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SEEING AROUND CORNERS: WHERE DISRUPTION AND ANTITRUST MEET

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"Disruption" is business-speak for innovative companies or technologies that challenge the status quo. Now more than ever, it seems like disruption is a constant theme in today's business and regulatory environment, presenting both threats and opportunities for companies in a wide array of industries. While disruption is predominantly thought of as a business issue, antitrust risks are often lurking in the background. In this article, we examine the antitrust implications associated with disruption from three distinct perspectives—the disruptive effects of artificial intelligence (AI) technology, the disruptive impact of shifting policies on competition in both the United States and the European Union, and the antitrust risk that can arise when responding to disruption—and offer practical insights on navigating these issues for businesses to keep in mind.

DISRUPTIVE TECHNOLOGY: ARTIFICIAL INTELLIGENCE

The rapid adoption of AI-based technologies has the potential to disrupt nearly every industry. However, the disruptive power of this technology can raise unique antitrust issues for both businesses and regulators.

AI POWERED DECISION-MAKING

More and more businesses from all industries and sectors are relying on AI-based algorithms that analyze data in real-time to provide forecasts or recommendations for critical business functions. While using AI to improve decision-making has the potential to offer significant and often pro-competitive benefits, it can also raise novel antitrust issues that require careful evaluation.

In the United States, both the Federal Trade Commission (FTC) and Department of Justice (DOJ) Antitrust Division have scrutinized the use of third-party pricing algorithms in certain industries, contending they can reduce competition and harm consumers. Specifically, the DOJ has recently intervened in private antitrust lawsuits involving allegations of algorithmic price-fixing in the health insurance, hotel, and apartment rental industries, arguing that "*competitors' joint use of a common pricing algorithm to set starting-point or maximum prices*" and "*information exchange through a common pricing algorithm*" can violate the antitrust laws.[1] For its part, the FTC has likened the use of a common pricing algorithm to competitors each delegating their decision-making to "*a guy named Bob*," warning that "*[i]f it isn't OK for a guy named Bob to do it, then it probably isn't OK for an algorithm to do it either* ."[2] Further solidifying that these concerns are real, one court presiding over an algorithmic price-fixing case has held, at the pleading stage, that an agreement between competitors to use the same pricing algorithm may be per se unlawful.[3]

Regulators outside the United States are also turning their attention to algorithmic decision-making. The European Commission (EC), the French, German and UK Competition Authorities have issued studies and guidance on the usage of algorithms.[4] All these authorities recognize that although algorithms can be pro-competitive, they also can facilitate anti-competitive agreements. In particular, European regulators have highlighted the risk of hub-and-spoke arrangements, where third parties facilitate anti-competitive information exchange through algorithms. Further, the EC and the UK Competition and Markets Authority have both emphasized that (1) if a pricing practice is illegal when implemented offline, it is probably illegal when implemented online and (2) firms cannot avoid liability by blaming their algorithms.

PRACTICAL CONSIDERATIONS FOR BUSINESSES

Businesses evaluating whether the use of AI to inform competitive decision-making poses an antitrust risk should apply a nuanced approach given the potential for AI to improve efficiency and enhance competition. Ultimately, by following best practices, businesses can maximize the competitive advantages offered by AI while minimizing antitrust risks that may arise. Businesses should, for example, carefully review their terms and conditions with third party algorithm providers and ensure that any non-public data they provide when training or using an algorithm is not used for other purposes or disclosed without their consent. Businesses should also continue to closely monitor the developments and enforcement actions in the United States and abroad in this space, as the legal landscape is rapidly adapting to the disruptive effects of AI.

Indeed, the broader antitrust policy implications for this technology remain unclear. In the final year of the Biden Administration, the DOJ and FTC launched several antitrust investigations into the AI practices of technology companies.[5] However, the second Trump Administration ("Trump II") appears so far to be less focused on regulating AI than on fostering innovation. While Trump II has reportedly continued certain investigations into AI firms and maintained other pro-enforcement policies from the previous administration, the new administration has also expressed concerns about over-regulation in the AI space. Then-FTC Commissioner (now Chairman) Andrew Ferguson and Commissioner Melissa Holyoak emphasized the importance of "striking a careful and prudent balance" to ensure that the FTC does "not charge headlong to regulate AI," while still ensuring "that Big Tech incumbents do not control AI innovators in order to blunt any potential competitive threats."[6]

WHEN DISRUPTION COMES FROM SHIFTING GOVERNMENTAL POLICIES

DISRUPTION FROM INCREASED SCRUTINY OF M&A DEALS

Outside of technology changes, in today's fast-paced and ever-evolving regulatory environment, companies must skillfully navigate the authorities' new governmental tools and shifting policies, to ensure their initiatives remain compliant with competition and regulatory laws worldwide.

