ANTITRUST TRADE AND PRACTICE

Artificial Intelligence Is Monopolizing the Attention of Regulators and Lawmakers

By **Karen Hoffman Lent And Kenneth Schwartz**

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Artificial intelligence (AI) has surged to the forefront of the corporate landscape as companies across all industries explore the ways in which AI can enhance their businesses. Whether looking to the meteoric rise of chip and cloud companies over the last year, or the mergers and acquisitions AI "gold rush," the hype surrounding AI seems to have no end.

However, the new era of AI technology has already ushered in competition concerns alongside consumer-protection fears. Accordingly, regulators and lawmakers—both domestic and globally—are taking note of the AI craze and are keen on ensuring that companies involved in AI are respecting both antitrust and consumer protection laws.

Rise of AI-Related Investigations and Litigation

On Jan. 25, 2024, the Federal Trade Commission (FTC) launched an antitrust inquiry scrutinizing the investments and partnerships of Alphabet, Microsoft and Amazon related to growing artificial

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intelligence startups OpenAI and Anthropic. (Press Release, FTC, "FTC Launches Inquiry Into Generative AI Investments and Partnerships" (Jan. 25, 2024)).

The inquiry centers around three separate investments in OpenAI and Anthropic totaling more than $15 billion, and sought information from the companies regarding: (1) the strategic rationale and practical implications behind the partnerships; (2) analysis of the transactions' competitive impact; and (3) competition for AI inputs and resources. FTC Chair Lina Khan explained the current inquiry: "[H]istory shows that new technologies can create new markets and healthy competition. As companies race to develop and monetize AI, we must guard

against tactics that foreclose this opportunity. Our study will shed light on whether investments and partnerships pursued by dominant companies risk distorting innovation and undermining fair competition."

In December, Rite Aid agreed to a five-year ban on the use of AI-driven facial recognition technology for surveillance purposes in a settlement with the FTC following the FTC's finding that the retailer "failed to implement reasonable procedures and prevent harm to

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consumers" in deploying the technology. (Press Release, FTC, "Rite Aid Banned from Using AI Facial Recognition After FTC Says Retailer Deployed Technology without Reasonable Safeguards" (Dec. 19, 2023)). The facial recognition tool relied on artificial intelligence to identify customers who may have engaged in shoplifting or other problematic behavior at hundreds of Rite Aid stores. However, the FTC alleged that the technology incorrectly tagged certain consumers.

The agency touted the settlement as a "groundbreaking order [that] makes clear that the Commission will be vigilant in protecting the public from unfair biometric surveillance and unfair data security practices." Commissioner Alvaro Bedoya separately released a statement in which he cautioned companies on their use of AI and urged legislators to enact protections for consumers' privacy into law. (Office of Commissioner Alvaro M. Bedoya, "Statement

of Commissioner Alvaro M. Bedoya On *FTC v. Rite Aid Corporation & Rite Aid Headquarters Corporation*" (Dec. 19, 2023)).

Federal Agencies Increasing AI Scrutiny

On Jan. 25, 2024, the FTC hosted its first-ever technology summit on artificial intelligence, examining competition concerns as a new digital age is ushered in. (*See* FTC Tech Summit (Jan. 25, 2024)). Khan, Commissioner Rebecca Kelly Slaughter and Bedoya delivered remarks to highlight the event, articulating what they view as critical at an inflection point of technology and antitrust law. Khan opened by criticizing the FTC's "hands-off" approach to tech consolidation following the dot-com boom. She argued that the agency's hesitancy to prosecute anticompetitive mergers in the late 1990s resulted in what she described as a heavily consolidated tech industry today. Khan emphasized that the FTC is strictly scrutinizing AI markets to prevent similar consolidation.

