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Competition Law in the Digital Era: Adapting to the New Environment

Pēteris Zilgalvis

Judge, General Court of the European Union


Photo by Markus Spiske


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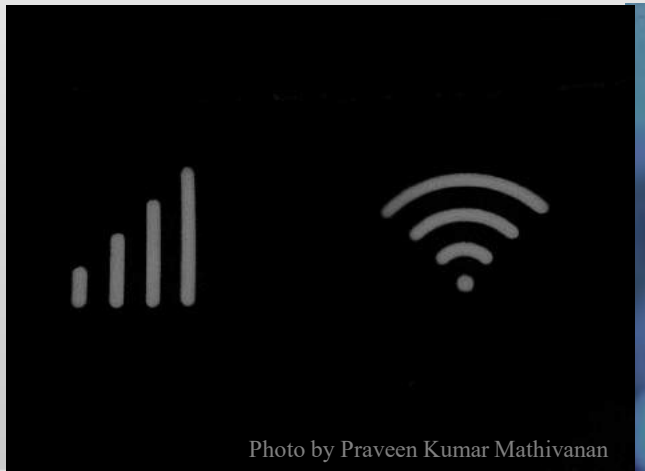
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Outline

- Specific features of competition in the digital economy
- “Innovation” in case law
- Example of generative artificial intelligence (“AI”)
- AI and Competition law
- Interim measures concerning the DSA
- CJEU Strategy on AI
- Conclusion

Introduction

The Link between Competition Law & Innovation

Innovative/ High tech firms are forced to share their intellectual property with competitors

OR

they are prevented from controlling the price at which their products and services are sold

↓

Less innovation

↓

Slows down the development of new goods and services

↓

Slows down competition to the detriment of consumers and broader economic performance

Allowing Innovative/ High tech firms to maintain barriers to entry to prevent competitors from entering the market to challenge their products/ services

↓

Hinders competition

↓

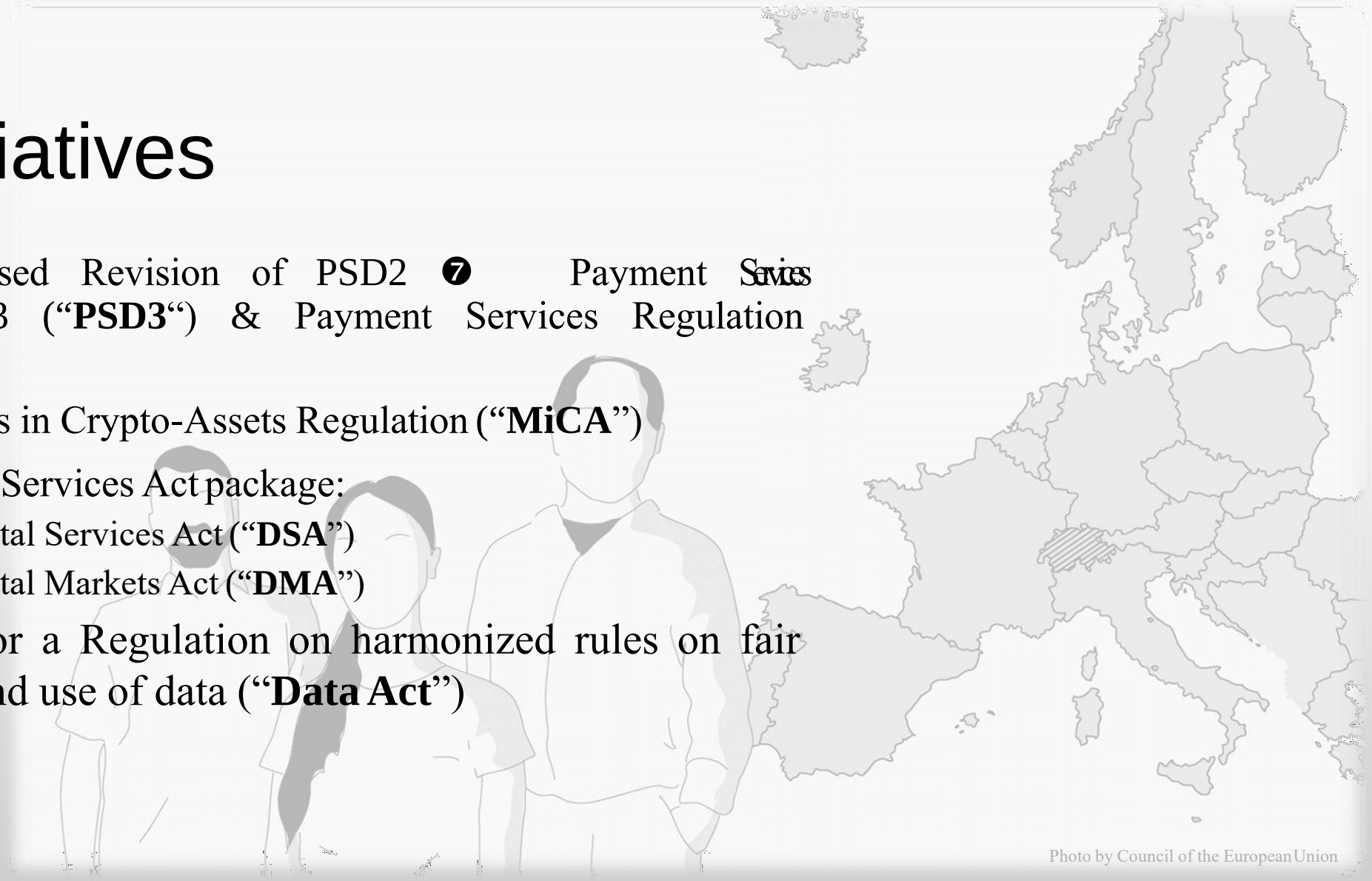
Possibly leads those firms to innovate less to the detriment of consumers

The Challenge for the Regulators and Courts

- Consider the specific features of the digital economy to foster innovation while ensuring proper application of competition law.

EU Initiatives

- The Proposed Revision of PSD2 ➡ Payment Services Directive 3 (“**PSD3**“) & Payment Services Regulation (“**PSR**”)
- The Markets in Crypto-Assets Regulation (“**MiCA**”)
- The Digital Services Act package:
  - The Digital Services Act (“**DSA**”)
  - The Digital Markets Act (“**DMA**”)
- Proposal for a Regulation on harmonized rules on fair access to and use of data (“**Data Act**”)



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Specific Features of Competition in the Digital Economy


Photo by Grab

Market Definition

- **Market power** and competitive effects are **usually assessed with reference to the boundaries set by <u>the relevant market.</u>**
- **In digital markets, the traditional approach does not necessarily work** because digital firms continuously redefine the boundaries of a market or create new markets. (Social networks example).
- **The use of market shares or profit margins may be questioned**. However, they can help understand the business model and how digital platforms generate turnover and profit.

