



ANTITRUST AGENCIES IDENTIFY GENERATIVE AI CONCERNS



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Generative Artificial Intelligence (“Generative AI”) technologies – such as conversational AI chatbots and apps that can generate novel images and text from user prompts – have captured the attention of business leaders and the public around the world this year. Antitrust and competition authorities are no exception. Although disruptive new technologies may be procompetitive in many ways, competition agencies are also wary of missing out on any potentially anticompetitive trends associated with the rise of Generative AI, especially given the frequently voiced criticism that competition agencies failed to respond adequately to issues arising from the internet and smartphone revolutions. Accordingly, antitrust agencies and governments have signaled their interest in AI developments. This article surveys some of the high-level competition issues that the U.S., UK, and European authorities have raised about Generative AI and its development.

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Generative Artificial Intelligence (“Generative AI”) technologies – such as conversational AI chatbots and apps that can generate novel images and text from user prompts – have captured the attention of business leaders and the public around the world this year. Antitrust and competition authorities are no exception. Although disruptive new technologies may be procompetitive in many ways, competition agencies are also wary of missing out on any potentially anticompetitive trends associated with the rise of Generative AI, especially given the frequently voiced criticism that competition agencies failed to respond adequately to issues arising from the internet and smartphone revolutions. Antitrust agencies, and governments more broadly, have accordingly signaled their interest in AI developments. For example, on October 30, 2023, President Biden supported the Federal Trade Commission (“FTC”) taking a leading role in addressing competition issues involving AI, stating in an Executive Order that “the Federal Trade Commission is encouraged to consider, as it deems appropriate, whether to exercise the Commission’s existing authorities, including its rulemaking authority under the Federal Trade Commission Act . . . to ensure fair competition in the AI marketplace and to ensure that consumers and workers are protected from harms that may be enabled by the use of AI.”²

On November 21, 2023, the FTC authorized a resolution streamlining its staff’s ability to issue civil investigative demands in investigations related to AI.³ Indeed, the current FTC has emphasized “that there’s no AI exemption to the laws on the books, so all of the laws that already prohibit unfair methods of competition or collusion or discrimination or deception, all of those laws still entirely apply.”⁴ In the UK, meanwhile, the Competition and Markets Authority (“CMA”) published its initial Report on AI Foundation Models, on September 18, 2023, which sets out the CMA’s early views on these models that underlie Generative AI technology and the competitive dynamics associated with the technology more generally.⁵ And on June 14, 2023, the European Parliament adopted its position on the draft EU Artificial Intelligence Act (“EU AI Act”), which proposes a comprehensive regulatory framework for AI.⁶

This article surveys some of the high-level competition issues that the U.S., UK, and European authorities have recently raised about Generative AI. These include issues involving AI training on copyrighted material, competition between Generative AI tools and human artists and creative professionals, as well as agency concerns about other industry dynamics related to mergers and business practices involving AI-related data sets, applications, computational resources, and engineering talent.

01

SECTION 5 AND COPYRIGHT-RELATED CONCERNS

FTC and U.S. Department of Justice (“DOJ”) officials have made several statements outlining different concerns related to Generative AI. One topic, in particular, that has received ample attention recently is the FTC’s concern that training AI tools on copyrighted content may constitute an unfair method of competition under Section 5 of the FTC Act in certain circumstances.

On October 4, 2023, the FTC hosted a public forum on the “Creative Economy and Generative AI,” with remarks from the Commissioners and representatives of various creative and artistic fields, including writers, visual artists, musicians, actors, and others. Several participants expressed concern that firms would train AI tools on their creative works and then subsequently compete against them by generating AI-produced creative works. Some of the issues the participants raised, such as the mechanisms for compensating artists whose work is used to train AI, may require new legislation or regulations to address. The three sitting commissioners, however, appeared to agree that, as Commissioner Rebecca Slaughter put it, the “FTC’s prohibitions against unfair and deceptive practices and unfair methods of competition apply to applications of AI just as much as they

2 Joseph R. Biden, *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, The White House (October 30, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/>.

3 Press Release, U.S. The Federal Trade Commission, FTC Authorizes Compulsory Process for AI-related Products and Services (November 21, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-authorizes-compulsory-process-ai-related-products-services>.

4 Hearing Transcript, Creative Economy and Generative AI (October 4, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/creative-economy-and-generative-ai-transcript-october-4-2023.pdf.

5 Competition and Markets Authority, *AI Foundation Models: Initial Report* (September 18, 2023), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1185508/Full_report_.pdf.

