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July 9, 2024

SUBJECT: Joint Section Comment to Canadian Competition Bureau on AI and Competition

Dear Sir/Madam:

On behalf of the American Bar Association Antitrust Law and International Law Sections, we respectfully submit this comment in response to Canadian Competition Bureau's discussion paper on artificial intelligence and competition. We appreciate the deadline extension that was granted for us.

The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,

David Schwartz
Chair, International Law Section

Fiona Schaeffer
Chair, Antitrust Law Section

COMMENTS OF THE AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION ON THE CANADIAN COMPETITION BUREAU'S DISCUSSION PAPER ON ARTIFICIAL INTELLIGENCE AND COMPETITION

July 9, 2024

The American Bar Association Sections of Antitrust Law and International Law (Sections) welcome the opportunity to participate in the Canadian Competition Bureau's (Bureau) public consultation process by responding to the issues raised in the Bureau's March 20, 2024 discussion paper on artificial intelligence (AI) and competition (Discussion Paper).[1] These comments reflect the expertise and experience of the Sections' members with competition law and economics.

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 9,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors, law, and economics students. The Antitrust Law Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the Antitrust Law Section have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Antitrust Law Section has provided input to enforcement agencies around the world conducting consultations on topics within the section's scope of expertise.[2]

The International Law Section focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing, and practical assistance related to cross-border activity. Its members total approximately more than 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The International Law Section's over fifty substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the International Law Section has provided input to debates relating to international legal policy. With respect

[1] Competition Bureau, Artificial Intelligence and Competition – Discussion Paper (Mar. 2024), https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/artificial-intelligence-and-competition [hereinafter Discussion Paper].

[2] Past comments of the Antitrust Law Section are available online at https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs. The Antitrust Law Section's positions expressed in this submission have been adopted by a majority of the Section's Council after debate reflecting the diversity of viewpoints among the Section's members.

to competition law and policy specifically, the International Law Section has provided input for decades to authorities around the world.[3]

EXECUTIVE SUMMARY

The Sections commend the Bureau's efforts to seek feedback on its Discussion Paper. While U.S. law has only begun to examine the effects of AI on competition issues, the Sections offer an overview of current and ongoing cases and enforcement priorities that may be of interest to the Bureau. The goal of this comment is to explain where U.S. enforcement and litigation overlap with certain issues in the Bureau's Discussion Paper to help advance the Bureau's understanding of how AI is affecting competition law.

Vigorous enforcement of antitrust and unfair competition laws plays a critical role in keeping all markets innovative and competitive. The Sections have long supported the evolution of antitrust and consumer protection laws to keep pace with evolving circumstances, technological innovation, new forms of competition, economic theory, and empirical evidence. In that spirit, the Sections commend the Bureau for taking the initiative to gather information and closely monitor developments in AI. The Sections support the Bureau's vigilance in scrutinizing AI markets for competitive concerns and, where appropriately supported by the evidence and applicable legal and economic principles, pursuing enforcement actions. In the exercise of such scrutiny, the Sections note that when discussing the antitrust impact of AI tools, it is important to distinguish between data monopsony issues present in antitrust markets for the development and distribution of AI software and monopoly issues present in the antitrust markets for products and services in which producers and consumers make use of AI.

Governments around the world are studying competitive effects in emerging technology markets. In the October 30, 2023 Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, President Biden called upon federal agencies (taking into account the views of industry, academia, and other stakeholders) to 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."[4] On November 8, 2023, competition law leaders and policymakers attended the G7 Hiroshima Summit on digital competition. At the conclusion of the Summit, the G7 competition authorities pledged to "take action by enforcing competition laws, improving the existing regulatory toolboxes, and developing new regulatory frameworks, to the extent necessary."[5] Nonetheless, the Sections respectfully submit that it is important to consider not just benefits but also the potential unintended consequences that may result from implementing a prescriptive regulation at this stage of development of these technologies, as well as under-enforcement and over-enforcement of existing laws in the area of AI.

Against this backdrop, in this submission Section I discusses the possible application of AI to algorithmic price-setting practices, which has raised questions about when AI price-setting constitutes tacit collusion or otherwise violates the antitrust laws. U.S. courts and enforcers are actively grappling with the issue, with significant attention paid to private class actions regarding competitors' joint use of pricing algorithms. Section II analyzes the role of data access and computational resources when developing competitive AI models. New market entrants without access to these inputs may face barriers to entry with respect to downstream AI model development. Antitrust enforcers can scrutinize these AI input markets for potential anticompetitive practices using existing antitrust policy and law. Lastly, Section III illustrates the application of existing merger law to AI markets by U.S. enforcers, who are scrutinizing the effect of

[3] *About Section Policy*, Am. BAR ASS'N, https://www.americanbar.org/groups/international_law/policy/about.

[4] Exec. Order No. 14,110 on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, 88 Fed. Reg. 75191, 75192 (Oct. 30, 2023).

[5] G7 Competition Authorities and Policymakers' Summit Digital Competition Communiqué ¶ 5 (Nov. 8, 2023), https://www.jftc.go.jp/en/pressreleases/yearly-2023/November/231108G7_result1EN.pdf.

mergers and strategic partnerships on issues including input foreclosure, nascent competition, and minority ownership.

