Innovation or Infringement? Generative AI and the Potential for Exclusionary Abuse under Article 102 TFEU

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Key Points

- The integration of generative AI powered features into large online platforms raises novel questions pertaining to abuse of dominance under Article 102 TFEU.
- Adding such features can lead to dominant undertakings entering new markets, and could lead to them infringing competition law through tying or self-preferencing.
- Dominant undertakings can nevertheless integrate generative AI into online platforms while complying with competition law, such as by enabling interoperability with competing third party undertakings offering similar AI-powered services or enabling generative AI features only for a subset of use-cases which do not lead to a departure from competition on the merits.
- While competition authorities face difficult strategic decisions about which remedies to pursue in such cases, a simple injunctive remedy could be both pragmatic and effective in the first instance, although several other options are available.

Several Big Tech firms have recently begun to integrate generative AI into their online platforms. In March 2025, Meta integrated its AI assistant into WhatsApp for European consumers,[1] and subsequently on Facebook and Instagram too.[2] This integration occurs at several points throughout Meta's platforms, including through a new "blue circle icon" on the WhatsApp app, inside the in-app search features, and in the sidebar of the Facebook website. The new functionality, powered by generative AI technology, permits consumers to ask "day to ask questions", do a "deep dive on topics of interest, or get

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[1] Meta already rolled out the same changes in the United States, and cited Europe's 'complex regulatory system' as why the changes were being rolled out later across the Atlantic. Meta, 'Europe, Meet Your Newest Assistant: Meta AI' (*Meta Newsroom*, 20 March 2025) <https://about.fb.com/news/2025/03/europe-meet-your-newest-assistant-meta-ai/> accessed 30 July 2025.

[2] ibid.

help with a 'how-to' or a problem that needs solving." [3] The integration prompted an investigation by the Italian Competition Authority (the AGCM) into whether Meta has abused its dominant position in the market for consumer communication apps by deciding "to pre-install its artificial intelligence service on the WhatsApp app" and thereby imposing "the use of its chatbot and AI assistance services on its users".[4]

At around the same time, Google also began to integrate "AI summaries" into its general search engine.[5] For some search queries, its search results now contain an "AI Overview" at the top, with the famous ten blue links coming underneath. This is analogous to previous changes that Google has made to its search experience, whereby the ten blue links were displaced by another feature. Some of these changes resulted in competition law scrutiny, such as in *Google Shopping* or *StreetMap*.[6] In fact, Google's AI Overview has already prompted a complaint to the UK's Competition and Markets Authority (CMA) on behalf of news publishers.[7] The complaint alleges that by integrating AI summaries into its search engine, Google has begun to compete directly against news publishers, while simultaneously pushing their websites "down 'below the fold' on the search results page meaning that, in many cases, they won't be clicked through to at all."[8] The complaint also states that Google's AI overview is generated using publishers' own content as an input, meaning that Google simultaneously consumes content produced by publishers while denying those same publishers internet traffic which would make that content commercially viable to produce.[9]

The integration of generative AI into online platforms may therefore warrant competition law scrutiny. On the one hand, the integration of generative AI into existing products could be viewed as an example of innovation and dynamic efficiencies in technology markets. On the other, given the large size of many such online platforms, the special responsibility of dominant undertakings to protect the effective structure of competition,[10] and the blurred nature of product boundaries in ecosystems markets,[11] the integration of generative AI could amount to an abuse of dominance. During her

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[3] ibid.
[4] Autorita' Garante della Concorrenza e del Mercato, 'The Italian Competition Authority launches investigation into Meta over abuse of dominant position' <https://en.agcm.it/en/media/press-releases/2025/7/A576> accessed 30 July 2025.
[5] 'Generative AI in Search: Let Google Do the Searching for You' (*Google*, 14 May 2024) <https://blog.google/products/search/generative-ai-google-search-may-2024/> accessed 30 July 2025.
[6] Case AT39740 *Google Search (Shopping)* [2017]; Case T-612/17 *Google Shopping ECLI:EU:T:2021:763* [2021] GC Case T-612/17; Case C-48/22 P *Google Shopping ECLI:EU:C:2024:726* (ECJ); *StreetmapEU Ltd v Google Inc* [2016] High Court of Justice (Chancery Division) EWHC 253 (Ch).
[7] Movement for an Open Web, 'Legal Complaint Calls for Urgent Opt-out from Google's AI News Theft' (*Movement For An Open Web*, 4 July 2025) <https://movementforanopenweb.com/legal-complaint-calls-for-urgent-opt-out-from-googles-ai-news-theft/> accessed 30 July 2025.
[8] ibid.
[9] ibid.
[10] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities ECLI:EU:C:1983:313* [1983] ECJ Case 322/81 paras 10, 57.
[11] Michael G Jacobides and Ioannis Lianos, 'Ecosystems and Competition Law in Theory and Practice' (2021) 30 Industrial and Corporate Change 1199, 1204–1211; Konstantinos Stylianou and Bruno Carballa-Smichowski, '"Market" Definition in Ecosystems' [2024] Journal of Antitrust Enforcement jnae046, 7–8 <https://doi.org/10.1093/jaenfo/jnae046> accessed 4 July 2025.

tenure as Chair of the US Federal Trade Commission, Lina Khan foresaw such questions, and warned that when it comes to AI, "claims of innovation [should not be] used as cover for lawbreaking".[12] Given that generative AI will clearly be a disruptive force in markets, with some economists forecasting its application in almost all areas of the economy,[13] and the tendency for digital markets to exhibit winner-take-all characteristics where dominant positions are very hard to contest,[14] competition authorities must therefore be on high alert for anti-competitive behaviour by undertakings looking to secure an early advantage.

This paper considers the circumstances under which the integration of generative AI into online platforms could be considered as an exclusionary abuse of dominance under Article 102 of the Treaty of the Functioning of the European Union (TFEU). Throughout, the analysis is presented first at an abstract level and then demonstrated using the integration of generative AI features by Meta and Google as examples. For the purposes of the analysis, I assume that the undertaking that operates the online platform in question is dominant in the relevant market in which the platform competes and is hence exposed to scrutiny under Article 102. Whether the platform in question is dominant or not, of course, depends on the legal and economic context in which it operates. Yet such a finding appears likely for such platforms, given the strong network effects and a barriers to entry present in many digital platform markets, [15] as well as previous findings of dominance[16] or designations of gatekeeper status under the Digital Markets Act (DMA).[17]

This paper progresses as follows. Section 1 considers market definition and argues that the integration of generative AI features into existing platforms may constitute entry into a separate product market, especially given the wide-ranging functionality of such features. Section 2 considers the applicability of tying theories of harm to cases concerning the integration of generative AI into dominant platforms. Section 3 considers self-preferencing as an alternate theory of harm. Section 4 considers the limiting principles of such theories of harm. Section 5 asks what remedies competition authorities might consider in the case of the abusive integration of generative AI into online platforms. Section 6 concludes.

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[12] 'FTC's Lina Khan Warns Big Tech over AI | Stanford Institute for Economic Policy Research (SIEPR)' (3 November 2023) <https://siepr.stanford.edu/news/ftcs-lina-khan-warns-big-tech-over-ai> accessed 30 July 2025; See also Andrew P McLean, 'Innovation against Change' [2024] Journal of Antitrust Enforcement jnae002 <https://doi.org/10.1093/jaenfo/jnae002> accessed 7 May 2024.

[13] Anton Korinek and Donghyun Suh, 'Scenarios for the Transition to AGI' (National Bureau of Economic Research, March 2024) <https://www.nber.org/papers/w32255> accessed 30 July 2025.

[14] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era* (Publications Office of the European Union 2019) 2–3 <https://data.europa.eu/doi/10.2763/407537> accessed 6 September 2023.

[15] AT40437 *Apple - App Store Practices (Music Streaming)* (European Commission) recitals 344-5; AT40684 *Facebook Marketplace (provisional non-confidential decision)* recitals 608-646.

[16] Case AT.39740 *Google Search (Shopping)* (n 7) recital 271; AT.40684 *Facebook Marketplace (provisional non-confidential decision)* (n 16) recital 728; AT.40437 *Apple - App Store Practices (Music Streaming)* (n 16) recital 520.

