ON THE ANTITRUST IMPLICATIONS OF EMBEDDING GENERATIVE AI IN CORE PLATFORM SERVICES

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Since the rise of ChatGPT, digital gatekeepers have integrated generative AI into their core services, potentially exacerbating harms from anti-competitive behaviors. Generative AI enables these platforms to repurpose content from business users to meet end-user demand directly, reducing the value provided by these business users. Consequently, platforms shift from intermediaries to direct suppliers, centralizing information and diminishing the need for users to leave their ecosystem. This centralization, combined with personalized content creation and opaque advertising practices, could lead to unprecedented levels of user manipulation. Business users, in turn, may face "exploitative platform discrimination," creating inescapable prisoner's dilemmas that allow platforms to extract excessive rents. This article outlines the potential harms from embedding generative AI into core platform services and proposes several measures to mitigate them. These measures include rebalancing economic control over creative outputs, severing anti-competitive links between content dissemination and creation, and exposing 'preferred partnerships' that undermine legitimate industry responses. By addressing these issues, we can prevent generative AI from consuming the web that enabled its rise and ensure it causes more good than harm.

I. INTRODUCTION

Since the rise of ChatGPT, major digital companies, often called "gatekeepers," have embedded new interfaces into their core platform services ("CPS")[2] to provide access to powerful generative AI systems ("GenAI") that recast online content or assist with specific information tasks. The emergence of a central AI assistant that combines various tasks currently handled by multiple platforms is only a matter of time.

The rivalry among Big Tech companies to offer such "one-stop-shop" AI assistants may eventually lead to transformative innovations that boost productivity. However, currently the use of GenAI also exacerbates harm caused those company's CPSs in the digital sphere.

This article outlines how gatekeepers' embedding of GenAI in their CPSs is a fire accelerator for the problems that we already have and the policy implications of that.

II. GATEKEEEPERS' EMBEDDING OF GENERATIVE AI INTO CORE PLATFORM SERVICES

Each gatekeeper designated under the European Digital Markets Act ("DMA") has integrated GenAI tools into the suit of their CPSs.

A. Some First Examples of Embedded Generative AI

In May 2024, Alphabet began rolling out "AI Overviews" at the top of the results pages on its flagship search engine, Google Search. Powered by several large language models ("LLMs"), AI Overviews summarize text from multiple websites to directly answer a query instead of recommending websites with relevant answers. Alphabet also integrated GenAI into its operating system Android, its web browser Chrome, its voice assistant, and its video sharing service YouTube. Within YouTube, for example, Alphabet is testing a "conversational AI tool" that summarizes videos, an-swers questions users may have about a video, and recommends related content, all without having to leave YouTube.[3]

Similarly, Amazon updated its voice assistant, Alexa, with GenAI, enabling users to discover new content such as TV shows and movies on Amazon Fire TV & Prime or new products on Amazon Marketplace. Amazon also offers sellers on its marketplace GenAI tools to create product listings and corresponding ads that are "more engaging and visually rich, and deliver a better advertising experience for customers."[4] Sellers "simply select their product and click "Generate." In just seconds, the tool delivers a series of lifestyle and brand-themes images" that encourages more confident purchase decisions.[5]

Meanwhile, Microsoft has integrated its AI-powered chat assistant, called "Copilot," into its browser Edge, its search engine Bing, and its productivity software, Microsoft 365.[6] The company also introduced a wide range of GenAI solutions for business users, including for retailers to "enable personalized shopping experiences."[7]

On Facebook, Instagram, WhatsApp and Messenger, Meta AI allows users to access real-time information from across the web without leaving Meta's apps. "Let's say you're planning a ski trip in your Messenger group chat. Using search in Messenger you can ask Meta AI to find flights to Colorado from New York and figure out the least crowded weekends to go – all without leaving the Messenger app."[8] As part of their "next-generation assistant," Meta also enables users to "create images from text in real-time using Meta AI's Image feature."[9]

Similarly, to enhance the appeal of its social network TikTok, ByteDance enables both end users and advertisers to generate AI images, video, and audio content. An AI-based "performance predictor" helps advertisers maximize sales by identifying the best creative assets and target

2 Core Platform Service refers to digital services listed in Article 2(2) Digital Markets Act.

3 https://support.google.com/youtube/thread/242690316/testing-new-experimental-generative-ai-features?hl=en.

4 https://www.aboutamazon.com/news/innovation-at-amazon/how-amazon-uses-generative-ai.

5 https://www.aboutamazon.com/news/innovation-at-amazon/how-amazon-uses-generative-ai.

6 https://www.microsoft.com/de-de/edge/features/copilot?form=MA13FJ.

7 https://www.nasdaq.com/articles/alphabet-googl-boosts-google-tv-with-generative-ai-feature#:~:text=This%20generative%20AI%20feature%20allows,discover%20new%20content%20more%20effectively.

8 https://about.fb.com/news/2024/04/meta-ai-assistant-built-with-llama-3/.