6 European Parliament Press Release, EU AI Act: first regulation on artificial intelligence (June 14, 2023), <https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence>.

have to every other new technology that's been introduced in the market over the last hundred years.”⁷

Commissioner Alvaro Bedoya then repeated this sentiment at an AI event held by the Open Markets Institute on November 15, 2023, similarly stating that AI development might be relevant to the FTC's authority under Section 5. He expressed the view that the statute's original purpose was to track innovation in industry, both good innovations as well as innovations in unfair methods of competition, thus empowering the Commission to examine when powerful actors use their power to eliminate competitors from the market, which he saw as relevant to current concerns regarding AI in the creative industries.⁸

The FTC echoed the concerns expressed at its October 4 public forum in a public comment submitted on behalf of the agency to the U.S. Copyright Office on October 30, 2023, as part of the Office's notice of inquiry examining copyright issues related to AI. Specifically, the FTC stated that “under certain circumstances, the use of pirated or misuse of copyrighted materials could be an unfair practice or unfair method of competition under Section 5 of the FTC Act.” Further, the agency noted that:

*As the courts apply the doctrine of fair use to the training and use of AI, the evolution of the doctrine could influence the competitive dynamics of the markets for AI tools and for products with which the outputs of those tools may compete. Conduct that may violate the copyright laws—such as training an AI tool on protected expression without the creator's consent or selling output generated from such an AI tool, including by mimicking the creator's writing style, vocal or instrumental performance, or likeness—may also constitute an unfair method of competition or an unfair or deceptive practice . . .*⁹

In line with this comment, the FTC may be indicating its view that AI-related copyright infringement not subject to the “fair use” doctrine would violate Section 5. In copyright law, the fair use doctrine permits the unlicensed use of copyrighted materials under certain circumstances. The extent to which fair use permits training AI models on copyrighted material is the subject of ongoing litigation.¹⁰

At the same time, the FTC's comment also noted that “conduct that may be consistent with the copyright laws nevertheless may violate Section 5.”¹¹ On this point, the FTC cited a 1937 case in which the respondents subject to an FTC order asserted, as a defense to Section 5 liability, that they had copyrighted a deceptive product label. The court rejected this defense, observing that a “copyright is not a license to engage in unfair competition.”¹² However, the FTC did not elaborate as to how the facts of this case would apply to potential Section 5 claims based on the training of AI models.

Overall, the proper scope of enforcement against unfair methods of competition under Section 5 of the FTC Act has been a matter of ongoing debate, with the current FTC having issued a policy statement on the statute in 2022 after withdrawing a previous policy statement issued in 2015.¹³

02

SPOTLIGHT ON DATA, APPLICATIONS, COMPUTE, AND TALENT

7 Creative Economy and Generative AI, *supra* note 4; see also FTC Comment, Artificial Intelligence and Copyright, U.S. Copyright Office, No. 2023-6 (October 30, 2023), at 5, https://www.ftc.gov/system/files/ftc_gov/pdf/p241200_ftc_comment_to_copyright_office.pdf (“Conduct that may violate the copyright laws—such as training an AI tool on protected expression without the creator's consent or selling output generated from such an AI tool, including by mimicking the creator's writing style, vocal or instrumental performance, or likeness—may also constitute an unfair method of competition or an unfair or deceptive practice.”).

8 Sarah Myers West & Max von Thun, et. al., *AI and the Public Interest*, Open Markets Institute (November 15, 2023), <https://www.openmarketsinstitute.org/publications/ai-and-the-public-interest>.

9 FTC Comment, *supra* note 7, at 5.

10 See e.g. *Thomson Reuters Enter. Ctr. GmbH v. Ross Intel. Inc.*, No. 1:20-CV-613-SB, 2023 WL 6210901, at *6-11 (D. Del. Sept. 25, 2023) (fair use defense in a case involving scraping content for training a generative AI tool).

11 FTC Comment, *supra* note 7, at 6.

12 *FTC v. Real Prods. Corp.*, 90 F.2d 617, 619 (2d Cir. 1937).

13 See Press Release, U.S. Federal Trade Commission, FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act (July 1, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act>.

Beyond potential Section 5 concerns involving AI training data and creative works, the FTC and DOJ have outlined several other general concerns related to Generative AI in recent public statements. For example, on June 29, 2023, FTC staff officials in the Bureau of Competition and Office of Technology published a blog post raising potential competition concerns associated with Generative AI.¹⁴ More recently, FTC and DOJ officials made comments at the November 9, 2023, ABA Antitrust Fall Forum conference, which was dedicated to exploring AI-related antitrust issues.¹⁵ While these statements do not necessarily indicate formal agency policy positions, they can provide insight into issues the agencies are monitoring. Three areas of Generative AI technology that the agencies have commented on in particular are (1) data and applications, (2) computational resources, and (3) talent.