[17] DMA100020 *Meta - online social networking services*; DMA100004 *Alphabet - online search engines*.

1. Generative AI and Product Market Definition

As alluded to above, the integration of generative AI features into online platforms can be understood in several ways. The addition of new generative AI features could be considered as simply adding a new feature to an existing product, aimed at improving its quality and ultimately enhancing the welfare of consumers. That such behaviour constitutes competition on the merits, and therefore by definition cannot be abusive, was the one of the arguments put forward by the defendant in *Google Shopping*.[18] The ECJ was clear, however, that conduct can be abusive even where it leads to a product or service improvement, so long as it departs from competition on the merits and is capable of having exclusionary effects.[19] From this, two insights may be inferred. First, even if generative AI powered features create benefits for consumer welfare, a dominant undertaking integrating such features could still be found to infringe Article 102 TFEU for doing so. Second, a successful abuse of dominance case must show that the use of generative AI in question constitutes conduct which departs from competition on the merits and can result in exclusionary effects.

A different perspective might focus on the risk that generative AI features allow market power to be leveraged from one market into another. In *Michelin* I, the Court established that dominant undertakings have a special responsibility not to engage in conduct which could "impair undistorted competition on the common market".[20] In *Hoffman*, it ruled that such distortions may occur on a market different from the one in which the abuse of dominance occurred.[21] Leveraging theories of harm combine these two notions, and consider that an undertaking can abuse its dominant position on one market by distorting competition in a related market. The integration of new generative AI features to an existing online platform might therefore be considered as anti-competitive leveraging, in the case that the dominant undertaking has used the dominant position conferred by its online platform to advantage its AI-powered product offering in an adjacent market.

A leveraging theory of harm would therefore entail the definition of two (or more) product markets. Before considering how generative AI might affect market definition, it makes sense to first consider the two ways in which an undertaking may be found to be active on multiple markets at once.

First, an undertaking may compete in more than one product market is by offering multiple products simultaneously. Often a key question in such cases pertains to whether the undertaking offers one integrated product, or multiple distinct products. In

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[18] Case C-48/22 P *Google Shopping ECLI:EU:C:2024:726* (n 7) para 140.
[19] ibid 188.
[20] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities ECLI:EU:C:1983:313* (n 11) para 10, 57; Case C-333/21 *European Superleague Company* ECLI:EU:C:2023:1011 [2023] ECJ Case C-333/21 para 128.
[21] Case 85/76 *Hoffmann-La Roche & Co AG v Commission of the European Communities ECLI:EU:C:1979:36* (ECJ) 91; Autorita' Garante della Concorrenza e del Mercato, 'A576 - The Italian Competition Authority launches investigation into Meta over abuse of dominant position' (22 July 2025) para 12 <https://www.agcm.it/media/comunicati-stampa/2025/7/A576> accessed 31 July 2025.

Hilti, for example, the Court found "that nail guns, cartridge strips and nails constitute three specific markets",[22] while the dominant undertaking argued that it offered "guns, cartridge strips and nails [as part of] a powder-actuated fastening system" on a single market.[23] Across several cases, the ECJ has set out a variety of factors which may be used to determine whether there are several different products or whether those products make up a single cohesive product. These factors, which are summarised in the Commission's recent Draft Guidelines on Exclusionary Abuse,[24] include the nature and technical features of the products, whether third party undertakings specialise in the production of just one of the products,[25] the history of the development of the products concerned, and the commercial practice of the dominant undertaking.[26]

Second, an undertaking may compete in more than one product market if it offers the same product on multiple distinct markets. This commonly occurs when a product is used by two distinct groups of consumers. For instance, in *Michelin I*, the Commission observed that new tyres may be sold directly to car manufacturers or sold to final consumers as replacement tyres through intermediary dealers.[27] Hence, it found that the undertaking competed on both markets simultaneously. Similarly in the *Microsoft/Skype* merger, the Commission considered that Skype provided both "consumer communications services and enterprise communications services" which formed "two distinct product markets", with the same product being offered on both markets.[28]

These two paths are not mutually exclusive; an undertaking may offer multiple products, and some of those products may also compete on multiple markets. Indeed, this is likely the case with generative AI features. Since generative AI features are often relatively broad in terms of their functionality, for instance, the same product might be able to proof-read text and also summarise news, it may be the case that such products could compete against more specialised offerings on multiple markets at once. The fact that new AI powered features are *built into* platforms is also not an obstacle to them being considered as a separate product for the purpose of competition law analysis. In *Microsoft (WMP)*, the General Court ruled that even in cases such as these where products are technically integrated together, the products can be a) distinct from each other, and b) considered as being offered on two different product markets.[29]

An abuse of dominance case which operationalises a leveraging theory of harm must therefore show that the new generative AI feature is a distinct product from the platform

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[22] Case T-30/89 *Hilti AG v Commission of the European Communities ECLI:EU:T:1991:70* [1991] GC Case T-30/89 para 66.
[23] *ibid para 68*.
[24] European Commission, 'Draft Guidelines on the Application of Article 102 of the Treaty on the Functioning of the European Union to Abusive Exclusionary Conduct by Dominant Undertakings' recital 90 <https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en>.
[25] Such as in Hilti, where third party undertakings manufactured nails, but not nail guns or cartridge strips. Case T-30/89 *Hilti AG v Commission of the European Communities ECLI:EU:T:1991:70* (n 23) para 67.
[26] European Commission (n 25) recital 90.
[27] Commission Decision 81/969 *Michelin I* recital 3.
[28] COMP/M6281 *Microsoft/Skype* paras 10-17.
[29] Case T-201/04 *Microsoft Corp v Commission ECLI:EU:T:2007:289* [2007] GC Case T-201/04 para 935.

into which it has been integrated, and that it competes on a separate product market. In tying cases, showing that products are distinct is typically satisfied by demonstrating separate consumer demand for the two products.[30] Naturally, this depends on the facts of the case at hand, so to illustrate, the following paragraphs analyse the WhatsApp AI Assistant integration and the Google Search AI Overview integration respectively.

In its own words, Meta's integration of generative AI into WhatsApp gives consumers access to a "reliable and intelligent assistant" within its platform. [31] The assistant can interactively respond to a wide range of tasks, including "planning a group trip, brainstorming dinner ideas, [or] settling an ongoing debate". [32] Several other undertakings also offer such AI assistants. These include Open AI's ChatGPT,[33] Anthropic's Claude,[34] and Mistral's le Chat.[35] Each of these undertakings offers products with almost identical functionality to Meta's assistant, and a paid tier through which consumers can access higher usage limits, more powerful AI agents, and more. The existence of these rival products, and the fact that consumers are willing to pay for them, clearly demonstrates the existence of a distinct consumer demand for AI assistants and situates them as a distinct product from Meta's social networks.

Google's AI Overview feature in its Search product is slightly different. Rather than offering an interactive AI agent, it provides summaries based off the search results for a query which piece "together all the information [consumers] need".[36] In some cases, AI overviews are essentially a re-organisation of the ten blue links; Google's blog post announcing the launch of the feature shows a consumer asking to "create a 3 day meal plan for a group that's easy to prepare", and the search engine displaying a meal plan with links to a recipe website for each meal. In such cases, the overview supplies the same amount of information as the previous results page, except in a re-organised form. To find more information, such as the details of recipes, consumers must click on the supplied links. That the AI results in a mere re-organisation of the structure of the results in prompts little reason, in this instance at least, to be concerned about harm to competition.

