

# ANTITRUST IN THE AGE OF AI



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CPI Antitrust Chronicle August 2023

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## ANTITRUST IN THE AGE OF AI

By *Rachel Brandenburger, Benjamin Faull & Saga McFarland*

The increasing pace of technological developments in recent years is profoundly disrupting traditional approaches to antitrust and competition law and regulation. Many jurisdictions around the world, including the EU and U.S. are sharpening their current tools and introducing new ones to address the challenges of digitalization. And the advent of generative AI tools, which is poised to be the biggest technological disruption to markets in years according to many experts, is also stimulating initiatives at international and national governmental, legislative and agency levels. Whatever impact these developments ultimately have, it is already clear that antitrust and competition law cannot operate in a silo. Intersectionality with other policy areas is increasingly necessary and the ecosystem of relevant national, multinational and intergovernmental organizations, institutions and agencies is expanding not only in the EU and the U.S. but also in many jurisdictions around the world.

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# I. INTRODUCTION

The increasing pace of technological development in recent years is profoundly disrupting traditional approaches to antitrust and competition law and regulation. Governments are introducing new legislation to modernize their approaches and new tools for regulators to scrutinize fast-changing digital markets. For example, the EU's Digital Markets Act ("DMA") was introduced into law on September 14, 2022, and came into effect at record speed on November 1, 2022. On July 4, 2023, the European Commission announced that Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft, and Samsung had notified the Commission that they met the thresholds to qualify as gatekeepers under the DMA.

While implementation of the DMA continues and other jurisdictions around the world debate whether and how to regulate digital platforms, attention has now also turned to the rapid and widespread availability of generative Artificial Intelligence ("AI") tools and their impact on our lives. The EU, for example, having passed the DMA only last year, is already considering new proposals for the regulation of AI. The EU is not alone in this respect. Many other jurisdictions around the world, including the U.S., are also sharpening their current tools and introducing new ones to address the challenges of digitalization and AI.

The advent of generative AI tools is poised to be the biggest technological disruption to markets in years, according to many experts. This presents issues for governments, legislators, regulators,<sup>2</sup> businesses, consumers, civil society organizations and others. These issues include the impact of automation on the employment market, how bad actors might use AI tools to subvert democracies, and whether the technology could, as some fear, end the world itself. These issues are well beyond the scope of this article, which focuses more narrowly on the increasingly intertwined relationship between antitrust and competition law and other areas of regulation and on the expanding set of national and international institutions that are examining and addressing these issues.

## II. KEY HIGHLIGHTS FROM THE EVER-CHANGING LANDSCAPE

### A. Digital Platforms

The "Big Tech" companies are, and have been, subject to investigations by antitrust agencies around the world, including the European Commission, the U.S. Department of Justice ("DoJ") and Federal Trade Commission ("FTC"), the UK Competition and Markets Authority ("CMA"), as well as antitrust agencies in Australia, Canada, India, Japan, South Korea, and several EU member states, including Germany, France, Italy, and The Netherlands.

In many jurisdictions, expert reports were commissioned by antitrust agencies and governments (e.g. European Commission Executive Vice President Vestager's three experts report and the UK Treasury's Furman report) and investigations and hearings were conducted by legislatures (e.g. the U.S. House of Representatives Judiciary Committee's "Investigation of Competition in the Digital Market: Committee Report and Recommendations" published in July 2022 following the Majority Staff Report of the Antitrust Subcommittee published in October 2020) and by antitrust agencies (e.g. DoJ/FTC joint workshops, the CMA's digital advertising market study, the Australian Competition and Consumer Commission's digital platforms and digital platforms services inquiries).

Multilateral organizations, including the Organization of Economic Cooperation and Development ("OECD"), the International Competition Network ("ICN") and the United Nations Conference on Trade and Development ("UNCTAD"), have also provided perspectives through roundtables, webinars, reports, and other initiatives.

