COMPETITION ASPECTS IN THE AI ACT – NAVIGATING THE MURKY WATERS OF THE ABUSIVE PRACTICES IN A DECENTRALISED VIRTUAL WORLD

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Abstract

The whole European construction, based on the three initial European Communities (namely, the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community) were built with several goals in mind, one of them being the establishing of a fair competition, seen as an essential step in the making of an internal market. For this reason, several dispositions were enshrined in the Treaties that served as a comprehensive legal framework for prohibiting those agreements that could have distorted the competition in the community market. These provisions stand and produce important effects as we speak, but the emergence of the AI poses a new and hard to digest threat to them, as not all the dispositions regulating the competition can easily be adapted to such a new and complex reality. However, the so-called AI Act tries to tackle this issue in creative and adaptive ways that we will analyse in the following.

Keywords: *competition, EU law, artificial intelligence, abusive practices, content creators, AI Act.*

1. Conceptual aspects. The notions of collusion and data collusion

As partially stated in the abstract, the original European Communities (the European Coal and Steel Community[1] and the European Economic Community[2]) have both been established with several well-crafted goals. Among these, building a fair competition in the cartelized European economic environment, that characterised the continent before and in the aftermath of the Second World War stands as a particularly important one, given the deeply entrenched American guidelines about competition, on the one hand, and fair and free trade, on the other hand, can affect economic recovery after a cataclysmic event like the aforementioned one[3].

This cornerstone goal of the early European construction was given its law form by several dispositions enshrined in the Treaties, like the ones in art. 86 TEEC (which stated that it is incompatible with the internal market and prohibited, to the extent that it could affect trade between member states, the abusive use by one or more companies of a dominant position held on the internal market or on a significant part of it) - of direct interest for our research, along with the exemplificative enumeration of the aforementioned abusive practices, in the form of: imposing, directly or indirectly, sale or purchase prices or other unfair trading conditions; limiting the production, distribution or technological development to the disadvantage of consumers; applying, in relations with commercial partners of unequal conditions for equivalent services, thus creating a competitive disadvantage for them and, last but not least, conditioning the conclusion of contracts on the partners' acceptance of additional services which, by their nature or in accordance with commercial usages, are not related to the subject of these contracts.

However, the problem with such provisions is that they were designed to apply to enterprises with a much more pronounced concrete nature, like the big industrial conglomerates in France, Germany, and Belgium, mostly active in the coal and steel industries (hence the sectorial objectives of the first European Community, the Coal and Steel one). Such undertakings had an easy to identify object of economic activity and their eventual

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[1] Established by means of the Treaty establishing the European Coal and Steel Community, signed in Paris, 18.04.1951, by France, Italy, West Germany, Belgium, Luxembourg, and the Netherlands, effective from 23.07.1952.

[2] Established by means of the Treaty establishing the European Economic Community, signed in Rome, 25.03.1957, by the same states, effective from 01.01.1958.

[3] See, for example, E.B. Haas, *The Uniting of Europe: political, social and economic forces, 1950-1957*, University of Notre Dame Press, Notre Dame, Indiana, 2004, *passim*.

(and, as a matter of fact, quite frequent) agreements, concerted practices or all kinds of abuses were, as such, also relatively clear and easy to prove.

The emergence of the AI, however, probably changed the game forever. In the AI era, those practices that affect the competition may no longer take the form of agreements, may no longer involve more than one enterprise (although this was never a condition before, only a frequent situation) and may be even harder to identify than before. Their effects, needless to say, can be just as devastating for the ideal of fair competition. Nevertheless, if a creative enough interpretation is given to carefully read EU law provisions, the necessary tools for combating the harm that the use of AI can do to fair competition in the EU can if not easily, then at least efficiently be found, and this is what we are going to try and prove in this study, nor before considering a series of conceptual statements, before proceeding to review the primary EU law provisions regarding competition matters and applying them to the use of AI.