Photo by Rahul Chakraborty

Market Power

- **On innovative markets, high market shares do not necessarily imply market power**, since incumbents are often challenged by new entrants.
- At times it may be **impossible to use static indicators to assess market power**, as some services are offered for free and some business models make very little or no turnover or profit.
- **Alternative sources of market power** (data, data gathering, and analytical capacity) may also be taken into account.

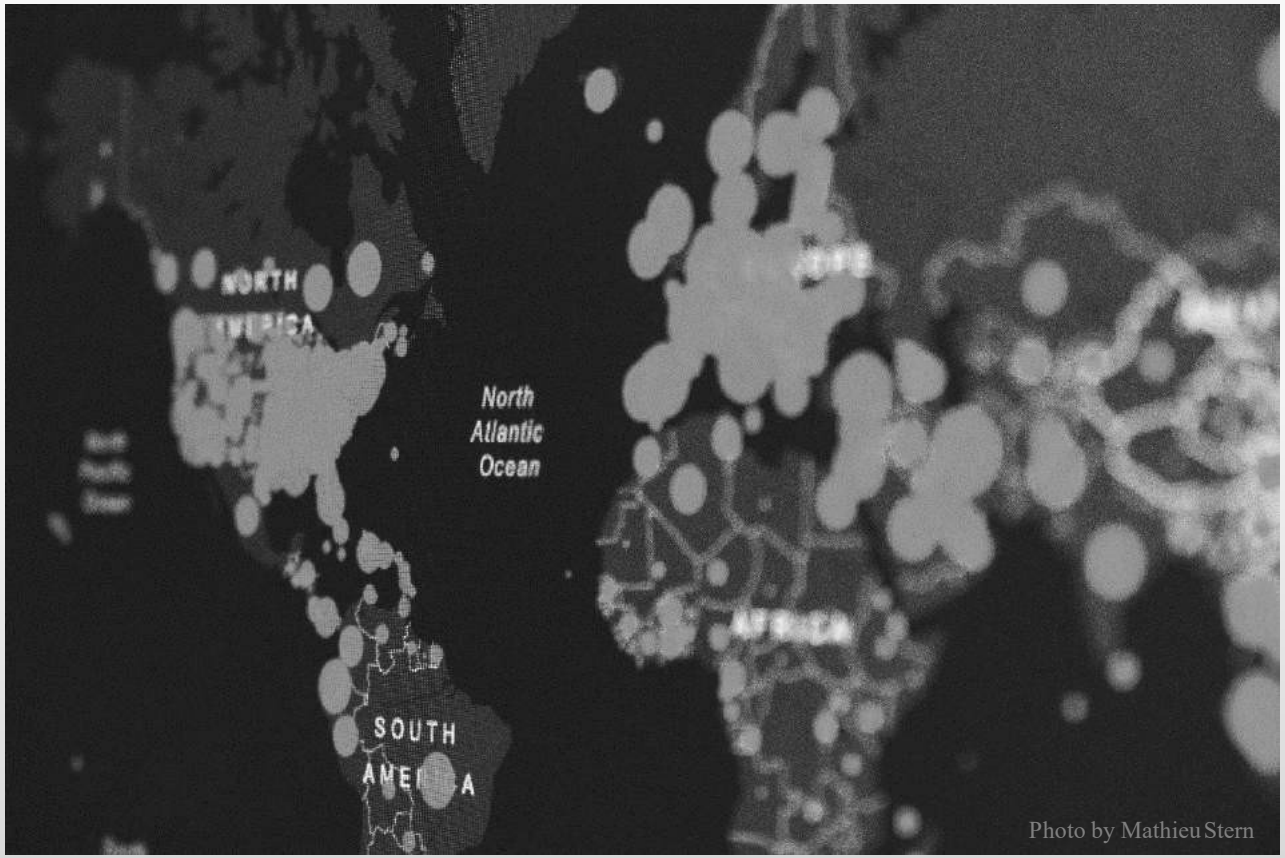

Photo by Mathieu Stern

Anticompetitive Behavior

- It may be challenging to assess whether market power may give rise to competition concerns through **exclusionary or exploitative conduct**.
- **Use of algorithms may be anticompetitive**, as it becomes easier for firms to achieve and sustain collusion without any formal agreement or human interaction.
- A major player with a very innovative product or service would also be **scrutinized for tying, refusal to supply or unfair conditions**.