In other cases, however, the generated AI overviews supply enough information such that consumers may not need to click on any of the supplied links. In a recent complaint submitted to the CMA,[37] the Independent Publishers Alliance and the Movement for an Open Web state that the AI Overview provided by Google provides enough information that in many cases consumers do not subsequently click on the search results, which have been "pushed down 'below the fold' on the search results page".[38] If these facts are

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[30] European Commission (n 25) recital 90.
[31] Meta (n 2).
[32] ibid.
[33] https://chatgpt.com accessed 31st July 2025.
[34] https://claude.ai accessed 31st July 2025.
[35] https://chat.mistral.ai accessed 31st July 2025.
[36] 'Generative AI in Search: Let Google Do the Searching for You' (n 6).
[37] Movement for an Open Web (n 8).
[38] Tom Hegarty, 'Foxglove Launches International Legal Challenge to Google's Mass Worldwide Theft of News' (*Foxglove*, 4 July 2025) <https://www.foxglove.org.uk/2025/07/04/legal-challenge-google-theft-of-news/> accessed 30 July 2025.

correct, then it appears that consumers are satisfied with the AI overview, and are therefore choosing to consume news, curated by Google, directly on the search results page. Clearly, the extremely well-established presence of independent news agencies indicates the existence of a product market separate from that of general search services which Google's search engine was previously found to be competing on.[39] As with AI Assistants, the fact that many news outlets offer paid subscriptions to consumers indicates that there is a separate and active consumer demand which further substantiates the existence of a separate product market for news. As such, we may conclude that the integration of AI summaries into Google's search engine has caused it to enter a new market for the purpose of a competition law analysis.

The above example demonstrates that when a generative AI powered feature is added to an existing platform, it may mean that the platform in question begins to compete in another relevant market. In cases where the dominant undertaking did not previously compete in that product market, such conduct may be considered as market entry. Regardless of whether the conduct constitutes a "fresh" entry or merely the strengthening of an existing position, such conduct could be framed as either tying or self-preferencing as shown in the following sections.

2. Generative AI Integration understood as Tying

Tying occurs when one product (the tying product) is made available only together with another product (the tied product).[40] In *Microsoft*, the Court established that four cumulative conditions must be present for the Court to find an abuse of dominance related to tying.[41] First, as considered in the previous section, there must be two distinct products. Second, the undertaking in question must be dominant on the market for the tying product. As above, this article assumes that the undertaking in question has already been assessed to hold a dominant position. Third, the undertaking must not give its customers a way to obtain the tying product without the tied product. Finally, the tying conduct must be capable of having exclusionary effects. Since the first and second criteria have been considered already, this section considers the third and fourth criteria.

The third criterion states that a finding an abuse of dominance through tying requires that consumers cannot obtain the tying product without the tied product.[42] Where an online platform is the tying product and AI-powered features are the tied product, such a finding would mean that consumers must be unable to use the online platform without the AI powered features enabled.

[39] Case AT.39740 *Google Search (Shopping)* (n 7) para 154.
[40] European Commission (n 25) recital 84; Case T-604/18 *Google Android ECLI:EU:T:2022:541* [2022] GC Case T-604/18 para 283.
[41] Case T-201/04 *Microsoft Corp v Commission ECLI:EU:T:2007:289* (n 30) para 869; Case T-604/18 *Google Android ECLI:EU:T:2022:541* (n 41) para 284.
[42] See also European Commission (n 25) recital 89.

The precise meaning of the word 'use' is important here, not least because the law may be more permissive than it first appears. In its recent *Facebook Marketplace* decision, the Commission found that Meta had abused its dominant position by tying "its online classified advertising service Facebook Marketplace with the Facebook personal social network",[43] even though consumers were not, strictly speaking, compelled to use Facebook Marketplace while using the Facebook social network. The Commission found "compulsion or coercion can still exist where the party accepting the tied product is not required to use it or is entitled to use the same product supplied by a competitor of the dominant undertaking".[44] The Commission justified its apparent deviation from the case law on the grounds that in *Microsoft*, the defendant had argued that the Commission had relied on a requirement "not normally taken into account when assessing the existence of abusive tying" when finding an abuse,[45] and the General Court had subsequently ruled that the overriding principle in Article 102 cases is whether the conduct in question is capable of restricting competition. In other words, new analyses may be used where previous analyses are not sufficient to capture exclusionary effects.[46]

Along those lines, the Commission supported its finding for the third limb of the tying test, that consumers cannot in practice use the Facebook social network without Facebook Marketplace, by using two additional points. First, while there were some ways that consumers could reduce the visibility of Facebook Marketplace within the Facebook social network, the none of these ways could "entirely remove" Facebook Marketplace since they were "limited and complex" to complete,[47] the Facebook Marketplace integration was enabled by default, [48] and consumers would have "limited incentives" to take the time to disable the integration.[49] Second, Facebook Marketplace was able to access features of Facebook's social network which were not accessible to other rival online classified advertising services.[50] These included the ability of Facebook Marketplace to send Facebook notifications to consumers, [51] a special integration into the Facebook News Feed, [52] and links to Facebook Marketplace in the Facebook navigational menus.[53]

Similar reasoning can be applied to the examples of generative AI features being integrated into the platforms of Meta and Google. In the case of Meta integrating its AI Assistant into WhatsApp, the third limb of the tying test is easier to satisfy than in *Facebook Marketplace*, since as stated in the AGCM's proceeding against Meta,

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[43] AT.40684 *Facebook Marketplace (provisional non-confidential decision)* (n 16) recital 4, 793.
[44] *ibid recital 750*.
[45] Case T-201/04 *Microsoft Corp v Commission ECLI:EU:T:2007:289* (n 30) para 846.
[46] ibid para 867.
[47] AT.40684 *Facebook Marketplace (provisional non-confidential decision)* (n 16) recital 824-5.
[48] ibid recital 826.
[49] ibid.
[50] ibid recital 798.
[51] *ibid recital 799-801*.
[52] *ibid recital 802-3*.
[53] *ibid recital 804*.

consumers have no way to turn off the AI assistant in the app.[54] Furthermore, just as in *Facebook Marketplace*, the Meta AI Assistant has access to special features within WhatsApp which rival AI Assistants cannot access, for instance, Meta's AI Assistant is integrated into the WhatsApp search bar, and into a dedicated button on the WhatsApp home screen.[55] For this reason, Meta's integration of its AI Assistant into WhatsApp could satisfy the third limb of the tying test, at least in the sense that it was understood in *Facebook Marketplace*.

In the case of Google's integration of its AI Overviews into its Search product, as of writing, consumers are able to turn off the integration for a particular query by appending "-ai".[56] However there appears to be no option for consumers to disable the overviews for all queries. Following the logic in *Facebook Marketplace*, consumers may be considered to have "limited incentives" to take the time to append "-ai" to each search query. [57] Hence, it appears that Google's integration of AI Overview into Search could also satisfy the third limb of the tying test.

The fourth limb of the tying test is that the conduct must be capable of having exclusionary effects. This requirement can be satisfied by an authority supplying an argument which convinces the Court that the tying conduct would result in consumers being less likely to use the products of rival undertakings that compete against the tied product. Empirical evidence already exists showing that that generative AI products which offer generalist features such as chat functionality may take away user demand from specialist rival products which are not powered by AI. A paradigmatic example is the decline of the popular forum for computer programming questions, Stack Overflow, which saw a 25% decrease in activity following the launch of ChatGPT.[58]

Turning back to the cases at hand, it is hard to say at this stage whether Meta and Google's integration of generative AI features into their online platforms could have exclusionary effects, since this would require a closer look at the competitive conditions in the relevant markets. An investigation by a competition authority, as is occurring in the case of Meta, would be necessary to get a sufficiently clear picture. Nevertheless, enough information is public to draw some preliminary conclusions.

As stressed in the Commission's recent Draft Guidelines on Exclusionary Abuse an authority must only show the *capability* for exclusion in order to bring an abuse of dominance case under Article 102.[59] In the case of Meta, such an argument could entail

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[54] Autorita' Garante della Concorrenza e del Mercato (n 22) paras 5-7; Computing, 'Meta Rolls out AI on WhatsApp in Europe and Users Cannot Disable It' (28 March 2025) <https://www.computing.co.uk/news/2025/ai/meta-rolls-out-ai-on-whatsapp-in-europe-and-users-cannot-disable-it> accessed 31 July 2025.

[55] Autorita' Garante della Concorrenza e del Mercato (n 22) para 4.

[56] Tested by the author on 31.07.2025, with the somewhat humorous exception that the query "How to turn off AI overview -ai" returns no results at all due to an apparent bug.

[57] AT.40684 *Facebook Marketplace (provisional non-confidential decision)* (n 16) recital 826.

