



AI Talks: A Cross-Disciplinary Series

# Antitrust and AI: Emerging Competition Regulation and Enforcement

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**Cooley**

# Speakers Today

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# Agenda

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- A Look Back at Antitrust and AI
- Changing Political Landscape
- Transactional Antitrust and AI
  - Filing and Jurisdictional Review
  - Theories of Harm
- Conduct and AI
  - Algorithmic Pricing
  - Regulatory Interests and Regimes
- Key Takeaways

# Agencies Study and Report on AI

## Partnerships Between Cloud Service Providers and AI Developers

*FTC Staff Report on AI Partnerships & Investments 6(b) Study*



Federal Trade Commission  
Office of Technology Staff  
January 2025



European Commission

Issue 3 | September 2024

## Competition Policy Brief

Competition in Generative AI and Virtual Worlds

Klaus Kowalski, Cristina Volpin, and Zsolt Zombori\*



### Joint Statement on Competition in Generative AI Foundation Models and AI Products

Margrethe Vestager, Executive Vice-President and Competition Commissioner, European Commission  
Sarah Cardell, Chief Executive Officer, U.K. Competition and Markets Authority  
Jonathan Kanter, Assistant Attorney General, U.S. Department of Justice  
Lina M. Khan, Chair, U.S. Federal Trade Commission