Photo by Martin Sanchez

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“Innovation” in Case Law

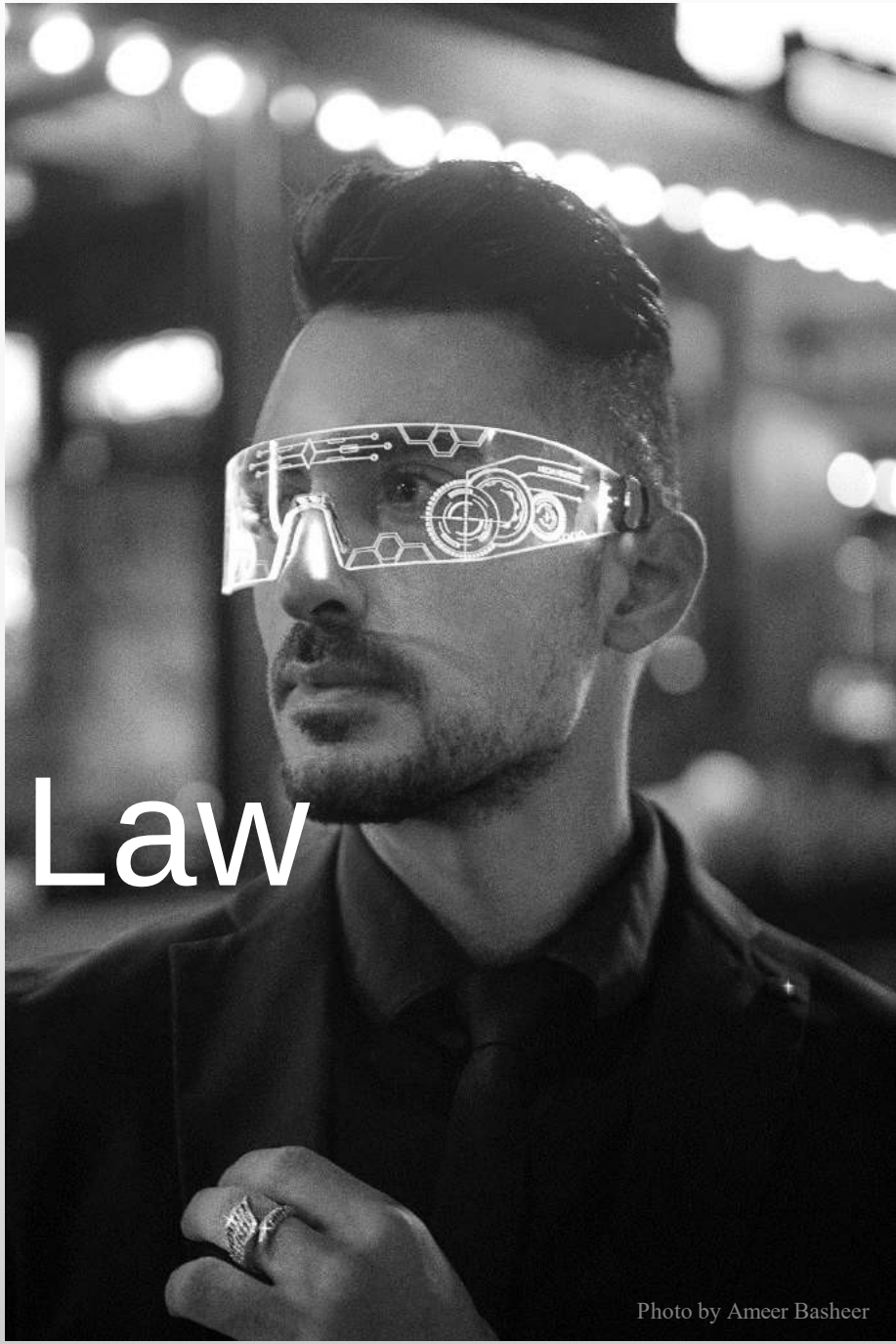
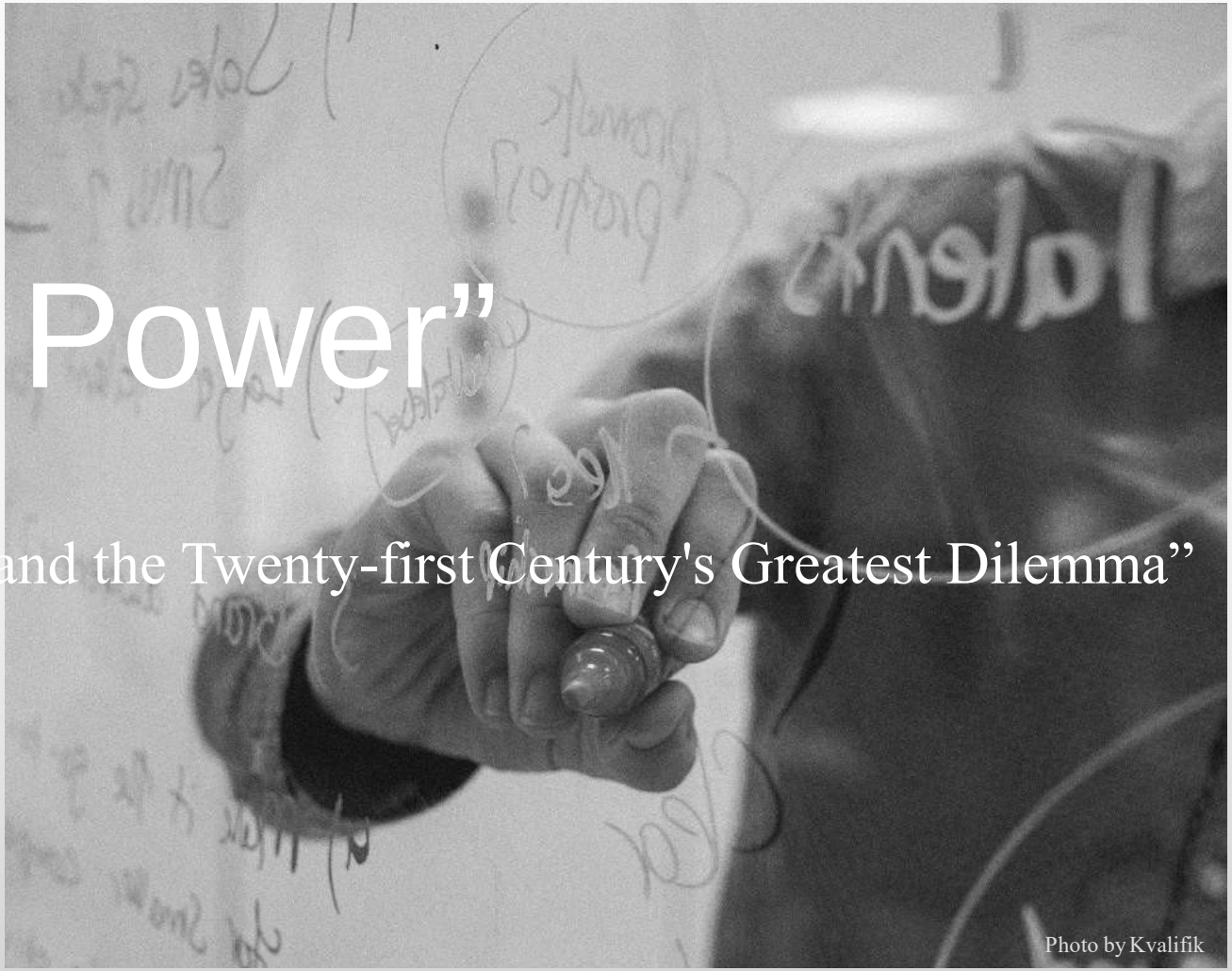


Photo by Ameer Basheer

“Innovation is Power”

Mustafa Suleyman,

“The Coming Wave: Technology, Power, and the Twenty-first Century's Greatest Dilemma”
2023



“Innovation” in the Communication Sector

- The consumer communications sector is a recent and fast growing sector.
- Characterized by short innovation cycles in which large market shares may turn out to be ephemeral.

“In such a dynamic context, **high market shares are not necessarily indicative of market power and,** therefore, **of lasting damage to competition** which EU merger regulation seeks to prevent.”

