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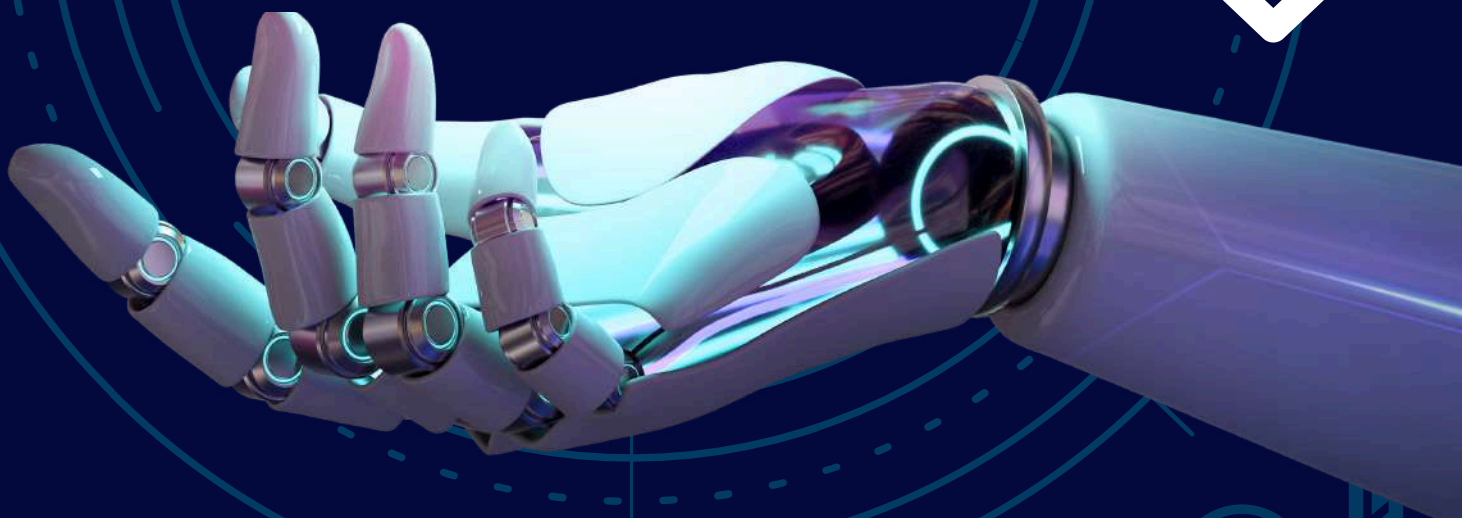
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# THE AI SUPREMACY BATTLE

## THE EU AND US ANTITRUST STRATEGIES

SOUJANYA BOXY & KHUSHI BANSAL



**CENTRE FOR COMPETITION  
LAW AND ECONOMICS**

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# The AI Supremacy Battle: The EU and US Antitrust Strategies

- Soujanya Boxy\* and Khushi Bansal†

## I. Introduction

The steadfast integration of Artificial Intelligence (AI) technologies has raised significant concerns globally regarding its impact on competition in the competitive landscape. Since AI systems have become increasingly focal to innovation and industry growth, the antitrust regulators are focusing on ensuring that AI-driven practices are not able to become a barrier in exploiting market power. The European Union (EU) and the United States (US), two of the most influential economies have developed distinct but parallel approaches for regulating anti-competitive practices associated with this arena. These approaches have resulted in a rich dialogue revolving around balancing innovation, protection of the consumers and fair market dynamics simultaneously. The EU has a multi-faceted framework, combining existing competition laws under the Treaty on Functioning of the European Union (TFEU) with the newly introduced AI-specific measures. In contrast to this, the US relies on the Sherman Antitrust Act, the Clayton Act and the Federal Trade Commission Act to deal with potential antitrust issues posed by AI. The European Commission has taken pro-active measures by initiating investigations into AI investments by technology giants and formulating comprehensive laws resolving these issues. The regulators in the US have intensified scrutiny over AI related combinations, particularly those involving technology giants which is a welcome step. The comparative analysis between these two giant economies aims to tackle the global challenge of ensuring that AI technologies promote innovation and fair competition, without allowing them to undermine market fairness or consumer welfare. The paper examines the rise of anti-competitive concerns from AI use and analyses the contrasting antitrust regulatory approaches in the two jurisdictions towards AI.

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## II. European Approach

### 1. Overview of the EU Antitrust Framework

The EU competition rules are established with the objective of ensuring the “*proper functioning of the EU’s internal market*”.<sup>1</sup>The EU policy toolkit essentially entails rules on matters of antitrust, merger control, state aid and public undertakings and services. Antitrust laws are aimed at ensuring a fair and contestable market, by preventing cartelization, abuse of dominant position, among other anti-competitive conducts. Antitrust laws are developed based on two important rules under the Treaty on the Functioning of the European Union (TFEU): Articles 101 and 102.<sup>2</sup>

Article 101 deals with prohibition of anti-competitive agreements between two or more independent businesses or market operators, which restrict or is likely to restrict competition. Agreements between businesses or undertakings are treated differently based on their nature and impact they will have on competition and market. For instance: Cartels are strictly prohibited, as they are automatically deemed void. However, there are exemptions for agreements that hold the ability to enhance technical or economic development and augment the production or distribution of goods. Certain conditions are to be met to avail exemptions, such as affording consumers a fair share of the benefits, non-imposition of any unnecessary restrictions and absence of an objective to foreclose competition. These exemptions are further governed by Block Exemption Regulations.<sup>3</sup>

Article 102 entails abuse of dominance. As per the Court of Justice of the EU (CJEU), a dominant position means “*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*”.<sup>4</sup>Pursuant to the EU regime, dominance, in itself, does not attract the provisions of this article. However, with dominance

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<sup>1</sup>Think Tank European Parliament, Competition Policy, EU Fact Sheets (May 31, 2024), [https://www.europarl.europa.eu/thinktank/en/document/04A\\_FT\(2017\)N54616](https://www.europarl.europa.eu/thinktank/en/document/04A_FT(2017)N54616).

<sup>2</sup>European Commission, Competition Policy, Antitrust and Cartels, [https://competition-policy.ec.europa.eu/antitrust-and-cartels\\_en#:~:text=European%20Antitrust%20policy%20is%20developed,market%20operators%2C%20which%20restrict%20competition](https://competition-policy.ec.europa.eu/antitrust-and-cartels_en#:~:text=European%20Antitrust%20policy%20is%20developed,market%20operators%2C%20which%20restrict%20competition).

<sup>3</sup>Fact Sheets on the European Union, European Parliament, Competition Policy, <https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy>.

