ANTITRUST TRADE AND PRACTICE

Antitrust Implications of AI Technology Remain Key Focus of U.S. Regulators

November 13, 2023

Following the launch of OpenAI's ChatGPT in November 2022, a wave of excitement about generative artificial intelligence (AI) swept the world. In addition to the popular interest, companies have begun utilizing AI throughout their businesses. However, as the technology becomes interwoven throughout commercial operations, AI could potentially raise antitrust risk. Antitrust enforcers have taken note and sought to reconcile the use of AI with antitrust laws.

U.S. Enforcers Highlight Applicability of Antitrust Laws to AI Technology

Enforcers at both the Federal Trade Commission and the Department of Justice's Antitrust Division have repeatedly affirmed their interest in applying and adapting existing legal frameworks of antitrust law to potential violations facilitated by AI technology. On April 25, 2023, for example, the FTC and DOJ, together with the Equal Employment Opportunity Commission and Consumer Financial Protection Bureau, issued a joint statement on enforcement efforts in which they affirmed that "[e]xisting legal authorities

By **Karen Hoffman Lent**

And **Kenneth Schwartz**

apply to the use of automated systems and innovative new technologies just as they apply to other practices." Rohit Chopra et al., Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems (Apr. 25, 2023).

And in a press release accompanying the joint statement, FTC Chair Lina Khan made clear that "[t]here is no AI exemption to the laws on the books, and the FTC will vigorously enforce the law to combat . . . unfair methods of competition." Press Release, FTC, FTC Chair Khan and Officials from DOJ, CFBP and EEOC Release Joint Statement on AI (Apr. 25, 2023).

Over the past year, the agencies have continued to emphasize their view of applying existing antitrust frameworks to AI.

Recent FTC Statements on Regulation of AI

At the FTC, Chair Khan articulated her vision for regulating the use of AI in a May 2023 op-ed

KAREN HOFFMAN LENT *and* KENNETH SCHWARTZ *are partners at Skadden, Arps, Slate, Meagher & Flom.*

for The New York Times in which she identified at least two key areas of concern about the antitrust implications of AI technology: the use of AI technology to facilitate collusive behavior, and the potential for AI technology to entrench market dominance.

On the potential for collusion via AI, Khan wrote that "the AI tools that firms use to set prices for everything from laundry detergent to bowling lane reservations can facilitate collusive behavior that unfairly inflates prices." Lina Khan, We Must Regulate A.I. Here's How, N.Y. Times Opinion (May 3, 2023). This concern is in line with statements from FTC enforcers as far back as 2017, when then-Acting Chair Maureen Ohlhausen delivered remarks on the potential for the use of shared pricing algorithms to violate antitrust laws. Maureen K. Ohlhausen, Should We Fear The Things That Go Beep In the Night? (May 23, 2017).

Under Project Gretzky, the Antitrust Division has hired data scientists and AI experts to ensure enforcers are familiar with and understand new technologies.

Price coordination among competitors is a textbook violation of the antitrust laws, and the FTC's statements demonstrate its view that coordination facilitated by AI technology would be illegal under existing antitrust frameworks. The Commission's interest in the possible use of AI-powered algorithms to facilitate collusive behavior was also reflected in the recently released Draft Merger Guidelines, which identify the "[u]se of algorithms or artificial intelligence to track or predict competitor prices" as one feature that might render a market more susceptible to coordination. U.S. Department of Justice & Federal Trade Commission, Draft Merger Guidelines (2023).

In her May 2023 op-ed, Khan also described the FTC's concern that "[t]he expanding adoption of AI risks further locking in the market dominance of large incumbent technology firms," Khan, *supra*, and the FTC expanded on this idea in a June 2023 blog post on its official website. U.S. Federal Trade Commission, Generative AI Raises Competition Concerns (June 29, 2023).

As the FTC's thinking goes, because of the large amounts of raw data and computational resources required to develop effective AI technologies, large technology firms—a longstanding target of Khan's FTC—may see an opportunity to withhold or restrict access to these inputs to entrench their dominance.

DOJ Emphasis on Understanding AI

As with the FTC, recent statements from the DOJ's Antitrust Division evidence a commitment to applying antitrust laws to AI technologies. In August 2023, for example, AAG Jonathan Kanter stated at a conference that "U.S. state and federal antitrust enforcers shouldn't be so intimidated by artificial intelligence and machine learning technology that they stop enforcing the laws." Khushita Vasant & Chris May, AI shouldn't intimidate agencies from enforcing US antitrust laws, DOJ's Kanter says, MLex (Aug. 3, 2023).

To ensure it has the expertise necessary to carry out this enforcement agenda, the Antitrust Division has implemented "Project Gretzky," an initiative named after hockey player Wayne Gretzky's strategy of "skating to where the puck is going." Ashley Gold, DOJ has eyes on AI, antitrust chief tells SXSW crowd, Axios (Mar. 13, 2023). Under Project Gretzky, the Antitrust Division has hired data scientists and AI experts to ensure enforcers are familiar with and understand new technologies.

The DOJ's concern that potential antitrust problems may exist with the use of AI technology has also resulted in several key policy changes. Most notably, DAAG Doha Mekki repeatedly cited the proliferation of AI and machine learning technology as a driving motivation behind the withdrawal of three longstanding policy statements setting forth the Division's approach to information sharing in the healthcare industry. Press Release, U.S. Department of Justice, Justice Department Withdraws Outdated Enforcement Policy Statements (Feb. 3, 2023).

