, Minnesota, Oregon, Tennessee, and Washington, filed a civil antitrust lawsuit against RealPage in August 2024, alleging that this entity violated Sections 1 and 2 of the Sherman Act⁸⁴. It has also extended the case, in January 2025, to six large landlords for algorithmic pricing scheme⁸⁵.

One of RealPage’s subsidiaries, a service called Rainmaker, is also facing multiple legal challenges for allegedly facilitating price-fixing in the hotel industry. Similar complaints have been brought against companies in industries as varied as health insurance, tire manufacturing,

⁸⁴ Please refer to <https://www.justice.gov/opa/pr/justice-department-sues-realpage-algorithmic-pricing-scheme-harms-millions-american-renters>.

⁸⁵ Please refer to <https://www.justice.gov/opa/pr/justice-department-sues-six-large-landlords-algorithmic-pricing-scheme-harms-millions>.

and meat processing, but winning these cases is proving difficult even though the Department of Justice recent lawsuit confirms that these issues will continue to raise the attention of antitrust enforcers.

In December 2023, a Tennessee judge rejected RealPage's motion to have a class-action lawsuit dismissed, but in May 2024, a Nevada judge dismissed a similar case against a group of Las Vegas hotels who used Rainmaker, concluding that there was not enough evidence of a price-fixing agreement, because the hotels involved had not shared confidential information with one another and were not required to accept Rainmaker's recommendations. Yardi, a RealPage competitor, is also being sued and the District Court of Seattle understood that enough evidence was presented to allow the price-fixing claims to move forward against the landlords and software maker Yardi Systems⁸⁶.

Apart from collusion, unilateral conduct concerns have also

emerged, once again reminiscent of past debates around online platforms and digital economy in general⁸⁷. Indeed, as AI relies heavily on data, companies with access to vast amounts of data can develop superior AI capabilities, what could generate efficiencies, or, in some cases, increase barriers to access to the market, resulting, for instance, in software favouring, similarly to what has, apparently, taken place, according to the European Commission in the Google Shopping case, resulting in a 2.42 billion euros fine⁸⁸. In the UK, the Competition and Markets Authority ("CMA") accepted commitments from Amazon where it was alleged, amongst other things, that the entity's algorithms were self-preferencing⁸⁹.

AI also raised increased interest in the field of mergers and

⁸⁷ Cfr., FARIA, TÂNIA LUÍSA (2017). *Di-reito da Concorrência e Big Data: Pon-to de Situação e Perspetivas*. In *Revista da Concorrência e Regulação*, n.º 29.

⁸⁸ Please refer to https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.

⁸⁹ Please refer to <https://www.gov.uk/cma-cases/investigation-into-amazons-marketplace>

⁸⁶ Please refer to <https://www.reuters.com/legal/litigation/landlords-software-maker-yardi-must-face-price-fixing-lawsuit-us-judge-rules-2024-12-05/>.

acquisitions. The UK's CMA recently investigated three proposed AI partnerships between incumbent tech platforms and AI startups, including Amazon's partnership with Anthropic, Microsoft's partnership with Mistral AI; and, Microsoft's hiring of former Inflection AI employees, as well as related arrangements with the company⁹⁰. The European Commission and the German Competition Authority have also shown interest in these cases, in particular in what concerns Inflection⁹¹.

However, relevant legal and economic issues result from this approach, in particular in what concerns the coherence and pre-

dictability of the concept of concentration and the merit of the intervention in view of the economic landscape..

Indeed, AI services have seen their user bases grow rapidly, and new entrants are, apparently, flourishing⁹². It is fair to consider that, despite the regulators' concern with these operators, the incumbent big tech players could easily leverage their dominance into generative-AI markets, we would not have seen the growth of such AI "unicorns" as OpenAI, Midjourney, and Anthropic, while AI platforms developed by incumbents, such as Meta's Llama or Google's Bard, have, up until now, been comparatively unsuccessful⁹³.