<sup>4</sup>Author Definition, Dominance (Notion), Concurrences, <https://www.concurrences.com/en/dictionary/dominance-notion#:~:text=In%20United%20Brands%2C%20the%20Court,affording%20it%20the%20power%20to>.

comes responsibility. Dominant undertakings cannot misuse their position to stifle competition. Some of the conducts that could constitute abuse of dominant position are predatory pricing, tying and bundling, refusal to deal, etc.<sup>5</sup>

Merger control rules as defined in the EC Merger Regulation (EC) No 139/2004<sup>6</sup>, provide for an assessment to pre-empt a planned merger or acquisition, which could have an adverse effect, thereby resulting in distortion of competition in the market. Undertakings need to notify their planned merger if they exceed certain turnover thresholds as given under Article 1, the EU Merger Regulation<sup>7</sup>. National competition authorities may also review mergers of below thresholds.<sup>8</sup>The rules also apply to undertakings based outside Europe, if they are carrying on business in the European markets. The requirement to notify is triggered once there is acquiring of control by an undertaking.<sup>9</sup>

State aid rules (under Article 107<sup>10</sup>) are framed to prevent states from giving undue advantage to specific undertakings and sectors, which could distort competition and adversely affect the trade among Member States.<sup>11</sup>

## 2. Potential AI Antitrust Issues in the EU

The EU Competition law empowers competition authorities to scrutinise any anti-competitive conduct or merger within the AI space. The potential antitrust risks associated with using AI and investing in AI could trigger various provisions of the EU Competition law, demanding scrutiny from the EU's antitrust authorities. Mostly, AI is likely to face antitrust risks due to algorithmic collusion (treated as an anti-competitive agreement), abuse of dominance and mergers that distort competition.<sup>12</sup>

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<sup>5</sup>European Commission, Competition Policy, Procedures in Article 102 Investigations, [https://competition-policy.ec.europa.eu/antitrust-and-cartels/procedures/article-102-investigations\\_en](https://competition-policy.ec.europa.eu/antitrust-and-cartels/procedures/article-102-investigations_en).

<sup>6</sup>Council Regulation (EC) No 139/2004 (20 Jan. 2004), <https://eur-lex.europa.eu/eli/reg/2004/139/oj>.

<sup>7</sup>Id.

<sup>8</sup>European Commission, Competition Policy, Mergers procedures, [https://competition-policy.ec.europa.eu/mergers/procedures\\_en](https://competition-policy.ec.europa.eu/mergers/procedures_en).

<sup>9</sup>Fact Sheets on the European Union, *supra* note 7.

<sup>10</sup>Article 107 TFEU

<sup>11</sup>Fact Sheets on the European Union, *supra* note 7.

<sup>12</sup>See Mayerl, *supra* note 1.

The EC in its note on ‘Algorithmic competition’ for OECD, explains an ‘algorithm’ as “*an exact sequence of instructions that generate an output in a clearly defined format from a given digital input and algorithms can include simple set of rules as well as very advanced machine learning or artificial intelligence systems*”.<sup>13</sup>

Algorithms can stifle competition through ‘algorithmic collusion’. The Commission also explains ‘algorithmic collusion’ as “*any form of anti-competitive agreement or coordination among competing firms that is facilitated or implemented through means of automated systems*”.<sup>14</sup>

Ariel Ezrachi and Maurice E Stucke in their work, “*Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy*”, discuss four ways in which algorithm collusion or coordination may take place:<sup>15</sup>

1. Hub and Spoke: Similar algorithms used by competitors, combined with vertical agreements can create hub and spoke arrangement wherein algorithms, acting as a hub, coordinate prices for competitors at the spokes.
2. Messenger: Algorithms are used as “messengers” to execute an agreement, reached to by humans and monitored to ensure compliance. In this scenario, algorithms act as a facilitator for existing collusions.
3. Predictable Agent: Algorithms can track competitor prices and quickly adjust their own prices strategies, even without an explicit agreement). These act as “predictable agents” and lead to “tacit collusion”.
4. Digital Eye: Highly sophisticated algorithms can independently learn and adapt pricing strategies in a way that ultimately leads to collusive outcome, even without human involvement.

As discussed, Article 101 of TFEU prohibits anti-competitive agreements, which could be either vertical or horizontal and explicit or tacit.<sup>16</sup> The provision is not restricted to only traditional antitrust agreements discussing product quality, pricing and total output but can also be applied to

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<sup>13</sup>See Org. Econ. Coop. & Dev. [OECD], Algorithmic competition – Note by the European Union, DAF/COMP/WD(2023)17 (Jun. 14, 2023), [https://one.oecd.org/document/DAF/COMP/WD\(2023\)17/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2023)17/en/pdf) (2023).

<sup>14</sup>See Id.

<sup>15</sup>See Thomas Jones, Matthew Bovaird, Patrick Cordwell, and Dylan McGirr, *Competition & EU law insights*, Bird & Bird (Jan.17, 2024), <https://competitionlawinsights.twobirds.com/post/102ixaa/artificial-intelligence-competition-and-antitrusts-next-frontier>.

<sup>16</sup>European Commission, *supra* note 6.

concerted anti-competitive conducts.<sup>17</sup> The EU antitrust authorities are increasingly worried about the risk of anti-competitive agreements and concerted conduct in digital markets. These markets operate in a strong vertical integration and conglomerate set-ups, which result in parallel conducts in different markets. The emergence of AI further adds to the potential antitrust risk, due to its ability to exclude competitors, exacerbate dominance of tech giants and facilitate collusions.<sup>18</sup>

The EC, in its note, specified three possible situations that could trigger the application of antitrust provisions and attract the scrutiny of antitrust authorities.<sup>19</sup> These situations are as follows:

1. Algorithms may be used to support existing collusion or facilitate collusion.
2. By providing similar or coordinated algorithms, a third party could enable different competitors to align their competitive factors such as customers, pricing, outcomes, etc.
3. The parallel use by multiple competitors of specific deep-learning or self-learning algorithms for pricing, which through their automatically reciprocal interaction can lead to parallel pricing, even without direct communication between the competing enterprises. This can be very challenging to prove.

The EC has addressed concerns about anti-competitive practices stemming from the use of software tools and digital platforms. In one case, they fined four consumer electronics manufacturers for using monitoring tools to track and prevent deviations from their desired resale prices. This effectively restricted online retailers' ability to fix their own prices.<sup>20</sup> Similarly, the CJEU decision in the Eturas case exemplifies how digital platforms can be used to coordinate prices. Eturas, an online travel booking system, used by travel agents, implemented a cap on online booking discounts through votes by agents. While some agents denied involvement, CJEU ruled

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<sup>17</sup>See Hans Hermann Bernard Vedder, Rick Busscher, and Martin Herz, *Commentary on Article 101 TFEU*, ResearchGate (Apr. 2016),

[https://www.researchgate.net/publication/299846387\\_Commentary\\_on\\_Article\\_101\\_TFEU](https://www.researchgate.net/publication/299846387_Commentary_on_Article_101_TFEU).

<sup>18</sup>See Max Klasse, Philipp Trube and Jasmin SujungMayerl, *Generative AI in the Antitrust Spotlight: EU Regulators Gear Up*, BLOMSTEIN (Feb. 16, 2024), <https://www.blomstein.com/en/news/generative-ai-in-the-antitrust-spotlight-eu-regulators-gear-up>.

<sup>19</sup>See Pauline Kuipers and Reshmi Rampersad, *Artificial Intelligence and Competition Law: Shaping the Future Landscape in the EU*, LEXOLOGY (Jan. 17, 2024) <https://www.lexology.com/library/detail.aspx?g=7383d6da-22f4-456e-a074-7ff2f2a0548c>.

