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Antitrust Symposium

NAVIGATING GLOBAL COMPETITION LAW CHALLENGES IN 2025

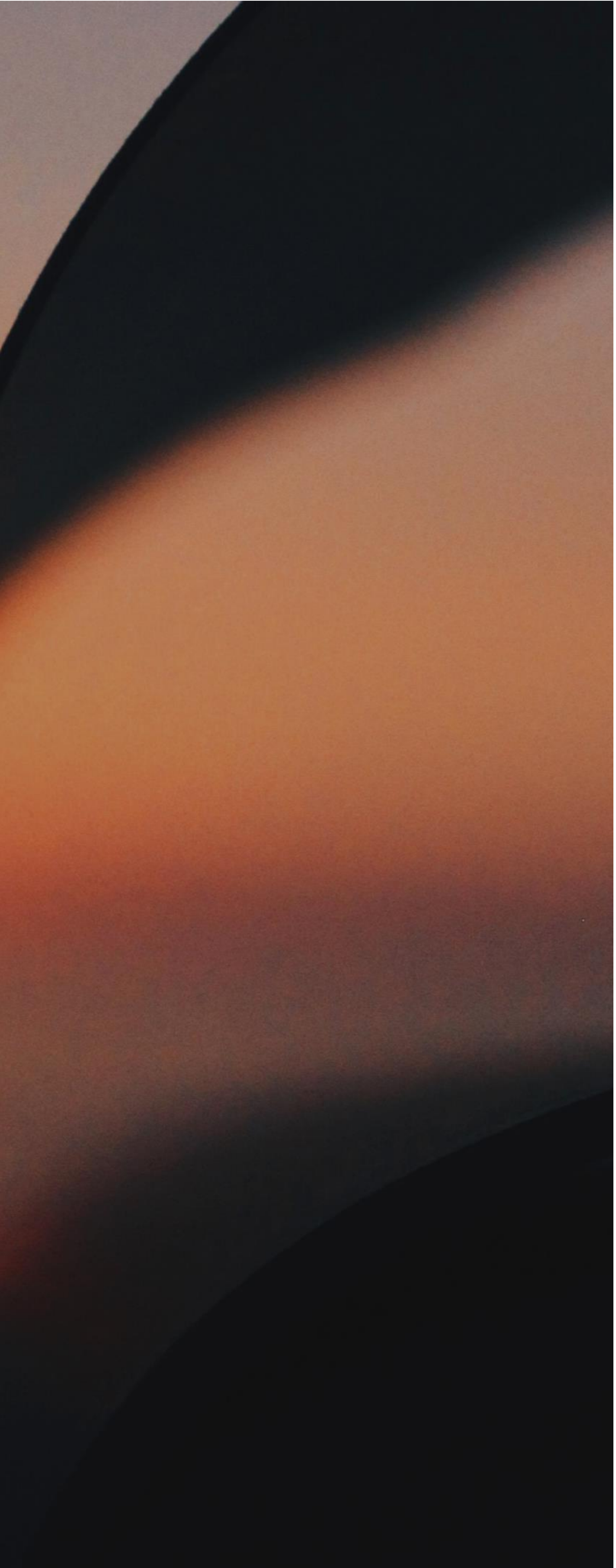

TABLE OF CONTENTS

ANTITRUST RISK IN A NEW REGULATORY CLIMATE

Mark Hills, Christian Horstkotte, and William Stallings

The recent change in leaders in both the United States and Europe has already had a notable impact on the antitrust landscape. Rules are changing—or, at least, their enforcement is taking more novel interpretations—against a potentially paradoxical backdrop of calls for growth and simplification. This trend is likely to continue, with businesses needing to adapt to this uncertainty and prepare for the new regulatory climate, creating both opportunities and threats.

ALL CHANGE AT THE TOP

Within just a few weeks, the Trump Administration has brought significant change to the US antitrust landscape. This includes elevating FTC Commissioner Andrew Ferguson to Chair of the FTC, nominating Mark Meador as a FTC Commissioner (who recently received Senate confirmation), appointing Pam Bondi to Attorney General, and Gail Slater to Assistant Attorney General for Antitrust at the DOJ. These new leaders are experienced antitrust lawyers who have pledged to prioritize antitrust enforcement, especially regarding Big Tech. The Trump Administration has further reshaped the antitrust leadership by firing the two Democratic FTC Commissioners, Rebecca Kelly Slaughter and Alvaro Bedoya.[1] The FTC is required by law to have a bipartisan makeup, with no more than three commissioners from the same political party, and a majority vote to take any action. The future of the bipartisan five-commissioner FTC is unknown, as Slaughter and Bedoya have sued President Donald Trump, claiming he violated long-established precedent by removing them from their positions, allegedly without cause. Collectively, these personnel developments are likely to have significant implications for the antitrust regulatory landscape and the independence of the FTC.