A. Data and Applications

In their June 2023 blog post, FTC staff officials observed that “[t]he foundation of any generative AI model is the underlying data,”¹⁶ and that “companies’ control over data may also create barriers to entry or expansion that prevent fair competition from fully flourishing.”¹⁷ At the ABA Antitrust Fall Forum, Markus Brazill, Counsel to DOJ Assistant Attorney General (“AAG”) Jonathan Kanter, similarly noted that competition concerns may arise in connection with large, proprietary datasets, particularly in regulated industries such as healthcare and finance.¹⁸ To the extent the agencies’ concern about data sets is focused on their potential to serve as a barrier to entry or expansion, there is ample antitrust case law and guidance addressing entry analysis and entry barriers in general.

The agencies have also voiced concerns about bundling, tying, exclusive dealing, or mergers involving data or applications where the effect would be to hinder switching among Generative AI tools themselves, or among providers of cloud computing services or other underlying aspects of creating or delivering an AI product or service. For example, the FTC post suggested that “[i]ncumbents may

be able to link together new generative AI applications with existing core products to reduce the value of competitors’ standalone generative AI offerings, potentially distorting competition.”¹⁹ Markus Brazill expressed a similar concern at the Fall Forum by describing a situation where “[t]here may be industry-specific software that’s either acquired or developed that is particular to a cloud service vendor,” thereby allowing the cloud provider to “dictate[] what kind of software you can use and vice versa.”²⁰ Overall, he explained that “when you look at investigations in this area... entry and lock in are major concerns that sort of loom large.”²¹

Regarding mergers specifically, in discussing how the proposed FTC and DOJ draft merger guidelines relate to AI transactions, Krisha Cerilli, deputy assistant director in the FTC’s Technology Enforcement Division, highlighted at the ABA Fall Forum how some tech firms’ access to certain datasets “raises questions about whether they have the ability to extend or maintain their dominance... using that access to data to impact the emergence of AI technology markets.”²² This observation is interesting in light of proposed draft Merger Guideline 7, which addresses mergers that may entrench or extend a dominant position.

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B. Computational Resources

The FTC and DOJ have also identified potential concerns related to the specialized computer chips and cloud com-

14 Federal Trade Commission, Generative AI Raises Competition Concerns (June 29, 2023), <https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/06/generative-ai-raises-competition-concerns>.

15 *Cloud, data, chips are key to thinking about harm in AI mergers, US FTC’s Cerilli says*, LexisNexis (November 9, 2023), <https://content.mlex.com/#/content/1523731/cloud-data-chips-are-key-to-thinking-about-harm-in-ai-mergers-us-ftc-s-cerilli-says?>.

16 *Generative AI Raises Competition Concerns*, *supra* note 14.

17 *Id.*

18 *Cloud, data, chips*, *supra* note 15.

19 *Generative AI Raises Competition Concerns*, *supra* note 14.

20 *Cloud, data, chips*, *supra* note 15.

21 *Id.*

22 *Id.*

puting infrastructure necessary to train and deploy AI models, asserting that there may be a limited number of significant providers of these resources. At the Fall Forum, citing commentary from industry participants, Ms. Cerilli stated that “there may only be a limited number of suppliers that are capable of producing those advanced AI chips,” as well as “a limited number of major players” in cloud computing, and incumbents “that have access to large volumes of data.”²³ Accordingly, she noted that those industry concerns may create a “special sensitivity... to the potential for anticompetitive acquisitions.”²⁴ Based on commentary at the Fall Forum, it appears the agencies are primarily anticipating potential vertical concerns related to mergers and acquisitions in the AI industry. The DOJ’s Markus Brazill noted, however, that mergers not between direct competitors can lead to “some challenges in terms of enforcement and providing the record evidence for a court to make a predictive leap without the established jurisprudence that we have in other areas.”²⁵

C. Talent

The FTC’s June blog post noted that “[a]nother essential input for generative AI is labor expertise,” and suggested that “[s]ince requisite engineering talent is scarce, powerful companies may be incentivized to lock-in workers and thereby stifle competition from actual or would-be rivals.”²⁶ This statement appears to align with labor-related competition concerns, such as non-compete or no-poach agreements, that the agencies have raised in various industries in recent years.

03 UK COMPETITION AND MARKETS AUTHORITY

The CMA’s most detailed statement on generative AI so far is its initial Report on AI Foundation Models²⁷ (“CMA Report”), issued on September 18, 2023, which sets out

the CMA’s early views on how foundation models (“FMs”) are developed and deployed as well as potential future regulatory interventions. FMs refer to the type of AI model, such as large language models (LLMs) or image generator models, that underlie current Generative AI technology.

The CMA Report identifies what it considers critical areas of potential concern for market competition — notably, that developers wielding significant market power could leverage FMs to dominate and potentially exclude other businesses from downstream markets (e.g. through anticompetitive tying or bundling of FM products and services). The CMA Report further recognizes the possibility of FM developers being denied vital resources (“key inputs”), like computational power or proprietary data, which the CMA is concerned could stifle competition and innovation.