Commissioners Slaughter and Bedoya delivered similar messages. Slaughter focused on the problem of entrenchment and the need for the agency to ensure adequate competition in both AI markets and markets for key AI inputs such as chipmaking, chip design, cloud computing and data collection. She emphasized that there is no AI exception to the law and stressed that even partnership agreements that do not require notification may violate the Hart-Scott-Rodino Act, seemingly referencing the new 6(b) inquiry into AI partnerships.

The summit consisted of three panels, respectively focused on AI-related competition concerns in chips and cloud computing, data and models, and consumer applications.

In the chips and cloud computing panel, the panelists agreed that there is too much industry dependence on one chipmaker and argued that there should be more competition in the space, that switching costs and discounting structures are impediments to competition in cloud computing markets, and that the government's own digital dependency on a few private actors creates a significant single-point-of-failure risk.

In the data and models panel, the panelists advocated that data privacy be treated as a right held by the consumer, that shared safety resources become commonplace for responsible AI training models, and that nothing about AI is "inevitable": companies, enforcers and

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consumers can shape what "good innovation" looks like.

And in the consumer applications panel, the panelists explained that companies must be held accountable for consumer harms resulting from their use of AI that agencies should provide bright-line rules for what constitutes illegal conduct in this realm, and that consumers and companies should temper expectations of AI's ability to supplant human labor.

A week later, on Feb. 1, antitrust enforcers from around the world met at a conference to discuss the digital economy, specifically AI, and how to combat potential harms that may arise from its use. Assistant Attorney General Jonathan Kanter

of the Department of Justice (DOJ) Antitrust Division stated that the division has "a lot" of work underway regarding AI and competition, including several ongoing active investigations. He argued that there is a need to "start demystifying AI" and to recognize that AI is just another market that should be thought of "from the chip to the end user." (Natasha Lomas, "Antitrust enforcers admit they're in a race to understand how to tackle AI", TechCrunch (Feb. 1, 2024)). The DOJ, Kanter explained, is focused on AI competition both upstream and downstream.

The DOJ's growing attention towards AI recently culminated with the division's first-ever appointment of a "Chief Artificial Intelligence Officer." On Feb. 22, Attorney General Merrick Garland announced that Jonathan Mayer, a computer scientist and lawyer, will hold both this title and the title of Chief Science and Technology Advisor. Mayer will advise Justice Department leadership on matters relating to cybersecurity, AI and other areas of emerging technology. Mayer formerly worked in similar technology roles at the California Department of Justice and in Vice President Kamala Harris' office as a technology law and policy adviser while she served as a U.S. senator.

Concerns from Lawmakers and White House

In October, President Biden signed an executive order establishing new standards for AI safety, security and innovation across industries. In particular, the order warned of the technology's ability to be deployed in ways that could "lessen market competition" and declared that the federal government will stop "unlawful collusion" and address "risks from dominant firms' use of key assets such as semiconductors, computing power, cloud storage and data." (Press Release,

The White House, "Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence" (Oct. 30, 2023)).

The White House has also been active on the consumer protection front. Recently, harm resulting from AI-generated "deep fakes" has dominated headlines, drawing the attention of President Biden and lawmakers. Deepfakes are synthetic media that have been digitally manipulated to convincingly mimic a person's appearance by altering that person's likeness, often by leveraging machine learning and artificial intelligence.

Recently, a finance worker in Hong Kong transferred more than $25 million to scammers after they employed generative AI to pose as the chief financial officer on a video conference call. The scammers likely used real-time deepfake technology to pose as the CFO, using AI machine-learning to mimic the executive's face and voice. The shakedown has been deemed one of the biggest corporate frauds using deepfake technology to date, and is emblematic of the larger consumer protection problem that AI is posing. (Parmy Olson, "On Zoom, 'You're on Mute' Is Now 'Are You Real?'" Bloomberg (Feb. 5, 2024)).