[58] R Maria del Rio-Chanona, Nadzeya Laurentsyeva and Johannes Wachs, 'Large Language Models Reduce Public Knowledge Sharing on Online Q&A Platforms' (2024) 3 PNAS Nexus pgae400 <https://doi.org/10.1093/pnasnexus/pgae400> accessed 31 July 2025.

[59] European Commission (n 25) Section 3.3.

the authority demonstrating that users would be less likely to use competing AI assistants on account of the integration of its own AI assistant into WhatsApp, as alleged in the AGCM's proceeding against the undertaking.[60]

In the case of Google's AI Overview, there appears to be early empirical evidence from multiple studies showing that news websites receive less traffic when AI Overviews are shown above news websites in the search results.[61] Some have even begun to speculate about when their websites may no-longer receive any traffic at all, a phenomenon known as "Google Zero".[62] These results are relevant for several reasons.

First, declining traffic to news websites may indicate that Google's AI Overview competes directly against those websites, since consumers are apparently satisfied with the information they receive on the news overview and do not need to click through to the news website. This could be considered as both evidence that Google's AI overview would compete in the same relevant market as independent news producers, and that Google's practices have the capability to produce exclusionary effects for independent news publishers.

Second, to the extent that a loss of traffic results in a loss of revenue for news publishers, such conduct could harm the ability of such publishers to fund journalism or even jeopardise their commercial viability altogether, resulting in exclusionary effect. From this perspective, it is important to note that other aspects of EU law which directly structure the business model of news production, such as the Copyright in the Digital Single Market (CDSM) Directive, may also come into play. In fact, the ECJ will soon hear *Like Company v Google*, a case pertaining to whether generative AI powered features reproducing editorial content without permission constitutes an infringement of EU copyright directives.[63] While a full consideration of such matters if out of scope for this article, copyright law, and other laws aiming to a fair balance of power in the press sector, could nevertheless offer a path to safeguard the economic viability of news publication in the face of generative AI.[64]

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[60] Autorita' Garante della Concorrenza e del Mercato (n 22) recitals 42-3.

[61] Michael Savage and Michael Savage Media editor, 'AI Summaries Cause "Devastating" Drop in Audiences, Online News Media Told' *The Guardian* (24 July 2025) <https://www.theguardian.com/technology/2025/jul/24/ai-summaries-causing-devastating-drop-in-online-news-audiences-study-finds> accessed 31 July 2025; Athena Chapekis and Anna Lieb, 'Google Users Are Less Likely to Click on Links When an AI Summary Appears in the Results' (*Pew Research Center*, 22 July 2025) <https://www.pewresearch.org/short-reads/2025/07/22/google-users-are-less-likely-to-click-on-links-when-an-ai-summary-appears-in-the-results/> accessed 31 July 2025.

[62] Nilay Patel, 'Google Zero Is Here — Now What?' *The Verge* (30 May 2024) <https://www.theverge.com/24167865/google-zero-search-crash-housefresh-ai-overviews-traffic-data-audience> accessed 20 August 2025.

[63] Case C-250/25 *Like Company v Google* Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice (CJEU); For a detailed analysis, see Philipp Hacker, 'Copyright, AI, and the Future of Internet Search before the CJEU' [2025] Verfassungsblog <https://verfassungsblog.de/copyright-ai-cjeu/> accessed 20 August 2025.

[64] Among these other laws are national laws which aim to give press organisations greater rights vis-a-vis online platforms. It should be noted that the French competition authority recently fined Google 250 million euros for failing to comply with national law on these matters, including with explicit reference to its practices pertaining to Generative AI powered chatbots. *Decision 24-D-03 regarding compliance with*

Finally, it is important to consider several factors which could increase the severity of the abuse, especially in light of the special responsibility of dominant undertakings to not distort the structure of effective competition on the common market.[65] Two such factors appear relevant.

First, in the case of Google, if consumers begin to access news primarily through Google's AI overviews instead of directly through independent news websites, Google could gain significant power to influence editorial perspectives. Crucially, the choice of editorial perspective may shift from consumers selecting among a variety of competing outlets, to Google's AI distilling those outlets' content into a summary form. Given the importance of journalism for democratic society, as noted in the recently passed European Media Freedom Act (EFMA) which describes media pluralism as a "pillar of democracy",[66] the General Court's underscoring the importance of "plurality in a democratic society" in *Google Android*,[67] and the special responsibility of dominant undertakings not to impair genuine, undistorted competition on the internal market,[68] these concerns should be taken into account when prioritising a potential Article 102 case, and serve to underscore the need for a prompt investigation by a competent authority.[69]

Second, generative AI technologies are trained on huge amounts of (usually public) data. As discussed above, some websites which are important sources of training data for generative AI models such as Stack Overflow, are becoming less popular as a result of generative AI alternatives. The integration of generative AI features into dominant online platforms could therefore lead to the foreclosure of fresh, high quality and open-access training data. In the case of Stack Overflow, for example, all user generated content is freely available under a permissive Creative Commons License,[70] which del Rio-Channona et al. describe as a "collective digital public good due to [its] non-rivalrous and non-exclusionary nature".[71] They observe that questions being

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the commitments in Decision 22-D-13 regarding practices implemented by Google in the press sector 2–3.

[65] Case C-333/21 *European Superleague Company* ECLI:EU:C:2023:1011 (n 21) para 128.

[66] Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act) (Text with EEA relevance) 2024 recital 2.

[67] Case T-604/18 *Google Android ECLI:EU:T:2022:541* (n 41) para 1028.

[68] Case C-333/21 *European Superleague Company* ECLI:EU:C:2023:1011 (n 21) para 128.

[69] For why competition law must take into account the broad range of both economic and noneconomic objectives laid out in the European Treaties, see Ioannis Lianos, 'Competition Law as a Form of Social Regulation' (2020) 65 The Antitrust Bulletin 3; See also Josef Drexl, 'Competition Law in Media Markets and Its Contribution to Democracy: A Global Perspective' (2015) 38 World Competition <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\WOCO\WOCO2015031.pdf> accessed 18 November 2024; Todd Davies, 'Market Diversity and Market Churn: Measures of Competitive Structure' (Social Science Research Network, 19 March 2025) Section 4.4 <https://papers.ssrn.com/abstract=5185363> accessed 31 July 2025.

[70] User generated content is variously licensed depending on when it was submitted to the site, but since 2018, is under the Creative Commons Attribution-ShareAlike 4.0 International license. https://stackoverflow.com/help/licensing accessed 20 August 2025.

[71] del Rio-Chanona, Laurentsyeva and Wachs (n 59) 8.

increasingly "fed into privately owned LLMs like ChatGPT" instead of being asked on freely accessible forums constitute a "significant shift of knowledge from public to private domains". [72] In the context of competition law enforcement, and as observed in *Google Shopping*, the foreclosure of critical inputs such as user traffic or real-world data to train AI models on can constitute a significant barrier to entry which may result in exclusionary effect.[73] Where the foreclosed inputs were previously public goods, and hence accessible to all competitors or potential competitors, the resulting harm to competition could be severe indeed.

Competition authorities could therefore examine whether the integration of Generative AI into the online platform of a dominant undertaking could create a "shift of knowledge from [the] public to [the] private domain",[74] which could ultimately have an exclusionary effect when it comes to the training of AI models. This would entail the presence of a market structure in which consumers' interactions with online platforms produced an open and accessible "collective digital public good" as with Stack Overflow, and the subsequent displacement of that market structure by a dominant undertaking exercising its architectural power to ensure that future interactions would occur privately on its platform.[75]

The privatisation of an input which was previously accessible to all undertakings, such as publicly visible question and answer data on Stack Overflow, and subsequent exclusion of competitors, might be described as foreclosure by enclosure. As the Court ruled in *TeliaSonera*, even in cases where the "input is not indispensable", a practice that results in the foreclosure of that input "may be capable of having anti-competitive effects on the markets concerned".[76] While such an approach to showing harm to competition, and ultimately exclusionary effects, would certainly be novel, it is not unthinkable.