The risk of over enforcement in this area is that incumbents will fail to enter these markets and that AI startups will struggle to obtain the funding they need to compete against larger AI firms. The referred above partner-

⁹⁰ Please refer to <https://www.gov.uk/cma-cases/amazon-slash-anthropic-partnership-merger-inquiry> / <https://www.gov.uk/cma-cases/microsoft-slash-mistral-ai-partnership-merger-inquiry> / <https://www.gov.uk/cma-cases/microsoft-slash-inflection-ai-inquiry>

⁹¹ Please refer to <https://www.reuters.com/technology/microsofts-deal-with-mistral-ai-faces-eu-scrutiny-2024-02-27/> / https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4727 / https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2024/29_11_2024_Microsoft.html

⁹² For additional information on AI statistics please refer to <https://www.ai-prm.com/ai-statistics/>

⁹³ Please refer to <https://seekingalpha.com/article/4727744-over-80-percent-of-ai-projects-fail-microsoft-is-vulnerable>.

ships with big tech incumbents involve, as far as we know, the acquisition of minority stakes together with cash investments that could enable these firms to better compete against market leaders, as OpenAI. Given the incredibly fast-paced nature of the sector, delaying these investments could have harmful consequences in terms of alternatives available to consumers.

Considering the uncertainty surrounding the economic and legal impact of AI, it is positive that the majority of the enforcers, in particular at EU level, are studying the relevant issues, even though there is significant pressure to intervene immediately what could lead to suboptimal results.

Indeed, in September 2024 the European Commission has published a policy brief on competition in generative artificial intelligence and virtual worlds, following the two calls for contributions launched in the same year⁹⁴. The European Commission, the CMA and the US autho-

rities have issued a Joint Statement on Competition in Generative AI Foundation Models and AI Product, in July 2024, highlighting the competition risks requiring ongoing vigilance, including concentrated control of key inputs, as chips, substantial compute, data at scale, and specialists, entrenching or extending market power in AI-related markets, with the risk of overestimating, in our view, the power of big tech incumbents in this segment.

The CMA has also conducted an initial review specifically focused on AI Foundation Models, publishing a comprehensive report in September 2023, updated in March 2024⁹⁵. The French *Autorité de la Concurrence* has also published its assessment of the AI ecosystem, acknowledging the advantages of vertical integration in the value chain, while stressing the lack of transparency of agreements and partnerships in the sector⁹⁶.

⁹⁵ Please refer to:

^hhttps://assets.publishing.service.gov.uk/media/661e5a4c7469198185bd3d62/AI_Foundation_Models_technical_update_report.pdf.

⁹⁶ [⁹⁴ Please refer to <https://digital-strategy.ec.europa.eu/en/news/commission-publishes-policy-brief-competition-generative-ai-and-virtual-worlds>.](https://www.autoritedelaconcurrence.fr/fr/communiqués-de-presse/intelli-</p>
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The Portuguese Competition Authority (“AdC”) has published an issues paper about the role of competition and generative AI in November 2023. In that paper, the AdC noted that the focus of competition in the context of generative AI will necessarily have to be on the following cornerstones: access to data, access to cloud computing or specialized hardware and access to base models.

Finally, the Hungarian *Gazdasági Versenyhivatal* (“GVH”) has published its first comprehensive analysis on the current state and potential of AI in Hungary. The report notes that limited capital and a shortage of skilled labor contributes to the low adoption of AI, especially among small and medium-sized enterprises. Companies that are using AI, in Hungary, in chatbots, fraud detection, and translation, are mainly applying it to non-core tasks like internal administration. In the banking and telecommunications sectors, AI adoption is, according to this study, still limited, though some firms are invest-

^gence-artificielle-generative-lautorite-rend-son-avis-sur-le.

ing in training to expand their AI capabilities. Large companies are likely to expand AI use in the coming years, while SMEs, according to the report, risk falling behind.

It is interesting to note that there is an underlying idea that there is a risk that AI will lead to excessive dependency on certain players, especially in a context in which the EU has been unable to innovate, with the potential to harm plurality and democratic values.

Recently, both the revised Market Definition Notice and the policy brief acknowledging the Commission’s priorities in the enforcement of Article 102 TFEU seem to demonstrate that the competition law goals were, apparently, recently broadened and that the case law has also confirmed that competition law can achieve wider objectives. Protecting consumer choice is perceived as a means to guarantee plurality in a democratic society, as referenced in the General Court’s ruling in *Google Android judgment*⁹⁷.

⁹⁷ Case T-604/18 - *Google and Alphabet v. Commission* (Google Android).

The defense of ‘European values’ that has appeared often in the regulation of the digital space, but using competition tools for these purposes may threaten the existing objective legal standards, thresholds and procedural safeguards. It also raises issues as to what is the precise scope of the European values of now and what are those that a competition enforcer would like to support in the future⁹⁸.