As can be found reviewing the doctrine, the simple term *collusion* defines *„a non-competitive, secret, and sometimes illegal agreement between rivals which attempts to disrupt the market's equilibrium. The act of collusion involves people or companies which would typically compete against one another, but who conspire to work together to gain an unfair market advantage*"[4]. Deriving from this, algorithmic collusion adds the capabilities conferred by the artificial intelligence to the various anticompetition conducts (therefore, it can be seen as *„the situation where algorithms are used to support or implement a (…) collusion*"[5], paving the way to that the European Commission has identified as the most threatening three possible results of algorithmic collusion, namely:

- *„algorithmic facilitation of traditional collusion: this involves the situation where algorithms are used to support or implement a pre-existing collusion*"[6];
- *„algorithmic alignment via a third party: this involves the situation where a third party provides the same algorithm or coordinated algorithms to different competitors resulting in an alignment between the parties with respect to competitive parameters such as pricing, output, customers etc. The difference between algorithmic alignment via a third party and the algorithmic facilitation of traditional collusion is that with algorithmic facilitation, the use of the same third-party software provider is not the consequence of an anticompetitive conduct*"[7];
- *„algorithmic alignment: the parallel use by competitors of distinct (pricing) self-learning/deep-learning algorithms that via their automatic, reciprocal interaction can lead to the alignment of the (pricing) behavior, without any direct contact between the competitors. This will be difficult to prove*"[8].

2. Possible breaches of fair competition resulting from each of the aforementioned hypothesis

The first hypothesis is susceptible of occurring within the spectrum of virtually all the provisions prohibiting the anticompetition agreements. It is particularly applicable within the scope of art. 101 TFEU[9], the usage of algorithmic tools facilitating practically all the arrangements forbidden by the aforementioned article.

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[4] J. Young, *Collusion: Explanation, Examples, Preventative Steps*, *https://www.investopedia.com/terms/c/collusion.asp, 28 December 2020*, accessed 20.02.2024.

[5] P. Kuipers, R. Rampersad, *Artificial Intelligence and Competition Law: Shaping the Future Landscape in the EU*, *https://www.lexology.com/library/detail.aspx?g=7383d6da-22f4-456e-a074-7ff2f2a0548c*, 17.01.2024, accessed 20.02.2024.

[6] *Ibidem*.

[7] *Ibidem*.

[8] *Ibidem*.

[9] Which states that: *„the following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States, and which have as their object or effect the prevention, restriction or distortion of competition within the internal market*", also stating a series of examples like *„those which: directly or indirectly fix purchase or selling prices or any other trading conditions; limit or control production, markets, technical development, or investment; share markets or sources of supply; apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage* [and those which] *make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*".

Of course, it can also be applied in the sphere of art. 102 TFEU[10], insofar as the algorithmic tools and devices help the abusive conducer to have a better view or even control of the data spectrum and/or to limit or even prohibit the access of smaller competitors to the market (as in the case of big data operators like Google, for example).

In our opinion, it is not, however, impossible to conceive the first hypothesis as applicable in the realm of art. 107 para. 1 TFEU[11], as data can be seen and in fact is a resource in its own right and if various types of data that a state, through one or more of its institutions, offices or agencies are placed at a private enterprise's disposal, they can create an advantage that is not easy, if even possible at all to overcome by the competition.

As far as the ability to prove the existence of such practices, that involve the use of algorithmic devices is concerned, in our opinion, their existence is not as hard to prove as it may seem at the first site. Virtually every single use of such mechanisms leaves its technical mark somewhere, a mark that can be found at a thorough, yet somehow not unusual inspection. The other two hypothesis, however, pose a far greater challenge on the Commission as far as proving their existence and usage is concerned.

„First, the viability of data, and market predictions can increase market transparency, which could cause companies to act less independently on the market but also make it easier for companies to communicate and detect any deviations from anti-competitive agreements. This is particularly relevant to online marketplaces where pricing and transaction data are readily available. Secondly, AI can enable price adjustments and interactions with competitors on e.g. platforms, which can facilitate the implementation and monitoring of anti-competitive behavior. In both scenarios, no direct communication between competitors needs to take place in order to have anti-competitive effects on competition. Lastly, the use of AI by companies that are dominant in a market can lead to the exclusion of competitors from the market. These identified risks will likely occur in markets that are already prone to collusion due to factors such as an oligopolistic market, product homogeneity and the presence of a small number of companies"[12].