3. Generative AI Integration understood as Self-Preferencing

Although the AGCM has framed its investigation into Meta's practices as a tying case, [77] it is possible that the integration of generative AI features could also be understood as self-preferencing, which is a distinct theory of harm under Article 102 TFEU as established in *Google Shopping*.[78] The distinction between a tying theory of harm and a self-preferencing theory of harm is principally that for the latter, the generative AI functionality supplied by rival undertakings must also be accessible on the dominant

[72] ibid.
[73] Case T-612/17 *Google Shopping ECLI:EU:T:2021:763* (n 7) paras 171-5.
[74] del Rio-Chanona, Laurentsyeva and Wachs (n 59) 8.
[75] Ioannis Lianos and Bruno Carballa-Smichowski, 'A Coat of Many Colours-New Concepts and Metrics of Economic Power in Competition Law and Economics' [2022] Journal of Competition Law & Economics 816.
[76] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* ECLI:EU:C:2011:83 (ECJ) para 72; The Court later generalised this logic this to refusal to supply cases in Slovak Telekom Case C-165/19 P *Slovak Telekom v European Commission* ECLI:EU:C:2021:239 [2021] ECJ Case C-165/19 P para 50.
[77] Autorita' Garante della Concorrenza e del Mercato (n 22).
[78] Case T-612/17 *Google Shopping ECLI:EU:T:2021:763* (n 7) para 236.

undertaking's platform, and compete against the generative AI functionality of the dominant undertaking. In other words, a self-preferencing theory of harm is appropriate in cases where the site of competition between the integrated generative AI feature and the undertakings against which the integrated generative AI feature is competing is on the platform itself. In such a situation, the dominant undertaking could apply "different underlying mechanisms on the basis of the advantages provided to it by its dominant position" and therefore breach the "general principle of equal treatment"[79] by favouring its own generative AI features over those of rivals.[80]

At first glance, applying a self-preferencing theory of harm to Meta's integration of an AI Assistant into WhatsApp appears difficult because it is not, as of writing, common to use an AI Assistant through WhatsApp. That said, the infrastructure for a third party to offer an AI assistant through WhatsApp exists, and Meta offers the possibility for businesses to connect with customers through its platform, for instance in order to offer a convenient means to conduct customer service.[81] In light of the Court's recent decision in *Android Auto*, Meta could be obligated to permit third party undertakings to use WhatsApp's business functionality in order to provide a competing AI assistant, since the functionality was clearly built 'with a view to enabling third-party undertakings to use it'.[82] It is important to note that ECJ's judgement in *Android Auto* must be contextualised in light of its other recent pronouncements relating to the conditions of market access. In *Superleague*, for instance, it held that "equality of opportunity [between] undertakings" is vital to the "maintenance or development of undistorted competition", and that permitting some undertakings the "*de jure* or even *de facto* [ability to determine] which other undertakings are also authorised to engage in [an economic] activity and to determine the conditions in which that activity may be exercised, gives rise to a conflict of interests and puts that undertaking at an obvious advantage over its competitors, by enabling it to deny them entry to the market concerned or to favour its own activity".[83]

The possibility of undertakings offering competing AI chatbots via WhatsApp is not merely a possibility, because in fact, OpenAI already offers an "experimental feature" which allows consumers to communicate with ChatGPT over WhatsApp.[84] As of today, however, it appears that OpenAI's assistant does not have access to the same level of integration as Meta's own assistant enjoys, such as in the search bar, or through the button on the WhatsApp home screen.[85] As such, Meta may have breached the general

[79] ibid para 155.
[80] Case AT.39740 *Google Search (Shopping)* (n 7) recital 600.
[81] https://business.whatsapp.com/ accessed 31 July 2025.
[82] Case C-233/23 *Alphabet Inc and Others v Autorità Garante della Concorrenza e del Mercato (AGCM) ECLI:EU:C:2025:110* [2025] ECJ Case C-233/23 para 47.
[83] Case C-333/21 *European Superleague Company* ECLI:EU:C:2023:1011 (n 21) para 133.
[84] '1-800-ChatGPT - Calling and Messaging ChatGPT with Your Phone' (*OpenAI Help Center*) <https://help.openai.com/en/articles/10193193-1-800-chatgpt-calling-and-messaging-chatgpt-with-your-phone> accessed 1 August 2025; Simonetta Vezzoso, 'Meta Sudans Redux: AGCM at the Gates' (*@WavesBlog*, 30 July 2025) <https://competitionwave.blogspot.com/2025/07/meta-sudans-redux-agcm-at-gates.html> accessed 1 August 2025.
[85] Assuming that if OpenAI did have access, then consumers would be given a choice as to which AI backend they would like to use in WhatsApp.

principle of equal treatment by failing to offer third-party undertakings the same level of integration that its own assistant enjoys, and may therefore be found to have abused its dominance through self-preferencing.

A hurdle to bringing a self-preferencing case against Meta would be that an authority would likely have to prove, as in *Google Shopping*, the importance of WhatsApp as a distribution channel for rival undertakings offering AI Assistants,[86] and demonstrate that the distribution channel could not be "effectively replaced by other sources". [87] This would be exceedingly hard to show in the case of Meta's integration of its AI Assistant into WhatsApp, since it appears that in the status quo, most competing AI Assistants acquire traffic from sources other than WhatsApp, not least because it appears that only OpenAI has launched a WhatsApp interface, and even then, only as an "experimental" feature.

Turning to Google's integration, both news websites and Google's AI Overviews are available through its Search product. Hence, one could be tempted to frame Google's conduct as using its Search product to preference its AI Overview product as a means to consume news, over the news websites to which it ranks in its search results. Unlike with the Meta example, Google's search engine is conceivably an important source of traffic which could not be "effectively replaced by other sources",[88] as it was in *Google Shopping*. A crucial distinction from the *Google Shopping* case is, however, that Google's AI Overview is not ranked in Google's search results because it is not a standalone product. Indeed, emphasis was given in *Google Shopping* to the fact that Google employees were concerned that its own comparison shopping product was "unlikely to appear high in the search results",[89] and that as a result, Google's conduct was aimed at "dramatically increasing traffic" to its own comparison shopping product.[90] The fact that Google's AI Overview feature is not a standalone product which is ranked in its search engine, but is rather a new feature of search engine, means that the fact pattern differs from that of its previous self-preferencing conduct in *Google Shopping*. A tying theory of harm which does not require a standalone product may therefore be more appropriate for the case at hand.

4. Limiting Principles

Although a full assessment of whether, and in what ways, the integration of generative AI features into online platforms by a dominant undertaking amounts to an abuse of dominance would require a detailed case-specific analysis, the preceding sections have outlined two general theories of harm through which such conduct could potentially be characterised as abusive. Given that the AGCM is now bringing proceedings against Meta and a complaint has been lodged with the CMA against Google for its conduct, such eventualities are clearly no longer theoretical.

[86] Case AT.39740 *Google Search (Shopping)* (n 7) recitals 444-451.
[87] ibid recitals 539-541.
[88] ibid.
[89] ibid recital 381.
[90] ibid recital 386.

Yet surely it should be possible for a dominant undertaking to make use of generative AI in its online platforms. Courts and competition authorities have been consistent in their emphasis that competition law permits dominant undertakings to "vigorously" compete with smaller undertakings, providing they do so on the merits.[91] The question, therefore, is where the limits lie.

When it comes to tying, dominant undertakings could in many cases reduce their exposure to competition law liability by simply giving consumers an easy way to decide if they would like to use generative AI features on the platform or not, since this would nullify the third limb of the tying test articulated by the Court.[92] Ideally, this should be an opt-in decision as to avoid status quo bias when features are enabled by default,[93] with the possibility of easily turning such features off again in the future.[94]

Yet giving consumers the ability to opt-in to generative AI features is somewhat unsatisfactory, not least because it appears to expose a tension between competition law and innovation. While in principle dominant undertakings should not be hindered by competition law in their attempts to compete on the merits, if they must request consumer permission to turn on "innovative" generative AI features in their products, then they may justifiably argue that they face a competitive disadvantage vis-à-vis non-dominant undertakings.[95]

On further inspection however, this tension is largely a product of a narrow understanding of how such generative AI features may be implemented in online platforms. Technology companies, when designing digital products and services, have wide latitude to implement them in a variety of different ways. This is an important point which is worth dwelling on. The latitude of technology companies to design digital platforms might be understood as similar that of an architect when designing a building. Architects are limited in a variety of ways, including by physical or technological constraints (such as the qualities of building materials), economic constraints (like whether a proposed building would be attractive to potential occupants), regulatory constraints (such as energy efficiency requirements), path dependencies (an existing building structure), and of course, their imagination. Yet within those 'hard' limits, lies a vast design space to be explored, in which an innumerable number of design choices exist.[96]

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[91] Case C- IV/30698 *ECS/AKZO* [1985] recital 81.