<sup>20</sup>Press corner, European Commission, Statement by Commissioner Vestager on Commission decision to impose fines on four consumer electronics manufacturers for fixing online resale prices (Jul. 24, 2018), [https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_18\\_4665](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_18_4665).



it constituted a concerted practice violating Article 101 (1). This is because neither travel agents nor Eturas publicly distanced themselves from this practice.<sup>21</sup>

Article 102, which prohibits big companies from abusing their dominant position, could also be applied to tackle anti-competitive behaviour in digital markets involving AI. For determining dominance in digital markets, factors such as responsiveness to market changes, accurate prediction and interpretation of data, and AI-powered innovation.<sup>22</sup> Some of the key areas where the EU competition authorities can conduct investigations for, are: i) “essential facilities”: if a dominant company uses AI to control access to crucial tools like Application Programming Interfaces (APIs) or training data that application developers need. By restricting access, they purposely create market entry barriers; ii) “multi-platform integration strategies”: AI enabling a dominant company to give itself an unfair advantage across different markets it operates in.<sup>23</sup> For instance: AI-powered recommendation systems might favour the company’s own products and services, harming competitors. In 2017, the EC fined Google for unfairly favouring its own comparison-shopping services in search results by giving it more prominent placement.<sup>24</sup> The EU General Court upheld this decision, clarifying that self-preferencing by a dominant company can, in some cases, constitute abuse under Article 102 TFEU.<sup>25</sup>

In merger control, the competition authorities assess only planned mergers that exceed certain turnover thresholds under the EU Merger Regulations.<sup>26</sup> They then evaluate whether such mergers, if approved, would impede competition. Harmful mergers ultimately reduce incentives to innovate and harm consumers’ interest. In the following, we will explore the three types of mergers and competition concerns related to AI:<sup>27</sup>

1. In horizontal mergers, combining the datasets or AI capabilities of competing companies can give them a significant advantage, solidifying their dominant market position.

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<sup>21</sup>See Sophie Lawrance, Marc Linsner, *Eturas – Any conclusions on platform collusion..?*, Kluwer Competition Law Blog (Jan. 19, 2017), <https://competitionlawblog.kluwercompetitionlaw.com/2017/01/19/eturas-conclusions-platform-collusion/#:~:text=The%20CJEU%20held%20that%20if,took%20steps%20to%20distance%20themselves>.

<sup>22</sup>See Mayerl, supra note 1.

<sup>23</sup>Id.

<sup>24</sup>Press release, European Commission, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service (June. 27, 2017), [https://ec.europa.eu/commission/presscorner/detail/es/MEMO\\_17\\_1785](https://ec.europa.eu/commission/presscorner/detail/es/MEMO_17_1785).

<sup>25</sup>See Johannes Persch, *Google Shopping: The General Court takes its position*, Kluwer Competition Law Blog (Nov. 15, 2021), <https://competitionlawblog.kluwercompetitionlaw.com/2021/11/15/google-shopping-the-general-court-takes-its-position/>.

<sup>26</sup>European Commission, supra note 12.

<sup>27</sup>See Mayerl, supra note 1.



2. In vertical mergers, the key concern is when a merger restricts competitors' access to vital tools like training data, APIs, or AI technology.
3. For conglomerate mergers, the focus is on “leveraging effects”. This refers to a situation where big companies might use their merger to tie or bundle AI technology with their products.

Even seemingly innocuous transactions can raise antitrust issues, particularly in the AI space. This includes joint ventures and large investments by tech giants in smaller AI firms. Some of the notable investments are investment in Anthropic by Google<sup>28</sup> and Amazon<sup>29</sup>, Nvidia's investment into Cohere and Inflection AI<sup>30</sup>, etc. German companies, who are offering Generative AI, require extra caution. It is because the Federal Cartel Office (FCO) can scrutinise a deal, even if it does not fall below the acquisition of control level (“decisive influence”) as stipulated under the EU merger control regime.<sup>31</sup>

It is worth noting that owning 25% of a company's shares might seem like a minority stake, but it can trigger a requirement to notify. On top of that, there is a concept “competitively significant influence”. Even smaller holdings can be important if they provide the investor significant influence on the target company, which include voting rights, shared interests, access to information, etc).<sup>32</sup>

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<sup>28</sup>See *Google Invests In Anthropic For \$2 Billion As AI Race Heats Up*, Forbes (Oct. 31, 2024, 12:40 PM), <https://www.forbes.com/sites/qai/2023/10/31/google-invests-in-anthropic-for-2-billion-as-ai-race-heats-up/>.

<sup>29</sup>See Kate Rooney, Hayden Field, *Amazon spends \$2.75 billion on AI startup Anthropic in its largest venture investment yet*, CNBC (Mar. 28, 2024, 2:55 AM), <https://www.cnbc.com/2024/03/27/amazon-spends-2point7b-on-startup-anthropic-in-largest-venture-investment.html>.

<sup>30</sup>See Nvidia Invests in 35 AI Companies in 2023, PYMNTS (Dec.11, 2023), <https://www.pymnts.com/artificial-intelligence-2/2023/nvidia-invests-in-35-ai-companies-in-2023/>.

<sup>31</sup>See Mayerl, *supra* note 1.

<sup>32</sup>See Daniel Wiedmann, *Merger Control Comparative Guide*, Mondaq, <https://www.mondaq.com/germany/antitrustcompetition-law/843534/merger-control-comparative-guide>.

### 3. Recent EU Laws

The EU's recent laws regulating digital markets are prompting tech giants to take cautious approach and revise their existing policies that harm consumers, competitors, and market competition. Two major laws are discussed as follows:

#### 3.1 Digital Markets Act

The EU's DMA aims to ensure fair and contestable markets. It identifies big companies that provide “core platform services” (CPS) as gatekeepers. Once designated, gatekeepers are subject to certain prohibitions and obligations, outlined in the Act<sup>33</sup>. Published on the EU's Official Journal in October, 2022 and in effect since May, 2023, the DMA<sup>34</sup> requires gatekeepers to:

1. ensure free interoperability between their different services,
2. allow app distribution from alternative app stores in addition to their own,
3. enable sideloading, etc.

These requirements promote a level playing field for all the digital market players, empower users with more choices, and ultimately stimulate innovation within the market. On September 6, 2023, the EC designated Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft as gatekeepers under the DMA.<sup>35</sup> On May 13, 2024, the EC further designated Booking as a gatekeeper.<sup>36</sup> These companies were required to comply with the DMA by March 7, 2024. Later, in March, the Commission initiated investigations into non-compliance with provisions of the DMA by Alphabet (its steering rules and self-preferencing) and Apple (its steering rules) and Meta (its pay or consent model).<sup>37</sup> In June 2024, the Commission sent preliminary findings to Apple indicating

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<sup>33</sup>Press corner, European Commission, Questions and Answers: Digital Markets Act: Ensuring fair and open digital markets\* (Sept. 6, 2023), [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_2349](https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2349).

<sup>34</sup>European Commission, Digital Markets Act (DMA), About the Digital Markets Act, [https://digital-markets-act.ec.europa.eu/about-dma\\_en](https://digital-markets-act.ec.europa.eu/about-dma_en).

<sup>35</sup>European Commission, Digital Markets Act (DMA), Gatekeepers, [https://digital-markets-act.ec.europa.eu/gatekeepers\\_en](https://digital-markets-act.ec.europa.eu/gatekeepers_en).

<sup>36</sup>Id.