Such situations have been observed and even sanctioned in the past, so their even more frequent and market disturbing occurrence in a future marked by the extensive use of the artificial intelligence is neither a surprise nor a happy development for the objective of ensuring a fair and economically healthy competition on the single market. As the specialized doctrine has pointed out, *„companies that have significant market power may use AI to exclude competitors. This can be done by programming the algorithm to give preferential treatment to their own products and services"*[13], which is a clear breach of the prohibition against the abuse of dominant position, set out in art. 102 TFEU.

For example, in a landmark decision[14], the Commission has imposed substantial fines (of EUR 2,42 billion) on Google (Google Shopping) for illegally favoring *„its own comparison-shopping service by displaying it more prominently in its search results than other comparison-shopping services"*[15]. Google sued the Commission before the EU Tribunal, introducing an action of annulment against the Commission decision, but the Tribunal only partially annulled the Commission decision, *„in so far as they concern the fourth element of the single and continuous infringement, consisting in having made the conclusion of revenue share agreements with certain original equipment manufacturers and mobile network operators conditional on the exclusive pre-installation of*

[10] Which states that: *„any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States*", the examples of such abusive conduct provided for by art. 102 TFEU being *„directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; limiting production, markets or technical development to the prejudice of consumers; applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage* [and] *making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*".

[11] Prohibiting state aid and having the following content: *„save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*".

[12] P. Kuipers, R. Rampersad, *op. cit*.

[13] *Ibidem*.

[14] See Commission Decision of 18.07.2018 relating to a proceeding under art. 102 TFEU and art. 54 of the EEA Agreement (Case AT.40099 - Google Android) (notified under document C (2018) 4761).

[15] R. Cardoso, Y. Ren, *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison-shopping service – Factsheet*, *https://ec.europa.eu/commission/presscorner/detail/es/MEMO_17_1785*, 27.07.2017, accessed on 03.03.2024.

Google Search on a predefined portfolio of devices upheld the aforementioned decision"[16], upholding the rest of the Commission's findings and setting the total fines to the amount of EUR 4.125.000.000.

In the same vein, the Commission has also opened and carried out an investigation against Amazon, on the grounds that the aforementioned company on the grounds that „*it has breached EU antitrust rules by distorting competition in online retail markets* (…) [by] *systematically relying on non-public business data of independent sellers who sell on its marketplace, to the benefit of Amazon's own retail business, which directly competes with those third party sellers*"[17].

Amazon's behavior in this matter can be considered a classic example of data collusion. Practically, the Commission has found out, after carrying a series of thorough investigations, that „*very large quantities of non-public seller data are available to employees of Amazon's retail business and flow directly into the automated systems of that business, which aggregate these data and use them to calibrate Amazon's retail offers and strategic business decisions to the detriment of the other marketplace sellers. For example, it allows Amazon to focus its offers in the best-selling products across product categories and to adjust its offers in view of non-public data of competing sellers*"[18].

Quite unlike the previous example, the Amazon case has been settled before reaching the Court and, even more significant, before any sanctioning decision had to be issued by the Commission. In fact, Amazon has obliged itself to a series of commitments regarding „*usage of non-public data relating to the sellers' activities on Amazon marketplace for its own retail business and* (…) *treat*[ing] *all sellers equally on the Amazon marketplace when ranking offers*"[19];

However, as significant as they may be (after all, they are considered cornerstone cases by the specialised literature and not only), what these two cases have in common is the fact that they addressed anti-competitive behaviors that rely on the use of the information technology, yet do not yet employ the various tools provided by the artificial intelligence, as the aforementioned behaviors happened before the proliferation of the AI. What would the AI bring to an already crowded array of tools that make anti-competitive behaviors harder to identify and harder to distinguish from normal economic behavior as well, given the fact that «„*a purely unilateral measure without express or tacit acquiescence does not constitute an agreement*"[20]. *And a mere parallel conduct alone cannot be qualified as a concerted practice. An alternative explanation for such conduct might be that general changes in the market similarly affected all companies and led to an alignment of behavior*»[21];

What would be the right juridical treatment of the situation where AI algorithms reach the same conclusion, staying at the origin of a similar or even identical market behavior, in the absence of any agreement or even alignment? For example, what can be done if AI tools analyse the same pool of users' market preferences in order to determine an identical optimal price for whatever goods and services a company might provide to its customers, as it already happens?