Across the Atlantic, Europe also has new antitrust leaders. The European Commission's ("Commission") newly appointed Competition Commissioner, Teresa Ribera, started her mandate with a "modernization" agenda, part of which is focused on ensuring effective enforcement actions against some of the world's biggest tech players on the basis of the EU's Digital Markets Act. In stark contrast to the Trump Administration's position on ESG collaboration, Ms. Ribera holds the Commission's "Clean, Just and Competitive Transition" brief alongside antitrust. In addition, as part of this brief, she is carefully considering the findings of the Draghi Report regarding the role of antitrust in increasing European competitiveness. In the United Kingdom, through an unprecedented move, the UK government replaced the Competition and Markets Authority's ("CMA") chair with Doug Gurr, a former Amazon UK executive. This was accompanied by the UK government giving the CMA a "strategic steer," publicly announcing potential changes to the merger regime to make it faster and more certain. These measures form a key pillar of the UK Government's attempt to remove regulatory barriers to economic growth.

Given the above, global businesses are facing a more uncertain antitrust enforcement climate than ever before, and this climate will differ across jurisdictions. There are opportunities, however, with authorities focusing more on the importance of economic growth in their decision-making than in the past, which could see more consolidation permitted in select, strategically significant sectors.

[1] See our Legal Update, *"Changes in the Makeup of the FTC May Impact Antitrust Policy."*

AGGRESSIVE ENFORCEMENT CONTINUES

While leadership at the antitrust agencies has shifted, enforcement actions against transactions have continued. The overhaul of the Hart-Scott-Rodino (HSR) reporting requirements, which was finalized during the Biden Administration, took effect on February 10, 2025. The revised HSR rules require parties to submit more transaction- and industry-related documents, making the process more complex and time-consuming. Chair Ferguson has defended the new rules as necessary to improve efficiency and reduce long-term costs for transacting parties and enforcers.[2] In addition, the FTC under Chair Ferguson has not made any move to depart from the stricter transaction enforcement regime that the Biden Administration pursued as part of the 2023 Merger Guidelines. In fact, Chair Ferguson has offered support for the 2023 Merger Guidelines, which lay out a more stringent transaction enforcement regime, lowering the threshold for when a transaction is presumptively anticompetitive, emphasizing the danger of vertical transactions, and giving greater considerations to labor markets. The DOJ, under then-Acting Assistant Attorney General Omeed Assefi, has concurred with the FTC's approach to the 2023 Merger Guidelines. Since the change of administration, both the DOJ and FTC have brought actions challenging transactions in the wireless networking and medical device industries.[3][4]

In Europe, the Commission has pledged to review both its horizontal and non-horizontal merger guidelines during 2025, although dramatic changes in approach are not expected. In addition, fundamental overhaul of the EU merger control system to expand the Commission's jurisdiction no longer seems to be a realistic prospect (at least for now). However, despite a significant defeat for the Commission—which came when the European Union's highest court held it was not competent to claim jurisdiction over transactions when neither its nor its Member States' merger thresholds were met—the specter of below threshold merger enforcement remains.[5] European competition authorities, including the Commission, continue to push their jurisdiction to the limits, leading to uncertainty for businesses acquiring in Europe. In the United Kingdom, at odds with recent UK government statements, the new Digital Markets Competition and Consumers Act 2024 substantially expanded the UK antitrust enforcement regime, in particular enhancing the CMA's already very wide discretion to review mergers through the introduction of a new jurisdictional threshold aimed at so called "killer acquisitions," essentially focusing on the market position of the acquiring party provided only that the target has a "UK nexus." These developments, taken alongside bolder enforcement of European rules controlling foreign investment and subsidies, make the regulatory climate for multi-jurisdictional deals as challenging as ever.

In parallel to merger developments, the FTC and the DOJ are maintaining their pursuit of behavioral antitrust cases. The FTC and DOJ have continued to litigate high profile cases against Big Tech companies, several of which were brought under the first Trump Administration. In addition, the DOJ and FTC have not backed down from cases the Biden Administration initiated under more novel theories or seldom-

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[2] See our Legal Update, *"New HSR Rules and 2023 Merger Guidelines – Here to Stay?"*

[3] "Justice Department Sues to Block Hewlett Packard Enterprise's Proposed $14 Billion Acquisition of Rival Wireless Networking Technology Provider Juniper Networks." Office of Public Affairs, US Department of Justice. 2025.