9 https://about.fb.com/news/2024/04/meta-ai-assistant-built-with-llama-3/.

audiences. Since 2019, TikTok has also been testing a feature that makes all posts in the app shoppable. It identifies objects in videos and then prompts viewers to "find similar items on TikTok Shop" by clicking into a page of products.[10]

Finally, Apple also announced a deep integration of GenAI features into the iOS operating system, which powers all its devices. Combining GenAI with personal data collected from such devices, the "personal intelligence system" is designed "to understand and create language and images, take action across apps, and draw from personal context to simplify and accelerate everyday tasks."[11] Among other capabilities, this technology now enables users to generate as many AI images as they want in seconds, directly on their device.[12]

B. Common Features and the Path to an AI-Super-CPS

A common feature of all described integrations is that end users can now access powerful GenAI modules directly through the omnipresent CPSs of digital gatekeepers. Instead of offering GenAI tools as standalone products, gatekeepers are incorporating them into their core revenue-generating services to expand its offerings. Thus, while we have not yet seen a successful standalone business model for GenAI, such tools have already strengthened existing models today.

New is the ambition of gatekeepers to provide an AI-powered personal support service capable of combining several intermediation and navigation functions. Frequently referred to as "AI agent" or "AI assistant," such Super-CPSs shall perform a series of complex tasks independently, relating to an overall (typically commercial) goal. For example, in order to generate (monetizable) AI answers to a user query implying a commercial interest in a holiday trip, gatekeepers may deploy several LLMs in parallel: one for generating a text comparing destinations, one for images, one for recommending holiday attractions, and one for suitable flight connections; all to maximize user engagement via AI-generated content.

In 2023, Microsoft founder Bill Gates described this envisaged shift towards a one-stop-shop "personal agent" as follows:

> "Eventually we'll create a personal agent that understands all your communication and understands what you're reading that can help you and give advice to you. In a sense, the personal agent will replace going directly to Amazon or going directly to Siri or going to Outlook. So, the fact that Google owns search, Amazon owns shopping, Microsoft owns productivity, Apple owns, sort of everything on an Apple device - Once you get this personal agent, it kind of collapses those separate markets. [..] So in a decade from now, we won't think of those businesses as quite as separate, because the AI, will know you so well that when you're buying gifts or planning trips, it won't care if Amazon has the best price or if someone else has a better price. You won't even have to think about it. So, it's a pretty dramatic potential."[13]

III. CURRENT COMPETITION CONCERNS RELATING TO CORE PLATFORM SERVICES

From a competition law perspective, the described GenAI embeddings raises concerns.

CPSs designated under the DMA significantly impact the economy as they form the central gateways for businesses of any kind and size to reach end users. Their algorithms, interface designs and information choices determine today's winners and losers. They influence a multitude of user decisions, from commercial choices to political votes.

At the same time, by definition, such CPSs feature a number of characteristics that can be exploited by the undertakings providing them. Over the years, we have observed a multitude of anti-competitive behaviors of such CPSs to leverage their king-maker platform position to their own benefit and to extract value from all market participants. Vertical integration created conflicts of interests that ultimately led to self-serving conduct.

Dominant CPSs often no longer match supply and demand on the basis of the genuine relevance of a business offer for the end user, but on the basis of which match generates the highest profit margin for the gatekeeper. This distortion of the economic matching process has

10 https://www.bloomberg.com/news/articles/2024-01-29/tiktok-tests-feature-that-could-make-all-videos-shoppable.

11 https://www.apple.com/newsroom/2024/06/introducing-apple-intelligence-for-iphone-ipad-and-mac/#:~:text=Apple%20Intelligence%20will%20transform%20what,-to%20deliver%20truly%20helpful%20intelligence.

12 *Ibid.*

13 https://www.nbim.no/en/publications/podcast/bonus-episode-bill-gates/. See also https://www.gatesnotes.com/AI-agents.

already significantly harmed economies. As a result, the DMA, as the world's first specific legislation on CPSs, lists and condemns some twenty particularly harmful behaviors of CPSs.

IV. EMBEDDING GENERATIVE AI INTO CORE PLATFORM SERVICES EXACERBATES COMPETITIVE HARM

As Andreas Mundt, President of the Bundeskartellamt, has rightly pointed out, "from a competition perspective, artificial intelligence is a fire accelerator of the first order. The power of the "Big Techs" increases even more as a result of AI and the problems that we already have with them are exacerbated."[14] For at least five reasons.

A. From Intermediation to Dis-Intermediation

Originally, CPSs attracted both end users and business users with the promise of an open, unhindered and low-cost access to the respective other user group.

However, over the years, several markets had tipped and both user groups became dependent on dominant CPSs. Once dominant, those platforms began to artificially condition access to the respective other user group on conditions that maximize their profit margin, extracting value from both sides. To be able to further use the service, end users had to consent to the collection, sharing and use of ever more personal data by the gatekeeper, triggering privacy concerns. Businesses in turn were expected to share ever more of their content, triggering intellectual property concerns, and/or to pay the CPS ever more for reaching end users.