## AI Action Summit

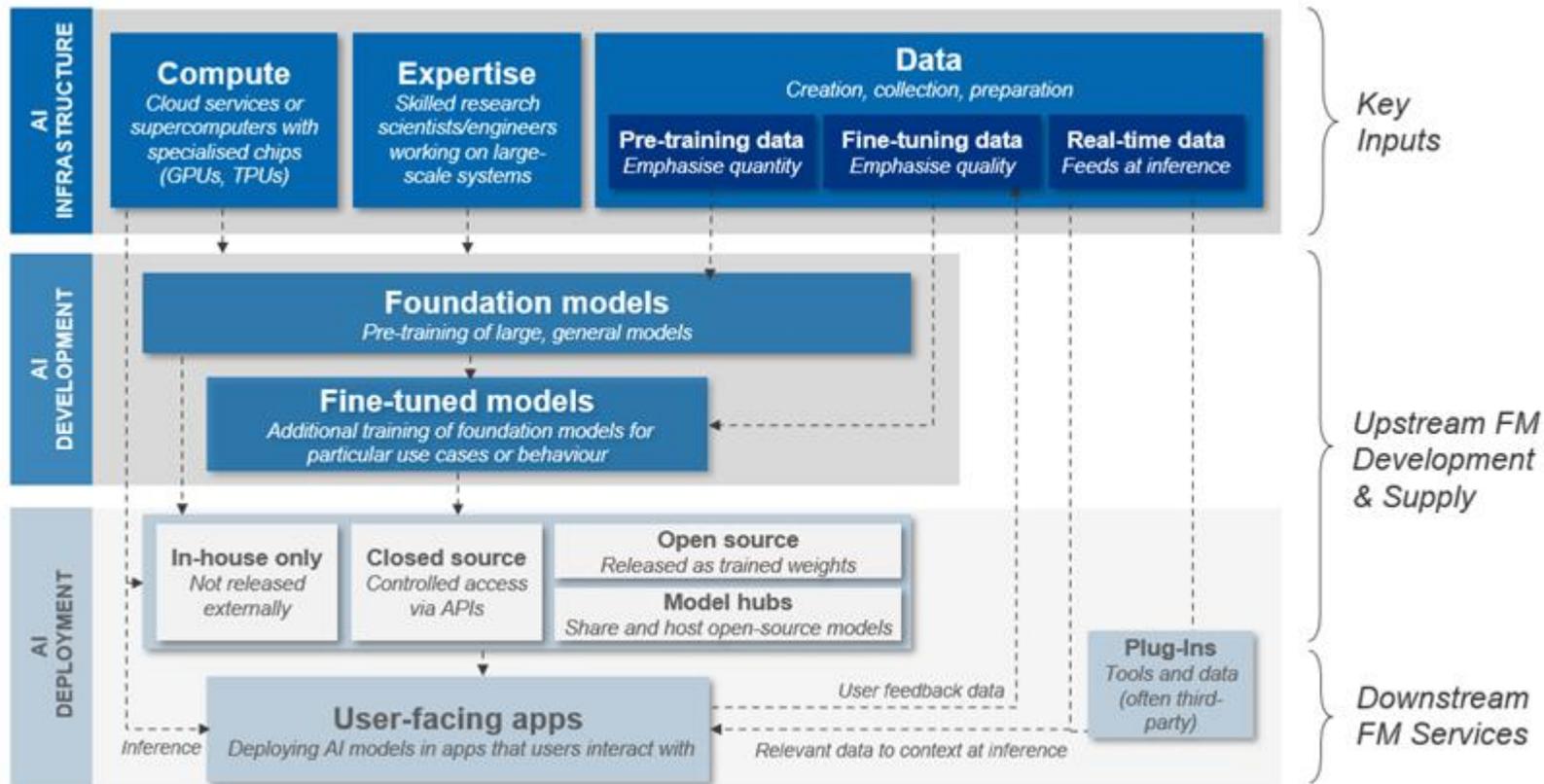
→ Paris, 6-11 February 2025

ALGORITHMIC COMPETITION  
OECD Competition Policy Roundtable Background Note



# Begin to Articulate Views

Some agencies have articulated areas for potential further scrutiny



Stated concerns include:

- Highly concentrated upstream
  - Especially computation and data
- High barriers to entry

- Ownership or “influence” links through the “stack”
  - Especially inputs to foundation models
- High barriers to entry

- Ownership or “influence” links through the “stack”
  - Certain input and foundation model providers to deployment

Potential to durably raise barriers to entry, enable entrenchment?

Source: UK CMA, AI Foundation Models Initial Report (September, 2023)

# Many of the Key Questions Remain

Agencies continue to explore:

AI Infrastructure	<ul style="list-style-type: none"><li>• Are providers of computational resource and data unavoidable trading partners?</li><li>• Are key inputs available to third parties? Refusal to deal/discrimination/self-preferencing? Capacity constraints, given own and third-party needs?</li><li>• Significance of data “feedback loop” from development and deployment?</li></ul>
AI Development	<ul style="list-style-type: none"><li>• Do some infrastructure providers have preferential access to developers?</li><li>• Do some developers have preferential access to key inputs?</li><li>• What are the barriers to entry for new developers? Access to sufficient capital?</li></ul>
AI Deployment	<ul style="list-style-type: none"><li>• Do vertical links create “lock-in effects” to distinct ecosystems, or is multi-homing prevalent?</li><li>• Risk for exclusionary conduct, such as tying, input restrictions, etc.?</li><li>• Risks for anti-competitive conduct by means of deployment, e.g., algorithmic collusion, surge pricing, data usage (exclusivity, cross-platform, 3P data)?</li></ul>
Mergers	<ul style="list-style-type: none"><li>• Significant competition within any applicable levels of technology stack?</li></ul>



# Changing Political Landscape

# Political Changes

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- Second Trump Administration sending mixed signals, but populist approach remains
- Continued headwinds for traditional M&A involving Big Tech
  - However, stated desire not to “regulate” AI nor stifle innovation
- Go it alone approach—less coordination with foreign agencies
  - Negative view of DMA and EU regulatory overreach of US companies



- New European Commission, mandate to boost competitiveness as well as addressing e.g., climate change, geopolitical tensions, and the AI paradigm
- Continued vigorous antitrust enforcement, including tech sector, and tech regulation (e.g., DMA, DSA), while simplifying regulatory frameworks (e.g., AI Act implementation)