<sup>37</sup>Press release, European Commission, Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act ( Mar. 25, 2024), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_24\\_1689](https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1689).

that its App Store is not compliant with the DMA and opened an additional investigation under the DMA.<sup>38</sup>

The EU's High-Level Group for the DMA believes that AI could undermine the fairness and contestability within the digital marketplace, which the DMA aims to address. In fact, the EC's Executive Vice-President for competition policy, Margrethe Vestager, has already stated that the DMA can apply to core platform services that use AI. Companies acting as gatekeepers in this scenario, would be required to demonstrate how their AI-integrated services comply with the DMA.<sup>39</sup> The DMA also regulates the kind of data that can be used for training and operating a gatekeeper's AI system. It restricts data by including a requirement of user consent for certain kinds of data processing and prohibiting gatekeepers from using such data to unfairly compete with other businesses that use their platform.<sup>40</sup>

### 3.2 AI Act

It is globally the first comprehensive law for regulating AI. The EC recommended this legislation in April, 2021. The final version of this legislation was approved in May, 2024.<sup>41</sup> It was recently published in the EU Official Journal and will come into effect on August 2, 2024.<sup>42</sup>

The new legislation, with its major focus on consumer protection, will impose obligations based on the level of risks associated with AI.<sup>43</sup> These risks are categorised into unacceptable risks and high risks.<sup>44</sup> AI systems posing unacceptable risks encourage scoring people depending on their socio-economic background and harmful behaviour and they are banned under this legislation. AI systems with high risks, including medical devices, autonomous vehicles, etc., are required to

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<sup>38</sup>Press release, European Commission, Commission sends preliminary findings to Apple and opens additional non-compliance investigation against Apple under the Digital Markets Act (Jun. 24, 2024), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_24\\_3433](https://ec.europa.eu/commission/presscorner/detail/en/IP_24_3433).

<sup>39</sup>Id.

<sup>40</sup>European Commission, Digital Markets Act (DMA), High-Level Group for the Digital Markets Act Public Statement on Artificial Intelligence (May 22, 2024), [https://digital-markets-act.ec.europa.eu/high-level-group-digital-markets-act-public-statement-artificial-intelligence-2024-05-22\\_en#:~:text=To%20the%20extent%20that%20such,cou%20covered%20by%20the%20DMA%20provisions](https://digital-markets-act.ec.europa.eu/high-level-group-digital-markets-act-public-statement-artificial-intelligence-2024-05-22_en#:~:text=To%20the%20extent%20that%20such,cou%20covered%20by%20the%20DMA%20provisions).

<sup>41</sup>See Karan Mahadik, *From GDPR to AI Act, here's a brief overview of the top EU tech laws*, The Indian EXPRESS (Jul. 11, 2024, 08:32), <https://indianexpress.com/article/technology/tech-news-technology/eu-list-of-tech-laws-with-brief-overview-9444281/>.

<sup>42</sup>See *EU AI Act Published: A New Era for AI Regulation Begins*, LATHAM & WATKINS LLP (Jul. 12, 2024), <https://www.lw.com/en/insights/eu-ai-act-published-a-new-era-for-ai-regulation-begins>.

<sup>43</sup>See Mayerl, *supra* note 1.

<sup>44</sup>European Commission, EU AI Act: first regulation on artificial intelligence (Jun. 8, 2024), <https://www.europarl.europa.eu/topics/en/article/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence>.

undergo “initial risk assessment” before being deployed. Amounts of fines are different for AI providers, importers, deployers, distributors, and others for non-compliance.<sup>45</sup>

Furthermore, to ensure smooth interaction between AI developers or providers, regulators and national authorities, the EU established a central AI authority in January 2024: the European Artificial Intelligence Office.<sup>46</sup> The Office is empowered to investigate potential breaches of AI regulations, by collecting complaints, requesting documents, conducting assessments and calling for enforcement actions.<sup>47</sup>

#### 4. The EU’s Multi-Pronged Approach to AI Regulation

Growing reliance on AI and rising AI investments by tech giants have become major competition concerns for the EU antitrust agency. This is evident by the recent wave of investigations into AI investments.<sup>48</sup> Their determination towards cracking down on large AI investments goes beyond inquiries and investigations. They have also introduced their ambitious AI Act and established a dedicated EU Artificial Intelligence Office to address AI-related issues, like manipulations, exploitation of users’ vulnerabilities, etc.<sup>49</sup> Additionally, the EC issued a call for insights regarding ‘competition in virtual worlds and Generative AI’ on January 9, 2024.<sup>50</sup> Following this, on June 28, 2024, it conducted a workshop on this topic with several participants, including national competition agencies, big tech giants, academia, start-ups, and other stakeholders, to contemplate on opportunities, challenges and impact of regulatory framework on the developing landscape of digital market and innovation.<sup>51</sup>

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<sup>45</sup>See Mahadik, supra note 46.

<sup>46</sup>European Commission, POLICY AND LEGISLATION, Commission Decision Establishing the European AI Office (Jan. 24, 2024), <https://digital-strategy.ec.europa.eu/en/library/commission-decision-establishing-european-ai-office>.

<sup>47</sup>See Mayerl, supra note 1.

<sup>48</sup>See Dr. Max Klasse, Philipp Trube and Jasmin Sujung Mayerl, *Generative AI in the Antitrust Spotlight: EU Regulators Gear Up*, LEXOLOGY (Feb. 16, 2024), <https://www.lexology.com/library/detail.aspx?g=133aa183-afcf-4d2d-b157-c88154b1c0df>.

<sup>49</sup> Press release, European Parliament, Artificial Intelligence Act: MEPs adopt landmark law (Mar. 13, 2024), <https://www.europarl.europa.eu/news/en/press-room/20240308IPR19015/artificial-intelligence-act-meps-adopt-landmark-law>.

<sup>50</sup> Press release, European Commission, Commission launches calls for contributions on competition in virtual worlds and generative AI (Jan. 9, 2024), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_24\\_85](https://ec.europa.eu/commission/presscorner/detail/en/ip_24_85).

<sup>51</sup> European Commission, Competition Policy, European Commission's Workshop on Competition in Virtual Worlds and Generative AI, [https://competition-policy.ec.europa.eu/about/reaching-out/virtual-worlds-and-generative-ai\\_en](https://competition-policy.ec.europa.eu/about/reaching-out/virtual-worlds-and-generative-ai_en).

### III. The US approach

#### 1. Overview of the US Antitrust Framework

This section introduces the US antitrust landscape, outlining the three primary federal antitrust statutes that govern competition and consumer protection. In addition to federal statutes, state attorneys general or private plaintiffs can enforce state-specific antitrust laws.

##### 1.1 The Sherman Antitrust Act, 1890

It is the first federal antitrust statute in the US.<sup>52</sup> Enacted in response to concerns around giant trusts (such as Standard Oil), and industry leaders (like U.S. Steel)<sup>53</sup>, it addressed the booming corporations of the late 19<sup>th</sup> century's rapid US economic expansion. However, this growth also raised fears about their potential monopolistic behaviour and its harm to ordinary citizens.<sup>54</sup>

Section 1 of the Act aims to crack down secret deals or agreements between the competitors that might limit competition. This statute makes it illegal to conspire to rig bids, set wages or prices, allocate customers or markets, which constitute criminal violations.<sup>55</sup> Other agreements, such as exclusive agreements that might restrict competition, are also prohibited and can be subjected to civil enforcement actions.<sup>56</sup>

In relation to AI algorithms, there are two ways in which they could violate this provision of law:<sup>57</sup>

1. Handshake agreements: Competitors could either expressly or impliedly agree to follow an algorithm's pricing decisions. This is similar to traditional "handshake agreements", where companies directly fix prices. Any use of pricing algorithms for bid rigging, fixing

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<sup>52</sup> Sherman Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1–7)

<sup>53</sup> Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911)

<sup>54</sup> See Satya Marar, *Artificial Intelligence and Antitrust Law: A Primer*, SSRN (Mar. 2, 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4745321#:~:text=This%20primer%20is%20a%20guide,enforce%20them%2C%20and%20their%20powers.](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4745321#:~:text=This%20primer%20is%20a%20guide,enforce%20them%2C%20and%20their%20powers.)