Judgement of the General Court, *Cisco Systems and Messagenet/Commission*, T-79/12, EU:T:2013:635, 11 December 2013, para. 69.

“Innovation” in the Communication Sector - continued

In a case concerning the interpretation of Art. 102 TFEU, the Court held that:

“Taking into account the objective of the competition rules […], their application cannot depend on whether the market concerned has already reached a certain level of maturity. Particularly in a rapidly growing market, Article 102 TFEU requires action as quickly as possible, to prevent the formation and consolidation in that market of a competitive structure distorted by the abusive strategy of an undertaking which has a dominant position on that market or on a closely linked neighboring market, in other words it requires action before the anti-competitive effects of that strategy are realized.”

Judgement of the Court, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, 17 February 2011, para. 108.

Innovation can be taken into account when assessing market power to identify dominance

- **a technological lead** is a relevant criterion to establish a dominant position.

"[…] the relationship between the market shares of the undertaking concerned and of its competitors, especially those of the next largest, the technological lead of an undertaking over its competitors, the existence of a highly developed sales network and the absence of potential competition are relevant factors […]"

Judgment of the Court of 13 February 1979, *Hoffmann-La Roche*, 85/76, para. 48.

General Court's Judgment in *Google Android*

"That is particularly so in the case of markets which, as in the present case, fall within the digital economy, where **traditional parameters** such as the price of products or services or the market share of the undertaking concerned **may be less important than in traditional markets**, **compared to other variables such as innovation, access to data, multi-sidedness, user behavior or network effects**.

Thus, **in a digital 'ecosystem',** which brings together several categories of supplier, customer and consumer and causes them to interact within a platform, **the products or services** which form part of the relevant markets that make up that ecosystem **may overlap or be connected to each other on the basis of their horizontal or vertical complementarity.** Taken together, the relevant markets may also have a global dimension in the light of the system that brings its components together and of any competitive constraints within that system or from other systems."

Judgment of the General Court of 14 September 2022, *Google Android*, T 604/18, paras. 115 – 116.

General Court's Judgment in *Google Android* - continued

"**Identifying the conditions of competition** relevant to the assessment of the position of economic strength enjoyed by the undertaking concerned **may** therefore **require multi-level or multi-directional examination** in order to determine the fact and extent of the various competitive constraints that may be exerted on that undertaking.

In conclusion, what is **important** in the context of the present plea is **to ascertain**, in the light of the parties' arguments and of the reasoning set out in the contested decision, **whether Google's exercise of the power** attributed to it by the Commission on the relevant markets **enabled Google to act to an appreciable extent independently of the various factors likely to constrain its behavior**."

Judgment of the General Court of 14 September 2022, *Google Android*, T-604/18, paras. 117 – 118.

Deterring innovation or reducing the incentive to innovate can be anti-competitive

"In order to establish the anticompetitive nature of the exclusionary practice constituting the second abuse, the Commission highlights two main consequences in the contested decision, in addition to the impediment to the development of Google's actual or potential competitors on the market for licensable OSs. First, according to the Commission, the second abuse led to the strengthening of Google's dominant position in the market for general search services. Second, **it deters innovation and limits the diversity of the offers available to consumers.**"

Judgment of the General Court of 14 September 2022, *Google Android*, T-604/18, para. 857.

Deterring innovation or reducing the incentive to innovate can be anti-competitive – continued

"It follows from the foregoing that the anticompetitive nature of the foreclosure of non-compatible Android forks by means of the AFAs must be regarded as established. **That conduct deprived potential or existing competitors of Google of any market, strengthened Google's dominant position on the markets for general search services and deterred innovation.**"

Judgment of the General Court of 14 September 2022, *Google Android*, T-604/18, para. 892.

General Court's Judgment in *Microsoft*

"It follows from the foregoing considerations that the final conclusion which the Commission sets out […] concerning the anti-competitive effects of the bundling is well founded. The Commission is correct to make the following findings: […]

- Microsoft interferes with the normal competitive process which would benefit users by ensuring quicker cycles of innovation as a consequence of unfettered competition on the merits;
- Microsoft shields itself from effective competition from vendors of potentially more efficient media players who could challenge its position, and thus reduces the talent and capital invested in innovation of media players;
- by means of the bundling, Microsoft sends signals which deter innovation in any technologies in which it might conceivably take an interest and which it might tie with Windows in the future."

Judgment of the General Court of 17 September 2007, *Microsoft*, T-201/04, para. 1088.

Increase in innovation may justify an exemption/ constitute and objective justification

- An exemption under Article 101(3) TFEU or an objective justification under Article 102 TFEU.
- A company must **prove that that their practice actually led to an increase in innovation.**

"The Court must therefore determine, first of all, whether the Commission was entitled to conclude that GSK's factual arguments and evidence, examination of which entailed a prospective analysis, did not demonstrate, with a sufficient degree of probability, that Clause 4 of the General Sales Conditions would make it possible to obtain an appreciable advantage of such a kind as to offset the disadvantage which it entailed for competition, by encouraging innovation."

Judgment of the General Court of 27 September 2006, *GlaxoSmithKline Services*, T-168/01, para. 252.