CPSs provide the marketplaces for matching supply and demand, but also for the exchange of information and ideas. This allows their owners to control and influence which businesses users and which of their offers, information or views particular end users may find, see and engage with, and at what costs. Regrettably, "as gatekeepers, they have the ability [and incentive] to extract more than their fair share from both sides of the market."[15]

GenAI further enhances the ability to exploit market participants. This is because gatekeepers can now use GenAI to effectively substitute, or threaten to substitute, much of the value that their business users provide. GenAI enables gatekeepers to use content provided by business users to the CPS to directly satisfy at least some of the end-user demand themselves.

The first wave of LLMs was built using data scraped from countless websites that had been optimized to appear prominently in online search engines and social networks. In a second wave, LLMs are being fine-tuned with data provided by businesses in the context of using a broad range of CPSs, including online intermediation and video streaming services. However, these GenAI-powered CPSs now have an incentive and the ability to reduce the need for end users to click through and use those businesses' websites and services. Initially, open access to business users' information allowed training the LLMs of those CPSs' GenAI models. Now, those AI models are targeting the value added by those very business users.

Research indicates that AI-powered search can fully answer a user's query 75 percent of the time without the need to visit a separate website.[16] Currently, for every 1.000 queries on Google Search, an average of 370 are directly answered by Google, resulting in no further clicks or search activity. These responses include information on current events, facts or people, sourced from crawled websites. Further 280 queries redirect users to another Google property, e.g. YouTube, Google Images, or Google News. Only 360 clicks lead to a third-party website.[17] Thus, already today, Google Search satisfies approximately two-thirds of all information demand directly, leaving only about one-third to the open web.

GenAI increases Google's share even further. "AI Overviews" have demonstrated how GenAI enables CPSs to scrape and repurpose content from their business users to satisfy end user demand. Research firm Gartner forecasts that due to AI answers traffic to the web from search engines will fall 25 percent by 2026,[18] despite an annual rise in query volume (demand) by over 10 percent.[19]

14 https://www.stern.de/digital/internet--kartellamt-sieht-ki-als--brandbeschleuniger--fuer-verbraucher-34839614.html.

15 https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-open-markets-institutes.

16 https://www.wsj.com/tech/ai/news-publishers-see-googles-ai-search-tool-as-a-traffic-destroying-nightmare-52154074.

17 https://sparktoro.com/blog/2024-zero-click-search-study-for-every-1000-us-google-searches-only-374-clicks-go-to-the-open-web-in-the-eu-its-360/.

18 https://www.gartner.com/en/newsroom/press-releases/2024-02-19-gartner-predicts-search-engine-volume-will-drop-25-percent-by-2026-due-to-ai-chatbots-and-other-virtual-agents.

19 Cf. United States & Co-Plaintiff States v. Google LLC, Plaintiff's Closing Statement, A-59 outlining the consistent rise of number of Google search queries between 2011-2022.

Google Search is just one example. On social media platforms, the click-through ratio for business users sharing content is often even lower. In 2023, TikTok even fully blocked links that navigated to any business outside the platform.[20] Others only allow clicks on ads. Pay-to-play has become the norm. GenAI further assists CPSs in keeping end users on their platforms until they click on an ad.

By recasting business users' content, GenAI creates a threat of full disintermediation. To the extent that information demand is already satisfied by the intermediary, there is no need for end users to engage with the intermediated businesses. Thus, GenAI is destined to further decrease the share of demand left for the open web to satisfy. Where gatekeepers generate content themselves, they have no incentive to direct end users to any third party. They may even cite efficiency gains: Why should end users take the effort to access any website or app for information if they can simply prompt their standard CPS?[21] Indeed, if an AI agent can present all the world's information, there is no need to turn anywhere else.[22]

Crucially, GenAI is not an information retrieval system that merely extracts and compiles third-party content. The systems generate new output that reduces the value of existing content, including the material the AI was trained on. Increasingly, user demand will be satisfied directly by the CPS with regenerated, synthetic content, decreasing demand for human creators. Thus, GenAI-powered CPSs have the ability to disintermediate or at least significantly reduce the use of websites and apps of suppliers that attracted users to the CPSs in the first place.

If AI assistants work as envisioned in Bill Gates' quote above, theoretically, end users may never need to look at any website or app again, because all content that could be found there can be repurposed and presented directly by the AI assistant. This presents a significant challenge not just for businesses that rely on attracting attention to serve ads on their own properties. Disintermediation is a threat to any business that aims to maintain direct customer relationships, rather than being relegated to providing raw data for an AI assistant that controls (and monetizes) customer interactions. The challenges many businesses have faced due to aggregators, search engines, app stores, and social media — where many struggled to unlock the monetary value of their content when discovered through these channels — seem set to repeat and indeed amplify.[23]

B. From Decentralized Information and Offers to Centralized Conclusions and Supply

The risk of disintermediation goes hand in hand with further centralization of power and loss of user sovereignty. The World Wide Web was created as a "decentralized" user-friendly linkage of diverse information repositories "with a long-tail of content and options," its creator Tim Berners-Lee wrote on the occasion of its 35th anniversary this year.[24] The vision of decentralized, multiple sources took its first blow with the rise of market-dominant CPSs such as Google Search, Facebook or Amazon Marketplace, which preferred to direct user attention to their own sources by preferencing them in rankings. With these CPSs embedding GenAI, there comes the ultimate reversal of the vision of decentralization, as these tools allow gatekeepers to regurgitate information from multiple sources directly on their own platforms, thereby eliminating the need to leave their CPSs.