<sup>55</sup> National Archives, Sherman Anti-Trust Act (1890), <https://www.archives.gov/milestone-documents/sherman-anti-trust-act#:~:text=Sec.,hereby%20declared%20to%20be%20illegal.>

<sup>56</sup> Antitrust Division U.S. Department of Justice, The Antitrust Laws, <https://www.justice.gov/atr/antitrust-laws-and-you#:~:text=The%20Sherman%20Antitrust%20Act,or%20markets%2C%20are%20criminal%20violations.>

<sup>57</sup> See Emily Renzelli, Whitney Williams, Erica Baum, *Antitrust Risks to Firms Lurk Inside Some AI Pricing Algorithms*, Bloomberg Law (Jun. 27, 2024, 2:00 PM), <https://news.bloomberglaw.com/us-law-week/antitrust-risks-to-firms-lurk-inside-some-ai-pricing-algorithms.>

prices or allocating markets, would be considered per se illegal, leading to criminal charges.<sup>58</sup>

2. Hub and Spoke agreements: Another Section 1 violation occurs when competitors (the spokes) use the same AI provider (the hub) that allows them to coordinate prices.

While antitrust scholars warn about antitrust risks under Section 1 due to pricing algorithms, regulators also keep an eye on Section 2 issues that might arise from AI use. Section 2 of the Act also prohibits any act, attempt, or conspiracy to monopolise a product and service market.<sup>59</sup> An unlawful monopoly arises when a single firm possesses dominance within a particular product or service market<sup>60</sup>. However, this dominance must be achieved through an anti-competitive conduct that stifles competition and not through competition on the merits.<sup>61</sup> Monopolization offences can be pursued through civil or criminal proceedings.<sup>62</sup> The FTC is concerned about two issues: First, dominant firms might leverage their strong network effects to lock in users, making it harder for other enterprises to get a foothold. Second, these firms could use algorithms to artificially lower their prices for an extended period, harming competitors and once competitors are driven out, they then could raise prices.<sup>63</sup>

### 1.1.1 Criminal Charges pursuant to Sections 1 and 2 violations

Companies that violate Sections 1 and 2 of the US regime face both criminal charges and significant fines of up to \$100 million, and individuals involved can be imprisoned for up to 10 years.<sup>64</sup> While this has not been common recently, regulators are stepping up enforcement, especially when it is related to the AI pricing algorithms. In May 2021, Federal Bureau of Investigation (FBI) raided the offices of a real estate company, Cortland Management, as part of

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<sup>58</sup>See Hannah Garden-Monheit and Ken Merber, *Price fixing by algorithm is still price fixing*, FEDERAL TRADE COMMISSION (Mar. 1, 2024), <https://www.ftc.gov/business-guidance/blog/2024/03/price-fixing-algorithm-still-price-fixing>.

<sup>59</sup>National Archives, *supra* note 79.

<sup>60</sup>Antitrust Division U.S. Department of Justice, *supra* note 80.

<sup>61</sup>United States v. Grinnell Corp., 384 U.S. 563 (1966)

<sup>62</sup>Antitrust Division U.S. Department of Justice, *supra* note 80.

<sup>63</sup>See Baum, *supra* note 81.

<sup>64</sup>See Satya Marar, *supra* note 78.

the DOJ's investigation into the RealPage AI price fixing conspiracy.<sup>65</sup>The DOJ has also issued statements of interest in similar cases.<sup>66</sup>

## 1.2 The Clayton Act, 1914

This law aims to keep the playing field level for companies and protect consumers from unfair business practices. It prohibits practices that can stifle competition. For instance: Forcing consumers to purchase bundled products, restricting consumers' choice and competition (tying and bundling); or selling products at a lower price (at a loss) to drive out competitors (predatory pricing); or merging in a way that creates monopolies, reducing competition. The law also prohibits individuals from serving on the boards of companies that directly compete. By sharing board members, the rivals get an opportunity to secretly coordinate pricing strategies, employee wages, etc.<sup>67</sup>

### 1.2.1 Merger Control Regime

Section 7 of the Act bans mergers and acquisitions likely to cause a substantial reduction of competition or the creation of monopolies.<sup>68</sup> Pursuant to the 1976 Hart-Scott-Rodino reforms, amendments to the Act mandate that parties planning mergers and acquisitions exceeding a designated threshold must file a premerger notification with the government. This notification facilitates a review of the transaction to assess potential violation of Section 7.<sup>69</sup>

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<sup>65</sup>See *FBI Raids Corporate Landlord in Major Rent Price-Fixing Probe*, PYMNTS (Jun. 3, 2024), <https://www.pymnts.com/cpi-posts/fbi-raids-corporate-landlord-in-major-rent-price-fixing-probe/#:~:text=The%20Federal%20Bureau%20of%20Investigation,a%20nationwide%20conspiracy%20to%20artificially>.

<sup>66</sup>See David C. Kully, Jessica L. Farmer, Anna P. Hayes, Patrick G. Selwood, *DOJ "Triples Down" on View that Use of Pricing Algorithms Can Support Price-Fixing Claims*, Holland & Knight (Apr. 24, 2024), <https://www.hklaw.com/en/insights/publications/2024/04/doj-triples-down-on-view-that-use-of-pricing-algorithms-can-support>.

<sup>67</sup>Antitrust Division U.S. Department of Justice, *supra* note 80.

<sup>68</sup>See Richard B. Blackwell, *Section 7 of the Clayton Act: Its Application to the Conglomerate Merger*, Will & Mar. L. Rev. Vol. 13 (1971-72),

<https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2684&context=wmlr#:~:text=In%201914%20Congress%20en%2D%20acted,may%20be%20to%20lessen%20competition>.

<sup>69</sup> Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435



### 1.3 Federal Trade Commission Act, 1914

The FTC Act empowers the Commission with various authorities, including prohibiting unfair or deceptive trade practices<sup>70</sup>, seeking monetary redress and relief, prescribing rules on unfair trade practices, gathering information and conducting investigations, and issuing reports and legislative recommendations.<sup>71</sup>

The Commission has actively exercised its authority under Section 5 and has declared its scope to be broader than the traditional antitrust laws. Given the FTC's current focus on AI, it is highly probable that Section 5 could be used to combat AI-driven price discrimination.<sup>72</sup>

## 2. Application of US Federal Antitrust Laws to AI

Federal antitrust laws regulate how companies interact with their competitors, consumers, and increasingly, how they use AI. These laws aim to create a fair and competitive marketplace for all businesses and protect consumers and employees from unfair practices that limit competition, leading to less innovation, lower wages, higher market entry barriers, and ultimately higher prices. Antitrust issues related to AI can be broadly categorised into two areas:<sup>73</sup>

1. Anti-competitive agreements entered into by two or more market players to reduce competition or facilitate reduction of competition in the market. These agreements include price fixing, bid rigging, restriction on output, allocation of markets and consumers, etc. In relation to the use of AI, antitrust watchdogs and private plaintiffs claiming for damages, are worried that companies are using similar AI pricing tools or algorithms with shared industry data to fix artificially higher prices.
2. Another focus is on abuse of dominant position by a single firm through anti-competitive and exclusionary conducts. For instance: Large companies bundling their AI products with proprietary software, could be deemed anti-competitive (exclusionary) conduct under

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<sup>70</sup> <https://www.mercatus.org/research/policy-briefs/us-antitrust-laws-primer>

<sup>71</sup> FEDERAL TRADE COMMISSION, Federal Trade Commission Act, <https://www.ftc.gov/legal-library/browse/statutes/federal-trade-commission-act>.