SPECIFIC COMMENTS

I. AI and Tacit Collusion (Discussion Paper § 3.2.2)

One antitrust concern with the increasing use of AI is how algorithmic pricing—prices set using one or more algorithms, particularly those integrating AI—may lead to tacit collusion or price-fixing. The Discussion Paper states that "[t]his phenomenon [of tacit algorithmic collusion] has not yet been observed or proven explicitly in real-world markets."[6]

Unlike manual price setting, algorithmic pricing can integrate significant amounts of competitive information nearly-instantaneously, including competitor pricing, supply, demand, and customer personal data. As a result, algorithmic pricing enables businesses to set prices towards a specified objective consistently across sales while quickly incorporating changes in the market, which can improve competition.[7] However, for the same reasons, the use of algorithmic pricing can also reduce the effectiveness of discounting in a free market and deter defections in a cartelized market.[8]

The widespread adoption of algorithms can also create opportunities for collusion. Generally, a firm's implementation of its own pricing policies is unilateral conduct not subject to the prohibition set out in Section 1 of the U.S. Sherman Act on agreements in restraint of trade.[9] However, when competitors use the same algorithms, opportunities arise for competitors to covertly communicate or use the algorithm as the "hub" of a "hub-and-spoke" conspiracy.[10]

A. Private Litigation

The development of U.S. antitrust law regarding AI-powered algorithmic pricing has thus far been primarily driven by private suits. These cases, all private class actions, allege illegal price-fixing or improper information exchange as a result of competitors' joint use of algorithmic pricing, in the form of a software product developed by a single vendor that sells the product to multiple competitors. The table below provides examples of ongoing litigation illustrating the types of allegations present in algorithmic pricing cases and how courts are grappling with whether these constitute restraints of trade.

Case	Allegation and Developments	Status
In re RealPage, Case No. 3:23-md-3071 (M.D. Tenn.)	The district court found the class plaintiffs adequately pleaded price-fixing by alleging that RealPage's customers were mutually aware that they were sharing proprietary data with RealPage's algorithm, and that the proprietary data was factored into the algorithm's outputs.	Complaints filed between November 2022 and January 2023; consolidated April 10, 2023; in discovery since January 2024.
Gibson v. Cendyn Group, Case No. 2:23-cv-00140, (D. Nev.)	Private plaintiffs filed a class action alleging price-fixing among multiple Las Vegas hotel operators who all used pricing	Initial complaint filed January 25, 2023; dismissed without prejudice on October 24, 2023; amended

[6] Discussion Paper, *supra* note 1, § 3.2.2.

[7] OECD, Algorithms and Collusion – Note by the United States, DAF/COMP/WD(2017)41, ¶¶ 3-4 (May 26, 2017), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/algorithms.pdf.

[8] *Id.* ¶ 5.

[9] *See, e.g.*, Maureen K. Ohlhausen, Should We Fear Things That Go Beep In the Night? Some Thoughts on Intersection of Antitrust Law and Algorithmic Pricing, Address Before the Concurrences Antitrust in the Financial Sector Conference (May 23, 2017), https://www.ftc.gov/system/files/documents/public_statements/1220893/ohlhausen_-_concurrences_5-23-17.pdf.

[10] *Id.* at 10 ("If it isn't ok for a guy named Bob to do it, then it probably isn't ok for an algorithm to do it either.").

Case	Allegation and Developments	Status
	algorithms provided by Rainmaker Group, a subsidiary of data software company Cendyn Group. The initial complaint was dismissed without prejudice because, among other reasons, plaintiffs failed to allege that the different hotel operators used the same pricing algorithm (of multiple offered by Rainmaker), or that the algorithm incorporated the proprietary data of rival hotel operators. The amended complaint was dismissed with prejudice because plaintiffs failed to allege that the defendants (i) agreed to adopt Cendyn's pricing recommendations, (ii) used the algorithm at the same times over a 10-year period; or (iii) exchanged non-public information.	complaint dismissed with prejudice on May 8, 2024.
Portillo v. CoStar Group, Case No. 2:24-cv-00229 (W.D. Wash)	Complaint filed alleging provider of data regarding hotel room rates insufficiently aggregated and anonymized the data it provides, enabling competitors to deanonymize the information.	Complaint filed February 20, 2024.
Duffy v. Yardi Systems, Case No. 2:23-cv-01391 (W.D. Wash.)	Plaintiff alleging that property managers in the multifamily housing market outsourced their pricing and supply decisions to Yardi System's RevenueIQ/RENTmaximizer algorithm, with competitors aware that other competitors are using the algorithm.	Complaint filed September 9, 2023
Cornish-Adebiyi v. Caesars Entertainment, Inc., Case No. 1:23-cv-02536 (D.N.J.)	Private plaintiffs filed a class action alleging price-fixing among multiple Atlantic City hotel operators who all used pricing algorithms provided by Rainmaker Group, a subsidiary of data software company Cendyn Group.	Complaint filed May 9, 2023
Segal v. Amadeus IT Group, S.A. et al., Case No. 1:24-cv-01783 (N.D. Ill.)	Private plaintiffs filed a class action suit alleging unlawful sharing of forward-looking data between major hospital companies using Amadeus Hospitality's analytics platform.	Complaint filed March 1, 2024
Dai et al. v. SAS Institute, Inc. et al., Case No. 3:24-cv-02537 (N.D. Cal.)	Private plaintiffs filed a class action alleging price-fixing among multiple hotel operators in several major metro areas who all used pricing algorithms provided by IDeaS, a subsidiary of SAS Institute, Inc.	Complaint filed April 26, 2024