[92] That consumers cannot obtain the tying product without the tied product. Case T-201/04 *Microsoft Corp v Commission ECLI:EU:T:2007:289* (n 30) para 869; Case T-604/18 *Google Android ECLI:EU:T:2022:541* (n 41) para 284.

[93] AT.40684 *Facebook Marketplace (provisional non-confidential decision)* (n 16) recital 822; Case T-604/18 *Google Android ECLI:EU:T:2022:541* (n 41) para 428.

[94] AT.40684 *Facebook Marketplace (provisional non-confidential decision)* (n 16) recital 825.

[95] An alternate view might be that even non-dominant undertakings would in any case almost certainly be required to ask for consent in order to enable such functionality under the General Data Protection Regulation (GDPR). Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) 2016 (OJ L).

[96] For a perspective on engineering problems aligned with such a view, see Richard R Hamming, *Art of Doing Science and Engineering: Learning to Learn* (CRC Press 1997) Chapter 9.

Just because the architect eventually settles on one design, does not mean that other designs were not possible, nor that other architects would have made the same choice. Open-ended engineering tasks rarely have a single best answer. Rather, they typically inhere a set of trade-offs, which must be subjectively evaluated by the decision-maker. For instance, when designing an apartment building, the height of each floor must be considered; higher ceilings might be more attractive to potential occupants, but would permit fewer floors to be built, higher costs, and less marketable floor area. Different decision makers may reasonably come to different conclusions. *In extremis*, overly low ceilings could fail to satisfy building regulations, or overly high ceilings could be economically or technically unviable.

Returning to the issue at hand, just because Big Tech companies such as Meta and Google have thus far chosen to implement generative AI in a manner which triggers competition law scrutiny, does not mean that they could not have implemented it in a manner which would not do so. It simply means that the *particular way* in which these dominant undertakings chose to implement generative AI may not have been compatible with the principles of the common market. On closer inspection, therefore, while a tension exists, it is not between competition law and innovation. Rather, it lies primarily in the trade-offs between design choices which are technically and economically convenient for the dominant undertakings making them, and the risk that such choices are not compatible with the common market and will trigger subsequent competition law intervention to contest them.

This view is closely tied to the special responsibility doctrine of Article 102 TFEU. It considers the special responsibility not as a barrier to innovation, but as a guardrail to ensure that innovation does not come at the expense of competition.[97] Design choices which benefit dominant undertakings at the expense of the potential for effective competition on the common market are prohibited. This aspect of Article 102 might be argued to be especially important in the fast-moving, tipping-prone digital markets considered in this article.

Dominant undertakings wishing to integrate generative AI into their online services should therefore take care, under their special responsibility, to ensure that they compete on the merits while doing so. Given the "objective difficulty of establishing what constitutes abusive conduct"[98] and the fact that competition on the merits is "amongst the most indeterminate and vague concepts in [EU and national law]",[99] the following paragraphs will take an examples-based approach by illustrating how both Google and Meta could go about doing so.

A simple way in which Meta could avoid infringing Article 102, as described above, is by letting consumers opt-in to the integration of its AI Assistant into WhatsApp. Yet

[97] See generally McLean (n 13).
[98] *Opinion of Advocate General Rantos in* Case C-377/20 *Servizio Elettrico Nationale SpA ECLI:EU:C:2021:998* (ECJ) para 53.
[99] Case 85/76 *Hoffmann-La Roche & Co AG v Commission of the European Communities ECLI:EU:C:1979:36* (n 22) para 4.

implementing an opt-in AI Assistant in WhatsApp in strict accordance with EU competition law may be challenging. As described above, Meta would be unable to prompt consumers to enable it in case such prompts were interpreted as coercive,[100] and without such prompts few consumers may decide to enable such a feature. It is important to note that low uptake of a feature is not necessarily indicative of low quality but rather could be a product of a lack of awareness or perceived need on the part of consumers. Furthermore, if one takes arguments pertaining to learning effects in the generative AI market seriously, Meta could face a chicken-and-egg problem if its AI Assistant would need significant usage to become good enough for consumers to want to use, but Meta would not be able to achieve the amount of usage required to facilitate such a level of performance without first integrating the feature into its online platforms as to artificially induce demand.[101]

Thankfully, there is a way to square the circle. Meta could integrate its AI Assistant into WhatsApp free of competition concerns providing that it provides the means for other undertakings to also integrate their third-party assistants into WhatsApp too. This would enable competition on the merits inside the WhatsApp platform, and assuming that no self-preferencing was involved, prevent any leveraging of Meta's market power from the market for consumer communication apps to the market for intelligent AI assistants. As discussed in Section 3, the infrastructure for third party undertakings to create WhatsApp chatbots already exists.

As also described in Section 3, however, Meta may still be found to be self-preferencing its own AI Assistant as a result of its integrations into the WhatsApp search bar and the AI button on the WhatsApp home screen among others. Meta should therefore either offer competing AI Assistants a similar level of integration or remove such functionality for its own AI Assistant.

Turning to Google's AI overviews, as discussed in Section 1, the integration of generative AI into Google's Search product poses a greater competition concern for some queries than for others. In the case of recipe websites for example, the effect of the integration on the structure of effective competition in the market may be scant, since Google is not competing directly against recipe websites in terms of providing content, and recipe websites are (presumably) not excluded by its conduct. As described, the same cannot be said for queries to Google's search engine which primarily return results from news publishers. The question, therefore, is how Google could have implemented generative AI in a manner which would constitute competition on the merits. Two options present themselves, which are not mutually exclusive.

First, Google could turn off its AI Overview feature for queries which would cause it to come into direct competition with rivals in an adjacent market. This would prevent the firm from infringing competition law simply by having it not enter new markets in the first place. This option would see Google not show AI Overviews for queries that pertain to news, or more generally, other queries that could see its AI Overviews competing

[100] AT.40684 *Facebook Marketplace (provisional non-confidential decision)* (n 16) recital 750.
[101] Such learning effects are mentioned in the decision itself. Autorita' Garante della Concorrenza e del Mercato (n 22); Simonetta Vezzoso (n 84).

against undertakings appearing in its search results. A similar approach could also be to let consumers opt-in to AI Overviews for different categories of search results, or on a per query basis. Interestingly, this approach was taken by a rival search engine, Kagi, where AI overviews are shown only when consumers append a question mark to their query.[102]

Second, it is important to note that in addition to its AI Overviews, Google also offers a standalone AI assistant, Gemini,[103] which is itself capable of summarising news. Instead of showing the AI Overview on queries related to news, Google could index and rank Gemini's summaries of relevant news for a given query in its search results.[104] Of course, if Gemini's outputs were ranked, Google's ranking must adhere to the "general principle of equal treatment" vis-à-vis other news publishers or other AI overview providers to ensure that Gemini would be competing on the merits.[105] A ranking-first approach could be used for all types of queries for which showing AI Overviews may result in Google entering new markets, and could allow the dominant firm to offer AI summaries while still respecting its special responsibility to not distort the effective structure of competition in downstream markets. While questions may remain about the fairness of using news publishers' content to compete against them, such questions would in the author's view would be best tackled by copyright law as described above, rather than through an exclusionary abuse case under Article 102 TFEU as considered here.

5. Potential Remedies

Once the integration generative AI features into a dominant online platform has been found to abusive under Article 102, the question for competition authorities becomes what an appropriate remedy under competition law should be. While the open ended, context specific and theory of harm specific nature of remedies under competition law makes it difficult to make concrete suggestions *in abstracto*, this section considers several general options.