<sup>72</sup> See Baum, *supra* note 81.

<sup>73</sup> See Victoria S. Duarte, John E. Susoreny, Derek A. Sutton, Lauren Norris Donahue, *ANTITRUST AND AI: US ANTITRUST REGULATORS INCREASINGLY FOCUSED ON THE POTENTIAL ANTICOMPETITIVE EFFECTS OF AI*, K&L GATES (Sept. 20, 2023), <https://www.klgates.com/Antitrust-and-AI-US-Antitrust-Regulators-Increasingly-Focused-on-the-Potential-Anticompetitive-Effects-of-AI-9-20-2023>.

antitrust laws. This conduct gives them and their partners an unfair advantage, hindering new competitors from entering the market.

### 3. US scrutinises Tech Giants: DOJ and FTC Target Unfair Practices in AI

The US Department of Justice (DOJ) is ramping up its scrutiny of competition issues in the AI space, amid a spending spree by tech giants desperate to lead in the transformative technology. The DOJ partnered with Stanford University to host a workshop on AI. The workshop on May 30, 2024, brought together industry leaders, government officials, and researchers to discuss the AI ecosystem, its impact on fair competition and trade-offs that might be necessary.<sup>74</sup> The DOJ's assistant attorney general and chief antitrust enforcer, Jonathan Kanter, emphasized that there is no special treatment for AI when it comes to upholding fair competition. Additionally, Lina Khan, the US Federal Trade Commission (FTC) chair, is concerned that the widespread adoption of AI solidifies the market power of tech giants. This could enable them to engage in collusive agreements and exclude “downstream competitors”.<sup>75</sup> She warned tech giants over their use and development of AI systems in a way that stifles competition.<sup>76</sup> This warning, along with the workshop, signals the Justice Department's proactiveness in preventing antitrust violations in the AI sector. A key concern was raised during the workshop was the potential for overregulation to stifle competition in the development of open-source AI models.<sup>77</sup> As open-source AI models make their source and codes available to everyone for use, modification and distribution.<sup>78</sup> Strict regulations could put these open-source AI models at a disadvantage as compared to closed, proprietary AI models, developed by large companies.

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<sup>74</sup>See Krysten Crawford,

*All eyes on AI: Promoting competition*, Stanford Institute for Economic Policy Research (SIEPR) (Jun. 4, 2024), <https://siepr.stanford.edu/news/all-eyes-ai-promoting-competition>.

<sup>75</sup>See Lina M. Khan, *Lina Khan: We Must Regulate A.I. Here's How.*, The New York Times (May 3, 2023), <https://www.nytimes.com/2023/05/03/opinion/ai-lina-khan-ftc-technology.html>.

<sup>76</sup>See Krysten Crawford,

*FTC's Lina Khan warns Big Tech over AI*, Stanford Institute for Economic Policy Research (SIEPR) (Nov 3, 2023), <https://siepr.stanford.edu/news/ftcs-lina-khan-warns-big-tech-over-ai>.

<sup>77</sup>See Crawford, *supra* note 57.

<sup>78</sup>See Tim Mucci, *Five open-source AI tools to know*, IBM (Dec. 15, 2023), <https://www.ibm.com/blog/five-open-source-ai-tools-to-know/>.

In January 2024, the FTC's Tech Summit<sup>79</sup> marked a deep dive into AI, with industry leaders engaging in discussions about fostering a fair and competitive AI landscape. This reflected the FTC's rising concern about AI's misuse and consumer harm.<sup>80</sup> In fact, their growing worries were underscored by their first enforcement action against Rite-Aid for discriminatory use of AI.<sup>81</sup>

In 2023, the FTC prioritised collaborating with the Office of Technology to protect fair competition, especially at critical junctures during technological advancements. Generative AI emerged as one such turning point.<sup>82</sup> The FTC observed that there is a high risk of market concentration within the AI industry.<sup>83</sup> According to the FTC, these are some reasons AI firms tend towards high market shares:<sup>84</sup>

1. Generative AI requires a massive amount of high-quality data for training its algorithms, which provides tech giants with a head start over new entrants in the market. It also allows the incumbents to leverage their superior AI models to prevent start-ups from entering the market altogether.
2. Other requirements for the operation and development of Generative AI include computation power. This forces new entrants to depend on pre-trained models, often offered by incumbents for free. This dependence creates a situation where only a few incumbents control the best models, restricting competition.
3. Network and Platform effects can create significant first mover advantages in Generative AI. Incumbents who get there first and establish a strong network and platform effects early on become even harder to compete with.

Moreover, these concerns are elaborated on in the FTC's blog, 'Generative AI Raises Competition Concerns'. The blog pointed out that tech giants controlling important resources (cloud

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<sup>79</sup>See Kirk J. Nahra, Arianna Evers, and Timothy J. Kolankowski, *FTC Hosts Tech Summit on Artificial Intelligence*, WILMERHALE (Feb.1, 2024), <https://www.wilmerhale.com/en/insights/blogs/wilmerhale-privacy-and-cybersecurity-law/20240201-ftc-hosts-tech-summit-on-artificial-intelligence>.

<sup>80</sup> See John Peckman, Robin Spillette, *Competition Authorities shining the light on AI*, FASKEN (May 1, 2024), <https://www.fasken.com/en/knowledge/2024/05/competition-authorities-shining-the-light-on-ai>.

<sup>81</sup> Press release, Rite Aid Banned from Using AI Facial Recognition After FTC Says Retailer Deployed Technology without Reasonable Safeguards, FEDERAL TRADE COMMISSION (Dec.19, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/12/rite-aid-banned-using-ai-facial-recognition-after-ftc-says-retailer-deployed-technology-without>.

<sup>82</sup>See *US antitrust enforcer says generative AI 'raises competition concerns'*, THE ECONOMIC TIMES, (Jun. 29, 2023, 10:22 PM), <https://economictimes.indiatimes.com/tech/technology/us-antitrust-enforcer-says-generative-ai-raises-competition-concerns/articleshow/101373580.cms>.

<sup>83</sup>See Spillette, *supra* note 63.

<sup>84</sup> *Id.*

computing, etc.) could unfairly squeeze out competition in the new Generative AI market. Some of the ways in which tech giants could hurt competition in the development and application of AI are as follows:<sup>85</sup>

1. Might bundle their existing products with new AI tools, making competitor offerings less attractive to consumers.
2. Might favour their own AI products and services within their ecosystems, restricting users' choices.
3. Might leverage their cloud dominance to give themselves and their partners an unfair advantage in AI development.
4. Might acquire promising AI start-ups to limit competition or control key inputs.

The FTC further started its investigations into some of the leading AI deals by major tech companies like Microsoft, Alphabet, Amazon, etc. On the other hand, the DOJ has launched several probes into competition within the AI sector. These probes primarily focus on antitrust violations by AI companies, particularly the practice of shared executives or directors across competing firms<sup>86</sup>.