Legislation to regulate digital platforms – the DMA and the Digital Services Act (DSA) – has been adopted in the EU. The EU has also entered into so-called "digital partnership agreements" with South Korea, Japan, and Singapore. Other jurisdictions are also considering introducing legislation to regulate digital platforms – notably, the UK with the Digital Markets, Competition and Consumers Bill published in April 2023 and proposals by the Australian Competition and Consumer Commission ("ACCC") in its most recent Regulatory Reform Report. Germany has introduced new powers into its competition legislation; the South Korean Fair Trade Commission has set up a task force to explore a digital regulation bill along the lines of the EU's DMA; India has proposed its Digital India Act; and Brazil has introduced a digital competition bill.

In the U.S., bipartisan efforts to adopt legislation in relation to digital platforms were unsuccessful in the last Congressional session. A new bipartisan bill in relation to digital advertising on major platforms - the Advertising Middlemen Endangering Rigorous Internet Competition Accountability Act ("AMERICA Act") - was introduced in the Senate in March 2023.

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<sup>2</sup> Whether and how AI should be incorporated into the investigative techniques of antitrust and other agencies and regulators is a topic in itself and beyond the scope of this article.

## ***B. AI***

The current regulatory landscape for AI is somewhat different from that of digital platforms. Activities consist largely of intergovernmental discussions and initiatives at national governmental, legislative and agency levels, rather than specific investigations into individual companies.

As in relation to digital platforms, discussions among leaders and regulators broadly center on the desire to foster innovation and determine the appropriate role of regulation, “guardrails” or other forms of controls. The “extraordinary benefits [of AI], from technology that helps farmers grow food more efficiently and computers that predict storm paths, to algorithms that can identify diseases in patients” (the Biden-Harris Administration’s Blueprint for an AI Bill of Rights) are not overlooked in these discussions. The discussions also feature concerns about the regulation of AI, including the risks of reinforcing the market positions of existing “Big Tech” companies rather than encouraging new entrants (which was also a key issue in debates about the DMA); bias and discrimination in employment screening; and disinformation and fraud. What is more, these discussions are occurring in the context of heightened geopolitical competition and rivalry – the race to establish AI leadership is not only between companies but between countries as well.

### **1. Intergovernmental Discussions**

Against this backdrop, the OECD’s Recommendation on AI, adopted by the OECD Council at the Ministerial level on May 22, 2019, was the first set of intergovernmental standards on AI. Issues of competition are addressed with the following recommendation: “Governments should review and adapt, as appropriate their policy and regulatory frameworks and assessment mechanisms as they apply to AI systems to encourage innovation and competition for trustworthy AI.”

Most recently, the G7 government leaders (Canada, France, Germany, Italy, Japan, the UK and the U.S.) and the EU who met at the Hiroshima Summit in May 2023 called for the formulation of “guardrails” around the development of AI. A month prior, G7 digital and technology ministers met and agreed on broad recommendations for AI regulations that affirmed that technology should be “human-centric and based on democratic values, including the protection of human rights and fundamental freedoms and the protection of privacy and personal data.”

### **2. EU**

In the EU, European Commission President Ursula von der Leyen has said “we want AI systems to be accurate, reliable, safe and non-discriminatory, regardless of their origin.” A proposed Artificial Intelligence Act (“AI Act”) was introduced by the European Commission in April 2021. The currently proposed AI Act uses a risk-based approach to AI regulation and categorizes applications and systems based on whether the risk level is “unacceptable” and therefore banned; “high” and therefore subject to specific legal oversight; or “low” and largely unregulated. The AI Act has been described as “a blueprint for European and global regulation” by the European Parliament’s Rapporteur on the AI Act, Brando Benifei. The European Parliament’s Internal Market and Civil Liberties committees passed the final text on May 11, 2023. Triologue negotiations between the European Parliament, Council and Commission commenced on June 14, 2023 and are in their final stages. Adoption of the AI Act is expected to occur before the end of 2023.

### **3. U.S.**

In the U.S., the Biden Administration and Congress are convening often to discuss what actions should be taken to effectively regulate or govern the rapidly emerging AI space. Certain Federal agencies and state governments are also active.