The so-called AI act was hoped to answer these questions, whether it really does remains to be seen and, as far as we are concerned, analysed in the following section of our case study.

3. The AI Act[22]. What does it mean for the competition aspects of AI usage?

Apart from the general scoped provisions laid out in the TFEU applicable in the competition field, the so-called AI act should have regulated those specific aspects of anti-competitive practices that use or are facilitated

[16] Judgment of the General Court of 14.09.2022 *Google LLC and Alphabet, Inc. v European Commission*, Case T-604/18, EU: T:2022:541.

[17] A. Podesta, M. Tsoni, *Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices*, *https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077, 10.11.2020*, accessed on 03.03.2024.

[18] *Ibidem*.

[19] A. Podesta, M. Tsoni, *Antitrust: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime*, *https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777*, 20.12.2022, accessed 03.03.2024.

[20] Judgment of First Instance of 26.10.2000, *Bayer AG*, T-41/96, EU: T:2000:242, para. 71, apud F. Beneke, M.-O. Mackenrodt, *Artificial Intelligence and Collusion*, IIC - International Review of Intellectual Property and Competition Law, vol. 50, 2019, pp. 109-134, *https://link.springer.com/article/10.1007/s40319-018-00773-x*, accessed on 03.03.2024.

[21] *Ibidem.*

[22] Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, Brussels, 21.4.2021 COM (2021) 206 final, https://eur-

by the artificial intelligence algorithms. However, whether or not it really accomplished this aim is still and will probably be for a long time at least debatable.

As far as the AI act in concerned, its creation finds its roots in the EU Digital Strategy and its original aims were to „*regulate artificial intelligence (AI) to ensure better conditions for the development and use of this innovative technology*"[23], starting from the premise that the „*AI can create many benefits, such as better healthcare; safer and cleaner transport; more efficient manufacturing; and cheaper and more sustainable energy*"[24]. With this aim in mind, „*in April 2021, the European Commission proposed the first EU regulatory framework for AI. It says that AI systems that can be used in different applications are analysed and classified according to the risk they pose to users. The different risk levels will mean more or less regulation*"[25].

Its aim is even clearly enshrined in the very first provisions governing the field of appliance of the future AI Act, stating that it shall govern the functioning of all the AI systems covered by it, besides the fact that „*any reference to an economic operator under Regulation (EU) 2019/1020*[26] *shall be understood as including all operators identified in Title III, Chapter 3 of this Regulation; (b) any reference to a product under Regulation (EU) 2019/1020*[27] *shall be understood as including all AI systems falling within the scope of this Regulation*[28].

However, as far as the prevention of data collusion and its impact on the competition field is concerned, the specialised doctrine has stated, not without a hint of disappointment, that „*the Draft AI Act appears to have a contrasting approach as the threshold for sharing information collected by national supervisory authorities in the course of their activities with national competition authorities seems to be lower. The obligation to share information applies regardless of whether violations of EU competition rules are suspected or alleged.*"[29]

Overall, the future AI act „*establish*[es] *obligations for providers and users depending on the level of risk from artificial intelligence. While many AI systems pose minimal risk, they need to be assessed*"[30]. The first and most powerful category is that of AI systems that pose unacceptable risks, like, for example, the ones that engage in „*cognitive behavioral manipulation of people or specific vulnerable groups: for example voice-activated toys that encourage dangerous behavior in children; social scoring: classifying people based on behavior, socio-economic status or personal characteristics; biometric identification and categorization of people* [and] *real-time and remote biometric identification systems, such as facial recognition*"[31]. The usage of such systems will be outright forgiven, with several exceptions being allowed for law enforcement purposes,

The following category is the so-called „high risk" one. AI systems like the ones that „ *negatively affect safety or fundamental rights*"[32] fit into this category, *divided in „ AI* systems that are used in products falling under the EU's product safety legislation (…) [that] *includes toys, aviation, cars, medical devices and lifts* (…) [and] *AI systems falling into specific areas that will have to be registered in an EU database* [like the ones used for]:*management and operation of critical infrastructure; education and vocational training; employment, worker management and access to self-employment; access to and enjoyment of essential private services and public services and benefits; law enforcement; migration, asylum and border control managemen*t [and] *assistance in legal interpretation and application of the law*"[33]. Such systems will not be forbidden but will have to be „assessed before being put on the market and also throughout their lifecycle"[34].