Thus far, where no self-preferencing occurred, CPSs allowed users to discover diverse sources of information from which to draw their own conclusions. Embedding AI answers removes end users' intermediate intellectual effort of comparing and learning from multiple sources – and goes directly to one conclusion from a centralized source, the CPS.[25] Gatekeepers train end users to trust their rankings and AI answers. Given the crucial position of CPSs in the digital ecosystem, their centralized conclusions therefore have the power to significantly influence the decision-making process. The GenAI abilities of CPSs to deliver conclusions does not just cannibalize attention from CPSs' business users, it equally threatens the entire notion of an open and decentralized web. And as the decision-making process becomes more centralized, every single business becomes more dependent on the goodwill of the already mighty CPSs in control.

C. From User Segmentation to Personalized Manipulation

The CPSs' centralization of information, the shift from ranking of information to direct AI answers, significantly increases the risk of end user manipulation.

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20 Cf. https://directpaynet.com/tiktok-bans-links-to-external-e-commerce-sites/.

21 Charlie Beckett/Mira Yaseen, Generating Change. A global survey of what news organisations are doing with AI, 2023, p. 72 "Why should people go to a news organisation for information if they can just prompt a chatbot?"

22 Cf. https://www.washingtonpost.com/style/media/2024/05/27/ai-media-barry-diller-iac-nyt/.

23 Cf. https://digitalcontentnext.org/blog/2023/08/03/what-generative-ai-means-for-media-companies.

24 https://webfoundation.org/2024/03/marking-the-webs-35th-birthday-an-open-letter/.

25 https://www.brookings.edu/articles/connecting-the-dots-ai-is-eating-the-web-that-enabled-it/.

Even before GenAI, CPSs had an incentive to use (or misuse) end users' data to personalize their services and target audiences for their business users. CPSs funded by advertising have always segmented user groups to provide targeted marketing. Social networks, in particular, have inappropriately conflated the goal of targeted advertising with the provision of targeted content, leading to filter bubbles and excessive profiling.[26]

GenAI is capable of individualized manipulation at a level never seen before. Previously, CPSs granted end users access to the same sources, which were typically ranked based on general relevance algorithms applied to every user. In response to the same query, users received the same recommendations — a list of businesses. Thus, the matching was somewhat traceable and reproducible. In contrast, based on pure probabilities, GenAI creates different answers to the same question, even if entered by the same person. "Hitting an LLM with the same question twice will yield different results."[27]

The lack of repeatability of AI-powered answers increases incentives to manipulate. "Since it is difficult even for experts to evaluate search engines, search engine bias is particularly insidious," Google founders warned already 1998.[28]

> "A good example was OpenText, which was reported to be selling companies the right to be listed at the top of the search results for particular queries. This type of bias is much more insidious than advertising, because it is not clear who 'deserves' to be there, and who is willing to pay money to be listed. [L]ess blatant bias are likely to be tolerated by the market. For example, a search engine could add a small factor to search results from 'friendly' companies, and subtract a factor from results from competitors."

GenAI tools represent an even bigger black box than search engines. This lack of transparency extends to CPSs, which are already notorious for their opaqueness. GenAI integrated into CPSs exacerbates the issue, creating systems that produce convincing conclusions without transparent processes. It becomes challenging, if not impossible, for users or authorities to understand or predict the workings and outputs of CPSs' AI recommendations, especially as these can be altered at any time. The use of multiple proprietary LLMs and collaborations with various third-party GenAI providers further complicates the landscape.

Gatekeepers have an incentive to exploit such opacity by incorporating biases that maximize their revenue per user query. The risk is particularly high for advertising-funded CPSs. For instance, social media platforms will likely use GenAI to repurpose content found online to increase engagement and nudge users towards their highest-paying advertisers. No one will be able to effectively monitor such personalized user manipulations.

Thanks to their market position, CPSs have privileged access to first-party data about users' interests. By integrating this data with their GenAI systems, gatekeepers can create personalized content that influences decisions at all stages of the typical customer journey, from creating awareness to concluding a sale. This, in turn, will allow gatekeepers to use GenAI-powered CPSs to transform into profit-maximizing "one-stop-shop" discovery and transaction machines. They will be able to present customers with harmonized marketing messages across multiple digital touchpoints along the customer journey, controlled by the gatekeeper itself. Within this accompanied journey, the gatekeeper can both generate demand and subsequently provide suitable offers to meet it.

As a result, instead of consumer-centric, relevance-based matching, we are likely to see CPSs present ever more offerings based on what the individual end user is most likely to purchase at the highest price. And the more end users engage with such AI-powered intermediation systems, the more such systems will learn about the users' preferences and the more insidious the manipulation of purchasing decisions may become.