For example, a meeting took place on May 4, 2023 between Vice President Harris, senior Administration officials and the CEOs of Microsoft, Alphabet/Google, Anthropic and OpenAI – companies described by the White House as being “at the forefront of AI innovation.” The purpose of the meeting was “to share concerns about the risks associated with AI” and to call on the CEOs to “take action to ensure responsible innovation and appropriate safeguards, and protect people’s rights and safety... consistent with the Biden-Harris Administration’s Blueprint for an AI Bill of Rights and the AI Risk Management Framework.”

On May 16, 2023, the Senate Committee on the Judiciary’s Subcommittee on Privacy, Technology, and the Law held a hearing entitled Oversight of A.I.: Rules for Artificial Intelligence. OpenAI CEO Sam Altman and IBM Chief Privacy & Trust Officer Christina Montgomery testified at the hearing.

Senate Democrats are convening three bipartisan Senators-only briefings this summer, on (1) What is AI today? (2) What is the frontier of AI and how do we maintain American leadership? and (3) How do the Department of Defense and Intelligence Community use AI today **and**

what do we know about how our adversaries are using AI? These hearings' titles and focus areas underscore that there is a significant focus on securing U.S. global leadership in the field of AI.

At the same time, Senators Michael Bennet (D-CO) and Peter Welch (D-VT) have introduced legislation to create a new federal agency with authority to regulate AI (Digital Platform Commission), while Senator Josh Hawley (R- MO) has released a framework for AI legislation that would allow citizens to sue companies for AI – associated harms.

Majority Leader of the U.S. Senate, Senator Chuck Schumer (D-NY) has stated that Congress “must move quickly” to regulate AI and has convened a bipartisan group of senators to craft legislation based on a policy framework he proposed in April and meetings that his staff is reported to have had with CEOs, scientists, and academics. In June, Senator Schumer launched the SAFE Innovation Framework for AI whose central policy objectives are – Security, Accountability, Foundations, Explain and Innovation.

Federal agencies exploring AI regulation include the Department of Commerce, whose National Telecommunications and Information Administration (“NTIA”) is conducting an inquiry into the usefulness of audits and certifications for AI systems. FTC action on AI includes a joint statement with the Civil Rights Division of the DoJ, the Consumer Financial Protection Bureau (“CFPB”) and the Equal Employment Opportunity Commission (“EEOC”) “to uphold America’s commitment to the core principles of fairness, equality, and justice as emerging automated systems, including those sometimes marketed as ‘artificial intelligence’ or ‘AI’, become increasingly common in our daily lives – impacting civil rights, fair competition, consumer protection, and equal opportunity.” Specifically in relation to antitrust, FTC chair Lina Khan has written “the FTC is well equipped with legal jurisdiction to handle the issues brought to the fore by the rapidly developing AI sector, including collusion, monopolization, mergers, price discrimination and unfair methods of competition” (New York Times, May 3, 2023).<sup>3</sup>

AI-related legislation has been introduced in at least 17 states and others are considering creating their own task forces to recommend future legislation. Additionally, a bipartisan mix of state attorneys general from Colorado, Connecticut, Tennessee, Virginia, Arizona, Arkansas, California, Delaware, District of Columbia, Illinois, Maine, Minnesota, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Vermont, and U.S. Virgin Islands has responded to NTIA’s request for comments on its inquiry into the usefulness of AI auditing and certifications.

AI is also an important topic of discussion between the EU and the U.S. At the close of the fourth ministerial-level meeting of the Trade and Technology Council (“TTC”) on May 30-31, European Commission Executive Vice President Vestager announced that the EU and U.S. are working together to develop a voluntary “AI Code of Conduct” in advance of any coming legislation. According to Vestager, the aim is to develop non-binding international standards on risk audits, transparency and other requirements for companies developing AI systems. The AI Code of Conduct would be submitted to G7 leaders and companies would be encouraged to adopt it voluntarily.