Federal enforcers have not yet filed lawsuits against the defendants in the above private class actions,[11] but they have filed statements of interest in several of the cases outlining their view of how existing law should be applied.[12] For example, in *RealPage*, the U.S. Department of Justice (DOJ) argued in a memorandum that the plaintiffs' allegations should be analyzed as price-fixing under existing law. The DOJ stated that the allegations of circumstantial evidence establish that an agreement existed between competitors.[13] The DOJ then further argued that the stringent *per se* standard employed for "hardcore" antitrust violations, not the more flexible rule of reason, was the applicable standard.[14] According to the DOJ, competitors engage in price-fixing when they knowingly combine their sensitive, nonpublic pricing

[11] The U.S. Department of Justice's Antitrust Division is, however, reportedly investigating RealPage. *See* Josh Sisco, *DOJ Escalates Price-Fixing Probe on Housing Market*, POLITICO (March 20, 2024) https://www.politico.com/news/2024/03/20/rental-housing-market-doj-investigation-00147333. Local enforcers in both Arizona and D.C. have also filed lawsuits against RealPage for conduct in their respective jurisdictions under theories of harm similar to those in *In re RealPage*. *See* Complaint, D.C. v. RealPage, Inc., No. 2023-CAB-006762 (D.C. Super. Ct. Nov. 1, 2023); Complaint, Arizona v. RealPage, Inc., No. CV2024-003889 (Ariz. Super. Ct. Feb. 28, 2024).

[12] Memorandum of Law in Support of the Statement of Interest of the United States, In re RealPage, Inc., No. 3:23-MD-3071 (M.D. Tenn. Nov. 11, 2023); Statement of Interest of the United States, Karen Cornish Adebiyi v. Caesars Ent., Inc. et al., No. 1:23-cv-02536 (D.N.J. March 28, 2024); Duffy v. Yardi Sys., Inc., 2024 WL 1676683 (W.D. Wash. April 18, 2024).

[13] Memorandum of Law in Support of the Statement of Interest of the United States at 12-14, In re RealPage, No. 3:23-MD-3071 (M.D. Tenn. Nov. 11, 2023).

[14] *Id.* at 18.

and supply information via algorithms, with the knowledge and expectation that other competitors would do likewise.[15]

In denying a motion to dismiss, the Court in *RealPage* agreed with DOJ's conclusions but not with its analysis. The Court held that the circumstantial evidence alleged adequately pleaded an agreement in restraint of trade.[16] However, the Court declined to apply the *per se* standard suggested by the DOJ, noting that the alleged conspiracy was not a "traditional straightforward price-fixing conspiracy" and should thus be assessed under the rule of reason standard, in part because the case presented a novel way of doing business not yet conclusively studied.[17]

In joint statements of interest in *Yardi Systems* and *Caesars*, the DOJ and the Federal Trade Commission (FTC) reiterated these arguments with further detail. Applying the argument from the *RealPage* brief, the agencies explain that direct communications between competitors are not necessary to find an agreement between them, indicating that joint delegations of pricing decisions to algorithms are illegal price-fixing agreements as a "rimless hub-and-spoke" conspiracy.[18] The agencies stated such an agreement would be an antitrust violation regardless of the algorithms' efficacy because the *agreement* between competitors is the forbidden conduct.[19] For the same reason, the agencies explained that independent subsequent deviations from a joint pricing recommendation do not remedy such agreements to jointly delegate pricing decisions, citing precedent on the fixing of list prices and sticker prices where sellers retained authority to deviate from an initial fixed price. The courts have yet to rule on the arguments in these cases.[20]

The differing outcomes in each of the cases and the unwillingness thus far of some courts to accept the reasoning of U.S. antitrust enforcers illustrate the active and unsettled debate over how existing law applies to AI markets.

B. Government Litigation

The FTC's challenge against Amazon, Inc.[21] is currently the primary federal enforcement action challenging the use of AI-powered algorithms as an anticompetitive practice.[22] The FTC's allegations against Amazon are wide-ranging, alleging monopolization and other anticompetitive practices in addition to an array of state antitrust law claims by 18 state attorneys general who have joined the complaint.[23] These claims include a charge that Amazon's use of its "Project Nessie" algorithm constitutes a "standalone" Section 5 claim, a statutory basis for litigation that is uniquely available to the FTC.[24] Section 5 of the FTC Act generally prohibits "unfair methods of competition" and is increasingly being used by the FTC to

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15 *Id.*

16 In re RealPage, Inc., No. 3:23-MD-03071, 2023 WL 9004808, at **4-5 (M.D. Tenn. Dec. 28, 2023).

17 In re RealPage, Inc., No. 3:23-MD-03071, 2023 WL 9004806, at *24 (M.D. Tenn. Dec. 28, 2023).

18 Statement of Interest of the United States at 8, Cornish-Adebiyi v. Caesars Ent., Inc. et al., No. 1:23-cv-02536 (D.N.J. March 28, 2024).