Knowing a few things about algorithms, in May 2024 Twitter founder Mark Dorsey rightly observed that "five companies are building tools that we will all become entirely dependent upon. And because they're so complicated, we have no idea how to verify the correctness, we have no idea how to verify how they work, [or] what they're actually doing."[29]

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26 Unilateral measures by Google and Apple, beyond what data protection laws require, have limited the ability of publishers to target users based on their previous behavior (such as search history). This, in turn, increased the need for contextual advertising, where ads are designed to match the content on a website or app, and vice versa, creating an unhealthy link between the creation of content and corresponding advertising.

27 Fergal McGovern, Why does GenAI give different answers when you ask the same question?, June 6, 2024, The Human Factor Newsletter.

28 http://infolab.stanford.edu/pub/papers/google.pdf.

29 https://fortune.com/2024/06/06/elon-musk-jack-dorsey-twitter-x-social-media-algorithms-free-will/.

D. From Prisoner's Dilemma to Prisoners' Death Penalty

In a competitive environment with free choice, one would expect that end users and business users who feel exploited by a certain service provider would simply turn their back on it. At the very least, they would limit its usage to a level that does not risk their own disintermediation, for instance by blocking the service's GenAI tool.

However, for dominant CPSs such free choice does not exist as they have become unavoidable trading parties. This dependency in turn allows CPSs to extract First-Party-Data to train their own specific GenAI.

The competition investigations into Meta's excessive data collection have already demonstrated how a market-dominant CPS may leverage user dependency to gain access to more data.[30] Similar mechanisms work to extract data from business users to train and operate AI models. CPSs benefit from several economic factors in this regard.

Websites have technical options to express their desire not to be scraped. Companies can also legally prohibit AI training with their content. However, in practice, such blockage is much more challenging if the AI tool in question is embedded into a gatekeeper's CPS, on which a company relies to reach its customers. In this case, the gatekeeper may effectively condition customer access through its CPS on the business user's willingness to allow the gatekeeper's use of data for GenAI.

Nearly every business user depends on designated CPSs. Yet, these CPSs do not depend on any individual business user. Similarly, while LLMs require a critical mass of data to train, they do not require the data from any specific business. In combination, this dynamics allow gatekeepers operating both CPSs and LLMs to create powerful "prisoner's dilemmas": a system that leaves business users with no choice but to allow the use of their data for GenAI, even though collectively they are worse off by doing so.

The most powerful tool to create such a system is to link the exposure of businesses via an unavoidable CPS to their individual approach to the gatekeeper's GenAI tools. Due to a strong saliency bias, even objectively minor differences in the relative prominence of businesses on a central platform can shift all demand to some businesses and render others invisible. A gatekeeper can take advantage of this correlation between its ranking and business users' success. One means is to make the prominence on a CPS of businesses or their offers or content, in comparison to similar businesses, dependent on the businesses' respective support for the gatekeeper's GenAI system. The powerful effect of such linkage was first described in the Commission's preliminary assessment of *Google Search (Shopping)* in 2013. Google had scraped press publishers' websites and displayed news snippets not only on Google Search but also on its specialized news search service, Google News. Former Competition Commissioner Joaquín Almunia condemned this practice, explaining:

> "Google creates a link between getting the right to use material from other sites on its specialised search services and the appearance that these sites have on Google's general search results – a practice that allows Google to benefit from investments made by other firms. I have asked Google to sever this link to restore competitive incentives."[31]

The anti-competitive link consisted in the fact that those press publishers that disallowed the display of news snippets on Google News were presented less prominently in the results pages of Google Search and thus penalized with less search traffic.

As subsequently the Commission shifted its focus, Google's strategy of leveraging the relative prominence on Google Search to create a prisoner's dilemma and extract data from publishers persisted. Today, it forms the heart of obtaining free real-time access to web content that can be used for "AI Overviews." In September 2023, to address copyright and regulatory concerns, Google introduced a new feature for web publishers named Google-Extended, "for website operators to determine if the content of their sites may be used for the further development of generative AI models or not."[32] However, in May 2024, publishers utilizing this option discovered that it did not prevent their content from appearing in AI Overviews on Google Search. Google contended, somewhat surprisingly,[33] that since AI answers were "built into Search, not bolted

30 Cf. CJEU, Case C-252/21, 4/7/2023, Meta/Bundeskartellamt, ECLI:EU:C:2023:537; and P https://cyprus.representation.ec.europa.eu/news/commission-sends-preliminary-findings-meta-over-its-pay-or-consent-model-breach-digital-markets-act-2024-07-01_en?prefLang=tress.

31 https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_1042.