At the outset, it seems important to note that regardless of the final form of the remedy, the competition authority should consider issuing an injunctive remedy to halt the abusive conduct in question by using an interim measure under Article 8 of Regulation 1/2003,[106] as to "shut the stable door before the horse has bolted" on the market in

[102] See https://help.kagi.com/kagi/ai/quick-answer.html accessed 20 August 2025.
[103] https://gemini.google.com/ last accessed 31st July 2025.
[104] Ony might question whether this approach is technically feasible. While an approach where content from generative AI bots is generated and indexed in (near) real-time would certainly involve technical and product questions, these are very likely surmountable and may serve to spur future innovation which could spill over into a more holistic re-think of how online search works.
[105] Case T-612/17 *Google Shopping ECLI:EU:T:2021:763* (n 7) para 155.
[106] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance) 2002 (OJ L); Daniel Mandrescu, 'Designing (Restorative) Remedies for Abuses of Dominance by Online Platforms' (2025) 13 Journal of Antitrust Enforcement 353, 359 <https://doi.org/10.1093/jaenfo/jnae040> accessed 1 August 2025.

question.[107] This was the case in *Broadcom*, where the Commission came to a *prima facie* conclusion that the dominant undertaking had imposed "exclusivity-inducing provisions" in agreements with its trading partners, and imposed interim measures to "immediately stop [Broadcom's] conduct" for an initial period of three years, pending investigation.[108] As explored in detail by Mandrescu,[109] such interim measures are practically feasible, and could help prevent further harm to effective competition, while giving the Authority the time to consider the next steps.

Indeed, such next steps require careful consideration. While competition law is inexorably regulatory in nature,[110] and indeed may be becoming more so,[111] the imposition of remedies which dictate the way firms should compete and risks impinging on their commercial freedom – in this case by dictating how generative AI should be integrated into a platform – is generally seen to be something to be avoided by competition law.[112] One option, therefore, may be for the competition authority, to first impose an injunctive remedy, and then to look to obtain a commitment from the undertaking in question to stop the abuse without necessarily imposing a fine. *Broadcom* set a precedent for such an outcome, where after receiving an injunction to stop its *prima facie* abusive conduct, the dominant undertaking came back to the Commission with binding commitments to meet its concerns.[113] These concerns were subsequently revised and accepted, and the case was closed.[114] As Colomo has noted, approaches which consisted only of negative obligations were common during the formative years of competition law, and the fact that they "dominated traditional enforcement does not mean that they are irrelevant in the contemporary landscape."[115] If the distortion of competition caused by generative AI has been caught early enough by the injunctive remedy, then no further remedy may be required in order to bring the infringement to an effective end. In the case that other undertakings were injured by the abuse prior to the injunction coming into effect, the increasingly active regime of private

[107] Bundeskartellamt, 'Amendment of the German Act against Restraints of Competition' <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html> accessed 12 March 2024.
[108] 'Antitrust: Commission Imposes Interim Measures on Broadcom' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6109> accessed 4 August 2025; AT40608 *Broadcom* recitals 14-15.
[109] Mandrescu (n 106).
[110] Niamh Dunne, 'Between Competition Law and Regulation: Hybridized Approaches to Market Control' (2014) 2 Journal of Antitrust Enforcement 225 <https://doi.org/10.1093/jaenfo/jnu002> accessed 31 July 2025; Pablo Ibáñez Colomo, 'On the Application of Competition Law as Regulation: Elements for a Theory' (2010) 29 Yearbook of European Law 261 <https://doi.org/10.1093/yel/29.1.261> accessed 11 November 2024; Josef Drexl and Fabiana Di Porto, *Competition Law as Regulation* (Edward Elgar Publishing 2015).
[111] Elettra Bietti, 'Experimentalism in Digital Platform Markets: Antitrust and Utilities' Convergence' (2024) 2024 University of Illinois Law Review 1277 <https://illinoislawreview.org/print/vol-2024-no-4/experimentalism-in-digital-platform-markets-2/> accessed 9 January 2025.
[112] Opinion of Mr Advocate General Jacobs Case C-7/97 *Bronner v Mediaprint* ECLI:EU:C:1998:264 (ECJ) para 56; Opinion of Advocate General Medina C-245/24 *LUKOIL Bulgaria* ECLI:EU:C:2025:570 (ECJ) paras 29-30.
[113] AT.40608 *Broadcom* (n 108) recitals 80-86.
[114] ibid recital 114.
[115] Pablo Ibáñez Colomo, 'Remedies in EU Antitrust Law' (2025) 21 Journal of Competition Law & Economics 137, 137–8 <https://doi.org/10.1093/joclec/nhae022> accessed 1 August 2025.

competition law enforcement could provide them with a means to claim compensation for damages.[116]

The advantage of this approach is twofold. First it avoids long proceedings which could tie up the resources of competition authorities.[117] Second, and perhaps most importantly, it is minimally invasive in the sense that it does not preclude the future integration of the generative AI feature into the online platform. Rather, it merely prevents the integration of such features in a manner determined by the competition authority to be anti-competitive, thus leaving the door open for the dominant undertaking to have another go at implementing the feature in a way which is not anti-competitive.[118] This approach is predicated on the understanding put forward in the previous section, that technology companies enjoy a large design space when it comes to designing new features, and that the tech companies themselves are far better placed to explore the trade-offs inherent in that design space than competition authorities are. Providing that the injunction is issued and complied with quickly enough, an injunctive remedy allows the competition authority to protect effective competition, while avoiding it getting into the weeds of the design of more complex remedies or trying to engage in the design of online platforms themselves.[119]

A second option would be for the competition authority to mandate a more comprehensive remedy. Generally speaking, any such remedy should be aligned with the theory of harm put forward by the Authority, should bring the infringement to an effective end, and may also look to restore the competitive conditions to those prior to

[116] Richard Whish and David Bailey, 'Private Enforcement of Competition Law: Its Role and Development in the EU', *Research Handbook on Private Enforcement of Competition Law in the EU* (Edward Elgar Publishing 2023) 3 <https://www.elgaronline.com/edcollchap/book/9781800377523/book-part-9781800377523-7.xml> accessed 1 August 2025; For a review of recent cases in the UK and a discussion of potential avenues for damages claims, see Matthew Tweddell and Konstantinos Pantelidis, 'Alternative Remedies for Breach of Competition Law: A Case for Restitution for Wrongs' Journal of Competition Law & Economics 1–3 <https://dx.doi.org/10.1093/joclec/nhaf018> accessed 1 August 2025; Niamh Dunne, 'The Role of Private Enforcement within EU Competition Law' (2014) 16 Cambridge Yearbook of European Legal Studies 143 <https://www.cambridge.org/core/journals/cambridge-yearbook-of-european-legal-studies/article/role-of-private-enforcement-within-eu-competition-law/57F7E18DF12B08046B08001C0783DDB2> accessed 1 August 2025.

[117] For a detailed discussion of the benefits of forgoing a fine in competition law cases, and the procedural changes which would make such an approach maximally effective, see Simon de Ridder and Lennart Enwaldt, 'To Fine, or Not to Fine: Reconciling Effective Enforcement with Fundamental Rights in Times of an Effects-Based Approach to EU Competition Law' (30 May 2025) <https://papers.ssrn.com/abstract=5383861> accessed 8 August 2025; For an exposition of the costs that long proceedings under Article 102 may bring, see Heike Schweitzer and Simon de Ridder, 'How to Fix a Failing Art. 102 TFEU: Substantive Interpretation, Evidentiary Requirements, and the Commission's Future Guidelines on Exclusionary Abuses' [2024] Journal of European Competition Law & Practice lpae033 <https://doi.org/10.1093/jeclap/lpae033> accessed 18 July 2024.

[118] As suggested by Colomo, who writes that 'delegating the design and implementation of remedies to the undertaking could present some advantages [because a]fter all, firms are in a better position to determine how best the infringement can be brought to an end.' Ibáñez Colomo (n 115) 161.