Indeed, it is important to recognize that the AI impact and

⁹⁸ In the Google Shopping case, on one side, the exploitative theory of harm points to the fact that informed choice (albeit not in the sense of the GDPR) is key to understanding commercial relationships within digital ecosystems. On the other side, the Commission rushed to detail not only the direct harm caused to consumers in monetary terms but also in non-monetary terms, including the user’s frustration when lacking sufficient information about how to conclude a transaction online. One would be right to assert that frustration is not a parameter of competition, just as time waste and the consumer’s inconvenience are not, either. By this same token, not one of these elements is a European value, so we can only go back to the ulterior concept of an informed choice in the sense of the General Data Protection Regulation, in its approximation to information self-determination.

the necessary regulatory tools exceed significantly the scope of competition rules. To a certain extent, in spite of a significant insistence in competition solutions, the EU has pursued an ambitious agenda for regulating the digital economy, including the Digital Markets Act (“DMA”)⁹⁹, the Digital Services Act (“DSA”)¹⁰⁰, and a new Regulation of Artificial Intelligence (“AI Act”)¹⁰¹. These regulations build on an already established structure of digital and business regulations in Europe that is comparatively restrictive, but that varies substantially between EU Member States.

3. DMA and DSA

The DMA entered into force on 1 November 2022 and started applying in full, including its core obligations, in March 2024. The DMA is part of a packa-

⁹⁹ Regulation (EU) 2022/1925 of the European Parliament and of the Council, of 14 September 2022.

¹⁰⁰ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022.

¹⁰¹ Regulation (EU) 2024/1689 of the European Parliament and the Council of 13 June.

ge of measures proposed by the European Commission to introduce more competition in digital markets and protect consumers while promoting data mobility and interoperability, impacting how the largest companies can handle data. This *ex ante* regulation has followed a string of *ex post* investigations by the European Commission targeting big tech companies, under the abuse of a dominant position provisions, that were considered by several authors rather inconsequential¹⁰².

Big tech companies¹⁰³ design-

¹⁰² AKMAN, PINAR (2022). *Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act*. In *European Law Review* 85.

¹⁰³ On 6 September 2023 the European Commission designated for the first time six gatekeepers - Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft - under the Digital Markets Act (DMA). On 29 April 2024, the Commission designated Apple with respect to its iPadOS, its operating system for tablets, as a gatekeeper under the DMA. On 13 May 2024, the Commission also designated under the DMA, Booking as a gatekeeper for its online intermediation service Booking.com. In total, 24 core platform services provided by those gatekeepers have been designated. Source: https://digital-markets-act.ec.europa.eu/gatekeepers_en.

nated as “gatekeepers”¹⁰⁴ by the European Commission, are subject to a supplementary level of regulation being, for instance,

¹⁰⁴ According to article 3 (1) and (2) of the DMA, “1. An undertaking shall be designated as a gatekeeper if cumulatively: (a) it has a significant impact on the internal market; (b) it provides a core platform service which is an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future. 2. An undertaking shall be presumed to satisfy the respective requirements in paragraph 1: (a) as regards paragraph 1, point (a), where it achieves an annual Union turnover equal to or above EUR 7,5 billion in each of the last three financial years, or where its average market capitalisation or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year, and it provides the same core platform service in at least three Member States; (b) as regards paragraph 1, point (b), where it provides a core platform service that in the last financial year has at least 45 million monthly active end users established or located in the Union and at least 10 000 yearly active business users established in the Union, identified and calculated in accordance with the methodology and indicators set out in the Annex; (c) as regards paragraph 1, point (c), where the thresholds in point (b) of this paragraph were met in each of the last three financial years”.

restricted in their ability to share data between their services without user consent. Equally, gatekeepers will also be obliged to share additional information with advertisers relating to how their ads perform leading to greater transparency.

Furthermore, one can argue that the DMA can regulate artificial intelligence despite AI not being listed as a core platform service, since the DMA can cover services that act as a “gateway” between business users and consumers. Consequently, in case technologies such as ChatGPT take the form of search engines or app stores, they will become relevant for the scope of Regulation¹⁰⁵.