These concerns set the stage for what the CMA anticipates to be a more robust regulatory environment. The CMA Report hints at a likely uptick in UK merger control and anti-trust enforcement within markets involving FMs. The CMA signals its intent to scrutinize closely any mergers or business practices that could undermine competition by entrenching market power, restricting access to key inputs, or imposing barriers to market entry.

Further underscoring these issues, on October 25, 2023, UK Information Commissioner John Edwards said that the UK’s data and competition regulators are working on a joint statement on FMs and looking into the cross-over between their mandates in this area.²⁸

04 EUROPEAN UNION

In the EU, a more regulatory approach has been proposed to manage concerns with AI as it develops. On June 14, 2023, the European Parliament adopted its position on

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Generative AI Raises Competition Concerns, supra* note 14.

²⁷ *AI Foundation Models: Initial Report, supra* note 5.

²⁸ The House of Commons, Science, Innovation and Technology Committee, *Oral Evidence: Governance of artificial intelligence, HC 945* (October 25, 2023), <https://committees.parliament.uk/oralevidence/13728/html/>.

the draft EU Artificial Intelligence Act (“EU AI Act”),²⁹ which proposes a comprehensive regulatory framework for AI.

Several variations of the draft EU AI Act have been published and subsequently revised which included reference to Generative AI and/or foundation models in some capacity. There have been intense debates as to the potential regulation of this type of AI and the final outcome is both uncertain and awaited. Additionally, while there have not been proposed provisions to address competition-specific Generative AI concerns under the EU AI Act, there are more general proposed provisions addressing Generative AI that touch on similar topics to concerns raised by U.S. authorities, such as the manner in which copyrighted material is used for training.

In its current form,³⁰ the EU AI Act is set to introduce more stringent requirements for certain “high-risk AI systems,”³¹ demanding comprehensive impact assessments on fundamental rights and adherence to various new regulations. These include mandatory registration in an EU-wide database, extensive testing, and documentation requirements. The Act’s scope is expansive, covering many types of AI systems, and may impose the strictest AI regulations compared to the UK and the U.S. However, the EU AI Act will not take effect until at least two years after it is finalized.

The development of a Generative AI system or FM currently would not necessarily lead to a high-risk classification; rather, for each specific generative AI system, an assessment as to the risks attached to that particular system should be conducted, which would then see certain obligations arise depending on the nature of the risks involved. On November 8, 2023, Olivier Guersent, the European Commission’s Director General for Competition, stated that any additional AI-specific competition concerns will be addressed through:

- “antitrust, if these concerns materialize,” likely referring to the existing rules against anticompetitive agreements and the prohibition of abuse of dominance (Articles 101 and 102 of the Treaty on the Functioning of the European Union, respectively);
- “merger control, if companies engage in ‘killer acquisitions’”; and
- the Digital Markets Act, which can now also regulate “core platform services like AI systems.”³²

On October 30, 2023, the European Commission also welcomed an agreement reached by G7 leaders regarding International Guiding Principles on Artificial Intelligence and a voluntary code of conduct for AI developers.³³ This guidance was noted by the European Commission to serve as a complement to the rules that will be mandated under the EU AI Act, once finalized.

“Several variations of the draft EU AI Act have been published and subsequently revised which included reference to Generative AI and/or foundation models in some capacity”

29 EU AI Act: first regulation on artificial intelligence, *supra* note 6.

30 The European Parliament reached a political deal with the Council on the AI Act on December 8, 2023. The agreed text will now have to be formally adopted by both the European Parliament and Council of the European Union to become EU law. See Press Release, European Parliament, *Artificial Intelligence Act: deal on comprehensive rules for trustworthy AI* (December 9, 2023).

31 EU AI Act: first regulation on artificial intelligence, *supra* note 6.

32 Olivier Guersent, Director General of DG Competition, Opening speech at the VI Lisbon Conference (November 8, 2023), https://competition-policy.ec.europa.eu/about/news/opening-speech-vi-lisbon-conference-2023-11-08_en.

33 European Commission Press Release IP/23/5379, Commission welcomes G7 leaders’ agreement on Guiding Principles and a Code of Conduct on Artificial Intelligence (October 30, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_5379.

05

CONCLUSION

The issues discussed above encompass many, although not all, of the topics that competition agencies and other adjacent authorities have commented upon regarding Generative AI during the past year. They provide a useful, forward-looking roadmap into the agencies' thinking at this relatively early stage in the development of Generative AI. Of course, as the technologies and related markets continue to develop, and as the agencies and industry participants gain practical insights into the role of Generative AI in the economy, new issues and concerns will undoubtedly arise. ■

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