

Navigating Antitrust in the Age of AI: Global Regulatory Scrutiny and Implications

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Companies across a range of industries are increasingly incorporating artificial intelligence (“AI”) into their businesses. As with any new technology, AI presents a number of questions concerning its relation to and compliance with antitrust laws. U.S. antitrust enforcers under the current administration have expressed a range of concerns around AI, including its effects on the accumulation of market power, the access that tech companies have to client data and the relationships between large tech companies and AI startups, including potentially using those relationships to sidestep required merger review processes.¹ Similar concerns have been raised internationally by antitrust agencies in the European Union, Australia, India, Japan and the United Kingdom, to name a few, although a consensus approach has yet to emerge.

CURRENT AI-RELATED INVESTIGATIONS

United States

The FTC earlier this year ordered five companies to provide information regarding recent investments and partnerships involving generative AI companies and major cloud service providers.² The Agency’s 6(b) inquiry³ was sent to Alphabet, Inc. (parent company to Google); Amazon.com, Inc.; Anthropic PBC; Microsoft Corp.; and OpenAI, Inc.

¹ See, e.g., *Assistant Attorney General Jonathan Kanter Delivers Remarks at the Promoting Competition in Artificial Intelligence Workshop* (May 30, 2024), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-promoting-competition>.

² *FTC Launches Inquiry into Generative AI Investments and Partnerships*, Federal Trade Commission (January 25, 2024), available at <https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-launches-inquiry-generative-ai-investments-partnerships>.

³ Section 6(b) of the FTC Act authorizes the FTC to conduct studies that allow enforcers to gain a deeper understanding of market trends and business practices. Findings stemming from such orders can help inform future agency actions.

Following those inquiries, the FTC and DOJ reached an agreement earlier this month to divvy up investigations into certain companies for potential anticompetitive conduct. The DOJ will investigate Nvidia and its leading position in supplying the high-end semiconductors underpinning AI computing, while the FTC is set to probe whether Microsoft and its partner OpenAI have unfair advantages with the rapidly evolving AI technology, particularly around the technology used for large language models.

Nvidia, OpenAI and Microsoft are some of the biggest players in the generative AI space. Nvidia is a leading AI chipmaker. OpenAI owns the most-used generative AI chatbot, ChatGPT, and is estimated to be valued at over \$80 billion. Microsoft has invested \$13 billion into OpenAI over the last several years. The companies' relationship has proved mutually beneficial: OpenAI has used Microsoft's vast computing resources to further develop its technology, while Microsoft has begun to integrate a number of OpenAI's services into its core businesses. Regulators are investigating whether the companies' partnership gives them an unfair advantage against competitors.

The FTC is also separately investigating Microsoft's relationship with another startup company, Inflection AI. In March 2024, Microsoft announced it was starting a new consumer AI division and hired Inflection AI's co-founders along with an estimated 70 other Inflection AI employees. Microsoft also paid \$650 million to license Inflection AI's models. The FTC is investigating whether Microsoft's investment constituted an acquisition that Microsoft failed to properly disclose.⁴

These investigations represent the agencies' latest efforts to police AI's effects on competition and mark an escalation in the agency's enforcement in this space.

European Union

In tandem with the European Union's flagship new AI Act, the European Commission (the "Commission") is showing increasing interest in AI investigations. For example, in March 2024, it sent formal information requests to certain large online search engines and other platforms (including Google, Facebook and TikTok) concerning risks and mitigation measures arising from generative AI. The Commission followed this in May 2024 by issuing an additional information request to Microsoft concerning risks arising from its Bing search engine's generative AI features.

The Commission has also invited comments on Microsoft's investment in OpenAI. Although the Commission reportedly concluded in April 2024 that the arrangement was not an acquisition (which would have made the transaction subject to the EU rules

⁴ Under the Hart Scott Rodino ("HSR") Act, any proposed merger or acquisition valued at \$119.5 million or higher must be reported to the FTC and DOJ and adhere to the applicable HSR waiting periods to ensure the transaction does not violate antitrust laws.

on merger control), it has continued to investigate whether to launch a formal antitrust investigation into the arrangement on the basis of its potentially distortive effects on the European Union's internal market.

Among EU Member States, national competition authorities have also displayed increasing recent interest in AI.⁵ The German regulator, for example has, similarly to other regulators, investigated Microsoft's involvement and cooperation with OpenAI. Although it determined in November 2023 that the arrangement was not subject to merger control in Germany, it left open the possibility of re-examination should Microsoft increase its influence into OpenAI in the future. Meanwhile, in February 2024, the French competition authority launched a public consultation into how large technology companies approach AI. A month later, it fined Google €250 million for "content scraping" from online news websites without permission to train its Gemini generative AI chatbot.

United Kingdom

The UK government has, up to now, taken a self-styled "pro-innovation" approach to AI regulation that is different from the EU model of establishing a common regulatory and legal framework.⁶ Intervention in the sector has largely come from the United Kingdom's Competition and Markets Authority (the "CMA"), which has recently stepped up its enforcement activities.

The CMA announced the launch of preliminary enquiries this April into whether certain commercial partnerships and hiring practices involving Amazon and Anthropic PBC, Microsoft and Inflection AI, and Microsoft and Mistral AI were anticompetitive. Although the CMA concluded in May 2024 that the latter did not fall within the scope of the UK merger control regime (since the arrangement didn't create a dependency between the companies), the decision is nevertheless important as it sets out in detail a framework for how the CMA may look at AI partnerships in the future. This follows the CMA having also invited comments on Microsoft's investment in OpenAI (the manufacturer of ChatGPT) in December 2023. A decision on whether to launch a formal investigation into whether this investment amounted to a notifiable merger under UK competition law is expected imminently.

⁵ This comes against the backdrop of increasing interest in AI by competition regulators globally, with both the Indian and Australian authorities, for example, launching investigations into AI in late 2023.

⁶ That could shortly change as a result of the upcoming UK election, as the Labour Party has pledged in its manifesto that: "*Labour will ensure the safe development and use of AI models by introducing binding regulation on the handful of companies developing the most powerful AI models...*"

The CMA is likely to continue taking an assertive approach to enforcement and will be granted sweeping new powers to do so once the UK Digital Markets, Competition and Consumers Act comes into force later in 2024.

Implications

Regulators globally are closely scrutinizing AI-related competition risks, and in the United States, the FTC and DOJ have streamlined the process for obtaining information in non-public AI-related investigations. As companies increasingly incorporate AI into their businesses, they should consider the following to help identify, manage and reduce their antitrust exposure:

- Seek advice from antitrust counsel before developing or integrating AI into your business. Counsel can assist in assessing the risks of such technology and provide guidance on protections that may mitigate the company's risk.
- Understand the nature of the technology that is being used, including what it is being used for, how it works, whether and how the software uses confidential data and who has access to that data.
- Avoid imprecise and inaccurate marketing materials concerning the company's use of AI that could be misconstrued to imply the company's or industry's use of AI is facilitating anticompetitive behavior.

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