

March 11, 2024

To: [COMP-VIRTUAL-WORLDS@ec.europa.eu](mailto:COMP-VIRTUAL-WORLDS@ec.europa.eu);  
[COMPGENERATIVE-AI@ec.europa.eu](mailto:COMPGENERATIVE-AI@ec.europa.eu)

SUBJECT: Joint Section Comments on Virtual Worlds and Generative AI

Dear Sir/Madam:

On behalf of the American Bar Association Antitrust Law and International Law Sections, we respectfully submit these comments in response to consultation requests by the European Commission concerning virtual worlds and generative AI.

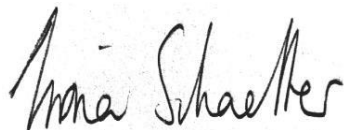
The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,



David Schwartz  
Chair, International Law Section



Fiona Schaeffer  
Chair, Antitrust Law Section

**COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTIONS OF  
ANTITRUST AND INTERNATIONAL LAW ON THE CONSULTATION ON  
GENERATIVE AI**

March 6, 2024

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The American Bar Association Sections of Antitrust and International Law (the Sections) welcome the opportunity to submit these comments to the European Commission (the Commission) on its consultation on generative AI (GenAI), published for public consultation on January 9, 2024. These comments reflect the expertise and experience of the Sections' members with competition law and economics.

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 9,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors and law students. The Antitrust Law Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the Antitrust Law Section have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Antitrust Law Section has provided input to enforcement agencies around the world conducting consultations on topics within the section's scope of expertise.

The International Law Section (the ILS) focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing, and practical assistance related to cross-border activity. Its members total approximately more than 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The ILS's over fifty substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the ILS has provided input to debates relating to international legal policy. With respect to competition law and policy specifically, the ILS has provided input for decades to authorities around the world.

**DISCUSSION**

Vigorous enforcement of antitrust and unfair competition laws plays a critical role in keeping all markets innovative and competitive. The Sections have long supported the evolution of antitrust and consumer protection laws to keep pace with evolving circumstances, technological innovation, new forms of competition, economic theory, and empirical evidence. In that spirit, the Sections commend the European Commission for taking the initiative to gather

information and closely monitor developments in GenAI. The Sections support the European Commission’s vigilance in scrutinizing GenAI markets for competitive concerns and, where appropriately supported by the evidence and applicable legal and economic principles, pursuing enforcement actions.

Governments around the world are studying competitive effects in emerging technology markets. In the October 30, 2023 Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, President Biden called upon federal agencies (taking into account the views of industry, academia, and other stakeholders) to promote a “fair, open, and competitive ecosystem and marketplace for AI and related technologies so that small developers and entrepreneurs can continue to drive innovation.”<sup>1</sup> On November 8, 2023, competition law leaders and policymakers attended the G7 Hiroshima Summit on digital competition. At the conclusion of the Summit, the G7 competition authorities pledged to “take action by enforcing competition laws, improving the existing regulatory toolboxes, and developing new regulatory frameworks to the extent necessary.”<sup>2</sup> Nonetheless, the Sections respectfully submit that it is important also to consider the potential unintended consequences that may result from implementing a prescriptive regulation at this stage of development of these technologies, as well as under-enforcement and over-enforcement of existing laws in the area of GenAI.

When discussing the antitrust impact of GenAI tools, it is important to distinguish between antitrust markets for the development and distribution of GenAI software and the antitrust markets for products and services in which producers and consumers make use of GenAI.

*Markets for GenAI software tools.* In relation to the development and distribution of GenAI software, the Sections see no reason at this time to expect that the relevant antitrust markets will differ significantly from other markets for application software.

More specifically, GenAI software markets may be characterized by competitive drivers or barriers to entry or growth that are similar to those applicable in other digital markets. With respect to data, in particular, the Commission has already addressed the importance of access to data in a number of merger and non-merger investigations. In the GenAI context, it seems likely that the role of data will be different for publicly available tools like ChatGPT (which rely on publicly available data) and more narrowly focused large language models (which rely on smaller, more function-specific datasets). In the latter case, enterprises may license GenAI tools for use on their own proprietary datasets.

Similarly, the role of interoperability based on public standards may vary depending on whether the tools in question are intended for general use or developed for particular applications.

The Sections note that the use of GenAI tools is likely to raise issues in various legal regimes, including consumer protection, data privacy and intellectual property laws (especially copyright). Without prejudice to the Commission’s efforts to monitor developments from an

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<sup>1</sup> Pres. Joseph R. Biden, Jr., Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence at 2-3 (Oct. 30, 2023) at <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence>.

<sup>2</sup> Statement of the G7 Competition Authorities and Policymakers on the 2023 Hiroshima Summit, “Digital Competition Communiqué” at 2 (Nov. 8, 2023) at [https://www.jftc.go.jp/en/pressreleases/yearly-2023/November/231108G7\\_result1EN.pdf](https://www.jftc.go.jp/en/pressreleases/yearly-2023/November/231108G7_result1EN.pdf).

antitrust perspective, the Sections respectfully recommend that the Commission consider the best approach to these issues in relation to GenAI tools as a matter of priority.

*Markets in which GenAI tools are used.* In relation to antitrust markets in which producers and consumers use GenAI software, the Sections note that GenAI software can be used in a potentially unlimited variety of markets. Traditional antitrust principles will continue to apply to the definition and analysis of these antitrust markets.

In the case of producers of goods and services, companies may be able to use GenAI tools to increase their efficiency. Given the variety of markets in which GenAI tools can be used, however, it would likely be impossible, and in any case premature, to generalize about the ways in which GenAI tools will affect competition in these markets.

On the demand side, GenAI tools are seeing widespread adoption by consumers, who are likely to be able to use such tools, *inter alia*, to assess the value of competing offerings, thus making more informed choices and putting additional competitive pressure on producers of goods and services.

The Sections take no position on the current state of competition or current need for specific antitrust or consumer protection enforcement action in GenAI markets. GenAI systems have advanced and improved rapidly and have substantially expanded in use. GenAI is a valuable tool that can increase innovation, promote efficiency, cost savings and economic growth, and potentially enhance competition to the benefit of consumers and the entire economy. That is also why it is important to be mindful of any potential antitrust and consumer protection concerns and engage in robust antitrust and consumer protection enforcement in this area, should circumstances warrant. The Sections respectfully submit that GenAI systems present complex issues, which require competition authorities to analyze carefully both potential procompetitive benefits and anticompetitive effects. The Sections also note certain specific issues in GenAI may warrant particularly close attention by the European Commission going forward, including network or platform effects, economies of scale, barriers to entry, and access to the large, high-quality datasets needed to develop and hone GenAI products and systems.

## CONCLUSION

The Sections appreciate the opportunity provided to comment on the GenAI consultation. We would be pleased to respond to any questions the Commission may have regarding these comments, or to provide additional comments or information that may be of assistance to the Commission.