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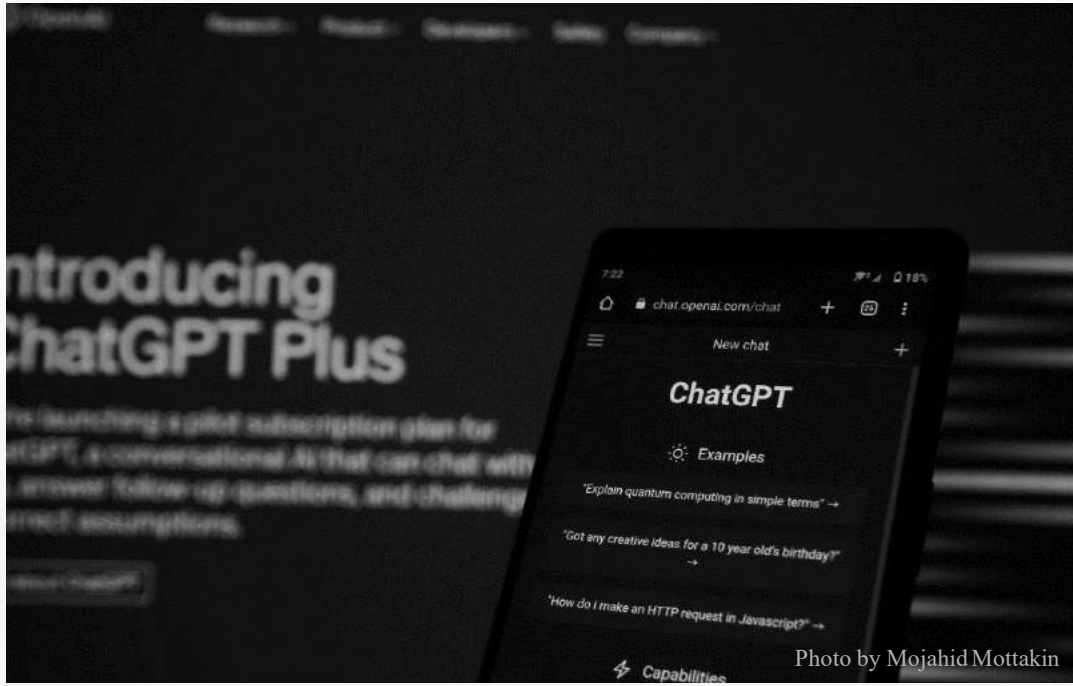
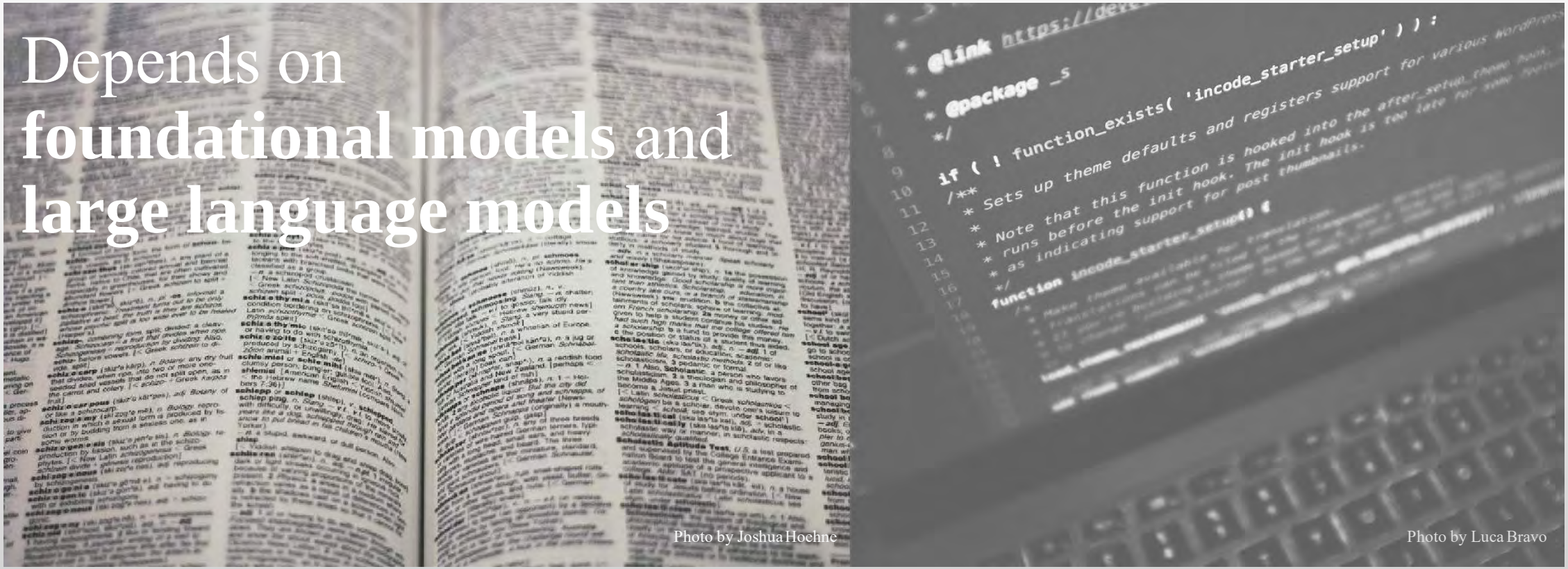


Photo by Mojahid Mottakin

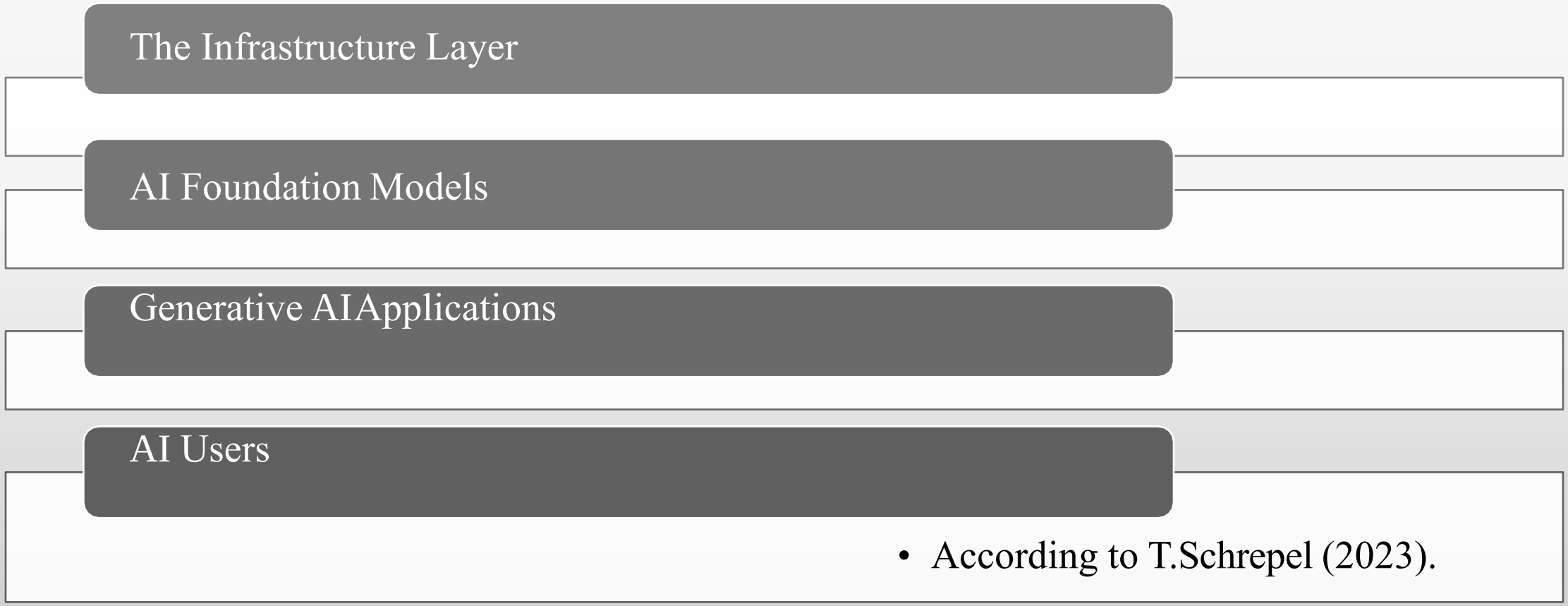
Generative AI

Photo by Mojahid Mottakin

Generative AI applications – a breakthrough innovation



The Four Interconnected Layers of Generative AI



- According to T.Schrepel (2023).