In regard to the US political approach to regulating AI, it is pertinent to note that President Joe Biden on October 30, 2023, passed an Executive order on *“the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence”*<sup>87</sup>, prioritising fostering competition and innovative AI landscape<sup>88</sup>. Prior proactive measures taken by the Biden Administration towards regulating AI include efforts that resulted in *“voluntary commitments from 15 leading companies to drive safe, secure, and trustworthy development of AI”* and the creation of a Blueprint for an “AI Bill of Rights”. Hearings are underway and multiple draft bills, some with bipartisan support, have been introduced in the current congressional session, though it remains uncertain whether they will be enacted into law in this session. The Executive Order mainly outlines a “Federal Government-wide”, multi-agency

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<sup>85</sup> Office of Technology Blog, Generative AI Raises Competition Concerns, FEDERAL TRADE COMMISSION (Jun. 19, 2023), <https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/06/generative-ai-raises-competition-concerns>.

<sup>86</sup> See Leah Nysten and Sabrina Willmer, *US Justice Department Steps Up Focus on Competition in AI*, Bloomberg (May 9, 2024, 03:49), <https://www.bloomberg.com/news/articles/2024-05-08/us-justice-department-steps-up-focus-on-competition-in-ai>.

<sup>87</sup> THE WHITE HOUSE, FACT SHEET: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence (Oct. 30, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/>.

<sup>88</sup> See Spillette, *supra* note 63.

strategy for addressing both benefits and risks associated with the development of AI. It mandates various executive departments and agencies take actions within specified timeframes in the upcoming months, prior to the Presidential election on November 5, 2024). The order broadly envisions a broad array of guiding principles, reports, priorities and several other actions on AI.<sup>89</sup> In relation to competition, the Order stipulates:

*“The Federal Government will promote a fair, open, and competitive ecosystem and marketplace for AI and related technologies so that small developers and entrepreneurs can continue to drive innovation”.*<sup>90</sup>

Previously, Congress specifically tasked the FTC with investigating how AI could be used to address various online harms, including bias and abuses. This is aimed at making the FTC vigilant about how large companies use AI and prevent its misuse. In June 2022, the FTC issued a report titled ‘Combating Online Harms Through Innovation’.<sup>91</sup> The report identified a central concern: AI and algorithms are only as effective as the data they are trained on. The report warned that biased or flawed data with missing context could lead to unfair and discriminatory outcomes, similar to mistakes made by human operators and developers.<sup>92</sup>

Several tech giants currently dominate the Generative AI landscape, including Nvidia, Microsoft and OpenAI.<sup>93</sup> Nvidia stands out as a leader in the AI chip manufacturing market.<sup>94</sup> Besides, OpenAI, renowned for its popular Generative AI tool, ChatGPT, boasts a valuation exceeding \$80 billion.<sup>95</sup> Over the past few years, Microsoft has poured \$13 billion into OpenAI, thereby fostering

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<sup>89</sup> See Rachel Brandenburger, Pamela Passman, *Spotlight on AI Regulation—With a Focus on How Antitrust Agencies Say They Are Watching the Space*, apco (Jan. 18, 2024), <https://apcworldwide.com/blog/spotlight-on-ai-regulation-with-a-focus-on-how-antitrust-agencies-say-they-are-watching-the-space/>.

<sup>90</sup>Id.

<sup>91</sup> FTC, FTC Report to Congress: Combatting Online Harms Through Innovation 2 (2022).

<sup>92</sup>See Anthony E. DiResta, Zachary E. Sherman, *The FTC Is Regulating AI: A Comprehensive Analysis*, Holland & Knight (Jul. 25, 2024), <https://www.hklaw.com/en/insights/publications/2023/07/the-ftc-is-regulating-ai-a-comprehensive-analysis>.

<sup>93</sup>See Thomas Barrabi, *Feds to launch antitrust probe into Microsoft, OpenAI, Nvidia over ‘monopoly choke points’*, NEW YORK POST (Jun. 6, 2024, 11:16 a.m.), <https://nypost.com/2024/06/06/business/doj-to-scrutinize-big-techs-ai-dominance-with-urgency-antitrust-chief-says/>.

<sup>94</sup>See *Nvidia becomes world’s most valuable company fuelled by AI boom*, en.philenews (Jun. 19, 2024), <https://in-cyprus.philenews.com/insider/nvidia-becomes-worlds-most-valuable-company-fuelled-by-ai-boom/>.

<sup>95</sup>See Cade Metz and Tripp Mickle, *OpenAI Completes Deal That Values the Company at \$80 Billion*, The New York Times (Feb. 16, 2024), <https://www.nytimes.com/2024/02/16/technology/openai-artificial-intelligence-deal-valuation.html>.

a symbiotic relationship.<sup>96</sup> OpenAI leverages Microsoft's enormous computing power for refining its technology, while Microsoft integrates OpenAI's services into its core businesses.<sup>97</sup>

Regulators scrutinise these partnerships, concerned that they could give tech giants an unfair edge over their rivals. As part of its efforts to address tech giant's control of the AI space, the FTC, has, in recent months, issued compulsory orders to five major companies.<sup>98</sup> These orders require information about the companies' recent investments, strategic goals behind partnerships with leading cloud service providers and Generative AI firms, the competitive impact of these partnerships, and competition for key AI inputs like computing power and data.<sup>99</sup> Specifically, the FTC has launched a Section 6(b) investigation, targeting Alphabet, Anthropic, Amazon, OpenAI and Microsoft.<sup>100</sup> Chair Khan, has also previously emphasised on the importance of this authority as it allows the Commission to gain deeper insights into companies' practices, detect critical market trends and antitrust violations.<sup>101</sup>

Following these investigations, the FTC and DOJ collaborated earlier last year to divide up investigations into potential anti-competitive conduct by some companies. For instance: the DOJ will spearhead investigation into Nvidia's leading position in supply of high-end semiconductors, crucial for AI computing.

In contrast, the FTC will focus on whether Microsoft and its partner, OpenAI, have unfair advantages in the constantly evolving AI field, particularly within the field of technology for large language models.<sup>102</sup> The FTC is also examining Microsoft's relationship with another start-up, Inflection AI. In March 2024, Microsoft made an announcement of its new consumer AI division

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<sup>96</sup> See Jordan Novet, *Microsoft's \$13 billion bet on OpenAI carries huge potential along with plenty of uncertainty*, CNBC (Apr. 9, 2023, 10:40 PM), <https://www.cnbc.com/2023/04/08/microsofts-complex-bet-on-openai-brings-potential-and-uncertainty.html>.

<sup>97</sup> See Josh Sisco, *Both of these agencies want a piece of Microsoft's Open AI partnership*, POLITICO (Jan. 19, 2024, 02:14 PM), <https://www.politico.com/news/2024/01/19/doj-ftc-microsoft-openai-antitrust-00136624>.

<sup>98</sup> See *US antitrust inquiry targets OpenAI and Anthropic's deals with Big Tech*, Rappler (Jan. 26, 2024, 11:15 AM), <https://www.rappler.com/technology/us-antitrust-inquiry-targets-openai-anthropic-deals-big-tech/>.

<sup>99</sup> Press release, *FTC Launches Inquiry into Generative AI Investments and Partnerships*, FEDERAL TRADE COMMISSION (Jan. 25, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-launches-inquiry-generative-ai-investments-partnerships>.

<sup>100</sup> See Ashley Gold, Michael Flaherty, *U.S. to open broad antitrust probe into AI giants: source*, AXIOS (Jun. 6, 2024), <https://www.axios.com/2024/06/06/us-regulators-investigate-ai-companies>.