[4] "FTC Challenges Medical Device Coatings Deal." Federal Trade Commission. 2025.

[5] See our Legal Update, "*Below the thresholds but on the radar | What's next after the ECJ's Illumina/Grail judgment?*"

used laws such as the Robinson-Patman Act.[6] Nonetheless, the FTC's enforcement priorities are likely to change. Unlike the previous FTC Chair, Lina Khan, Chair Ferguson has rejected a broad interpretation of Section 5 of the Federal Trade Commission Act, which gives the agency authority to challenge unfair methods of competition. Further, antitrust leaders within the Trump Administration have mixed views on the role of AI in the tech sector. European antitrust investigations into Big Tech continue, with notable fines and or behavioral remedies being required from companies in the sector. At the same time, the European authorities have acknowledged the importance of allowing startups to access the investment they need, and encouraging innovation in AI and related infrastructure. This has been particularly notable in the several investigations the authorities opened into partnerships between startups and big tech companies, with protracted periods of time being taken to, ultimately, conclude that merger investigations were not possible or merited.

Despite recent emphasis on growth and business-friendly approaches, the competition landscape continues to lack much-needed legal certainty. As the conflicting pressures and priorities described above battle it out in the minds of antitrust enforcers before reaching a new paradigm, businesses will need to be ready to adapt to evolving regimes, and to respond to regulatory threats—in addition to opportunities—appearing on the horizon. This is a critical period for antitrust to be on the radar of the C-suite.

[6] "FTC Sues PepsiCo for Rigging Soft Drink Competition." Federal Trade Commission. 2025.

FIVE ANTITRUST CONVERSATIONS IN-HOUSE LAWYERS SHOULD BE HAVING RIGHT NOW

Nathalie Jalabert-Doury, Airlie Goodman, Oral Pottinger,
Daniel Storino, and Richard Snyder

