Cooley

UK Antitrust Regulator Outlines Guiding Principles for AI Foundation Model Market

October 9, 2023

Like many regulators across the globe, the UK Competition and Markets Authority (CMA) has been hypervigilant in watching the development of the artificial intelligence (AI) foundation model market.

Following a five-month initial review into the market launched earlier this year, the CMA published its initial report on the UK market for AI foundation models on 18 September 2023.

The report outlines a series of proposed guiding principles for the AI foundation model market, which will be relevant to any organisations that are developing or deploying foundation models in the UK.

Supported by an overarching principle of 'accountability' for outputs created by AI systems, the CMA's proposed guiding principles focus on three key areas:

- Foundation model development – with key principles of 'access' and 'diversity'.
- Use of foundation models in other markets – with key principles of 'choice', 'flexibility', and 'fair dealing'.
- Use of foundation models by consumers – with a key principle of 'transparency'.

The report does not call out any current competition concerns or advocate for any immediate regulatory intervention. However, a golden thread that runs throughout the report is the CMA's objective to ensure that vibrant competition and innovation are promoted in the development of the foundation model market.

The CMA's objectives outlined in the report echo recent statements from Lina Khan, chair of the US Federal Trade Commission (FTC), who highlighted that the FTC is watching the sector closely.

It is clear that regulators in the US and UK do not want to be caught behind the curve in regulating this important and emergent market.

Foundation model development

Key principle: 'Access'
A key focus of the report is on a need to maintain an ability for organisations to access the key resources needed to successfully develop a foundation model – data, computing power, technical expertise and capital.

In the report, the CMA highlights a need to make sure that successful early movers in the market do not gain entrenched and disproportionate market power through creating economies of scale and benefiting from the positive feedback loops, which drive model improvement and come from high volume user engagement with AI systems in the wild.

The report notes that a positive market outcome would be a dynamic market in which a range of foundation model developers are able to gain access to these resources, on reasonable terms, allowing them to effectively challenge these incumbents and early movers.

Key principle: 'Diversity'
The report highlights a need to maintain a sustained diversity of business models, supported by the availability of both closed-source and open-source foundation models.

The CMA identifies that there are a variety of ways in which a model could be considered to be 'open' – e.g., some may simply be the 'raw ingredients' for the model and require costly and time-consuming development

and pre training, while others may come ‘pre-trained’ with weights and biases, meaning they only require relatively inexpensive and quick fine-tuning.

The CMA observes that many significant players in the market have already open-sourced certain models – including a number of high-performing, fine-tuned models – and notes that this has led to vibrant innovation in the sector. The CMA notes that the continued availability of these open-source models will help reduce barriers to entry for new players. Conversely, if access to key resources, such as data, computing power, technical expertise and capital, were restricted to only a handful of firms, the CMA’s concern is that larger and more successful market players might be able and incentivised to provide only closed-source models, potentially resulting in entrenchment and disproportionate market power.

Use of foundation models in other markets

Key principle: ‘Choice’
The CMA’s position is that positive market outcomes are likely to follow if downstream firms have effective choice as to how to incorporate models into their products or services – e.g., through application programming interfaces (APIs) and plug ins – including through the ability to develop models in house (an approach that would likely be supported by the continued availability of pre-trained, open-source models).

Key principle: ‘Flexibility’
Touching on a common regulatory goal of driving moves toward increased interoperability in the tech space, the CMA highlights the benefits of:

- Organisations deploying foundation models being able to ‘mix and match’ multiple foundation models.
- Consumers having the ability to easily switch the best solutions without technical or contractual restrictions.

Key principle: ‘Fair dealing’
The report also highlights concerns around potential anticompetitive effects that could hinder successful exploitation of downstream services enabled by foundation models – where firms that might acquire market power impose anticompetitive contractual terms or engage in anticompetitive conduct (e.g., by foreclosing other upstream or downstream services).

Use of foundation models by consumers

Key principle: ‘Transparency’
The report calls for consumers and downstream firms to be provided with information about the use and limitations of technologies supported by foundation models. To support this principle, the CMA impresses the importance of developers giving organisations that deploy their technology the information needed to allow them to manage their responsibilities to consumers (e.g., through the use of ‘model cards’ that can be used to provide users and deployers with basic information about a model).

Next steps

The CMA itself concedes that it does not view the guiding principles as ‘the finished article’; rather, they are a product of continuing dialogue with the sector and inform its thinking and development of the principles. The CMA is planning to commence a ‘significant programme of engagement’ and speak to a wide range of interested parties – ranging from consumer groups and academics to leading foundation model developers and deployers, along with innovators and new entrants to the market. The emphasis of the report is that the CMA is very much seeking a collaborative approach with the sector.

That said, it is also clear from the report that the CMA is closely watching the sector and will not hesitate to intervene should competition or consumer issues begin to emerge.

The next occasion on which we will gain insight into the CMA’s thinking will be early 2024, when it will publish an update on its principles – including its view as to how those principles have been received and adopted across the market, as well as further market trends.

How can we help?

If you receive an information or meeting request from the CMA or want to proactively engage in dialogue with the CMA, please contact one of the Cooley lawyers listed below for assistance.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our legal notices.

Key Contacts

Caroline Hobson London	chobson@cooley.com +44 20 7556 4522
Leo Spicer-Phelps London	lspicerphelps@cooley.com +44 (0) 20 7556 4334
Anna Caro London	acaro@cooley.com +44 20 7556 4329

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.