32 Cf. https://www.lobbyregister.bundestag.de/media/6d/00/324043/Stellungnahme-Gutachten-SG2406240295.pdf.

33 In reality, like LLMs themselves, the technology used for generating AI Overviews differs significantly from the information retrieval technology used for standard search results.

on, and integral to how Search functions,"[34] publishers could only exclude their content by blocking the Google Search crawler. This presents publishers with two options: First, they can block the crawler (Googlebot) entirely, removing their presence from any search result and rendering them invisible online. Alternatively, they can use a "nosnippet" meta-tag in their website's header. While this prevents their content from being used directly in AI Overviews, it also strips any text snippet or video preview from their regular search results, reducing them to a basic hyperlink. A choice between a rock and a hard place.

Thus, with a view to securing free access and use of web content for AI Overviews, Google penalizes publishers that opt-out of GenAI by showing them less prominently on results pages of Google Search as compared to publishers that tolerate AI Overviews. As a result, in fear of losing user attention and thus traffic, all publishers end up tolerating AI Overviews, even though they know that overall this harms their industry significantly.

Google is not the only gatekeeper leveraging discriminatory tactics to effectively embed GenAI in CPSs.[35] Apple recently stated that "exposure," in terms of preferential access to its end-user base, could be "of equal or greater value than monetary payments."[36] Typically, the greater the benefit of prominence on a CPS, the more likely the CPS is to expropriate business users' content through self-serving discriminatory rankings, thereby maximizing its gains from GenAI. Conversely, business users face a prisoner's dilemma: no one dares to block GenAI, fearing dis-advantage, but collective non-cooperation would actually prevent their disintermediation. While collective blocking would benefit all by preserving their independent operations, each user has an individual incentive to permit access in exchange for increased prominence or direct payments. However, if by allowing GenAI a business user obtains a relative advantage *vis-à-vis* its direct rivals, all business users will follow to avoid being left out. Yet, if all follow, no one ends up gaining relative prominence on the CPS, but all cede absolute prominence to the gatekeeper. Ironically, the more they engage with the system to gain a competitive advantage — by meeting the CPS's data access requests — the more value they relinquish and the weaker they become *vis-à-vis* the gatekeeper.

Gatekeepers force business users to enable AI solutions that may disintermediate them in the long term by threatening to otherwise immediately disadvantage them in their exposure to end users. This creates a race to the bottom for business users, with the gatekeeper as sole beneficiary.

It follows that as long as gatekeepers maintain their central role in matching the supply from business users with the demand from end users, business users have no real choice but to meet the conditions imposed by the gatekeeper, including supporting GenAI capable of disintermediating them. They are subjected to a prisoner's dilemma they cannot escape, which could spell the end for their business model.

E. From Open Web to Preferred Partnerships

Prisoner's dilemma are frequently backed up by "Preferred Partnerships." Gatekeepers operating CPSs are entering into cooperations with selected business users to pull them "closer" to their system. Instead of treating all business users equally, "preferred partners" obtain particular advantages. This includes more relative prominence on CPSs, better access to essential resources like data or even direct payments for their closer cooperation.

Cooperations that create efficiencies are pro-competitive. However, we have seen gatekeepers using contracts only to exert control, silence critics or weaken opposition. The preferred status of one business typically means the disfavoring or even exclusion of others. Gatekeepers use such unequal treatment to torpedo any rational attempts of a certain group of business users to escape a prisoner's dilemma created by a CPS,[37] such as those described above. In a situation where the gatekeeper wins, if only a few companies cooperate, paying off such few to "defect" can be a very effective tool to divide and conquer.

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34 https://searchengineland.com/google-extended-does-not-stop-google-search-generative-experience-from-using-your-sites-content-433058.

35 For example, Microsoft lends the crawlers and web index of its search engine Bing to several providers of GenAI-powered answer engines, including Perplexity.AI, You.com, and ChatGPT. Publishers wishing to block those providers (as they add no value to them) therefore need to block Bing's crawlers. Yet, if they do, they also no longer appear in the general results of Bing or its search syndication partners, such as Ecosia, which do not provide AI answers. Neither will they appear in Copilot, which Microsoft plans to integrate into several CPSs. Microsoft's options for blocking GenAI also do not allow differentiation within Microsoft services. Similarly, publishers cannot specify that their content may be used for GenAI answers in Copilot, but not for the training of GenAI models. They can only either allow or disallow both. Cf. https://blogs.bing.com/webmaster/september-2023/Announcing-new-options-for-webmasters-to-control-usage-of-their-content-in-Bing-Chat.

36 https://www.theverge.com/2024/6/13/24177550/apple-openai-chatgpt-deal-payment-revenue-sharing-chatbot.

37 For an example see Google's set-up of the Google News Showcase initiative to torpedo press publishers' collective bargaining for copyright renumeration. Autorité de la Concurrence, Decision 22-D-13 of 21 June 2022, paras 49 et sub., 59 "The Autorité found that access to the Showcase programme had significant consequences in terms of visibility for news agencies and publishers and considered that the mechanism put in place by Google was therefore likely to give these publishers and news agencies a strong incentive to accept the conditions imposed by Google or else have their conditions of visibility impaired compared to other publishers and news agencies that had agreed to take part in the programme."