The Digital Markets Competition and Consumers Act is the UK equivalent of the DMA. It gives the CMA the ability to respond quickly and flexibly to the rapid developments in digital markets, including through setting targeted conduct requirements on firms found to have strategic market status in respect of a digital activity. The CMA has confirmed

that AI and its deployment by firms will be relevant to the CMA, particularly where AI is deployed in connection with a more developed digital footprint¹⁰⁶.

Another piece of legislation is the DSA which came into force in November 2022 and establishes legal rules for online platforms operating in the EU.

Broadly, the DSA seeks to make online platforms more responsible for the content they host and to strengthen user rights and protections, combating illegal activities, reinforcing the fundamental rights of individuals, and improving the free movement of services within the EU.

However, it also contains several provisions which directly impact on data protection considerations including bans on targeted advertising on online platforms by profiling children or based on special categories of personal data such as ethnicity, political views or sexual orientation, new obligations for the protection of minors on any platform in the EU.

¹⁰⁶ Please refer to <https://www.gov.uk/government/news/cma-sets-out-initial-plans-as-new-digital-markets-competition-regime-comes-into-force>.

¹⁰⁵ <https://globalcompetitionreview.com/article/ai-covered-dma-eu-official-says>.

There is an obligation to set out in plain and intelligible language, in the online platform’s terms and conditions, the main parameters used in their recommender systems, as well as any options for the recipients of the service to modify or influence those main parameters and very large online platforms and search engines (more than 45 million users), have an obligation to provide at least one option which is not based on profiling.

Both these Act will be enforced by the European Commission, and it will be interesting to see to what extent they could overlap or generate conflict with the applicable competition provisions and to what extent they will address specifically AI related matters¹⁰⁷.

¹⁰⁷ So far the existing investigations under the DMA seem to correspond to conducts already investigated under competition rule, as steering, self-preferencing and pay or consent, amounting to an abuse of a dominant position without the requirement to prove dominance or abuse. For further information please refer to https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1689.

4. The AI Act

The AI Act was enacted in the context of the European Commission’s Artificial Intelligence Strategy, which aims to make the EU a global reference for artificial intelligence, ensuring that artificial intelligence is human-centered, sustainable, safe and inclusive, at the same time it ensures respect for fundamental rights and democracy, as well as environmental sustainability. At the same time, the AI Act aims to foster innovation and establish the EU as a leader in the field of AI, acting as a promoter for making European industry competitive and with the ability to face its direct competitors (the USA and China) with increased fairness and innovation.

The AI Act will have far-reaching implications for both the development and use of AI; however, the practical consequences for providers and users are still unclear in many areas. In relation to competition law, the impact will be on competition enforcement, for example, the broad powers of procedure provided to the relevant supervisory agencies, which include examining evidence and accessing data and documents, are transferrable

to national competition authorities.

From a data protection perspective, while the General Data Protection Regulation¹⁰⁸ (“GDPR”) governs the processing of personal data, the AI Act addresses the development and deployment of AI systems. The interplay between these two regulations has deep implications for all stakeholders (i.e. businesses, regulators, and individuals), creating both synergies and challenges.

One can take the view that both the GDPR and the AI Act share the same foundational principles which is to ensure that technology is at the service of individuals, it respects their fundamental rights at the same time it promotes trust in innovation to build a fully operational Single Digital Market (with all the economic and social benefits it brings along). The GDPR has established itself as the landmark

regulation (not just at a European level, but rather worldwide) by establishing the most set of strong rules aiming at the protection of privacy and personal data, while the AI Act aims to create a legal framework for the safe and ethical use of AI. Both regulations are grounded on the same risk based approach, prioritizing the implementation of measures to prevent or mitigate the occurrence of harm (physical, material or immaterial) to individuals. As an example of this, GDPR’s general principles of transparency, accountability, and data minimization align closely with the AI Act’s focus on mitigating risks posed by AI systems which are classified in four risk categories: minimal, limited, high, and unacceptable. This common approach ensures that AI systems designed to process personal data should comply with rigorous standards of fairness and accountability, ensuring that the individuals’ rights are not undermined by AI systems. In addition, the GDPR sets forth that when processing activities are likely to result in high risks to individuals’ rights and freedoms a Data Privacy Impact Assessment is mandatory. The AI Act reproduces this approach

by imposing more stringent obligations for high risk AI systems (such as those used in critical infrastructure or biometric identification) such as conformity assessments to ensure compliance with safety, transparency, and accountability standards. This alignment facilitates integrated compliance strategies for organizations handling personal data through AI systems.