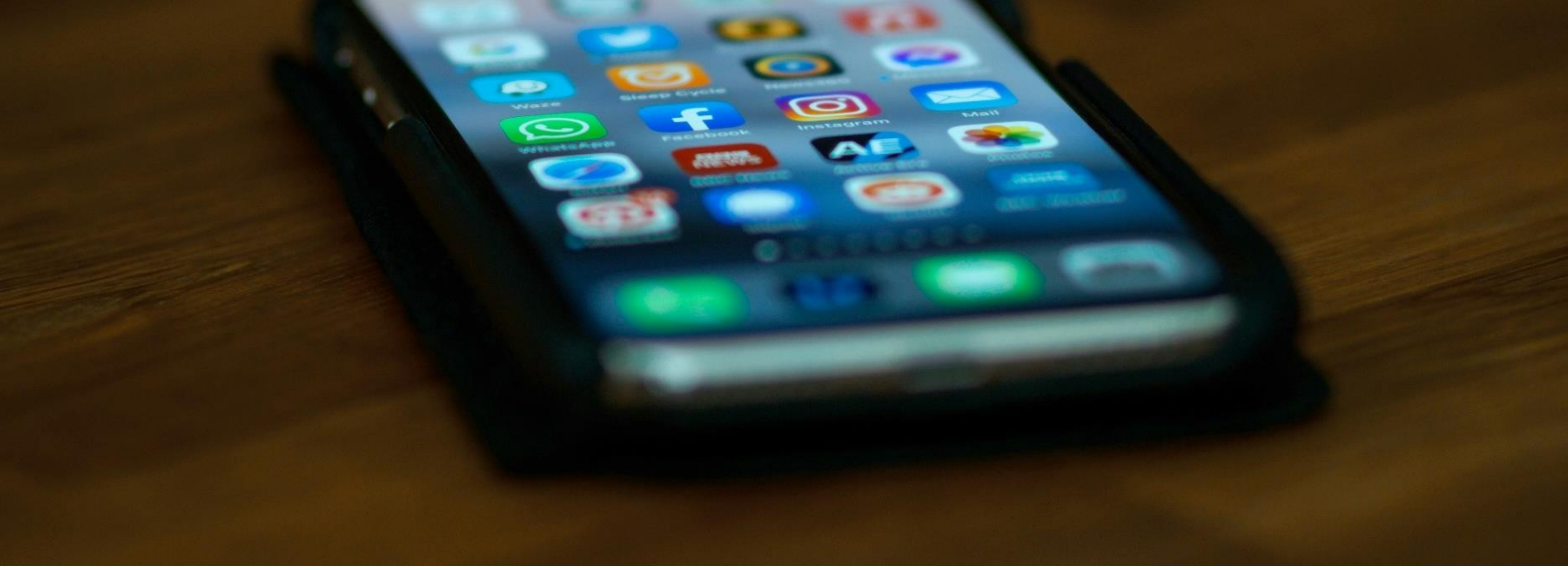
INTRODUCTION

The unprecedented nature of the intense activity by regulators and politicians in the antitrust space is requiring in-house antitrust counsel to put new topics on agendas for business leaders to consider, alongside more familiar topics but with a new risk profile. Enforcers around the globe are adapting and obtaining new tools to tackle new behaviors they perceive as potentially problematic, with actions by one authority often having a knock-on effect around the world, including in private enforcement. Against such a frenetic backdrop, it is important to highlight key areas where businesses should consider paying particular attention, as developments indicate trends which can guide antitrust counsel as they seek to adopt a risk based approach in prioritizing which are the key conversations they should be having right now, and how to turn these conversations into opportunities to build succeed.

1. DAWN RAIDS

A key tool in an enforcer's toolbox, dawn raids are not only back on the agenda post-pandemic, but they are also more intrusive than ever before. In particular, personal devices and homes are now regularly in scope, as well as data accessible from the premises even if stored on IT systems outside of the jurisdiction. Whilst there are limits on the powers of enforcers in this area, particularly in respect of the need for an authority to have "sufficient indicia" properly recorded before conducting inspections, the ability to withhold material from inspectors on the ground that it is personal or legally privileged, remains challenging. Furthermore, when businesses and their individual staff members fail to give the authorities the access to data which they should during a dawn raid, including for example ephemeral messages on their person devices (see more below), hefty fines are becoming increasingly likely, even if the data is subsequently provided promptly.

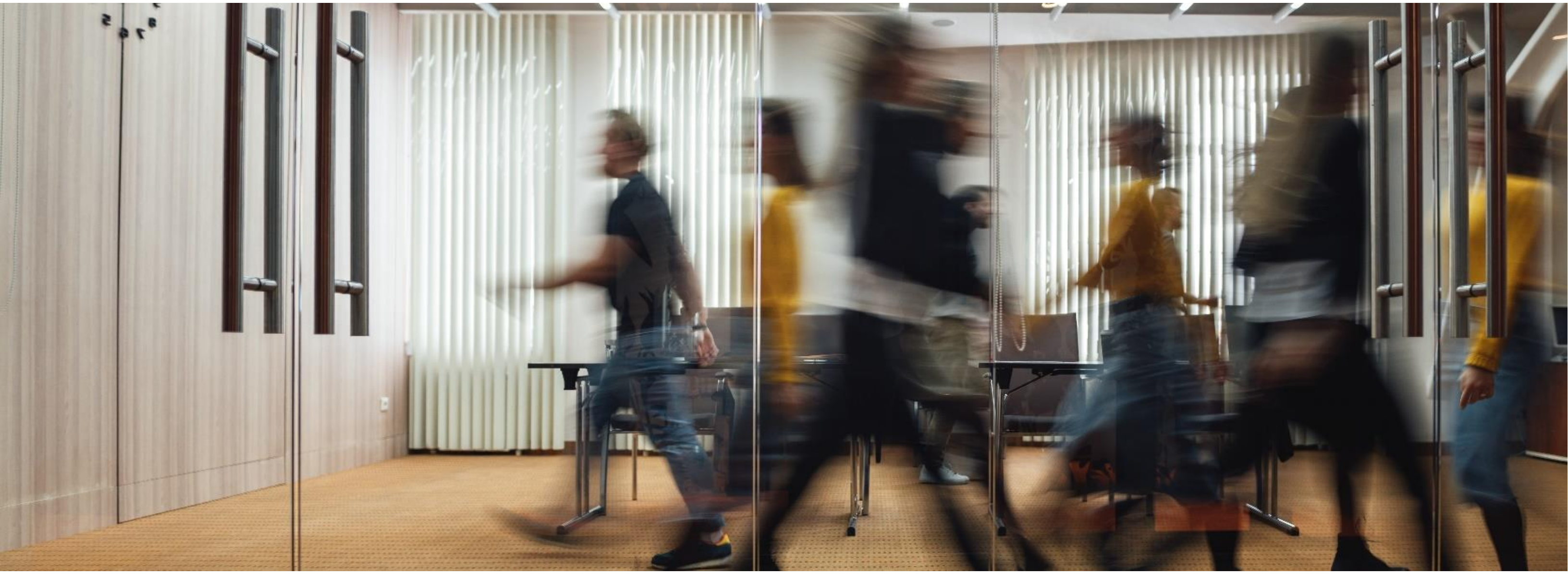
A striking feature of dawn raids over the past few years, has been that whilst the global cartel investigations of the 2000s seem to be less numerous with enforcers around the world conducting joined up investigations which last several years, this is being replaced with dawn raids in Europe triggering court filings in the United States. This puts tremendous pressure on companies who have to handle spontaneously, private actions in the United States, and public enforcement in Europe. A global strategy is essential.