Dealmakers, in particular, find themselves on the front line. In Europe, the review of M&A and private equity deals has become increasingly unpredictable, with the line between reviewable and non-reviewable transactions now blurred by the authorities, especially when it comes to innovation-driven sectors.

To respond to new market realities and bridge perceived enforcement gaps, several European authorities have introduced new tools, such as alternative merger control thresholds (e.g., Germany and

Austria) or call-in powers (e.g., Italy). Others, like France and Belgium, do not hesitate to rely on their existing antitrust tools to scrutinize below-threshold transactions under similar rules to the Sherman Act.[7] Still, mindful of potential undesirable impacts, the European Union's highest court recently emphasized the importance of maintaining a "*predictable control system, taking into account the need for legal certainty*."[8] Meanwhile, calls to foster "European champions" and boost EU competitiveness[9] may help temper further merger control complexity.

Adding another layer of challenge is the rise of other areas of enforcement. Alongside traditional merger control, dealmakers must now contend with a growing array of foreign direct investment ("FDI") regimes,[10] which increasingly involve broad jurisdictional tests and leave large discretion to governmental authorities. The recent EU Foreign Subsidies Regulation ("FSR")[11] has further complicated matters, disrupting deals involving companies backed by non-EU public funding. While the first in-depth enquiries concerned Chinese state-owned companies or foreign sovereign funds, the shifting geopolitical and trade landscape is likely to pull a broader set of buyers and investors, including those from the United States, into the EU Commission's spotlight.

Across the Atlantic, mixed signals from US regulators demand equal attention. While the recent overhaul of the Hart-Scott-Rodino ("HSR") regime[12] increased documentation and disclosure requirements, market-oriented legislators are intent on dismantling the reform.[13] The resulting policy swing could create additional uncertainty for cross border-transactions.

Against this backdrop, companies—especially in highly exposed sectors such as tech and pharmaceuticals—must proactively assess potential regulatory hurdles. It has become more important than ever to initiate antitrust and regulatory analyses as early as reasonably practicable in the process, ensuring ample time for information gathering, Q&A, and analyses. This is particularly crucial for FDI, FSR, and HSR filings, as assessing filing requirements and the transaction's feasibility require an increasingly deep understanding of local businesses, extensive financial data collection, and close coordination between antitrust experts, and with clients. Antitrust advisors can also play a key role in negotiating transaction terms, helping companies craft new closing conditions that address notably the new call-in risks, prolonged review timelines, and overall risk management between buyer and seller. The possibility of leveraging the authorities' new tools to fend off hostile takeovers or block competing bids; rival projects can also transform these legal obstacles into strategic opportunities.

DISRUPTION FROM ESG POLICY

Companies also face increasing threats of disruption from policy makers' divergent goals across nations and political parties. A good case study for this phenomenon is companies' collective ESG initiatives, where striving for a greener economy and stronger human rights meets the constraints of competition law. The divide is most evident between the European Union and the United States.

In Europe, national[14] and EU instruments[15] on sustainability reporting, due diligence, and carbon-intensive product imports explicitly invite companies to collaborate to jointly address climate and human rights issues in the (common) supply chain. Achieving meaningful change, however, often requires environmental and ethical standards to be set industry-wide, implying collaboration among numerous competitors. Such cooperation may touch on sensitive competitive factors, potentially limiting consumer choice or (even marginally) increasing prices. For instance, competitors might agree to phase out energy-inefficient washing machines or guarantee fair wages within food or fashion supply chains.

The EC revised its Horizontal Guidelines[16] to explicitly cover ESG-related cooperation between competitors, identifying these forms of collaboration as unlikely to raise antitrust concerns. Some national competition authorities have also signaled they do not want competition rules to stand in the way of agreements that contribute towards a more sustainable society, encouraging competitors to submit projects for informal antitrust assessment (e.g., the *Cocoa Forum* and *Bananas* cases in Germany[17] as well as several ESG-initiatives reviewed by the Dutch competition authority).