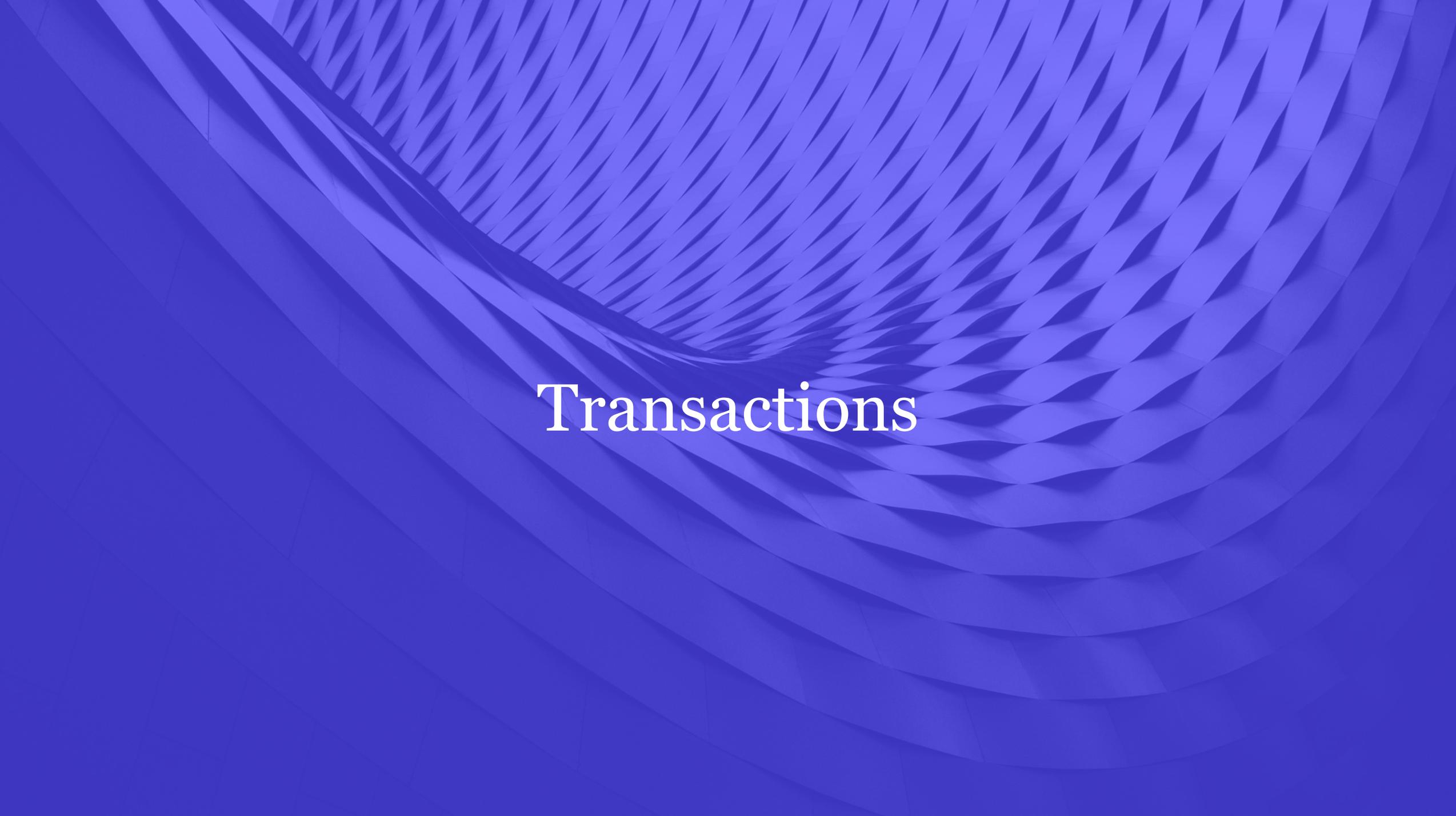


- Labour Government elected in July 2024 with mandate to drive UK growth
- UK regulators instructed to apply regulatory frameworks to drive growth and innovation
- Government’s strategic steer to CMA calls on CMA to support implementation of UK AI Opportunities Plan
- Pro-competitive market development will be a CMA focus

# Shifting Political Environment

- Potential divergence between antitrust authorities
  - US = less regulation of AI
  - EU = continued scrutiny
  - UK = potentially moderated scrutiny
- Expect greater alignment when traditional theories of harm applied to AI
- Less agency coordination  $\neq$  less coordination for companies
  - More important to consider and be prepared to address how different agencies may take different approaches to AI enforcement
  - Deals: early coordination and global risk assessment





# Transactions

# AI Deal Reportability and Agency Review

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- AI deals often raise bespoke structures, which can impact potential reportability under merger rules or investigation under general antitrust rules
  - US: Straightforward analysis based on HSR filing rules (though FTC has investigated whether structures have been used to avoid HSR)
  - EU, UK (and many others): In addition to traditional thresholds, a more nuanced (and expansive) view on jurisdiction
- Important to factor in to deal structuring, planning and execution
  - Illustrated by recent examples re AI “partnerships”, “acqui-hires”, and “call-in” risks