For instance, it would be most rational for press publishers to collectively negotiate a reasonable copyright licensing deal for the use of their content by a GenAI service. However, such a service could undermine collective bargaining efforts by offering slightly higher compensation to a few individual publishers than they would receive from a group deal. This strategy is employed with the knowledge that it will effectively disrupt all collective negotiation efforts.[38]

The embedding of GenAI in CPSs accelerates the transition from an open web, where platforms direct end users to a diverse array of third-party services, to closed platforms that retain end users within their domain to directly monetize or favor certain partners. Previously, we observed CPSs prioritizing their own services in search rankings. With GenAI, this self-serving behavior extends further as CPSs increasingly become suppliers themselves.

V. SOME POLICY RECOMMENDATIONS

Antitrust law alone will not be able to deal with all described concerns of embedding GenAI in dominant CPSs. However, competition is an important piece of the puzzle.

Thus far, authorities paid attention to ensuring competition along the entire value chain of GenAI. No less attention should be placed on addressing the issues resulting from the integration of GenAI into already dominant CPSs. A top priority must be to sever the anti-competitive links created by gatekeepers between the prominence of business users on CPSs and their willingness to support GenAI tools capable of exploiting them.

A. Rebalancing Economic Control over Own Creative Output

Arguably, the most pressing topic regarding GenAI is the protection of providers of creative (human) content to ensure sufficient incentives for future innovation on which also AI relies.

To become a profitable hub for finding and consuming content, one does not need to own the content. It is enough to effectively *control* the content and its monetization. Currently, for web content such control entirely lies with digital gatekeepers. Powerful technology essentially allows their GenAI systems to repurpose and monetize any content published online. It is essential to give back control to the actual rightful owners, the content providers.

1. Reinforcing Intellectual Prohibition Rights

For good reasons, the core of any property right, including intellectual property, is the right to say "no." Absent market power and unilateral dependencies, everyone would say "no" to the use of their valuable content by GenAI providers without any compensation. The problem we face is that digital gatekeepers will not take a "no" for an answer, and copyright law itself provides insufficient tools to address this. As long as gatekeepers can effectively penalize anyone who dares to prohibit the use of their content for GenAI with significant disadvantages on any unavoidable CPS, saying "no" remains a theoretical option only. This is not a copyright issue; it is a matter of market power, antitrust law. By severing such anti-competitive links, antitrust law needs to ensure that content providers regain control over the monetization of their content to remain independent market participants. This applies to both the right to say "no" and the right to say "yes, against reasonable compensation."

2. Mandatory Bargaining Framework for FRAND Compensation

Where content providers are generally willing to say "yes," agreeing on compensation can also be affected by market dominance. Currently, gatekeepers' king-maker power from controlling CPSs creates an imbalance in bargaining power. This allows gatekeepers to outright reject any compensation for the use of protected content or to insist on a price close to zero.

Stronger inter-platform competition could shift the balance of power and create more opportunities to bargain for the value of content.[39] However, until inter-platform competition is achieved, other antitrust tools must be deployed to level the playing field.

38 See Autorité de la Concurrence, *ibid.*

39 https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-open-markets-institutes.

Some lessons can be learned from previous attempts by press publishers around the globe to secure compensation for the use of their content by search engines and social networks. The central lesson is that this issue cannot be left to copyright law alone but requires antitrust support. Publishers managed to secure payments from small companies, but they failed with their heaviest users, Google and Meta.[40]

Antitrust backup can be provided through a framework for disputes over prices and other payment conditions. The Australian "News Media and Digital Platforms Mandatory Bargaining Code" provides helpful guidance. Addressing the "bargaining power imbalance that exists between digital platforms and Australian news businesses"[41], the law created a mandatory framework for large digital platforms to negotiate in good faith with news publishers for using the latter's content. Convincing key elements include some (though not sufficient) obligations that prevent platforms from creating prisoner's dilemmas. They must provide information about the scope of their usage and any planned changes to algorithms affecting referral traffic or advertising associated with it. Any differentiation between news businesses based on their payment expectations is prohibited. Where parties cannot agree on remuneration, an arbitral panel selects between two final offers made by the bargaining parties, thereby shifting the dynamics. Such measures would equally facilitate negotiations about compensation for the use of content for GenAI services.

3. Exemptions for Collective Agreements to Rebalance Bargaining Powers

As outlined, gatekeepers try to create a prisoner's dilemma, where if one content provider defects, all other providers are worse off, and the gatekeeper wins. Affected content providers, therefore, have a legitimate interest in discussing and agreeing on suitable countermeasures. The antidote to "divide and conquer" is to "unite and stand." Where this is the case, antitrust law should not penalize but facilitate such defensive measures. To this end, a secure framework is needed in which content providers can collectively agree and negotiate with platforms about the use of their content for GenAI and about ensuring continued nationwide coverage of their media. Such framework could take the form of a block exemption,[42] guidelines[43] or binding commitments to not pursue certain activities aimed at rebalancing the bargaining position of content providers.