As far as the general purpose and generative AI is concerned, AI systems like Chat GPT fall into the aforementioned category and will be bound to comply with a series of requirements regarding transparency, like

lex.europa.eu/resource.html?uri=cellar:e0649735-a372-11eb-9585-01aa75ed71a1.0001.02/DOC_1&format=PDF, accessed 03.03.2024 (AI Act in the following).

[23] **** EU AI Act: first regulation on artificial intelligence. The use of artificial intelligence in the EU will be regulated by the AI Act, the world's first comprehensive AI law. Find out how it will protect you*, https://www.europarl.europa.eu/topics/en/article/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence, 19.12.2023, accessed 03.03.2024.

[24] *Ibidem*.

[25] *Ibidem*.

[26] Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20.06.2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) no. 765/2008 and (EU) no. 305/2011

[27] *Ibidem*.

[28] Art. 63 of the AI Act.

[29] P. Kuipers, R. Rampersad, *op. cit*.

[30] K. Živković, D. Đurić, *The AI Act – EU's First Artificial Intelligence Regulation*, *https://www.kinstellar.com/news-and-insights/detail/2577/the-ai-act-eus-first-artificial-intelligence-regulation*, January 2024, accessed on 03.03.2024.

[31] *Ibidem.*

[32] *Ibidem.*

[33] *Ibidem.*

[34] *Ibidem.*

„*disclosing that the content was generated by AI; designing the model to prevent it from generating illegal content* [and] *publishing summaries of copyrighted data used for training*"[35] At least the second and third requirements of this enumeration have a limited, but not neglectable positive impact on the competition field, although they do not seem to be specifically designed to prevent anti-competitive behaviors, such an effect therefore being rather conjectural. However, „*high-impact general-purpose AI models that might pose systemic risk, such as the more advanced AI model GPT-4, would have to undergo thorough evaluations and any serious incidents would have to be reported to the European Commission*"[36], which may also investigate their use in relation to the Treaty provisions in the competition field.

Finally, pretty much the only serious requirement regarding the last category of AI systems, the ones that pose a limited risk, is for them to „*comply with minimal transparency requirements that would allow users to make informed decisions* [so that] [a]*fter interacting with the applications, the user can then decide whether they want to continue using it. Users should be made aware when they are interacting with AI. This includes AI systems that generate or manipulate image, audio or video content, for example deepfakes*"[37].

4. Conclusion: does the AI act do enough in the competition field? And if not, what is for us to do at the present time?

Although, as the specialised doctrine put it „the need for an effective legal framework to ensure the proper functioning of the European market has been felt since the beginning of the union construction"[38], what the AI act does in this matter is surprisingly feeble. Of course, there are certain provisions (that we, as a matter of fact, mentioned in our essay), but the overwhelming majority of the aspects that could, for now, be conceived as being brought about by the evolution of the AI and could affect the competition are not treated or are treated insufficiently. As a consequence, it will continue to be the role of the general provisions regarding competition aspects to regulate competition matters where the AI is present and employed. Therefore, only time will tell whether a creative interpretation of the already existing provisions will be enough to face the various and multiple challenges posed by the proliferation of the AI or the rapid, continuous and mostly unpredictable evolution of the aforementioned technology will prove to be more than the TFEU and the derived EU competition law can handle.

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[35] *Ibidem.*
[36] *Ibidem.*
[37] *Ibidem.*
[38] I. Lazăr, *Dreptul Uniunii Europene în domeniul concurenței*, Universul Juridic Publishing House, Bucharest, 2016, p. 18.

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