In another viral consumer harm, sexually explicit deepfake images of pop star Taylor Swift were widely shared on social media. In response, the White House urged Congress to draft legislation preventing these "alarming" uses of generative AI. A bipartisan group of lawmakers introduced federal legislation in January that would give people a property right in their own likeness and voice, and would provide a right to civil recourse if that property right were infringed. (Leah Sarnoff, "Taylor Swift and No AI Fraud Act: How Congress plans to fight back against AI deepfakes", ABC News (Jan. 30, 2024)). This act, titled the NO AI FRAUD Act, is Congress' latest attempt at policing AI, after a previous iteration of the bill, the NO FAKES Act, failed to gain traction.

Further driving concerns around generative AI is the ability for the technology to influence elections. In a year where roughly half of the world's population is slated to vote, many fear that AI may facilitate the nefarious spread of misinformation to manipulate elections. Already, deepfake technology was used in Slovakia's October 2023 election when digitally-altered audio of a candidate was released days before ballots were cast. Shortly before New Hampshire's presidential primary, robocalls using AI mimicked President Biden's voice to discourage people from voting.

As the U.S. prepares for the presidential election this fall, states are beginning to act; five states have passed laws effectively banning AI-made deepfakes in political campaigns, while another seven states consider their own versions of similar legislation. (Zach Williams, "More States to Push Laws Banning AI Election Deepfakes in 2024" Bloomberg (Dec. 22, 2023)).

In response to these growing AI concerns, the Biden administration named Elizabeth Kelly to lead the newly established AI Safety Institute. The institute was created to play a critical role in fostering the development of AI technology. It intends to create testing standards for major AI developers by July to ensure that systems are safe for consumers and businesses. Meanwhile, the Federal Election Commission is also considering rule changes that would prohibit federal candidates from misrepresenting other candidates using generative AI tools.

International Enforcers Showing Interest

International enforcers are increasingly playing a significant role in antitrust regulation, especially as it relates to the digital economy. In recent months, European regulators have scuttled two large tech acquisitions due to competition concerns, though those deals likely would have received approval in the United States. Further, the European Commission has emphasized March 7, 2024 as the date by which so-called "gatekeepers" of the digital ecosystem must comply with the Digital Markets Act.

As it relates to artificial intelligence, the European Union is bringing similar intense antitrust scrutiny and has undertaken a variety of measures to ensure competition in this space. The European Commission has sent requests for information to several large digital firms and is currently nearing final adoption of its AI Act. The AI Act aims to foster voluntary communication from companies regarding the processes and practices they are putting in place for safe use of AI. It would also impose transparency obligations on companies developing generative AI, especially AI systems that the legislation considers "high risk."

There is tension brewing in the European Union between regulators seeking to ensure safe implementation of AI and proponents of innovation arguing that too much regulation will prevent European-based AI companies from competing globally.

In February, European Commission Executive Vice President Margrethe Vestager stated that "the choice [for AI] should not be American or American," alluding to American companies' dominance in the technology sector. (Steven Overly and Laurens Cerulus, "AI choice should not be 'American or American,' EU antitrust chief warns", Politico (Feb. 1, 2024)). She signaled increasing concerns among competition regulators that control over artificial intelligence may be dominated by those same companies.

Fears of American influence over AI markets have motivated French politicians and technology companies alike to push back against the European Union's AI Act, arguing that it may hamper the ability of France's own AI pioneer, Mistral, to compete with OpenAI and other American startups.

Conclusion

As companies continue to race toward use of AI, regulators and lawmakers are increasingly training their attention on the identification and prevention of competition and consumer-related harms. The Biden administration has made antitrust enforcement a key focus of its tenure and this competition spotlight is rapidly shifting toward AI. As the federal agencies, congressional leaders and European authorities ramp up their policing of AI, companies should be attentive to their uses of AI and monitor new developments, especially as they relate to competition and consumer protection.

Organizations should remain cognizant that traditional antitrust principles still apply to AI practices. Further, companies utilizing AI should exercise caution in training their AI to avoid disproportionate application and resulting consumer harms. As always, companies should work closely with antitrust counsel before utilizing AI in competitively sensitive processes.