2. EPHEMERAL MESSAGES

Global antitrust authorities have grown increasingly concerned about the potential for ephemeral messaging to facilitate secret collusion and cartel behavior. Commonly used in popular applications like Snapchat, WhatsApp, Telegram, and Signal, ephemeral messaging is a form of digital communication where messages automatically disappear after receipt, or shortly after, and is frequently used to conduct business. Antitrust authorities in the United States have recently issued policy statements explicitly addressing ephemeral messaging, and instructing firms to maintain records of digital communications on third-party platforms. Europe is some way behind in terms of issuing specific guidance. However, last year the European Commission ("Commission") imposed a €15.9 million fine on a company when a senior leader deleted relevant WhatsApp messages during a dawn raid. In the United Kingdom, the new Digital Markets, Competition and Consumers Act ("DMCCA") has given the Competition and Markets Authority ("CMA") powers to target ephemeral messaging during its investigations and places more extensive onerous obligations on businesses to preserve evidence, including ephemeral messages. It will be interesting to see if formal guidance follows in Europe, potentially taking inspiration from the US position. In the meantime, in-house counsel must ensure document retention policies are up to date, and employees must understand that messages on their personal devices might be required by enforcers.[1]

[1] See our Legal Update, "The Vanishing Point: Antitrust Risks Raised by Ephemeral Messages."



3. LABOR MARKETS

Notwithstanding the growing importance of digitalization and artificial intelligence, human intelligence and knowledgeable staff members remain key for successful businesses. Antitrust authorities around the world are increasingly active in taking steps to safeguard competitive labor markets. In 2024, over the dissents of now-Chairman Ferguson and Commissioner Holyoak, the Federal Trade Commission ("FTC") adopted a rule that imposed a blanket prohibition on employment non-competes and made them per se illegal. Although the rule was enjoined in court almost immediately and finds no support among the current Commissioners, Chairman Ferguson stated that he is committed to investigating anticompetitive labor practices on a case-by-case basis. More recently, Chairman Ferguson announced the FTC Labor Task Force and assigned it responsibilities including investigation and prosecution of deceptive, unfair, or anticompetitive labor market conduct, including no poach, non-solicitation, no-hire, wage-fixing, and noncompete agreements.

In Europe, labor markets have typically been left to Member States to handle given their inherently national nature, reflecting local cultures and employment environments. However, over the past few months, the European Commission has stepped up its enforcement against anti-competitive conduct in labor markets focusing on no-poach agreements and wage fixing.[2] Indeed, in late 2023, dawn raids in the online ordering and food-delivery sector focused on suspected no-poach agreements.[3] Furthermore, the EU regulator has made clear that restrictive agreements in this area are likely to be considered as restrictions of competition "by object", such that their anti-competitive harm is presumed, with no analysis of their effects being required. It has also made clear that going forward, it might exercise regulatory scrutiny of so called "acqui-hires" on the basis of its merger rules where the staff acquisitions may lead to a change in market conditions.

[2] Aresu, Alessio, and Brigitta Renner-Loquenz. Antitrust in Labour Markets | Competition Policy Brief No 2/2024. European Commission, May 2024.
[3] "Antitrust: Commission Carries out Unannounced Inspections in the Online Food Delivery Sector." European Commission - European Commission, Nov. 2023.

Most recently in the United Kingdom, the CMA imposed a fine on five sports broadcast and production companies after they found that the companies had colluded on rates of pay for freelancers.[4] This decision came with a clear warning to employers in general to ensure they do not breach competition law, and has promised to issue further guidance in this space soon. Evidently, labor markets are high on the watchlist for enforcers around the world, and businesses should consider training up HR personnel on antitrust compliance, not just front-line leaders and legal staff.

[4] "Sports Broadcast and Production Companies Fined £4 Million in Freelancer Pay Investigation." GOV.UK, Mar. 2025.