The Current Competition Landscape is Dynamic

- Numerous firms are innovating and competing to develop LMs and AI powered applications.
- At the same time, warnings that foundation models might end up in the hands of only a few large players with dominant positions in the digital sector.
- A rapid consolidation of the entire space around a few players can happen due to the nature of the foundation models themselves.


Photo by Gabriel Crismariu

"Meeting demand for cheap and seamless services usually requires scale (massive up-front investment in chips, people, security, innovation) which rewards and accelerates centralization. In this scenario, **there will be just a few mega-players whose scale and power will begin to rival traditional states.**" Mustafa Suleyman, "The Coming Wave: Technology, Power, and the Twenty-first Century's Greatest Dilemma" 2023, p.190.

"In sum, **returns on intelligence will compound exponentially**. **A select few artificial intelligences** that we used to call organizations **will massively benefit from a new concentration of ability** – probably the greatest such concentration yet seen**. Re-creating the essence of what's made our species so successful into tools that can be reused and reapplied over and over, in myriad settings, is a mighty prize, which corporations and bureaucracies of all kinds will pursue, and wield**." Suleyman, M., p.191.

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AI and Competition Law

Photo by Growtika

AI and Collusive Conduct

- **Pricing collusions involving an algorithm** can be caught under competition law.
- In 2018, the Commission sanctioned four electronic consumer manufacturers for engaging in **fixed or minimum resale price maintenance** ("RPM") by restricting the ability of online retailers to set their own retail prices for widely used consumer electronics products, including tablets, headphones, speakers and kitchen appliances. Commission Decisions of 24 July 2018 relating to a proceeding under Article 101 TEU, Cases: AT.40465 — ***Asus***, C 338/13, 21.09.2018; AT.40469 — ***Denon & Marantz***, C 335/5, 20.09.2018; AT.40181 — ***Philips***, C 340/10, 24.09.2018; AT.40182 — ***Pioneer***, C 338/19,21.09.2018.
- E-commerce allowed cross-border trade in the EU to grow, but the rapid advancement into the digital age may also have facilitated implementation and monitoring of **vertical (and horizontal) restrictions that may be contrary to EU law**.
- **Pricing algorithms and** especially **self-learning algorithms** form **a significant challenge** to the competition authorities.
- The ever-changing nature of the digital markets calls for **a pro-active, flexible, and creative approach to competition law enforcement, at all levels.**

Collusion decided on and implemented by AI

AI "acted independently"

Genuinely independent AI conduct resulting in parallel behavior

- Absence of concentration and the *knowing* substitution of cooperation for the risks of competition

Does not meet the conditions to be prohibited

Enforcement gap for the authorities.

Two distinct AI systems communicated

The communication/ signaling of two AI systems leads to parallel behavior)

Law prohibiting anti-competitive agreements applies.

AI and Abusive Conduct

Examples of anti-competitive strategies that AI could facilitate:

- Predatory pricing – rapid analysis of pricing data to determine the response of the competitor to changes in the market.
- AI integration in consumer facing products could allow excluding competitors, push customers toward their own offerings without their knowledge.
- AI use in collection of information on customers (preferences, brand loyalty, purchasing patterns) resulting in discrimination.
- AI abuses without intended harm.

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Interim measures concerning the DSA

Order of the President of the General Court,
27 September 2023, T 367/23 R,
Amazon Services Europe

Photo by Andrew Neel

Large Online Platform under The Digital Services Act ("DSA")

- **Amazon ("A.") challenged its designation as "a very large online platform" ("VLOP") before the General Court.**
- **A. also filed for interim measures** to suspend certain requirements under the DSA pending a decision on the wider legal challenge.
- **The General Court ruled in its favor**, agreed to suspend a requirement under the DSA that A. must make an ads library public.
- However, **the Court did not agree to suspend a separate DSA requirement** on A. to offer the store's users a non-profiling option powering the recommendations it serves them.

Photo by Petrebels

Large Online Platform under The Digital Services Act ("DSA") – continued

On the Ads Library issue, **A.'s lawyers argued:**

- **The requirement to publish an ads archive** would result in the disclosure of confidential information that **would cause "serious and irreparable harm** to its advertising activities and, by extension, to all its activities".
- **The disclosure of the ad information would weaken its competitive position** and cause an irreversible loss of market share, and harm its ad partners.

The General Court:

- **Agreed A. had established that the release of the information could cause serious and irreversible commercial harm.**