19 *Id.* at 12; Duffy v. Yardi Sys., Inc., 2024 WL 1676683, at *4 (W.D. Wash. April 18, 2024).

20 Statement of Interest of the United States at 12 - 13, Cornish-Adebiyi v. Caesars Ent., Inc. et al., No. 1:23-cv-02536 (D.N.J. March 28, 2024); *Duffy* at *4-5; *see also* Hannah Garden-Monheit & Ken Merber, *Price Fixing By Algorithm is Still Price Fixing*, FED. TRADE COMM'N (Mar. 1, 2024), https://www.ftc.gov/comment/197878.

21 Complaint, Fed. Trade Comm'n v. Amazon, No. 2:23-cv-01495 (W.D. Wash. Nov. 2, 2023), ECF No. 114 [hereinafter Amazon Complaint].

22 However, the agencies have previously considered how technological advances present opportunities for collusive behavior. *See* United States v. Airline Tariff Pub. Co., 836 F. Supp. 9 (D.D.C. 1993) (pre-AI Section 1 case involving conspiracy via an online airline reservation system).

23 Amazon Complaint, *supra* note 21, at 133-157.

24 *Id.* at 135-136.

challenge conduct that may not cleanly fit within existing precedent under other competition statutes such as the Sherman Act or Clayton Act.[25]

According to the FTC complaint, Project Nessie is an algorithm that anticipates whether competitors' pricing responds to Amazon's own pricing, which Amazon then allegedly uses to manipulate other sellers into raising prices in tandem with Amazon's own increases.[26] The FTC does not allege that the conduct violates Section 1 of the Sherman Act, suggesting that it intends to apply Section 5 to certain unilateral applications of algorithmic pricing that would not otherwise be forbidden by U.S. antitrust laws.[27]

C. Legislative Deliberations

Legislators are also considering ways to address algorithmic price fixing, although no such amendment has yet been enacted. The Preventing Algorithmic Collusion Act[28] would make it unlawful to use or distribute any pricing algorithm—defined to capture machine learning or other AI techniques—that uses, incorporates, or was trained with nonpublic competitor data. The law would also create a presumption of price-fixing when a defendant has distributed such pricing algorithms to more than one person for the purposes of setting or recommending prices.

Along similar lines the Preventing the Algorithmic Facilitation of Rental Housing Cartels Act addresses similar conduct specifically within the rental housing market.[29] If applied to the currently pending cases, the laws would significantly reduce the burden on plaintiffs to prove that competitors agreed to fix prices. Plaintiffs would only need to show that at least two competitors purchased services from a provider of algorithmic pricing services, without a need to demonstrate whether such conduct constitutes an agreement between competitors. Both bills have been referred to the Senate Judiciary Committee. While some legal commentators have described the legislation as a way to close gaps in the law,[30] others have expressed concern that such a law would collapse the distinction between bare information sharing and collusive price-fixing.[31]

II. Barriers to Entry (Discussion Paper § 3.1.1)

The Bureau correctly recognizes that "[p]articipation in AI development markets heavily relies on the ability to access data and [computational] inputs" and that there is "an emerging market for data providers for AI purposes."[32] These inputs can serve as a barrier to entry given the importance of raw data and computational resources in the model development process.

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[25] 15 U.S.C. § 45.

[26] Amazon Complaint, *supra* note 21, at 127-29.

[27] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Fed. Trade Commission Act, File No. P221202 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf (detailing the FTC's most recent view of its authority on Section 5).

[28] Preventing Algorithmic Collusion Act of 2024, S.3686, 118th Cong. (2024), https://www.congress.gov/bill/118th-congress/senate-bill/3686.

[29] Preventing the Algorithmic Facilitation of Rental Housing Cartels Act of 2024, S.3692, 118th Cong (2024), https://www.congress.gov/bill/118th-congress/senate-bill/3692.

[30] Bruce D. Sokler, et al., *Senators Propose Clarification of Antitrust Law to Expressly Cover Algorithmic Collusion – AI: The Washington Report*, MINTZ (Feb. 8, 2024) https://www.mintz.com/insights-center/viewpoints/2191/2024-02-07-senators-propose-clarification-antitrust-law-expressly.

[31] David Hamilton, et al., *The Preventing Algorithmic Collusion Act: A Swing and a Miss?*, DLA PIPER (Feb. 27, 2024), https://www.dlapiper.com/en/insights/publications/2024/02/the-preventing-algorithmic-collusion-act.