4. INFORMATION EXCHANGE

Notwithstanding several comments from enforcers appearing to accept that market players exchanging information can be pro-competitive, in practice, this remains a risky area. For over 30 years, companies in the United States relied on the Department of Justice ("DOJ") guidance outlining permissible forms of information exchange. These "safety zones" or "safe harbors" allowed firms to share information without drawing DOJ antitrust scrutiny under specified conditions. An information exchange was considered presumptively valid under the guidelines if:

1) the exchange was conducted through a third party;
2) the information was at least three months old; and
3) at least five other companies participated in the exchange.

The guidance was originally issued in connection with healthcare antitrust litigation, but it has been regularly applied to protect firms sharing information in many other industries. However, US firms can no longer rely on this long-standing guidance to exchange information without risking DOJ action, as in 2023, the DOJ withdrew the three policy statements establishing the "safety zone" and "safe harbor" protections. The Department reasoned that "the statements [were] overly permissive on certain subjects, such as information sharing" because "the healthcare landscape has changed significantly" over the last three decades. Further, the Department argued that the withdrawal would promote "transparency" and promised enforcement actions on a "case-by-case" basis.

Since the guidelines were withdrawn, the DOJ has pursued multiple antitrust litigations involving information exchanges. There is, however, ongoing uncertainty as to what forms of information exchange are currently permissible, as the DOJ has yet to replace the withdrawn guidelines and has not committed to when we can expect such a development.

In Europe, there has been a similar tightening of the rules: following a revision of the Commission's Horizontal Guidelines in 2023, when an undertaking receives information, it is now presumed to have taken that information into account and to have adapted its market conduct accordingly. To avoid liability and hefty fines, companies must take proactive steps, such as clearly distancing themselves from the exchange or reporting the conduct to the relevant authorities. In-house counsel should also be aware of the risks of collusive outcome at the EU level when asked to submit data to a benchmarking exercise, even if carried out by a third party, especially since the revised Guidelines suggest that an exchange of individualized data for the purpose of benchmarking would generally not be considered indispensable.

More generally in Europe, while information exchange has long been a priority in competition enforcement, recent developments suggest a renewed focus on how market players communicate commercially sensitive information and in particular in digital environments. Although Europe currently lacks the kind of algorithmic collusion cases which we are seeing in the United States, recent activity by the competition authorities shows a particular emphasis on digital exchanges and technological tools, with the Court of Justice confirming that the use of digital platforms can lead to illegal coordination of prices. In addition, over the past few months, the Commission has become increasingly attentive to the ways in which apparently harmless disclosures and, in particular, how public disclosures may lead to aligned behavior between competitors in certain market conditions. Against this backdrop, in-house counsel should be aware that the boundary between legitimate disclosure and unlawful price signaling appears increasingly blurry, especially in markets where pricing intentions can quickly influence the conduct of competitors.

The legal framework around these technologies is constantly evolving, suggesting that vigilance around digital pricing strategies and internal system design is key for in-house counsel who assist companies who use these technologies, or who may be a victim of unlawful activity in this ever-growing area.

5. COLLECTIVE ACTIONS

In the United States, antitrust, unfair competition, and consumer protection claims (as well as follow-on actions like securities law claims against publicly traded companies) remain a common target for plaintiffs' class action lawyers. The availability of attorneys' fees awards and treble damages in antitrust cases make them lucrative options for the plaintiffs' bar, and the permissive standard for initial pleadings and broad scope of discovery in federal litigation mean that antitrust cases can create outsized litigation cost and substantial pressure for *in terrorem* settlement values. Companies engaging in mergers and acquisitions, operating in industries subject to heavy regulatory scrutiny (such as technology or healthcare), or responding to other kinds of government investigations or studies often find that private class actions follow in the wake of government action, even where the transaction does not ultimately close, or when the investigation is completed with no enforcement action taken.

Companies seeking to mitigate the risk of potentially costly antitrust class action litigation are well served by instituting robust compliance and employee training programs and periodically refreshing those programs to ensure that employees are aware of and appropriately trained in best practices relating to common areas of antitrust risk, such as competitor communications, pricing, marketing, and distribution processes, and other commercial and strategic functions. Likewise, the engagement of skilled antitrust counsel early in the lifecycle of a transaction and integrating antitrust counsel into strategic planning for substantial business decisions can help ensure that best practices are followed early on and can help mitigate the potential for class actions becoming an expensive and time-consuming distraction from the company's everyday operations.