In addition to the risk based approach, both the GDPR and the AI Act also have transparency as one of their main principles. Under the GDPR, data controllers have an obligation to inform data subjects about how their personal data is being processed, including, *inter alia*, the purpose and legal basis for such processing. Likewise, the AI Act dictates that users of AI systems must be informed when they are interacting with an AI system, ensuring that individuals are not misled or manipulated about the nature of the system. These transparency requirements enhance, in both regulations, individuals’ awareness and control over technology, strengthening their ability to make informed decisions.

Both the GDPR and the AI Act also put emphasis on accoun-

tability. Under the GDPR, data controllers shall be responsible for, and be able to demonstrate compliance with the data protection principles. The AI Act introduces similar obligations, requiring deployers and providers of high-risk AI systems to establish risk management systems, maintain detailed documentation, and ensure ongoing monitoring of AI performance.

Despite all these common topics, ensuring compliance with both these regulations may reveal itself somewhat burdensome, particularly for small and medium-sized enterprises (SMEs) with limited legal and technical expertise as well as with lower financial resources to put in place robust compliance and governance programs (which can also be considered as an obstacle to innovation). In addition to these practical difficulties, there are also some provisions of both the GDPR and the AI Act which can create ambiguities. One example relates the possibility granted by the GDPR to process personal data based on the controller’s legitimate interests. On the contrary, the AI Act may impose explicit user consent when dealing with high-risk AI systems. Ba-

¹⁰⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

lancing these differences also requires careful consideration and interpretation as well as guidance from regulators to ensure a consistent application of both regulations.

In any case, all these measures seem essential to prevent harm and build trust, ultimately fostering sustainable innovation in the long term.

Despite the uncertainties which still surround the interplay between the GDPR and the AI Act, one thing is for sure; these regulations reflect the EU's ambition to set global standards for ethical and responsible technology governance.

By aligning their operations and practices with the GDPR and the AI Act, organizations can not only ensure compliance but also contribute to a technological landscape that respects human dignity and individuals' fundamental rights. In doing so, they will be better positioned to differentiate themselves in the market by prioritizing trust, transparency, and accountability and becoming more competitive at the same time.

5. Conclusion

Regulating AI using competition tools is not, as demonstrated, a totally new challenge, but the development of generative AI has resulted in a resurgence of the discussion in terms of unilateral conduct, collusion and merger control. It is positive that the several competition authorities are studying the legal and economic impact of AI, but the risk of enforcement exists, in particular considering the investigations opened to the acquisition of minority shareholdings and acquisitions in AI start-ups.

It is manifest that the rapid pace of AI development poses a challenge for regulatory frameworks that are slower to adjust, but it is also true that the permanent uproar against the alleged accumulation of market power in the digital space can lead to precipitation in regulating phenomena that are not totally developed or known. The European "regulatory brutality" results in competition regulation's purposes being constantly tested out by the European Commission as somewhat more expansive and all-encompassing than what was initially intended, making enforcement more unpredictable.

Besides the apparent overreaching scope of competition law, *ex ante* regulation by the EU has created several additional layers whose impact is rather unclear, layers that now include the AI Act. The European Commission itself has announced this framework as the world's first comprehensive AI regulation, even though it is unclear if it is premature or precocious in particular since the EU is currently not home to very large AI models.

Furthermore, the complex vertical and horizontal relationship between the European Commission, competition authorities and other public authorities, for example, the European AI Office within DG Connect), raises primary questions for the collaboration between EU institutions, the Member States and their specialised organisations and institutions.

It is true that EU competition law cannot be directly influenced by regulation in terms of outcomes and a regulatory breach is not the same as an antitrust violation, but the lack of compliance with regulation, including the data protection regulation or rules applying to operators using AI applications into their own servi-

ces, could be a potential indicia of lack of competition on the merits¹⁰⁹, but cannot prevail over the competition law rationale, focused on prices, quality and innovation.

Finally, the interplay of the several jurisdictions in terms of enforcement and the interplay between distinct pieces of legislation are likely to make the enforcement of the existing provisions more uncertain, resulting in increasing uncertainty in the internal market.

¹⁰⁹ C-252/21 - *Meta Platforms and Others*.