Adopted in 1993, 1996 and 2011, these policy statements on antitrust enforcement in healthcare set forth a number of "safe harbors" with regard to information sharing that became influential across industries as indicators of permissible conduct. As DAAG Mekki made clear in a speech one day before their official withdrawal, the Division viewed the policy statements as "outdated" and "no longer reflect[ing] market realities" because healthcare has become "a data intensive industry that relies on the power of machine learning, artificial intelligence, and other advanced tools." Doha Mekki, Remarks at GCR Live (Feb. 2, 2023).

The DOJ has also warned companies that they must update their compliance programs to account for the use of AI technology and pricing algorithms. Khushita Vasant, AI, pricing algorithms must be trained, checked, updated for antitrust compliance, US DOJ official says, MLex (June 7, 2023).

Acting Assistant Chief of DOJ's Criminal I section Carolyn Olson explained in a June 2023 talk that companies must be vigilant to ensure any AI pricing algorithms do not violate compliance programs. Olson further stated that, in investigations of potential algorithmic collusion, the DOJ would ask "whether the company enabled its AI to fix prices, whether it enabled the AI to communicate with competitors to abuse its monopoly power, and whether the company included training on its AI to prevent the fixing of prices."

AI in Recent U.S. Antitrust Litigation

Despite regulators' enforcement interest in AI-related antitrust violations, how courts will react to theories based on the anticompetitive potential of AI remains to be seen. While the DOJ has secured guilty pleas in at least one investigation into traditional price fixing facilitated by algorithms, enforcers have not yet tested many of their views about the antitrust dangers of AI in the courts, though the plaintiffs' bar has increasingly attempted to bring such claims.

In 2015, the DOJ launched its first investigation into the use of algorithms to facilitate a price-fixing conspiracy by online poster sellers. Press Release, U.S. Department of Justice, Former E-Commerce Executive Charged with Price Fixing in the Antitrust Division's First Online Marketplace Prosecution (Apr. 6, 2015).

\According to the DOJ, the conspirators expressly discussed the prices of certain posters to be sold on Amazon Marketplace and agreed to fix the prices of those posters by adopting specific pricing algorithms to coordinate changes to their respective prices. In 2015, the Antitrust Division secured a plea agreement to a one-count felony charge arising from David Topkins' agreement with competitors to fix prices for certain online posters by using a shared pricing algorithm, followed in 2019 by guilty pleas from co-conspirators Daniel Aston and Trod Ltd. Press Release, U.S. Department of Justice, Former E-Commerce Executive Pleads Guilty to Price Fixing; Sentenced to Six Months (Jan. 28, 2019).

Although the wall posters investigation represents the first major enforcement action directed at the use of algorithms to fix prices, it is an example of a traditional price-fixing scheme where algorithms provided the means for enacting an express agreement to fix prices. Thus far, U.S. enforcers have not brought cases testing theories of tacit collusion via AI technology.

Theories of algorithmic collusion have recently attracted the attention of the plaintiffs' bar in a number of ongoing cases. Following an October 2022 ProPublica article describing the use of pricing algorithms in short-term residential real estate, more than 33 putative class action complaints were filed against RealPage, the company that sells the algorithm, and various rental prop-

---

Thus far, U.S. enforcers have not brought cases testing theories of tacit collusion via AI technology.

---

erty lessors. Heather Vogell, Rent Going Up? One Company's Algorithm Could Be Why., ProPublica (Oct. 15, 2022).

These complaints accuse the lessors and RealPage of conspiring to raise the prices of multifamily residential real estate in the United States above competitive levels by providing real-time pricing and supply information to the algorithm and agreeing to follow the unit-specific pricing recommendations the algorithm provides in return. The cases were consolidated in April 2023 in the Middle District of Tennessee and remain ongoing. Nate Beck, MDL Panel Sends RealPage Antitrust Cases To Tenn. Court, Law360 (Apr. 12, 2023).

Similar allegations regarding the use of algorithmic pricing to facilitate price-fixing conspiracies have also been made in recent federal lawsuits involving casino hotels in the District of Nevada and the District of New Jersey (note: Skadden is involved in these matters as counsel for defendant Caesars Entertainment). The Nevada case was recently dismissed without prejudice, while the other cases have not yet progressed beyond the motion to dismiss phase. Together, they may provide the earliest opportunities to see whether courts share enforcers' concerns about the antitrust implications of AI technology.

Conclusion

As AI continues to become more integrated in business operations, antitrust enforcers will continue to focus on its potential to facilitate price collusion. The courts have yet to provide guidance on the antitrust implications of AI. In the meantime, however, companies would do well to understand precisely what their machines are learning, with whom they are communicating and to put in place compliance policies that address the use of AI. They also should assess whether their use of AI implicates traditional antitrust principles, paying special attention to using third-party algorithms to set prices or production levels.

Organizations should exercise caution to avoid unlawful information sharing, from avoiding discussing the use of algorithms with competitors or disclosing what algorithm your company is using, to understanding the use of third-party or proprietary data. As always, companies should work closely with antitrust counsel before utilizing AI in competitively sensitive processes.