In-house counsel for US-headquartered international businesses must also be aware of the increasingly prevalence of antitrust class actions being brought against such companies in both the United Kingdom and the European Union, including where those they have settled antitrust class actions in the United States relating to the same products and markets. This has been driven in large part by: (i) rapid developments of the European class action litigation regimes; (ii) an active claimant bar with participants including US claimant law firms opening transatlantic practices; and (iii) a significant increase in the availability of litigation funding. The UK regime in particular has experienced rapid growth since a key

Supreme Court decision unlocked the regime in 2020, growing from a standing start to more than 50 cases in 2025, which collectively allege damages in excess of £160 billion. The EU regimes have seen similar growth, and the Representative Actions Directive requires each Member State to implement at least an opt-in class-actions regime in its domestic law, with many such as Portugal and the Netherlands already having well-established and active class-actions regimes.

US companies that may not previously have considered antitrust class actions in the United Kingdom or European Union should take steps to consider their exposure in those jurisdictions. This will include reviewing past and current business practices, agreements, and communications that may involve the United Kingdom or EU Member States. Where these nexuses are identified, companies will benefit from early engagement with antitrust counsel to assess the likelihood of class action claims being brought against them and how to best mitigate that risk, including using the strategies outlined above in relation to the United States. Given the rapid pace of change in the European regimes, companies should also monitor legislative changes and key case law developments both in the United Kingdom and European Union, reviewing and updating antitrust compliance policies and litigation strategy to ensure they reflect the latest developments.

CLOSING

Notwithstanding promises of "pro-business, pro-growth" approaches to competition enforcers, it is clear that businesses continue to face risks of unprecedented levels of intervention by antitrust authorities and or by private claimants. Although the stakes are high—with ever increasing penalties and or fines, and a greater likelihood of personal liability being attributed to senior leaders when things go wrong—having key conversations ahead of time and establishing strategies to handle these risks allows businesses to turn these difficult conversations into opportunities for their businesses to thrive.

Because of these developments, it is more important than ever to seek legal guidance if your company has questions regarding labour markets, information exchange of collective actions. Mayer Brown is prepared to advise and counsel companies on the implications of these developments in their current and future business activities. Please do not hesitate to reach out to any of the authors for further information about this topic and additional developments.

SEEING AROUND CORNERS: WHERE DISRUPTION AND ANTITRUST MEET

Jean-Maxime Blutel, Gail Levine, Matthew Provance, and Johannes Weichbrodt

"Disruption" is business-speak for innovative companies or technologies that challenge the status quo. Now more than ever, it seems like disruption is a constant theme in today's business and regulatory environment, presenting both threats and opportunities for companies in a wide array of industries. While disruption is predominantly thought of as a business issue, antitrust risks are often lurking in the background. In this article, we examine the antitrust implications associated with disruption from three distinct perspectives—the disruptive effects of artificial intelligence (AI) technology, the disruptive impact of shifting policies on competition in both the United States and the European Union, and the antitrust risk that can arise when responding to disruption—and offer practical insights on navigating these issues for businesses to keep in mind.

DISRUPTIVE TECHNOLOGY: ARTIFICIAL INTELLIGENCE

The rapid adoption of AI-based technologies has the potential to disrupt nearly every industry. However, the disruptive power of this technology can raise unique antitrust issues for both businesses and regulators.

AI POWERED DECISION-MAKING

More and more businesses from all industries and sectors are relying on AI-based algorithms that analyze data in real-time to provide forecasts or recommendations for critical business functions. While using AI to improve decision-making has the potential to offer significant and often pro-competitive benefits, it can also raise novel antitrust issues that require careful evaluation.

In the United States, both the Federal Trade Commission (FTC) and Department of Justice (DOJ) Antitrust Division have scrutinized the use of third-party pricing algorithms in certain industries, contending they can reduce competition and harm consumers. Specifically, the DOJ has recently intervened in private antitrust lawsuits involving allegations of algorithmic price-fixing in the health insurance, hotel, and apartment rental industries, arguing that "*competitors' joint use of a common pricing algorithm to set starting-point or maximum prices*" and "*information exchange through a common pricing algorithm*" can violate the antitrust laws.[1] For its part, the FTC has likened the use of a common pricing algorithm to competitors each delegating their decision-making to "*a guy named Bob*," warning that "*[i]f 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*."[2] Further solidifying that these concerns are real, one court presiding over an algorithmic price-fixing case has held, at the pleading stage, that an agreement between competitors to use the same pricing algorithm may be per se unlawful.[3]

Regulators outside the United States are also turning their attention to algorithmic decision-making. The European Commission (EC), the French, German and UK Competition Authorities have issued studies and