# Is an AI “Partnership” a “Merger”?

- Does partnership confer sufficient “influence / dependence”?
- Examples: *MSFT/OpenAI*, *MSFT/Mistral*, *GOOG/Anthropic*, *AMZN/Anthropic*
- Consider totality of relevant factors. Reviewed partnerships not “*currently*” subject to merger control, key factors include:
  - EU: Not “*control on lasting basis*” via \$13 Bn investment and circumstances around firing/re-hiring of founder/CEO
  - Germany: “*material competitive influence*” via \$ 1 Bn investment, technology access (2019); existing link *not strengthened sufficiently* via increased \$ investment, developed contracts (2023), though local nexus was stronger
  - UK: “*material influence*” may be conferred via CSP-FM agreements on compute infrastructure or distribution. Other relevant factors, e.g., (i) practical influence at shareholder and/or board level (including via consultation rights); (ii) being an important source of (a) compute; (b) distribution; and/or (c) funding; (iii) collaboration and development
- Analyze under general competition law rules as well as merger rules
- If applicable, merger rules trigger notification “standstill” obligations, hold up closing
- Partnerships can be called in for merger review, so substantive analysis relevant
- Important to analyze partnership when established + any changes made over time



# Does an AI Talent Acqui-Hire Constitute a “Merger”?

- Does the “package” constitute a “business”?
- Examples: *MSFT/Inflection*, *AMZN/Adept*
- Consider totality of assets/rights “coming across”; but talent viewed as a “key” resource.
- European agencies adopted new, low standard (e.g., *MSFT/Inflection* in principle reviewable):
  - EU: hire of nearly all staff, non-exclusive IP license, waiver of non-solicit clause
  - Germany: hire of nearly all staff, non-exclusive license to key IP, credit line agreement
  - UK: hire of core staff, with associated know-how

Other deal features (e.g., a TSA) were seen to reinforce the conclusions, but were not in themselves necessary

Consider, especially:

- Employment of staff + access to other assets? (Non-) exclusive technology licenses? Other operational assets or rights? Customer relationships?
- Does RemainCo have sufficient assets, people, rights to be an ongoing concern and continue support others?
- Consider carefully additional rights / restrictions that could be viewed as creating preferential access to technology or exclusionary in nature
- Deal documents: memorialize genuine business objectives, procompetitive benefits; ensure deal team is properly trained



# Potential “Call-in” Review Drives Uncertainty

- Allocation of jurisdiction over a deal is not only determined by statutory thresholds
  - Does deal gives rise to a “merger”? Potential substantive concerns?
  - EU Court in *Illumina v. Commission*: EU Member States may refer to the EC a deal that (i) does not have an EU dimension; but (ii) affects trade within the EU, and (iii) threatens to significantly affect competition within the requesting Member State(s). Requesting Member States must have jurisdiction under national law
    - Ended EC 2021 policy to encourage referral of certain deals of deals regardless of Member State jurisdiction
    - Seven Member States referred *MSFT/Inflection* to the EC, but withdrew requests after *Illumina/Grail* ruling
  - Italy “called in” *NVIDIA/Run:ai*, referred to the EC (deal cleared – 8 months after announcement); challenge to EC’s jurisdiction in *NVIDIA v. Commission* (pending)
- Consider, especially
- Jurisdiction under EU/national set thresholds?
  - Could EU Member States “call in” the deal?
  - Could one of them also refer to the EC?
  - EU law criteria for reference satisfied?
  - Potential substantive concerns?
  - Notification or call-in risk in the UK?

# Theories of Competitive Harm

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- Historically, most merger enforcement has focused on mergers of head-to-head competitors
  - For AI, consider each layer of the AI technology stack
- Wider variety of theories considered in recent years
  - Vertical mergers: combination of companies in the same supply chain
    - Vertical theories can also arise from partnerships
  - Employment effects: What effect a merger may have on employees (employees as an input)
    - Can be an area of significant focus in AI where limited pool of talent / engineers
  - Potential competition theories: mergers of companies that don't compete today but could compete in the future
    - Is an incumbent purchasing a purchasing a nascent competitor to prevent future competition?
  - Mergers that entrench or extend a dominant position
    - Moat building through limiting interoperability or blocking third-party access