[32] Discussion Paper, *supra* note 1, § 3.1.1. *See also Generative AI Raises Competition Concerns*, FED. TRADE COMM'N (June 29, 2023), https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/06/generative-ai-raises-competition-concerns (identifying data, talent, and computational inputs as potential inputs to AI development that could require antitrust scrutiny).

A. Data as a Barrier to Entry

Access to a substantial volume of high-quality data may be important and even essential in some cases to create competitive AI models from scratch. New entrants or others without such access may struggle to compete against large incumbents who have been developing data collection technology and collecting user data for years. Although merely having large amounts of data is not unlawful, the FTC has asserted that large incumbents' control over data can "create barriers to entry or expansion that prevent fair competition from fully flourishing."[33]

The data used by model creators vary in the degree to which they are publicly available to market participants. Public data, or easily observable data such as address data, tend to have lower barriers to entry than proprietary datasets involving user behavior. The proprietary nature of certain pieces of data may leave upstart model developers without access to comparable data at a severe disadvantage to incumbents. Competition concerns may also arise from collusive data partnerships that foreclose market participants from access to certain data.

Access to data in specialized data markets, if heavily restricted, may prevent new entrants from developing AI models by using such data. Specialized data protections can come from a combination of restricted sharing due to the sensitivity of health and financial data and significant investments in data collection. Issues around specialized data are not new. For example, in 2014 the FTC identified the anticompetitive effects of concentration of specialized data in the proposed merger between Verisk and Eagleview, two companies who collect rooftop measurement data used by insurance companies to estimate repair costs.[34] The FTC alleged that the merger would have resulted in an unlawful concentration in the market for rooftop aerial measurement products (the image libraries and proprietary technology that interprets them). The parties ultimately abandoned the merger, illustrating the potential for enforcers to prevent transactions that combine substitute suppliers or specialized data, potentially reducing the number of options model developers have when developing AI models.

Beyond formal consolidation via merger, joint data partnerships are another area worthy of antitrust scrutiny since they can raise barriers to entry for competitors. Data partnerships like these are not new, either. In 2009, the DOJ investigated Microsoft and Yahoo!'s partnership to combine their online search. Although this partnership reduced the number of competitors in the search engine market, the DOJ cleared the transaction in part because of the need for robust search data in the creation of a viable search product to compete with Google.[35] As discussed in more detail below, the FTC issued inquiries into many leading generative AI and cloud service platforms to better understand how direct investments and partnerships between major technology companies could affect competition.[36] Data partnerships may spur or inhibit competition and enforcers can examine the circumstances in question using customary antitrust analyses to find any anticompetitive effects.[37]

Lastly, data creators, like artists, writers, and publishers, are more actively seeking to protect and control the use of their data. Despite much of the content being readily available online, many creators still

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[33] *Id.*

[34] Complaint, In the Matter of Verisk Analytics, Inc., Insurance Service Office, Inc., and EagleView Tech. Corp., FTC Docket No. 9363 (Dec. 16, 2014), https://www.ftc.gov/system/files/documents/cases/141216veriskcmpt.pdf.

[35] Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and the Right [Approach] to Privacy*, 80 ANTITRUST L.J. 121, 143-144 (2015). *See* also Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of the Internet Search and Paid Search Advertising Agreement Between Microsoft Corporation and Yahoo! Inc. 1–2 (Feb. 18, 2010), http://www.justice.gov/atr/public/press_releases/2010/255377.pdf.

[36] Press Release, Fed. Trade Comm'n, FTC Launches Inquiry into Generative AI Investments and Partnerships (Jan. 25, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-launches-inquiry-generative-ai-investments-partnerships.

[37] Ohlhausen & Okuliar, *supra* note 35, at 151-152.

retain copyright ensuring prevention of unauthorized monetization of their work. After the first wave of AI products like ChatGPT, copyright holders now seek to control access to data and potentially create revenue from model developers who require large well-archived data sets. This is an area where competitive concerns about data access come into tension with copyright law. Copyright litigation highlights the value of data as an input for AI developers and is being brought with increasing frequency by copyright holders. For example, the New York Times sued OpenAI over the use of Times' articles in the training of ChatGPT and seek deletion of AI models using its articles as training data.[38] This case and many others seek clarity in whether the "fair use" doctrine in U.S. copyright law can immunize the ingestion and processing of copyrighted information by AI models, especially when the underlying training data can be easily accessed on the internet.

Licensing is one method by which companies seek to secure rights to use data that is or may be proprietary. Companies with large volumes of data are creating new revenue streams by licensing data to model developers. Reddit's $60 million per year licensing arrangement with Google provides Google with valuable real-time Reddit data, while Reddit will gain access to a tailored Google AI to support its search functionality.[39] In response, the FTC opened an inquiry into the licensing arrangement.[40] Whether through licensing arrangement or litigation, companies with substantial troves of data are actively trying to both monetize and protect their IP despite the ease of accessibility of this content via the Internet. However, the cost of access to a valuable dataset could pose a significant barrier to entry for new entrants who may be limited to scraping the internet.