In sharp contrast, the United States has been more skeptical to ESG collaboration: Anticipating backlash, six large US banks recently quit the Net Zero Banking Alliance – effectively burying the initiative.[18] Trump II's agency appointments also may signal upcoming antitrust enforcement against ESG protocols. For example, newly appointed FTC Chairman Andrew Ferguson previously tweeted that "*[c]oncerted refusal to deal can violate the antitrust laws. We've seen similar things with ESG. . . . Antitrust enforcers should take this seriously*."[19] Further, the United States has seen state antitrust enforcement against ESG initiatives, with Republican-led states recently filing suit against firms for alleged climate activism that reduced coal production.[20] So, further antitrust enforcement in the ESG space should be expected, widening the gulf of enforcers' priorities across the Atlantic.

While antitrust rules share common principles globally, the conflicting signals sent by EU and US authorities pose significant disruption for multinational companies pursuing joint sustainability efforts. With a view to their (joint) ESG initiatives, firms need to balance reputational concerns (of in-action) with the risk of substantial fines for cartel violations (in the event of ill-advised over-action). In this rapidly evolving environment, antitrust experts can assist companies by structuring ESG collaborations that comply with regulatory frameworks on both sides of the Atlantic.

RESPONDING TO DISRUPTION AND DISRUPTORS

While the potential for disruption creates opportunities for new market entrants, the sudden appearance of a disruptor can lead incumbent firms to consider taking swift and decisive action to reclaim or solidify their position in the marketplace. However, responding to the threat posed by disruption can raise its own set of antitrust concerns that must be weighed alongside the business considerations.

POTENTIAL EXCLUSIONARY PRACTICES

An incumbent firm responding to disruption might think to seek some measure of exclusivity from its suppliers or its key customers in order to prevent or discourage them from doing business with a new market entrant. Alternatively, the incumbent might demand "most favored nation" (MFN) status with its suppliers in order to ensure that suppliers do not offer better terms to an upstart. While these arrangements can be permissible under the antitrust laws, and even pro-competitive in many circumstances, they can create antitrust concerns when implemented in response to a competitive threat—particularly if the incumbent firm implementing these strategies has a monopoly or dominant position in the relevant market. Thus, when it comes to exclusivity, it's important to keep in mind that antitrust concerns are generally less significant for: (1) contracts with short durations or which are easily terminated; (2) exclusive deals with distributors rather than customers; and (3) exclusive deals that have other demonstrably pro-competitive benefits, such as arrangements that increase output, achieve economies of scale, or prevent free riding.[21]

At the extreme, an agreement among incumbent firms not to do business with a new market entrant or to otherwise thwart its entry into the market could constitute a "group boycott." In the United States, so-called "naked" group boycotts, where an agreement among competitors has no other purpose than to competitively disadvantage the target of the agreement, are frequently condemned as unlawful.[22] In fact, in a recent private antitrust lawsuit filed against a leading AI platform, the DOJ and FTC have sought to clarify that group boycotts involving competing firms are properly analyzed under the per se rule.[23] Therefore, incumbent firms should take care that the terms of any agreements or arrangements they have with other market participants do not present the appearance of shutting out a disruptor from the marketplace.

PROTECTING INTELLECTUAL PROPERTY

Disruption from the introduction of new technology may infringe upon an incumbent firm's intellectual property, either by copying aspects of incumbent firms' products or services or through the unauthorized use of an incumbent firm's website, platform, or software. But in taking steps to protect their intellectual property rights, dominant companies should be aware that claims of "sham" litigation initiated without probable cause to block the entrance of a rival is potentially actionable under the antitrust laws.[24] In fact, major companies in the semiconductor, pharmaceuticals, and machinery manufacturing industries are currently facing allegations of initiating sham litigation to maintain market dominance.[25] Similarly, in certain circumstances, the enforcement of patents obtained by a dominant firm through fraud can itself be the basis for an unlawful monopolization claim.[26] These issues should be thoroughly vetted before litigation is initiated by a dominant firm against an upstart.

KEY TAKEAWAY

Antitrust and competition is an ever-evolving field that requires businesses to remain vigilant as disruption of all kinds continues to pressure and shift the status quo. Businesses now, more than ever, should take care to consult early with antitrust experts to create plans and guidelines for how to engage with and respond to rapidly changing markets.