#### 4. UK

The UK Government has seen Brexit as an opportunity to develop a “pro-innovation” approach to AI regulation that explicitly contrasts the approach of the EU’s AI Act. Before the G7 Hiroshima Summit, UK Prime Minister Rishi Sunak said, “We have taken a deliberately iterative approach because the technology is evolving quickly, and we want to make sure that our regulations can evolve as it does as well.”

The UK Government published a white paper entitled A Pro-Innovation Approach to AI Regulation on March 29, 2023. It presents a strategy to “strengthen the UK’s position as a global leader in AI” on the basis that “the UK can play a central role in the global conversation by shaping international governance and regulation to maximize opportunities and build trust in technology, while mitigating potential cross-border risks and protecting the UK’s democratic values.” The white paper proposes that the government should favor an “adaptable” approach to regulating to AI over “heavy-handed” measures by enabling “existing regulators to prepare tailored, context-specific approaches that suit how AI is used in each sector.”

At the agency level, the CMA announced an initial review of competition and consumer protection considerations in the development and use of AI foundation models on May 4, 2023. The CMA said that AI “has the potential to transform the way businesses compete as well as drive substantial economic growth... Our goal is to help this new, rapidly scaling technology develop in ways that ensure open, competitive markets and effective consumer protection.” The CMA will publish a report setting out its findings in September 2023. The Information Commissioner’s Office has launched an investigation into potential racial bias caused by AI recruitment systems. Specifically, it is investigating the use of AI to review and sort through job applications in light of concerns around algorithmic discrimination against candidates of minority groups.

<sup>3</sup> The FTC is reported to have opened an investigation into OpenAI (see e.g. Financial Times, July 14, 2023).

AI has also been an important topic of discussion between the UK and the U.S. Following Prime Minister Rishi Sunak's bilateral meeting with President Biden in June 2023, both sides expressed a commitment to "accelerate cooperation on AI to ensure the safe and responsible development of the technology." They also pledged to continue "ongoing activity internationally including at the OECD, UN, Global Partnership for AI, Council of Europe and International Standards Organizations, as well as the G7 Hiroshima AI Process."

## 5. Other Jurisdictions

Besides the U.S., EU and the UK, other jurisdictions around the world are also actively developing approaches to regulate the development and use of AI. For example, Canada announced its AI and Data Act proposal in June 2022, which aims to create an AI development framework centered around consumer protection and human rights; China released Interim Measures for the Management of Generative AI Services, which will be in effect from August 15, 2023; and the Australian Department of Industry, Science and Resources is currently conducting a consultation to determine how to "mitigate any potential risks of AI and support safe and responsible AI practices."

## III. EMERGING TRENDS

Several trends are emerging from this ever-changing landscape:

### ***A. The Increasing Speed of Technological Development***

The increasing speed with which new technological developments are impacting businesses and economies around the world is creating unprecedented challenges for agencies and regulators. These challenges include their ability to understand, analyze and investigate these developments and, if necessary, take meaningful corrective action before affected markets have tipped in favor of a single or limited number of players and the technology in question has developed network effects that inherently disadvantage newcomers, particularly SMEs.

This challenge is reflected in the emerging use of regulation as a new, complementary tool to antitrust and competition law, as well as in discussions about the correct balance between regulation and innovation that is occurring in relation to AI.

### ***B. Regulation as a New, Complementary Tool to Antitrust and Competition Law***

The advent of "Big Tech", "Big Data" and digital platforms that are capable of controlling entire markets has driven a debate among legislators, antitrust agencies and regulators, interest groups, businesses, and academics about whether traditional antitrust or competition law is an ideal, or even adequate, enforcement tool to guarantee open and contestable markets. As summarized above, some jurisdictions have already decided there is a need for regulation parallel to antitrust or competition law in the digital sector and have enacted sector-specific regulations (e.g. the EU's DMA and DSA) or enhanced their existing competition law (e.g. Germany's introduction of section 19a of the Act against Restraints of Competition). Other countries are in the process of doing so (e.g. the UK's Digital Markets, Competition and Consumers Bill), have proposed legislation (e.g. Brazil and India), are considering doing so (e.g. South Korea) or have made proposals for change to their governments (e.g. the ACCC). In other jurisdictions (notably, the U.S.), whether to do so is still under debate. The advent of AI is taking this debate to a whole new level of complexity, as this article has described.