<sup>101</sup> See Karen M. Lent, Matthew M. Martino, Michael H. Menitove, David P. Wales, Oliver F. Green, *FTC Opens Inquiry Into AI Partnerships, Signaling Intensified Focus on Emerging Tech*, Skadden (Feb. 6, 2024), <https://www.skadden.com/insights/publications/2024/02/ftc-opens-inquiry-into-ai-partnership>.

<sup>102</sup> See *Navigating Antitrust in the Age of AI: Global Regulatory Scrutiny and Implications*, Debevoise & Plimpton (Jun. 20, 2024), <https://www.debevoise.com/insights/publications/2024/06/navigating-antitrust-in-the-age-of-ai-global>.

and recruited Inflection AI's co-founders, chief scientist, researchers alongside other employees.<sup>103</sup> Microsoft also acquired a license to Inflection AI's models for \$650 million.<sup>104</sup> The FTC investigates whether this deal constitutes an acquisition that Microsoft failed to report.

These instances collectively demonstrate the ongoing focus of the US antitrust agencies on how tech giants are attempting to gain an unfair advantage in the AI space, thereby hurting competitors.

#### 4. Implications of Violations under Antitrust Laws

Violations of antitrust laws can have far-reaching consequences, such as Federal agencies may go for civil enforcement actions, which ultimately would lead to civil monetary penalties and various injunction orders forcing companies to change their behaviour. Businesses or private individuals may go for private civil actions. This process can prove to be very expensive for the company to defend, and they may have to pay treble damages for the losses suffered by the plaintiff and attorney fees. In various severe cases, companies and culpable individuals (employees, internal management, and third parties) will face criminal prosecution under felony charges.<sup>105</sup> Companies face hefty fines of up to US\$100 or more in some circumstances for criminal violations of antitrust laws. Similarly, culpable individuals can be imprisoned for up to 10 years and fined up to US\$1 million.<sup>106</sup>

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<sup>103</sup>See *US senators call out big tech's new approach to poaching talent, products from smaller AI startups*, THE ECONOMIC TIMES (Jul. 13, 2024, 04:48 PM), <https://economictimes.indiatimes.com/tech/artificial-intelligence/us-senators-call-out-big-techs-new-approach-to-poaching-talent-products-from-smaller-ai-startups/articleshow/111713073.cms?from=mdr>. (hereinafter *US Senators*)

<sup>104</sup>See *US authorities greenlight antitrust probe into Microsoft, OpenAI, Nvidia*, COMMUNICATIONS TODAY (Jun. 6, 2024), <https://www.communicationstoday.co.in/us-authorities-greenlight-antitrust-probe-into-microsoft-openai-and-nvidia/>.

<sup>105</sup>*Id.*

<sup>106</sup>*Id.*



## IV. Comparison

The EU and the US differ in their enforcement of competition law. The EU imposes fines on companies through an administrative system.<sup>107</sup> In the US, there is a two-pronged approach: criminal (carried out by the DOJ) and civil (by the FTC) enforcements with potential fines and imprisonment for individuals.<sup>108</sup> An increasing trend emerges within the EU. Member states are increasingly criminal penalties against individuals for specific anti-competitive conduct.<sup>109</sup> Additionally, private lawsuits for treble damages are a significant tool in the US.<sup>110</sup>

Approaches to merger review also differ globally. Mandatory regime requires companies to notify the competition regulator and wait for their approval before closing the deal. Voluntary regime allows companies to close the deal before approval, but risk investigations and penalties later. The US and the EU have mandatory regimes.<sup>111</sup>

In the EU, antitrust claims originating from the use of AI are generally pursued either through the DMA or traditional antitrust rules. The EC's investigation into Microsoft Bing under the DMA, included its AI chatbot functions<sup>112</sup>. The European Parliament suggests expanding the DMA's scope to encompass Generative AI. It is worthwhile to note that antitrust agencies also investigate specific partnerships between tech giants and AI start-ups under both the merger and conduct regulations. The EU is wary that the control of data, which is critical for AI, will lead to market power abuses. To sum up, the EU is applying existing antitrust law alongside new regulatory measures for addressing AI-related antitrust issues.

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<sup>107</sup> See Ivan Milosevic, Andrea Cvetanovic, *Imposing Administrative Fines on Companies or What Is the Reason for Delaying the Adoption of European Values in the Countries of the Western Balkans*, CEE LEGAL MATTERS (Apr. 23, 2024), <https://ceelegalmatters.com/serbia/26247-imposing-administrative-fines-on-companies-or-what-is-the-reason-for-delaying-the-adoption-of-european-values-in-the-countries-of-the-western-balkans#:~:text=EU%20legislation%20prescribes%20a%20system,states%20or%20the%20European%20Commission.>

<sup>108</sup> See Michael Kades, *The state of U.S. federal antitrust enforcement*, Washington Center for Equitable Growth (Sept. 17, 2019), <https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/?longform=true>.

<sup>109</sup> See Romanoff, *supra* note 126.

<sup>110</sup> Department of Justice, *Public and Private Antitrust Enforcement in the United States* (Feb. 11, 2014), <https://www.justice.gov/atr/file/517756/dl#:~:text=Supreme%20Court%20also%20has%20called,crucial%20deterrent%20to%20potential%20violators.%E2%80%9D>.

<sup>111</sup> See Dietrich Marquardt, *The Achilles' heel that can frustrate a global transaction: Voluntary merger notification regimes*, NORTON ROSE FULBRIGHT, (Oct. 2021), <https://www.nortonrosefulbright.com/en/knowledge/publications/d7f0da38/the-achilles-heel-that-can-frustrate-a-global-transaction-voluntary-merger-notification-regimes>.

<sup>112</sup> See Jindrich Kloub, Deirdre Carroll and Laurine Daïnesi Signoret Wilson Sonsini Goodrich & Rosati, *European Union: How the European Commission is leading the charge in digital market regulation*, GCR (Jun. 7, 2024)

Conversely, the US enforces antitrust laws under the existing Sherman Act, Clayton Act and Federal Trade Commission Act. The FTC and DOJ mostly focus on market concentration resulting from partnerships, which could stifle competition. There is also growing concern about algorithmic collusion, wherein AI systems are used to automatically coordinate prices and market behaviours. This makes AI systems a facilitator of antitrust infringements. In the Vegas Strip Hotel Price fixing Case (2024)<sup>113</sup>, the DOJ even argued that using pricing algorithms without any explicit agreement to follow them can still constitute unlawful concerted action. Other concerning aspects of algorithms is information exchange, distorting competition. Under the Trump administration, it is yet to be seen what would constitute sufficient evidence for a Section 1 infringement and whether algorithmic pricing would be treated per se anti-competitive.

## V. Conclusion

Both the EU and US will likely evolve their approaches to AI regulation to ensure their regulation is balanced in fostering innovation while protecting competition, privacy, and consumer welfare. They make an effort to align these regulations with the needs of technological advancements and evolving competitive dynamics. The EU, with its proactive stance, is expected to further refine its regulatory regime and the US may need to adapt its existing laws to address the challenges posed by AI in the dynamic digital market.

The UK CMA's recent approval of two major AI deals (Microsoft-Inflection AI and Google-Anthropic) reflects a shift towards a more balanced and effective approach. The EU's proactive approach contrasts with the US' reactive approach, highlighting the ongoing quest among regulators for an effective approach for navigating complexities surrounding AI use, without affecting innovation. As AI technologies continue to reshape industries, staying abreast of these regulatory developments is crucial.

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<sup>113</sup>Richard Gibson, et al., v. Cendyn Group, LLC, et al. (2024)