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[1] *In re Multiplan Health Insurance Provider Litigation*, Case No. 1:24-cv-06795, Statement of Interest of the United States (filed Mar. 27, 2025, in the U.S. District Court for the Northern District of Illinois, Eastern Division).

[2] Maureen K. Ohlhausen, Former Commissioner, U.S. Federal Trade Commission, Remarks from the Concurrences Antitrust in the Financial Sector Conference: Should We Fear the Things That Go Beep in the Night? Some Initial Thoughts on the Intersection of Antitrust Law and Algorithmic Pricing.

[3] *Duffy v. Yardi Sys.*, 2024 U.S. Dist. LEXIS 219629 (W.D. Wash. Dec. 4, 2024). It should be noted that the defendants in this litigation deny the existence of any agreement between them to use the third party algorithm at issue.

[4] European Commission, press release dated 21 August 2023, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*; French Competition Authority and Federal Cartel Office, *Joint Study on Algorithms and competition* (November 2019); Competitions & Market Authority*, Guidance on the Application of the Chapter I Prohibition in the Competition Act 1988 to Horizontal Agreements* (August 2023).

[5] For example, in June 2024, the DOJ and the FTC launched probes into three major AI firms and the FTC began investigating attempts by AI companies at skirting the United States's merger disclosure requirements. In September 2024, the DOJ issued a subpoena to a AI chipmaker as part of its investigation, potentially reflecting concerns that the company was making it harder to switch to other suppliers and penalizing buyers who purchased from competitors.

[6] *See* Concurring and Dissenting Statement of Comm'r Andrew N. Ferguson, Joined by Comm'r Melissa Holyoak, Regarding the FTC Staff Report on AI Partnerships & Investments 6(b) Study, Matter No. P246201 (Jan. 17, 2025); *see also* Concurring and Dissenting Statement of Comm'r Melissa Holyoak, Joined by Comm'r Andrew N. Ferguson (Jan. 17, 2025).

[7] See French Competition Authority's decision No 24-D-05 of 2 May 2024 (meat-cutting sector) and the Belgian Competition Authority's press release No 3-2025 of 22 January 2025 (*Dossche Mills/Ceres*).

[8] European Court of Justice, 3 September 2024, C-611/22 P and C-625/22 P, *Illumina Grail*.

[9] Mario Draghi's report dated 9 September 2024, *The Future of European competitiveness*.

[10] Including the expected reform of the EU FDI Screening Mechanism.

[11] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.

[12] FTC Finale Rule on Premerger Notification; Reporting and Waiting Period Requirements, 10 October 2024.

[13] See our Legal Update, *New HSR Rules and 2023 Merger Guidelines – Here to Stay?*, Mayer Brown (February 27, 2025).

[14] See German Supply Due Diligence Act of 22 July 2021, and the French Law No 2017-399 of 27 March 2017.

[15] Corporate Sustainability Reporting Directive (Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022), Taxonomy Regulation (Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020), Corporate Sustainability Due Diligence Directive (Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024) and Carbon Border Adjustment Mechanism (Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023).

[16] Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (C/2023/4752).

[17] See FCO press releases of 18 January 2022 and 13 June 2023 on these initiatives.

[18] *Six Big US Banks Quit Net Zero Alliance Before Trump Inauguration*, The Guardian.

[19] Andrew Ferguson, X.com (Nov. 8, 2024), https://x.com/AFergusonFTC/status/1855065186899742796.

[20] *Investment management firms sued by Republican states over climate push*, Reuters.

[21] *Simon & Simon, PC v. Align Tech.*, Inc., 533 F. Supp. 3d 904, 916 (N.D. Cal. 2021).

[22] *Honey Bum, LLC v. Fashion Nova, Inc.*, 63 F.4th 813, 820 (9th Cir. 2023).

[23] *Musk v. Altman et al.,* Case No. 4:24-cv-04722, Statement of Interest of the United States and Federal Trade Commission (filed Jan. 19, 2025, in the U.S. District Court for the Northern District of California, Oakland Division).

[24] *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993).