Data is one of the key inputs to AI models and accordingly is a vital consideration in conduct and merger cases in the AI sector. Classical antitrust analytical tools can be used to examine data markets, but enforcers should be mindful of how other areas of law like copyright and privacy interact with competitive markets. Active litigation and new licensing models are being developed and should be monitored to ensure access to data does not impede competition.

B. Computational Inputs as a Barrier to Entry

In addition to data, the Bureau correctly identifies the vital role of computation inputs to AI development. The FTC recently conducted an inquiry into the business practices of several companies that have emerged as the leading providers of cloud computing services.[41] Comments are currently being collected to identify the types of conduct currently in the market and to learn whether and if so, how existing antitrust laws may be ineffective.

In closing, Canadian and U.S. enforcers both recognize the potential ability of data and cloud computing resources to pose a barrier to entry to new market participants. The various inquiries and policy statements signal an ability and willingness by U.S. enforcers to scrutinize both sets of product markets using existing policy and law.

III. Considerations for Mergers (Discussion Paper § 3.1.6)

The Bureau's Discussion Paper highlights several considerations for mergers and acquisitions, two of which are a particular focus of U.S. enforcers in the context of AI: vertical mergers (input foreclosure)

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[38] N.Y. Times v. Microsoft Corp. et al., No. 1:23-cv-11195 (S.D.N.Y. Dec. 27, 2023).

[39] Emma Roth, *Google cut a deal with Reddit for AI training data*, THE VERGE (Feb. 22, 2024), https://www.theverge.com/2024/2/22/24080165/google-reddit-ai-training-data.

[40] *Reddit Receives FTC Inquiry on AI-Related Deals Ahead of IPO*, REUTERS (Mar. 15, 2024), https://www.reuters.com/technology/reddit-receives-ftc-inquiry-ai-related-deals-ahead-ipo-2024-03-15.

[41] *See* Solicitation for Public Comments on the Business Practices of Cloud Computing Providers (Mar. 22, 2023), https://www.regulations.gov/docket/FTC-2023-0028/document.

and conglomerate mergers (tying, nascent competition).[42] To assist the Bureau in understanding where U.S. and Canadian merger policies may align in the field of AI, below we provide an overview of how the FTC and DOJ have addressed vertical and conglomerate issues in the AI context. Merger scrutiny in the AI context comes amidst proposed changes to the DOJ and FTC's merger guidelines.[43] The policy positions espoused by the agencies depart from prior guidance and jurisprudence. Critics of the guidelines identify the absence of any safe harbors, novel presumptions of illegality, and resurrection of theories like implications of potential competition.[44] We also highlight one area of FTC focus not expressly addressed by the Bureau, acquisitions involving partial control or minority ownership.

A. Vertical Theories of Harm

U.S. courts have yet to meaningfully address data or other input markets in the context of AI given the early stages of litigation and investigations in the space. U.S. enforcers, however, point to the importance of data and other inputs in a range of industries, including AI. For example, the FTC recently challenged an acquisition involving critical inputs in the medical testing industry in *Illumina/Grail*.[45]

Since the FTC sued to block Illumina's proposed acquisition of Grail, the FTC and DOJ have issued statements voicing their concerns around input foreclosure in the AI context. In June 2023, the FTC, describing generative AI technology as presenting a "paradigm shift" in competition law, published a statement titled "Generative AI Raises Competition Concerns" wherein it outlined its view as to the competitive implications of three key inputs into generative AI: data, computational resources (e.g., chips, cloud computing), and human talent.[46]

Developing commercially successful AI tools may depend on access to data and computational power, among other things.[47] In its June Statement, the FTC underscored its vertical concerns with respect to these inputs. The agency asserted that data, talent, and computational resources are "key building blocks" for generative AI and that any assertedly small number of incumbents controlling data, computational resources, or talent "may try to buy up critical applications and cut off rival access to core products" or engage in input foreclosure by trying to "buy up complementary applications and bundle them together."[48]

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[42] Discussion Paper, *supra* note 1, § 3.1.6.

[43] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, MERGER GUIDELINES (Dec. 18, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [hereinafter U.S. MERGER GUIDELINES].

[44] Keith Robert Fisher, *Progression and Retrogression in Antitrust Scrutiny Under the Merger Guidelines*, ABA (May 9, 2024), https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-may/progression-retrogression-antitrust-scrutiny-merger-guidelines. *See also* Ted Bolema, *Decoding the 2023 FTC and DOJ Merger Guidelines: Insights into Shifting Antitrust Enforcement*, MERCATUS CENTER, (Feb. 15, 2024), https://www.mercatus.org/research/policy-briefs/decoding-2023-ftc-and-doj-merger-guidelines-insights-shifting-antitrust; Sean Heather, *The Final Merger Guidelines: A Nightmare Before Christmas?*, U.S. CHAMBER OF COMM. (Dec. 19, 2023), https://www.uschamber.com/antitrust/the-final-merger-guidelines-a-nightmare-before-christmas.