[119] As in Google Shopping. Case AT.39740 *Google Search (Shopping)* (n 7) recital 699; Ibáñez Colomo (n 115) 150.

the distortion to competition caused by the abuse in question.[120] As for the form of the remedy, the Authority must choose between a structural or a behavioural approach. The types of abuses considered here, where a generative AI feature has been integrated into an online platform, make it difficult to imagine how a structural remedy could be applied other than having the dominant undertaking spin out the feature into a startup. That leaves behavioural remedies, which would seek to restore competition on the merits by having the dominant undertaking alter the way in which it has implemented the generative AI feature. Unfortunately, the imposition of complex remedies is likely to be difficult because competition authorities may not have the "the powers, expertise, and resources" to design, implement and monitor them.[121] While the above section on limiting principles offers some guidance, the inherently fact specific nature of such remedies precludes this article from offering a more detailed proscription.

Regardless of the content of any such behavioural remedy, its credibility could be enhanced by taking a two-tiered approach as suggested by Bougette et al.[122] This would involve the imposition of a behavioural remedy as suggested in the paragraph above, as well as an additional "conditional [fine] whose imposition – both in terms of activation and magnitude – would depend on the observed implementation and effects of the behavioural obligations".[123] Such an approach would seek to enhance the credibility of the behavioural remedy by creating a strong deterrent for non-compliance, yet it would still suffer from the drawback, as mentioned above, of the competition authority needing to quickly design an effective remedy in the first place.

A third option involves noting that the integration of generative AI into online platforms may also warrant scrutiny under the Digital Markets Act (DMA).[124] While the DMA applies without prejudice to EU competition law and conduct that amounts to an abuse of dominance under Article 102 is forbidden regardless of whether it is also prohibited under the DMA,[125] it is also the case that the DMA is complementary to competition law and both laws are applied in parallel by largely the same competent authorities.[126] As such, in cases where the online platform in question is designated as a gatekeeper under the DMA, authorities may decide to pursue action under the DMA instead of under competition law. A clear advantage of the DMA is that it offers a more regulatory approach to intervention than competition law does, such as the potential to open

[120] Ioannis Lianos, 'Competition Law Remedies: In Search of a Theory' in Ioannis Lianos and D Daniel Sokol (eds), *The Global Limits of Competition Law* (1st edn, Stanford University Press 2012) 178 <https://www.jstor.org/stable/j.ctvqsdqbd.17> accessed 30 September 2024.
[121] Ibáñez Colomo (n 115) 138; Jean Tirole, 'Market Failures and Public Policy' (2015) 105 American Economic Review 1665, 1670–1674.
[122] Patrice Bougette, Frédéric Marty and Simone Vannuccini, 'Competition Law Enforcement in Dynamic Markets: Proposing a Flexible Trade-off between Fines and Behavioural Injunctions' [2025] Working Papers AFED <https://ideas.repec.org//p/afd/wpaper/2506.html> accessed 1 August 2025.
[123] ibid 20.
[124] Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) 2022 (OJ L).
[125] ibid recital 10.
[126] ibid.

market investigations under Article 18 DMA.[127] While an analysis of whether the integration of generative AI features into gatekeeper platforms could breach the obligations set out in the DMA is out of scope for this paper, in cases where the DMA could be applied, then it may be that an *ex ante* regulatory approach may work better than an *ex post* competition law approach in terms of the next steps.[128] Given the highly specific nature of many of the obligations in the DMA, whether an Authority decides to take such a route should depend first and foremost on how clearly the launch of the generative AI feature in question violates one of the gatekeeper's obligations under the DMA.

A fourth option could be for an agency to decide, in the first instance, to issue an injunctive remedy under Article 102 TFEU as per option one and then consider whether further action may be best explored under the framework provided by the DMA. In fact, this option is explicitly foreseen by the DMA, which notes that "in cases of urgency due to the risk of serious and irreparable damage to competition, the Commission should consider adopting interim measures [under competition law]".[129] This strategy assumes that the competent authority is confident in its assessment that such an approach would not transgress the principle of *ne bis in idem*. While questions around double jeopardy under competition law and the DMA remain relatively unclear, one strategy the Authority could pursue would be to argue that the purpose of competition law, to protect "prevent competition from being restricted",[130] and the purpose of the DMA, to underwrite "fair and contestable" digital markets, are different.[131] A circumspect injunctive remedy under competition law aiming to protect against distortions of competition may therefore leave the path option to future intervention of a more regulatory nature under the DMA with the aim of fostering fairness and contestability. Again, any such assessment would be inevitably specific to the facts of the case as emphasised by Zelger,[132] and is thus not considered in detail here.

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[127] Although such an option is only possible in cases of systemic non-compliance. Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

[128] This could, for example, be the case for Google's AI Overview, which could potentially fall under Article 6(5) of the DMA. Further, the impact on Google's conduct on the news publishing industry raises also concerns pertaining to democracy as described above, which the Digital Markets Act may be well suited to tackle. Todd Davies and Spencer Cohen, 'Error Costs, Platform Regulation, and Democracy' [2025] Journal of Competition Law & Economics nhaf008 <https://doi.org/10.1093/joclec/nhaf008> accessed 4 April 2025.

[129] Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) recital 78.

[130] Case C-333/21 *European Superleague Company* ECLI:EU:C:2023:1011 (n 21) para 124.

[131] See Article 18(2) DMA. Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act); See also Patrick Harrison, Monika Zdzieborska, and Bethany Wise, 'Ne Bis in Idem: The Final Word?' (*Kluwer Competition Law Blog*, 7 April 2022) <https://legalblogs.wolterskluwer.com/competition-blog/ne-bis-in-idem-the-final-word/> accessed 1 August 2025.

[132] See generally Bernadette Zelger, 'Taming BIG TECH – A Shift in Paradigm and Its Implications for the Principle of Ne Bis in Idem' (2025) 48 World Competition <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\WOCO\WOCO2025010.pdf> accessed 31 July 2025.

6. Conclusion

In light of recent competition law concerns pertaining to the integration of generative AI features into online platforms, particularly Meta's integration of its AI Assistant into WhatsApp and Google's integration of AI Overviews into Google Search, this paper has sought to sketch out a more general framework for the assessment of exclusionary abuse cases in such contexts.

Section 1 considered that the integration of generative AI features into platforms could constitute the entry of a dominant undertaking into a new market, in the case where the online platform begins to fulfil a function that it did not previously fulfil, and as a result, start to compete against undertakings on a market in which it was not previously competing.

Section 2 considered whether a tying theory of harm could be leveraged in such cases, as in the ACGM's proceeding against Meta. It found that a tying theory of harm is most relevant in cases where generative AI is integrated by default into dominant online platforms, and that while the potential for exclusionary effects greatly depends on the specific facts of the case, empirical evidence provides a strong indication that such effects can occur, and have indeed already manifested in practice.

Section 3 then considered the feasibility of a self-preferencing theory of harm. It argued that exposure to a self-preferencing theory of harm is most likely in cases where the competition between the integrated generative AI feature and the undertakings against which the integrated generative AI feature is competing occurs on the platform itself. In such cases, the dominant undertaking may have breached the "general principle of equal treatment" by conferring an advantage on its own generative AI product in the downstream market and hence may have departed from competition on the merits.

Section 4 then examined the limiting principles of such theories of harm. It proposed several ways in which dominant undertakings may limit their exposure to competition law scrutiny while nevertheless integrating generative AI into their products. First and foremost, this involves a close look at whether the features they are implementing brings them into fresh competition on a new market, and whether if so, they are competing on the merits. It considered that methods to reduce competition law risk with regards to the integration of generative AI are highly context specific, but in general may be lessened by having consumers opt-in to the new functionality, by offering interoperability such that third-party undertakings may compete on the merits against generative AI features offered by the dominant undertaking, or by judiciously implementing generative AI features only for a subset of the functionality which does not bring the undertaking into direct competition with downstream rivals in the first place. Given the wide latitude that tech companies have when designing their platforms, it is likely that many generative AI features could be implemented in such a manner.

Section 5 suggested a number of avenues that competition authorities might explore when it comes to remedies. These included simple injunctions, behavioural remedies,

regulatory avenues under the DMA, and a combination of each. First and foremost, it argued that competition authorities should look to halt the abusive conduct through an injunction to prevent further harm to competition on the market, before considering what the next steps might be.