[25] *Realtek Semiconductor Corp. v. MediaTek, Inc*., No. 23-CV-02774-PCP, 2025 WL 744038 (N.D. Cal. Mar. 7, 2025); *Mylan Pharms. Inc. v. Teva Pharms. Indus. Ltd*., No. CV 21-13087 (JXN) (JSA), 2025 WL 756793 (D.N.J. Feb. 27, 2025); *Danieli Corp. v. SMS Grp., Inc.,* No. 2:21-CV-1716, 2024 WL 4792744 (W.D. Pa. Nov. 14, 2024).

[26] Hovenkamp, Herbert J., "The Walker Process Doctrine: Infringement Lawsuits as Antitrust Violations" (2008). *All Faculty Scholarship*. 1784.

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DOJ ANTITRUST DIVISION'S LATEST COMPLIANCE GUIDANCE: NOW COVERING CIVIL IMPLICATIONS, WHISTLEBLOWING, EPHEMERAL MESSAGING, AND AI

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The US Department of Justice's (DOJ) Antitrust Division recently updated its guidance explaining how it currently evaluates, and will evaluate going forward, companies' antitrust compliance programs when making criminal charging decisions and sentencing recommendations. The November 2024 version of the document, "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations" ("Guidance"), updates the 2019 document of the same name to discuss potential implications for civil antitrust matters and recent areas of focus, including whistleblowing programs, ephemeral messaging use and preservation, and artificial intelligence (AI) and other new technologies.

FUNDAMENTAL QUESTIONS FOR EVALUATING COMPLIANCE PROGRAMS

Antitrust compliance programs, when properly designed and applied, serve an important role in reducing a company's antitrust risk. The Antitrust Division uses the parameters set out in the Guidance to evaluate corporate antitrust compliance programs at two stages: when considering whether and what type of criminal charges to bring against a corporation and when making sentencing recommendations. In both the original and updated versions of the Guidance, the Antitrust Division's "fundamental" questions for evaluating corporate compliance programs have remained the same:

- "Is the corporation's compliance program well-designed?"
- "Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?"
- "Does the corporation's compliance program work in practice?"

With this Guidance, the Antitrust Division is sending the message that an hour of antitrust compliance training, once a year, may not be sufficient and that companies should instead thoughtfully design their antirust compliance plans to be both effective and appropriately tailored to their lines of business. Although the Guidance recognizes that antitrust violations may occur even if a company has a well-designed antitrust compliance program, companies subject to a DOJ antitrust investigation will derive material benefits if their antitrust compliance programs reflect the Guidance.

ANTITRUST COMPLIANCE CHECKLIST

The Guidance provides a checklist of key factors for an effective antitrust compliance program—one that prevents, detects, and addresses antitrust violations.

- **Design and Comprehensiveness.** The compliance program should be embedded in the company's business. It should be clearly written and updated regularly to reflect legal developments and emerging risks. Particularized antitrust guidance should be provided to employees whose decision-making roles or external contact with competitors create a heightened risk.
- **Preparation for Investigations.** The company should prepare an evidence preservation plan covering ephemeral messaging and business information on employee devices. A company involved in a criminal investigation should be prepared to explain its preservation plan and use case for ephemeral messaging and other technologies that may deny the DOJ access to evidence.
- **Culture of Compliance and Ethics.** Executives and managers—including mid-level managers—should visibly support and promote a culture of compliance. Compliance programs that focus on the ethical rationale for antitrust compliance are more effective. Leadership should make clear that the company does not tolerate antitrust violations and should be ready to take accountability in the event of compliance shortcomings.
- **Responsibility and Resources.** The Chief Compliance Officer and others responsible for antitrust compliance should have qualifications, training, autonomy, and authority to oversee the program effectively. Compliance reporting structures should enjoy independence from management with authority to report directly to the board, if needed.
- **Risk Assessment.** The compliance program should be tailored to the company's business and the antitrust risks it presents. The company should update its antitrust compliance policies continually to reflect changes to its business, including the use of artificial intelligence and algorithmic pricing.
- **Training and Communication.** The company should provide employees antitrust compliance training tailored to their roles, including both online and in-person training. Antitrust concerns often surface during live antitrust training.
- **Monitoring and Auditing.** The company should review and revise its compliance program periodically, informed by lessons from prior violations or compliance incidents. Successful antitrust compliance programs may also use monitoring, data analytics, and auditing to detect irregularities that may signal antitrust violations.
- **Reporting and Investigation.** The company should provide its employees clear, well-established mechanisms to report antitrust concerns without fear of retaliation. Investigations into antitrust concerns should be conducted promptly and the findings documented fully.
- **Incentives and Discipline.** The company should integrate compliance into its employee rewards programs, including compensation. The company should reward its employees for compliance. Similarly, the consequences for failure to adhere to the antitrust laws should be communicated clearly and followed consistently.