[45] Illumina, Inc. & GRAIL, Inc., FTC Docket No. 9401, https://www.ftc.gov/legal-library/browse/cases-proceedings/201-0144-illumina-inc-grail-inc-matter; U.S. MERGER GUIDELINES, *supra* note 43, § 2.5. Illumina, a DNA sequencing firm, had proposed to acquire Grail, a maker of cancer detection tests. The FTC alleged that the merger would provide Illumina with the ability to harm by Grail's competitors by impeding access to Illumina's gene sequencing platform.

[46] FTC, *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 [hereinafter June 2023 FTC Statement]. The 2023 U.S. Merger Guidelines recognize the danger of foreclosure, stating that "mergers can violate the law when they create a firm that may limit access to products or services that its rivals use to compete." U.S. MERGER GUIDELINES, *supra*, note 43, § 2.5.

[47] Discussion Paper, *supra* note 1, § 2.1 ("Firms in AI development markets rely on access to expertise, data, and compute to design and train AI technologies.").

[48] *See* June 2023 FTC Statement, *supra* note 46. The FTC explained that "incumbents may be able to link together new generative AI applications with existing core products to reduce the value of competitors' standalone generative AI offerings" or "funnel[] users toward their own generative AI products instead of their competitors' products." *Id*.

Transactions among these stakeholders will likely pose questions under U.S. vertical merger policy. Whether these views and approaches will be accepted in litigation has not yet been determined.

B. Nascent Competition

The Bureau also recognizes risks of "conglomerate mergers," which generally implicate large technology firms and strategies including bundling/tying and acquisitions of nascent competition.[49] U.S. enforcers are particularly focused on nascent competition.[50] In 2022, the FTC unsuccessfully sought to enjoin Meta's acquisition of Within Unlimited, Inc. on the grounds that the acquisition would eliminate both present and future competition for VR fitness apps, in part because post-acquisition, Meta "would no longer have any incentive to develop its own competing app from scratch. . .to compete. . .on the merits."[51] In denying the FTC's motion for a preliminary injunction halting the acquisition, the District Court accepted the FTC's potential competition theories of harm but found that the FTC failed to produce adequate evidence of Meta's ability and incentives to actually enter the relevant VR fitness app market.[52] In doing so, the Court pointed to a lack of evidence that Meta had the ability to effectively enter the market, and further that market participants changed their behavior in response to such a possibility.[53]

In its June 2023 statement, the FTC recognized the danger of incumbents acquiring rivals rather than trying to out-compete them in the AI context, noting that large incumbent firms active in generative AI or who control a critical input "may be tempted to simply buy up nascent rivals instead of trying to out-compete them by offering better products or services."[54] FTC and DOJ leaders have themselves publicly voiced analogous concerns. Lina Khan, Chair of the FTC, warned that large incumbents could "panic" and block or buy new entrants, to protect their moats and protect their dominance.[55] Jonathan Kanter, Assistant Attorney General for the DOJ's Antitrust Division, voiced similar concerns in light of what he called the AI industry's inherent dependence on scale.[56]

Startups have thus far been at the forefront of AI development. Some of these companies, such as OpenAI, Character.AI, and Anthropic, have garnered billion-dollar valuations and interest from some of the largest U.S. technology firms.[57] In an industry where enforcers worry that incumbent firms could use M&A activity "to consolidate market power in the hands of a few players," acquisitions or partnerships involving these companies have drawn, and will continue to, draw, scrutiny by U.S. enforcers.[58] Again, it remains uncertain whether and to what extent the agencies' views will be regarded as persuasive to courts in resolving litigated claims.

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[49] Discussion Paper, *supra* note 1, § 3.1.6.

[50] U.S. MERGER GUIDELINES, *supra*, note 43, § 2.4 ("mergers can violate the law when they eliminate a potential entrant in a concentrated market").

[51] Amended Complaint For a Preliminary Injunction Pursuant to Section 13(B) of the Federal Trade Commission Act at 5, Fed. Trade Comm'n v. Meta Platforms, Inc., No. 5:22-cv-04325 (N.D. Cal. Oct. 7, 2022), ECF No. 101-1.

[52] Fed. Trade Comm'n v. Meta Platforms Inc., 654 F. Supp. 3d 892 (N.D. Cal. 2023).

[53] *Id.*

[54] June 2023 FTC Statement, *supra* note 46.

[55] Jan Wolfe & Dave Michaels, *FTC Chair Lina Khan Vows to Protect Competition in AI Market*, WALL ST. J. (Mar. 27, 2024), https://www.wsj.com/articles/ftc-chair-lina-khan-vows-to-protect-competition-in-ai-market-bb80e460.

[56] Dep't of Justice, *2023 Annual Antitrust Enforcers Summit: Welcome and Interviews of AAG Kanter and FTC Chair Khan*, YOUTUBE (Mar. 28, 2023), https://youtu.be/bmPLUIEGxeo?si=-wOsXbPqVn1WJfnu.

[57] Edward Ludlow, Priya Anand & Sarah McBride, *Character.AI in Funding Talks at More than $5 Billion Valuation*, BLOOMBERG LAW (Sept. 28, 2023) https://news.bloomberglaw.com/private-equity/character-ai-in-funding-talks-at-more-than-5-billion-valuation ("For example, Character.AI, an AI chatbot startup founded in [2021] has raised hundreds of millions of dollars in funding and as of November 2023 was valued at approximately $5 billion.").