### ***C. Policymaking, Legislation and Enforcement Are Increasingly Multijurisdictional***

There are existing fora for dialogue and cooperation on policymaking and regulatory enforcement at intergovernmental (e.g. G7, OECD) and inter-agency (e.g. ICN) levels. In addition, policymakers, legislatures, agencies, and regulators around the world often keep a close eye on what their international counterparts are doing. Yet, differing policy objectives, enforcement tools and legal powers can result in different outcomes even where the underlying issues may have a global impact.

In the antitrust and competition law field, and specifically in relation to digital platforms, phrases such as "heading in the same direction" (ACCC Chairman Rod Sims), "a common understanding of the principles we are working to defend" (European Commission Executive Vice President Margrethe Vestager) and "coherence" (CMA Chairman Jonathan Scott and ACCC Chair Gina Cass-Gottlieb) have been offered as lodestars, supplanting the traditional concept of "convergence." The appropriate lodestar for AI is still under discussion, as this article has shown.

#### ***D. An Expanding Intersection Between Antitrust and Competition Law and Other Areas of Law/Regulation in an Ecosystem of National, Multinational and Intergovernmental Institutions***

Regulation of digital platforms has brought the intersection between antitrust, privacy, data protection and consumer protection law into greater focus. Implementation of the DMA in the EU, for example, will include guidance from a high-level group of senior officials drawn from several areas of enforcement and regulation: competition, privacy, consumer protection, telecom, and media. Other jurisdictions have (further) integrated traditionally separate functions within existing agencies (e.g. competition and consumer protection within the FTC and the ACCC respectively) or established a cooperation forum between existing agencies and regulators (e.g. the UK's Digital Regulation Cooperation Forum between the Information Commissioner's Office, the CMA, the Office of Communications and the Financial Conduct Authority) to meet the new challenges associated with regulating digital platforms.

In relation to the debate about whether and how to regulate AI, antitrust and competition law are part of an even broader landscape of issues involving a vast array of governmental institutions, agencies, and regulators both within and across jurisdictions. As this article has shown, dialogues and initiatives are occurring within inter-governmental fora, including the G7 and OECD, and among national governments, legislatures, agencies, and regulators. Many reports are also being commissioned and written around the world to explore solutions to the issues raised by AI.

On July 18, 2023, the UN Security Council held its first meeting on "the potential threats of artificial intelligence to international peace and security." This was organized by the UK "to discuss the potential and risks of AI's possible use in autonomous weapons and nuclear weapons."

In addition, UK Prime Minister Rishi Sunak has announced that the UK will host "the first major global summit on AI safety" this autumn to address the global "challenges and opportunities presented by the rapid advancement of Artificial Intelligence." He emphasized that "No one country can do this alone. This is going to take a global effort. But with our vast expertise and commitment to an open, democratic international system, the UK will stand together with our allies to lead the way."

In sum, a complex, multijurisdictional, multidisciplinary, and multifaceted landscape for AI regulation is emerging.

## **IV. CONCLUSION**

In the age of AI, antitrust and competition law cannot operate in a silo. Intersectionality with other policy areas is increasingly necessary and the ecosystem of relevant national, multinational and intergovernmental organizations, institutions and agencies is expanding. Nor is this only about the EU and the U.S. - or their degree of alignment on these issues. Jurisdictions around the world are also making their voices heard.

The extent to which the developments and trends summarized in this article will ultimately disrupt the traditional antitrust and competition law and regulation landscape remains to be seen. But it is already clear that an informed understanding of the political, economic and social drivers of the changes we are facing has never been more important.



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