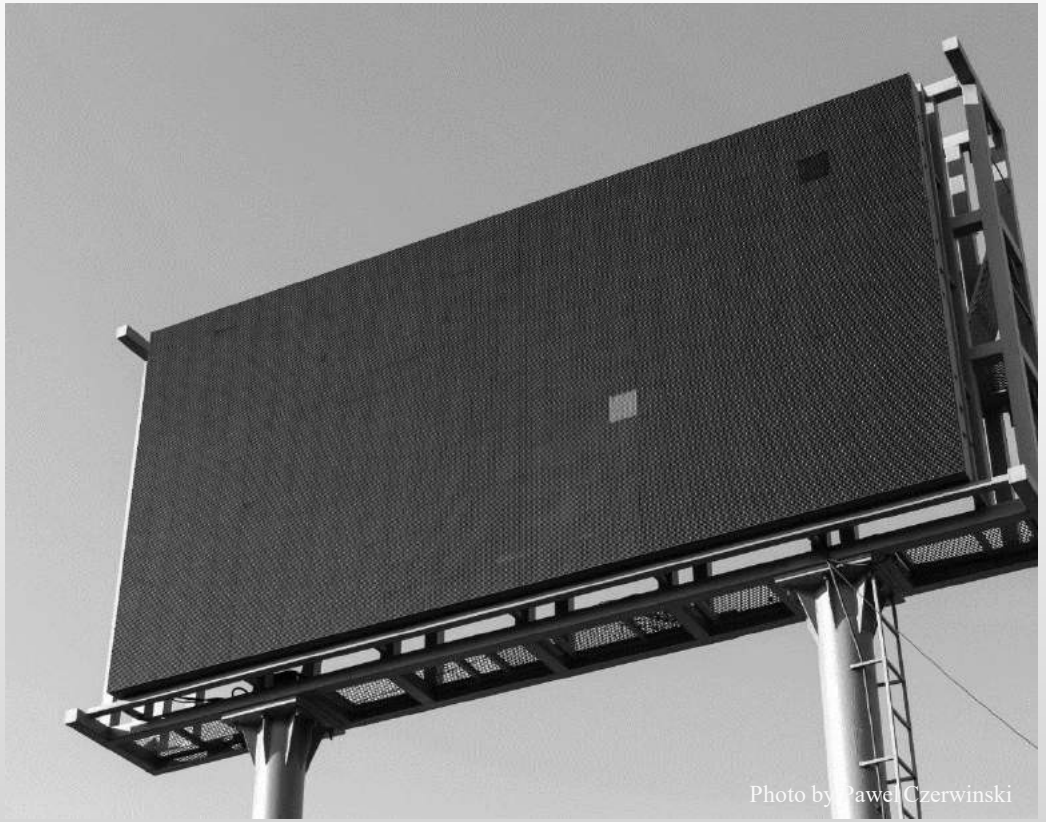
Photo by Pawel Czerwinski

Per the ruling A. is working on compiling an Ads Library, and may yet be required to publish the data online if its wider legal challenge fails.

Large Online Platform under The Digital Services Act ("DSA") – continued

On recommender systems, where A. was not successful in its application for interim measures, **A.'s lawyers argued:**

- the DSA obligation on VLOPs to provide **an opt-out to users of profiling-based recommendations would result in a significant and irreversible loss of its market share** — triggering serious and irreparable harm.

However, A. was unable to quantify the level of claimed harm to its business (a ballpark estimate could fall within a range of between $500 million and $3.8 billion).

The General Court:

- **DSA does not demand that there be no profiling-based recommender systems, merely that users be given a choice to opt-out** — further pointing out **A. remains free to inform users** about the impacts such choices might have on their experience of its platform.
- Expresses **skepticism over A.'s assertion that the existence of an opt-out would reduce use of its Store**, since customers could opt to switch the profiling recommendations back on.
- **Did not find A. had established the existence of irreparable harm to the required legal standard to grant interim measures — declining to suspend this DSA requirement.**

Large Online Platform under The Digital Services Act (“DSA”) – continued

The Commission lodged an appeal against the order of the President of the General Court.

The Court of Justice:

- On 27 March 2024, the Vice-President of the Court of Justice set aside the part of the order of the President of the General Court suspending the requirement under the DSA that A. must make an ads library public.
- The Vice-President found that the Commission was denied the opportunity to comment on the arguments put forward by A. during the proceedings before the General Court.
- This was in breach of the principle that the parties should be heard.
- The Commission was able to present its arguments before the Court of Justice and the Vice-President of the Court gave final judgment and dismissed the application for interim measures.

Photo by Arne Immanuel Bänsch

Large Online Platform under The Digital Services Act ("DSA") – continued

- The Vice-President of the Court considered that A.'s argument that the obligation to make an ads library publicly available unlawfully limits its fundamental rights to respect for private life and the freedom to conduct a business, cannot be regarded, prima facie, as irrelevant and as lacking in seriousness.
- He also concluded that, in the absence of a suspension, it is likely that A. would suffer serious and irreparable harm before any decision as to annulment of the Commission decision is made.

Those findings were not decisive in themselves. They have to be balanced with all of the interests involved in order to come to a decision on the matter of suspension.

- In the eyes of the Vice-President, it had not been demonstrated that A.'s existence or long-term development would be jeopardised if the suspension was not granted.
- **Suspension would delay, potentially for several years, the full achievement of the objectives of the DSA and therefore potentially allow an online environment threatening fundamental rights to persist or develop**.

The Vice-President concluded that the interests defended by the EU legislature prevail over A.'s material interests, with the result that the balancing of interests weighs in favour of rejecting the request for suspension, overturning this part of the General Court's order.

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AI Strategy of the Court of Justice of the European Union

Photo by Sara Kurfeß

AI holds significant potential for the Court of Justice of the European Union ("CJEU") in that it will:

- enable automation of simple tasks in the judiciary and administration;
- offer new possibilities in legal research, translation, interpretation;
- enhance accessibility of the Court;
- facilitate access to information.

Vision Statement

"The Court of Justice of the European Union will leverage on responsible, equitable, traceable, reliable and governable AI capabilities as well as on its own workforce talent in its journey towards becoming a Smart Court."


Photo by Sara Kurfeß

CJEU has started the journey to embrace AI since 2020

To transition from the current "experimental phase" to the "industrialization phase", we must:		
Adopt a governance that allows making smart choices in selecting the right AI tools for the right purpose, in a controlled way.	Balance the benefits with the risks and adopt policies to create clear rules and guidelines for a correct technology adoption.	Design and adopt a correct IT architectural posture, with embedded security, data protection and ethics by design.

Goals and Objectives

Goal 1

Improve the efficiency and effectiveness of the administrative and judiciary processes

Goal 2

Enhance the quality and consistency of judiciary decisions

Goal 3

Increase access to justice and transparency towards the EU citizen

1. Improve the efficiency and effectiveness of the administrative and judiciary processes

1.1 Identify and integrate AI solutions which bring efficiency and effectiveness

1.2 Enable data-driven transformation, optimizing work processes and leveraging AI benefits

- ✓**Data governance:** without quality and representative data, developers cannot train AI algorithms to produce a quality output.
- ✓**A data strategy**: how the Court will collect, process, store and disseminate data when using AI. The judiciary process will employ mainly algorithms created and used within the organizational boundary, due to the high sensitivity of the data related to cases and data protection requirements.

1. Improve the efficiency and effectiveness of the administrative and judiciary processes – continued

1.3 Create a transformative ecosystem for future-ready workforce capabilities

People are the most important asset of the organization. To fulfil its future mission, the workforce needs to adapt continuously. New skills and competences are already required.

1.4 Adopt a governable AI

The acquisition and the usage of the AI tools, and the continuous updating and supervision of such tools.