[58] June 2023 FTC Statement, *supra* note 46.

C. Partnerships

U.S. enforcers also assert that transactions involving partial ownership or minority interests warrant scrutiny for their impact on competition.[59] Although not expressly identified by the Bureau as a consideration for mergers, such transactions in the AI space have become a hotspot of FTC inquiry. In January 2024, the FTC launched an inquiry into several technology companies' investments in or partnerships with AI developers and the potential impact of such partnerships and investments on competition.[60] The orders, which are non-public, are issued pursuant to Section 6(b) of the FTC Act, which authorizes the FTC to conduct studies that allow enforcers to gain a deeper understanding of market trends and business practices.[61] The FTC issued orders to Alphabet (Google's parent company), Amazon, Anthropic, Microsoft, and OpenAI, each of whom is involved in three separate "multi-billion-dollar investments: Microsoft and OpenAI, Amazon and Anthropic, and Google and Anthropic.

By way of background, Microsoft, Amazon, and Google have not acquired control of OpenAI or Anthropic but instead have built minority positions in the companies bolstered by ongoing partnership commitments. Microsoft owns a minority interest in OpenAI, is the exclusive cloud computing provider via its Azure platform, and has partnered with OpenAI to offer new AI-powered services.[62] Amazon has committed to invest up to $4 billion in Anthropic in exchange for a minority ownership position in the company, Amazon Web Services will become Anthropic's primary cloud provider, and is providing chips to develop future AI foundation models.[63] Google has also announced a $2 billion investment in Anthropic and a partnership whereby Google will provide Anthropic with cloud computing resources for future development of Anthropic's AI models.[64]

According to the FTC, its inquiry seeks information related to, among other things, the strategic rationale of these investments, the practical implications around these transactions, an analysis of the transactions' competitive impact, and the competition for AI inputs and resources (data, computing power, and talent). The inquiry is ongoing and as of the time of this writing, the FTC has not yet published its findings. In June 2024, the FTC and DOJ reportedly reached an agreement to investigate key AI participants Nvidia, OpenAI, and Microsoft.[65] Such an agreement echoes the agencies' 2019 agreement to investigate Google, Amazon, Microsoft, and Apple for anticompetitive practices and would be one of the strongest signals yet of antitrust enforcers' desire to regulate AI firms. Although this comment is focused on U.S. enforcement efforts, Big Tech's AI partnerships have drawn scrutiny in other jurisdictions. For example, in April 2024, the United Kingdom's Competition and Markets Authority announced a probe into Microsoft's relationships with Mistral AI and Inflection AI and Amazon's partnership with Anthropic.[66] Minority acquisitions and partial ownership of AI firms is thus an issue the Bureau may consider going forward.

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[59] U.S. MERGER GUIDELINES, *supra*, note 43, §2.11 ("acquisition of less-than-full control may still influence decision-making at the target firm or another firm in ways that may substantially lessen competition").

[60] FTC Press Release, *supra* note 36.

[61] 15 U.S.C. § 46(b). The FTC has exercised its 6(b) authority to study a number of industries, including the business practices of pharmacy benefit managers (2022), how social media and video streaming services use consumer data (2020), and how broadband companies collect, retain, use, and disclose information about consumers and their devices (2019).

[62] *See Microsoft and OpenAI Extend Partnership*, MICROSOFT (Jan. 23, 2023) https://blogs.microsoft.com/blog/2023/01/23/microsoftandopenaiextendpartnership.

[63] *See Amazon and Anthropic Announce Strategic Collaboration to Advance Generative AI*, AMAZON (Sept. 25, 2023) https://press.aboutamazon.com/2023/9/amazon-and-anthropic-announce-strategic-collaboration-to-advance-generative-ai.

[64] *See Google Announces Expansion of AI Partnership with Anthropic*, GOOGLECLOUD (Nov. 8, 2023) https://www.googlecloudpresscorner.com/2023-11-08-Google-Announces-Expansion-of-AI-Partnership-with-Anthropic.

[65] David McCabe, *U.S. Clears Way for Antitrust Inquiries of Nvidia, Microsoft and OpenAI*, N.Y. TIMES (Jun. 4, 2024), https://www.nytimes.com/2024/06/05/technology/nvidia-microsoft-openai-antitrust-doj-ftc.html.

[66] The probe is ongoing, however in May 2024 the CMA announced that it would not pursue an investigation into the Microsoft/Mistral partnership. *See Microsoft/Mistral AI Partnership Merger Inquiry*, COMPETITION & MKTS. AUTH., https://www.gov.uk/cma-cases/microsoft-slash-mistral-ai-partnership-merger-inquiry#found-not-to-qualify-decision.

In sum, Canadian and U.S. enforcers both recognize that transactions involving AI firms may present a variety of competitive issues around input foreclosure, tying, and nascent competition. The public statements, intra-agency agreements, and industry inquiries that so far mark the limit of enforcement action nonetheless signal a willingness by U.S. enforcers to scrutinize AI transactions using existing policy and law.