



Case summary

15 November 2023

Bundeskartellamt examined whether partnership between Microsoft and OpenAI was subject to notification obligation under merger control

Sector:	Focus on the digital economy
File number:	B6 – 34/23
Date of decision:	25 September 2023

In its examination of a notification obligation under merger control, the Bundeskartellamt concluded that the previous stages of Microsoft's involvement in and cooperation with OpenAI did not trigger a notification obligation under German merger control rules and that the companies did not violate the prohibition of implementing a concentration without clearance.

Background and reasons for the examination

Artificial intelligence (AI) has been one of the key issues in current IT, at the latest since OpenAI made its ChatGPT application, which runs on OpenAI's large language model GPT-3, publicly available free of charge in November 2022. The new forms of generative AI are said to possess a disruptive potential similar to the introduction of the smartphone, for example. Competition authorities around the world are therefore also keeping a close eye on the developments in this area.

Following press reports in January 2023 that Microsoft supposedly wanted to invest 10 billion US dollars in OpenAI, the Bundeskartellamt asked the company for more information on this project, as it had not been previously notified under merger control. Microsoft then submitted numerous documents and provided details on the project both in writing and in talks with the Bundeskartellamt. At the Bundeskartellamt's request, OpenAI also commented on the matter.

Legal assessment

The Bundeskartellamt's legal assessment focused particularly on the questions of

- whether the project constituted a concentration as defined by law, mainly whether Microsoft had possibly acquired a material competitive influence on OpenAI (Section 37(1) no 4 German Competition Act (GWB)), and
- whether the requirements relating to the transaction value threshold (Section 35(1a) GWB) were met, in particular whether OpenAI fulfilled the requirement of having substantial operations in Germany.

With regard to the question of whether Microsoft gained a material competitive influence on OpenAI, the authority found that the company had already invested one billion US dollars in OpenAI in 2019 and had received special rights in return. At the time, the investment was already part of a wider partnership allowing Microsoft to access the technologies developed by OpenAI. As their cooperation progressed, both companies further deepened their partnership in 2021. Most recently, in January 2023, Microsoft decided to once again invest heavily in OpenAI. At the same time, the contractual basis for their cooperation was further developed in the interests of both parties.

With regard to the requirement of OpenAI having substantial operations in Germany, the authority found that, after making ChatGPT publicly available free of charge, the company's offers not only reached more than 100 million monthly users worldwide within a very short period of time. But also in Germany, ChatGPT had attracted so many users by January 2023 that, according to the joint guidance on transaction value thresholds published by the Bundeskartellamt and the Austrian Competition Authority, this constituted a case of substantial operations in Germany. Prior to this, however, the number of users was still very low, both in Germany and worldwide.

Based on these findings, the Bundeskartellamt ultimately informed Microsoft and OpenAI that it did not consider the previous cooperation between the two companies to have violated the prohibition of implementing a concentration without clearance. The Bundeskartellamt assumes that in 2019, or at the latest when the partnership was deepened in 2021, Microsoft already secured its influence on OpenAI to an extent sufficient for a notification obligation to arise under German law (Section 37(1) no 4 GWB). At that time, however, OpenAI's activities in Germany were not substantial enough to satisfy the requirements relating to the transaction value threshold (Section 35(1a) no 4 GWB). Once the company's activities had become substantial enough to meet the requirements in early 2023, the contractual and economic terms of the cooperation were further developed. However, Microsoft's existing material competitive influence was in the end not further strengthened at this point.

If Microsoft were to increase its influence on OpenAI in the future, it would have to be re-examined whether the companies are subject to a notification obligation. What is more, the Bundeskartellamt's findings regarding the obligation to notify a concentration do not provide any indication as to whether the cooperation between Microsoft and OpenAI is also in line with competition law beyond merger control, that is, in particular, whether it complies with Article 101 TFEU.

In general, the partnership between Microsoft and OpenAI follows a trend that can be observed in the entire market environment, namely that both large tech companies and innovative start-ups strive to develop capable AI and turn it into a commercially usable product. This requires specialist knowledge to develop the models, large amounts of data to train them and extensive computing capacities both to train the models and to run the applications. The computing capacities can be provided mainly by large providers of cloud computing services, so-called hyperscalers. Apart from the cooperation between Microsoft and OpenAI, there are also reports of other cooperation projects, between Amazon, Alphabet/Google and Anthropic, for example, or most recently the investments of, inter alia, SAP, Bosch and the Schwarz group in the German start-up Aleph Alpha. Furthermore, Alphabet/Google and Meta have also already developed various AI models of their own and applications based on them.

Microsoft

Microsoft is one of the largest tech companies in the world. Among private users, the company is known in particular for its Windows operating system, its Office software, the Teams platform and the Xbox games console. LinkedIn and Bing search are also part of Microsoft's portfolio. In addition, the company offers business customers productive business and server software as well as cloud services (Azure). Microsoft has already conducted its own research on AI and has started to increasingly integrate the technology behind ChatGPT into its own offers such as the Bing search. The company also offers a cloud-based interface for using this technology.

OpenAI

OpenAI is an AI start-up which has become known worldwide mainly for making its application ChatGPT publicly available free of charge. In addition to the language models of the GPT-X series used for this purpose, OpenAI has also developed a model for creating images (DALL-E). To further develop its models and operate its interfaces and applications, the company needs computing capacities provided by third parties. Business customers can use interfaces to embed OpenAI's AI models into their applications, fine-tune the models to suit their needs or use a specific version of ChatGPT for businesses.