KEY UPDATES TO THE GUIDANCE

The November 2024 updates to the Guidance are notable in that they bring to the forefront topics on which the Antitrust Division appears to be laser-focused. Below are the key 2024 updates to the Guidance, which businesses—and their counsel and compliance teams—should keep top of mind as they evaluate the sufficiency of their antitrust compliance programs.

CIVIL ANTITRUST IMPLICATIONS

Though the Guidance focuses on criminal liability, the Antitrust Division notes in the 2024 version that "a well-designed antitrust compliance program should also minimize risk of civil antitrust violations" and the enforcement actions that can follow. The Guidance states that "[a] strong culture of compliance can allow a company to steer clear of civil antitrust violations."

Notably, the Guidance goes further, suggesting that "if [civil antitrust] violations do occur," companies should "promptly self-disclose" to the Antitrust Division. Companies should understand, however, that the protections of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA)—which makes available certain limitations on a company's damages liability in an action brought by civil plaintiffs—are limited to the self-reporting of criminal, not civil, violations.

Still, the Guidance makes clear that civil DOJ enforcement agents will be using a similar rubric as the Antitrust Division's criminal prosecutors for evaluating a company's compliance program: "In seeking to resolve investigations into civil antitrust violations, companies asking the Antitrust Division to take notice of existing or improved compliance efforts, including to avoid court-mandated further compliance and reporting requirements or retention of and supervision by external monitors, should expect the civil team to consider many of the same factors when assessing the effectiveness of their compliance program as criminal prosecutors do."

EPHEMERAL MESSAGING USE AND PRESERVATION

The Guidance also includes new content to address the use and preservation of ephemeral messaging platforms. When evaluating the design and comprehensiveness of an antitrust compliance program, the Antitrust Division will now consider what "electronic communication channels" the company and its employees use or allow to be used for business purposes, what mechanisms the company has installed to manage and preserve information within those channels, whether the company has clear guidelines regarding the use and preservation of ephemeral messaging communications, and what preservation or deletion settings are available and the company's rationale for its approach to those settings.

This new focus in the Guidance is consistent with enforcement agencies' growing interest in ephemeral messaging. For example, in March 2023, the DOJ announced updates to its Evaluation of Corporate Compliance Programs (ECCP) document that added provisions regarding the use of ephemeral messaging. The DOJ recently updated the ECCP again in September 2024, maintaining those ephemeral messaging provisions. And in early 2024, the Federal Trade Commission and the Antitrust Division announced that they were updating the language in their standard preservation letters, grand jury subpoenas, and certain other correspondence to reflect new guidance on the proper preservation of this material.

AI, ALGORITHMIC SOFTWARE, AND OTHER TECHNOLOGIES

The Antitrust Division will also now consider a company's approach to AI and other evolving technologies when evaluating whether a compliance program has been "appropriately tailored" to account for antitrust risk. In particular, the Antitrust Division will now ask questions such as whether the company's risk assessment addresses its use of AI, algorithmic revenue management software, and other technologies; what steps the company is taking to mitigate risks related to that technology; whether the compliance organization understands the AI and other tools used by the company; and how quickly the company can "detect and correct decisions" made by AI and similar tools that are "not consistent with the company's values."

The Guidance now accounts for AI in the Antitrust Division's evaluation of antitrust training and communication as well. The Antitrust Division will now consider how a company's training addresses "permissible and nonpermissible uses" of AI and other new technologies and whether the training addresses "lessons learned" from other antitrust violations or compliance incidents at that company and others in the same industry.

WHISTLEBLOWING PROCESS AND PROTECTIONS

The updated Guidance includes new language related to a company's confidential reporting structure and investigation process, including a focus on protections for whistleblowers. The Antitrust Division will now ask how a company determines which antitrust complaints should be further investigated and its process for doing so; whether the company's policies are, "in practice," encouraging or chilling the reporting of antitrust violations; whether the company has an anti-retaliation policy and related training for employees; and whether the company's use of non-disclosure agreements is consistent with an effective and non-retaliatory whistleblower program.