2. Enhance the quality and consistency of judiciary decisions

2.1 Leverage on automatization

2.2 Enhance the legal research

- ✓ Use of AI to assist judges, legal officers or colleagues in legal research. AI will quickly analyze large amounts of data; identify relevant cases, provide recommendations.
- ✓ Future interconnection of national databases, neuronal translation might reduce language barriers.
- ✓ AI combined with data visualization: a visual representation of cases to detect the connection degree between cases or the evolution of a certain category of cases.
- ✓ Academic research on the use of AI to predict case outcomes based on past cases and legal precedents. We need to investigate ethical aspects.

2.3 Leverage on standardization

3. Increase access to justice and transparency towards the EU citizen

3.1 Increase accessibility to citizens with disabilities

- ✓ Provide tailored support and remove barriers to access.

3.2 Increase access to justice and transparency

- ✓ Chatbots and virtual assistants will provide information about the Court.
- ✓ Use of an AI avatar to produce briefing videos and carry out internal training.
- ✓ Real-time subtitling/ AI synthetized voice interpretation.
- ✓ Extended reality to enhance the visitors' experience at the Court.

3. Increase access to justice and transparency towards the EU citizen - continued

3.3 Embed multilingualism in every activity (both internally and externally)

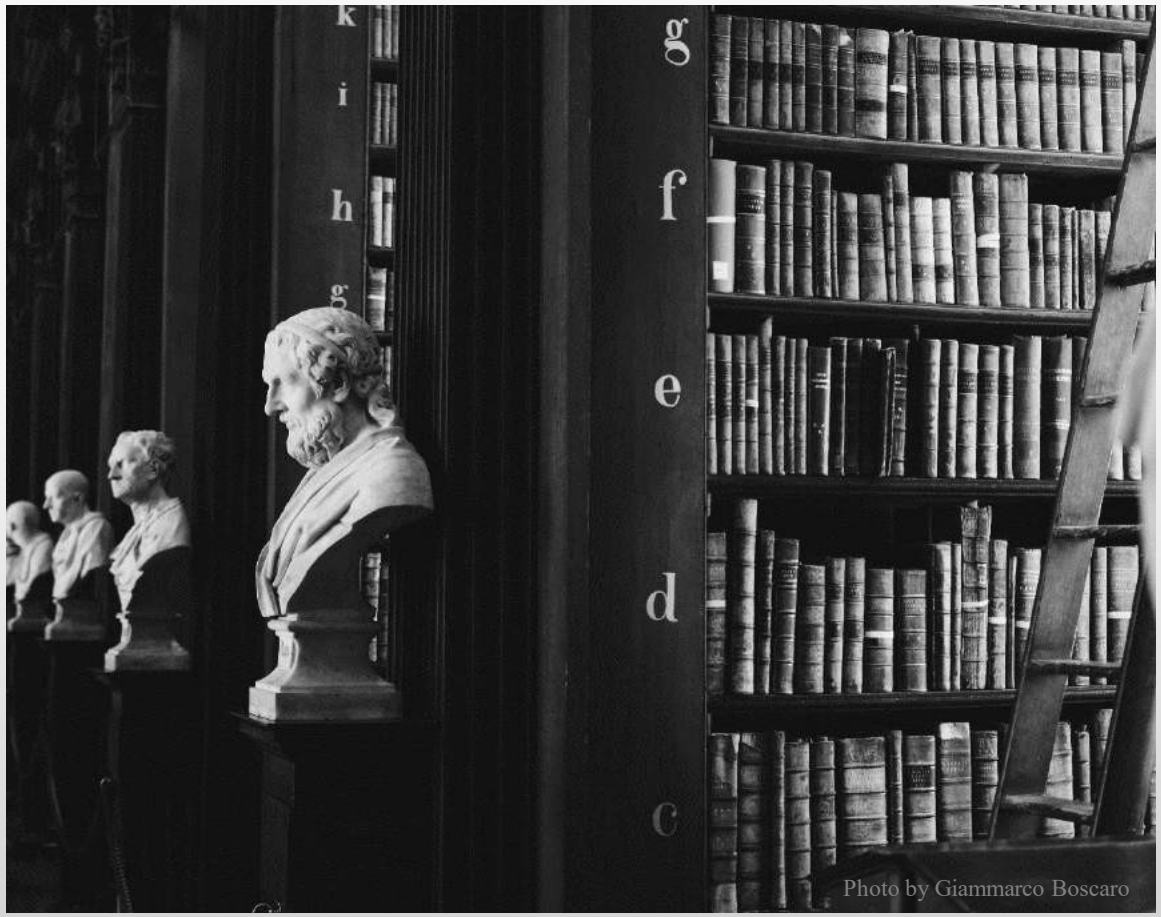
- ✓ Translation based on Natural Language Processing ("NLP").
- ✓ NLP will evolve. Multimodal translation in almost real time, contextual translation, and cross language retrievals.

3.4 Engage as active partner within the e-Justice ecosystem

- ✓ Cooperation with national courts via Judicial Network of the EU ("JNEU").
- ✓ Collaboration at EU interinstitutional level.
- ✓ Find the right partners in the academic and research world.

AI Principles at the CJEU

- **Fairness, impartiality and non-discrimination**: the data and algorithms must not contain biases (equal treatment and non-discrimination).
- **Transparency**: we must understand the reasoning behind AI algorithms.
- **Traceability**: auditable and explanatory AI solutions, accountability mechanisms.
- **Privacy and Data Protection**: AI solutions must handle personal data in a secure and ethical manner.
- **Human Oversight**: humans must continuously supervise the employed AI tools.
- **Continuous Improvement**: AI tools should advance along the evolving legal and ethical standards.



Risks

We can anticipate the risks and adopt adequate risk management policies and mitigation strategies.

- **Bias and discrimination:** biased/ corrupted data may lead to discrimination
- **Ethical concerns:** the role of AI in decision making
- **Disclosure of sensitive data, data security and data privacy:** the use of algorithms in a cloud/ cloud solutions
- **Vulnerability to cyberattacks:** leading to data leaks
- **Explainability:** complexity of AI perplexes citizens' understanding of how judges make their decisions
- **Relevance:** insufficient/ inferior training data will compromise the accuracy of results
- **Resilience**: any interruption of AI solutions will cause disruptions
- **Over-relying on technology**: lack of a proper human filter
- **Hype abuse**: users may adopt AI tools in an uncontrolled way causing security, data protection, IT, IP, contractual and other issues.
- **Resources** (lack thereof)

Photo by Markus Spiske

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Thank you for your attention

Pēteris Zilgalvis