In particular, authorities should clarify that agreements made in the context of collective bargaining between content providers and large GenAI providers, intended, by their nature and purpose, to improve compensation for the use of copyright-protected material, are not anti-competitive and therefore do not infringe antitrust law. Equally, activities such as to jointly (i) request data from GenAI providers, (ii) develop and implement technical standards to regain control over the use of content, (iii) request to conclude a license agreement, (iv) create and distribute documents addressing the challenges AI poses to the industry and/or (iv) request changes to the use of content, should be exempt from antitrust scrutiny.[44]

B. Severing Links Between CPSs and Generative AI

The most powerful tool to leave businesses no choice but to cooperate with the gatekeeper's GenAI is to punish any non-cooperation by reducing their relative prominence on CPSs, and hence, their access to end users.

As highlighted previously, such links should be rigorously condemned under antitrust law. Germany was the first country to explicitly prohibit such conduct through a special provision on abusive conduct by undertakings of paramount significance for competition across markets.[45] This provision should be widely adopted and implemented.[46] In the absence of a specific provision, such behavior, which may be termed "exploitative platform discrimination," should be considered an abuse of dominance or an unfair unilateral practice under general antitrust laws. The link created between the CPS and the GenAI service confers an unjust advantage on the latter. The anti-competitive effects may be even more significant than other established forms of abuse, such as bundling, most-favored-nation and exclusivity clauses.

40 https://www.cjr.org/the_media_today/canada_australia_platforms_news_law.php.

41 https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd2021a/21bd048.

42 For example, akin to Section 30 (2)(a) German Competition Act.

43 For example, akin to European Commission, Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons, OJ C 374/2 of 30/9/2022.

44 Cf. https://www.jftc.go.jp/en/pressreleases/yearly-2023/September/230921EN2.pdf.

45 Section 19a (2) sentence 1, no. 7 German Competition Act. For more on the provision see https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4764658.

46 Including by the Bundeskartellamt, which thus far failed to activate it.

In any event, considering that GenAI (answer) services serve a different function for both end users and business users, they operate in a distinct market. Accordingly, it may constitute abusive tying or self-preferencing if a dominant provider of a CPS fully integrates, partially embeds, or prominently displays its own GenAI service or any content it generates.[47]

C. Separation of (Ad-Funded) Content Dissemination from Creation

For a gatekeeper operating a CPS funded by advertising, owning and controlling a GenAI system that can create individualized content and non-traceable marketing messages creates a massive incentive to manipulate end users. The gatekeeper will seek to maximize advertising revenue by setting up and implementing personalized micro-targeting campaigns that accompany an end user throughout their entire customer journey with tailored and coherent marketing messages from the highest-paying advertisers.

Given the non-transparency of such a system, it is unlikely that this conflict of interest can be effectively supervised by anyone. Today's interlocked network of ad tech and CPSs already creates room for self-serving behavior that is very difficult to monitor. Adding GenAI to a gatekeeper's multiple layers to manipulate the dissemination of content and corresponding ads to maximize revenue certainly exceeds what behavioral remedies can control.

This provides strong arguments for the structural separation of CPSs that disseminate content from AI services that generate content. A gatekeeper, which, by operating a dominant CPS, has the power to determine, de facto, the conditions in which end users may access content, should not turn into a content provider itself, as this gives rise to a conflict of interests and puts it at an obvious advantage over competing content providers, by enabling it to favor its own content and also, in doing so, to prevent the growth of content providers to the detriment of consumers.[48] In any event, any such integration, must be accompanied with a framework of substantive, clear and transparent criteria that preclude the gatekeeper from favoring the content of its GenAI or of synthetic content over human content and enable effective review.[49]

More rigorously, the creation of an unlawful conflict of interests may also be assumed when a dominant CPS providing GenAI content to end users monetizes its service through advertising connected to or tailored to the content it displays. The prompt-based and inherently individualized nature of GenAI content creation should not be monetized with personalized advertising, as this creates incentives to align both into an inseparable mix, to the detriment of end users and advertisers alike. Such a requirement would maintain the important separation between content and advertising, a principle deeply rooted in media law but challenging to enforce in the context of personalized GenAI.

D. Addressing Preferred Foreclosure Partnerships

As outlined, "preferred partnerships" are often a synonym for "exclusion of rivals"; contracts to create a prisoner's dilemma at the expense of third parties and, more often than not, to the sole advantage of the gatekeeper.

Authorities should therefore thoroughly assess the exclusionary effects of partnerships involving arrangements on the presentation of the partner on a CPS in return for their willingness to cooperate with the gatekeeper in the era of GenAI.

In particular, authorities should scrutinize whether promised preferential exposure to the gatekeeper's user base actually entails an anti-competitive pact to exclude the partner's rivals from accessing this user base. As such clauses amount to splitting up customer groups, they should be sanctioned. The same applies to any agreements that condition a partner's preferential CPS prominence on their acceptance of unreasonable terms for the use of their content for GenAI purposes.

47 Cf. Höppner, *ibid.*, paras 86-92.

48 Cf. CJEU, Case C-333/21, 21/12/2023, *European Superleague*, ECLI:EU:C:2023:1011, para. 133.

49 Cf. CJEU, *ibid.*, para. 134.