The Guidance's new language on whistleblowing comes after the DOJ's August 2024 launch of a new corporate whistleblower awards pilot program. Both developments signal an increase in the DOJ's interest in corporate whistleblower protections.

KEY TAKEAWAY

With these updates to the corporate compliance Guidance, the Antitrust Division and the broader DOJ are continuing to message their key areas of focus. These include issues surrounding ephemeral messaging, AI and other emerging technologies, and whistleblower protections. Businesses, their counsel, and their compliance teams should be attuned to these updates when evaluating and developing their antitrust compliance programs.

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US DOJ AND FTC JOIN G7 COMPETITION AUTHORITIES IN PROMISING VIGOROUS COMPETITION ENFORCEMENT IN THE AI INDUSTRY

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On October 3 and 4, 2024, the US Department of Justice Antitrust Division (the "Antitrust Division") and the Federal Trade Commission (FTC) participated in the G7 Competition Authorities and Policymakers' Summit in Rome to discuss cooperation and enforcement priorities in the Artificial Intelligence (AI) industry. At the end of the summit, the parties issued a joint Digital Competition Communiqué outlining the competition risks, guiding principles, plans for coordination, and roles of competition authorities in ensuring robust competition in the AI space. This statement builds on past joint statements, and strongly suggests that the DOJ and FTC—as well as their foreign counterparts—intend to take increased enforcement actions against companies in the AI industry going forward.

The Communiqué emphasized that the G7 members are committed to "vigorous and timely competition enforcement" and emphasized several areas of "significant competition concern:" (1) the concentration of AI inputs and infrastructure, including energy access; (2) "self-preferencing" and bundling of products by large tech companies; (3) the use of algorithms to fix prices or wages; (4) partnerships among AI firms, which could serve similar purposes as mergers without merger review; and (5) suppression of competition in related markets, which large incumbents could allegedly use to increase their power in AI. The Communiqué also explained that these concerns could "spill over" to other areas for enforcement, including the privacy, consumer protection, and copyright spaces. The Communiqué concluded by reiterating a "commitment to dialogue and knowledge sharing among G7 competition agencies and policymakers" and a plan to build a "shared global expertise" to confront the challenges to competition posed by AI.

In addition to the United States (and the European Union), the other members of the G7 are Canada, France, Germany, Italy, Japan and the United Kingdom.

While the G7 has shown coordination in antitrust enforcement actions in the past, its competition authorities now exhibit an unusually high level of coordination as they each wrestle with the emerging AI industry. Just one year ago, the G7 competition authorities also gathered to discuss the risks associated with the increased growth of the AI industry, and they issued another Digital Competition Communiqué which outlined in broader and more general terms many of the same themes that the group expanded upon in its most recent Communiqué. Three months ago in July, Lina M. Khan, Chair of the FTC, and Jonathan Kanter, Assistant Attorney General for the Antitrust Division, joined competition authorities from the UK and the European Union in signing on to a Joint Statement on Competition in

Generative AI Foundation Models and AI Products. While this statement emphasized that decisions of these competition authorities "will always remain sovereign and independent," it acknowledged that the perceived risks of AI—concentration of inputs, market power, and partnerships among industry participants—will be global in nature, and outlined the agencies' key concerns regarding competition in the AI industry.

Things are changing rapidly in the AI enforcement space, and with those changes comes increased uncertainty for companies operating in the AI sector. Ultimately, companies should know that if they receive outreach from one of these competition authorities related to their AI use, they should expect to hear from the other G7 competition agencies in the countries in which they operate, and should assume an open flow of information among these agencies. Right now, there are ongoing investigations launched by multiple authorities into the same partnerships between major tech companies and innovative AI companies.

Because of these rapid new developments, it is more important than ever to seek legal guidance if your company has questions regarding the use of AI, or receives outreach from any enforcement agency. Mayer Brown is prepared to advise and counsel companies on the implications of these developments in their current and future business activities in the AI space. Please do not hesitate to reach out to any of the authors for further information about this topic and additional developments.

For further Mayer Brown analysis on global enforcers' response to AI, and Competition and AI Law generally, please see AI Challenges in Competition Law: How Are Regulators Responding? and Expert Q&A on the Competition Law Issues Raised by Generative AI

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