# National Security is a Key Dimension

- AI is increasingly viewed by governments as a national security priority / risk
- Designation of AI infrastructure as critical technology and infrastructure (e.g., UK and EU), enhanced AI national security measures, foreign- and outbound investment controls

Key Factors	Potential impacts
<ul style="list-style-type: none"><li>• Threats from foreign actors to weaponize data using malign influence campaigns, cyber attacks etc.</li><li>• With increasing adoption of AI, Governments are concerned about resilience and security</li><li>• Parts of AI stack are in focus – e.g., data centers, chips</li><li>• Greater focus on tech sovereignty and reliance on national or regional players (e.g., Europe)</li></ul>	<ul style="list-style-type: none"><li>• More transactions coming under microscope of authorities as a result of FDI reviews → greater risk for call-ins?</li><li>• Data access/sharing remedies to address foreclosure/incumbency concerns → may conflict with cyber-security/national security policy?</li><li>• A focus on stronger national or regional players → may present challenges to merger control?</li></ul>



# Business Conduct and market development

# Algorithmic Pricing

- Use of algorithms and AI to determine prices increasingly under scrutiny across jurisdictions
- Surge price-fixing conspiracy claims
- **Key Factors:**
  1. Industry participants provide competitively sensitive information to a third-party software / pricing systems *and*
  2. Participants use of that software to generate pricing recommendations
- Choosing the same pricing mechanism, could be enough to violate the antitrust laws as it reflects “coordination in the approaches to determine prices” - DOJ statement of Interest *In Re Multiplan Health Insurance Provider Litigation* (Trump Administration)
- In Europe, information sharing may in certain circumstances amount to illegal, cartel-like, conduct
- Looking ahead: as pricing tools become more powerful, AI and algorithmic pricing likely to face continued scrutiny

“Algorithmic collusion, you know, basically robots acting like parties in a room and how they would maximize profits. If you just tell a robot to maximize profits, they'll autonomously do cartel-like pricing behavior. So that's a cause of great concern.”



Roger Alford, Principal Deputy Assistant Attorney General, DOJ

# Areas of Regulatory Interest



Development of AI infrastructure and access to inputs



Bottlenecks and exclusivity



Restrictions on accessing talent



Continued use of market review type probes



Use of AI software and agents having collusive or coordinated outcomes



Use of AI tools by agencies to detect anti-competitive conduct

# Regulatory “Coherence”

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- AI will increasingly become subject to aligned multi-agency policies and enforcement which will dictate compliance approaches
- Agency concerns around perceived regulatory “gaps”; relationship between cyber-, platform-, content-, consumer protection-, and competition regulation; regulators emphasizing close working cooperation, strong international agency cooperation
- Regulators’ desire to marry related regulatory frameworks to ensure coherent regulatory oversight
- Implications:
  - Consider multi-agency regulatory engagement strategies
  - Avoid looking at regulatory compliance in silos
  - Use cross-practice teams to review strategic proposals and commercial offerings



# Takeaways

# What All this Means in Practice



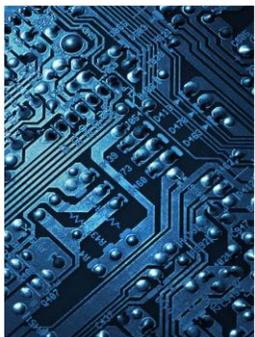
## Transactions

- Analyze merger control/antitrust risks: structures conferring influence or reliance (e.g., minority investments, acqui-hires, partnerships)
- Review board interlocks
- “Small” transactions may still result in deal scrutiny (e.g., acquiring key technology, inputs)



## Market growth, commercial strategy

- Concentrated input markets may attract scrutiny and could result in possible intervention
- Consider growth trajectory and impact of commercial model and market features, e.g., ability of customers to switch, interoperability standards and access, open source or closed access?



## Use of AI tools

- Use or supply algorithmic software or AI agents
- Important to understand how the tools work, source of inputs, application of outputs



## Licensing, other commercial arrangements

- Monitor exclusivity concerning data, infrastructure, and models
- Assess justifications for and impact of exclusivity, bundling and pricing practices
- Factor in evolving market presence



## Compliance

- Implement targeted compliance program addressing risks of outside board members, market facing strategy, and relationships across AI stack

Thank you!

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