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[1] *In re Multiplan Health Insurance Provider Litigation*, Case No. 1:24-cv-06795, Statement of Interest of the United States (filed Mar. 27, 2025, in the U.S. District Court for the Northern District of Illinois, Eastern Division).
[2] Maureen K. Ohlhausen, Former Commissioner, U.S. Federal Trade Commission, Remarks from the Concurrences Antitrust in the Financial Sector Conference: Should We Fear The Things That Go Beep In the Night? Some Initial Thoughts on the Intersection of Antitrust Law and Algorithmic Pricing.
[3] *Duffy v. Yardi Sys.*, 2024 U.S. Dist. LEXIS 219629 (W.D. Wash. Dec. 4, 2024). It should be noted that the defendants in this litigation deny the existence of any agreement between them to use the third party algorithm at issue.

guidance on the usage of algorithms.[4] All these authorities recognize that although algorithms can be pro-competitive, they also can facilitate anti-competitive agreements. In particular, European regulators have highlighted the risk of hub-and-spoke arrangements, where third parties facilitate anti-competitive information exchange through algorithms. Further, the EC and the UK Competition and Markets Authority have both emphasized that (1) if a pricing practice is illegal when implemented offline, it is probably illegal when implemented online and (2) firms cannot avoid liability by blaming their algorithms.

PRACTICAL CONSIDERATIONS FOR BUSINESSES

Businesses evaluating whether the use of AI to inform competitive decision-making poses an antitrust risk should apply a nuanced approach given the potential for AI to improve efficiency and enhance competition. Ultimately, by following best practices, businesses can maximize the competitive advantages offered by AI while minimizing antitrust risks that may arise. Businesses should, for example, carefully review their terms and conditions with third party algorithm providers and ensure that any non-public data they provide when training or using an algorithm is not used for other purposes or disclosed without their consent. Businesses should also continue to closely monitor the developments and enforcement actions in the United States and abroad in this space, as the legal landscape is rapidly adapting to the disruptive effects of AI.

Indeed, the broader antitrust policy implications for this technology remain unclear. In the final year of the Biden Administration, the DOJ and FTC launched several antitrust investigations into the AI practices of technology companies.[5] However, the second Trump Administration ("Trump II") appears so far to be less focused on regulating AI than on fostering innovation. While Trump II has reportedly continued certain investigations into AI firms and maintained other pro-enforcement policies from the previous administration, the new administration has also expressed concerns about over-regulation in the AI space. Then-FTC Commissioner (now Chairman) Andrew Ferguson and Commissioner Melissa Holyoak emphasized the importance of "striking a careful and prudent balance" to ensure that the FTC does "not charge headlong to regulate AI," while still ensuring "that Big Tech incumbents do not control AI innovators in order to blunt any potential competitive threats."[6]

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[4] European Commission, press release dated 21 August 2023, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*; French Competition Authority and Federal Cartel Office, *Joint Study on Algorithms and competition* (November 2019); Competitions & Market Authority*, Guidance on the Application of the Chapter I Prohibition in the Competition Act 1988 to Horizontal Agreements* (August 2023).

[5] For example, in June 2024, the DOJ and the FTC launched probes into three major AI firms and the FTC began investigating attempts by AI companies at skirting the United States's merger disclosure requirements. In September 2024, the DOJ issued a subpoena to a AI chipmaker as part of its investigation, potentially reflecting concerns that the company was making it harder to switch to other suppliers and penalizing buyers who purchased from competitors.

6 *See* Concurring and Dissenting Statement of Comm'r Andrew N. Ferguson, Joined by Comm'r Melissa Holyoak, Regarding the FTC Staff Report on AI Partnerships & Investments 6(b) Study, Matter No. P246201 (Jan. 17, 2025)*; see also* Concurring and Dissenting Statement of Comm'r Melissa Holyoak, Joined by Comm'r Andrew N. Ferguson (Jan. 17, 2025).

WHEN DISRUPTION COMES FROM SHIFTING GOVERNMENTAL POLICIES

DISRUPTION FROM INCREASED SCRUTINY OF M&A DEALS

Outside of technology changes, in today's fast-paced and ever-evolving regulatory environment, companies must skillfully navigate the authorities' new governmental tools and shifting policies, to ensure their initiatives remain compliant with competition and regulatory laws worldwide.

Dealmakers, in particular, find themselves on the front line. In Europe, the review of M&A and private equity deals has become increasingly unpredictable, with the line between reviewable and non-reviewable transactions now blurred by the authorities, especially when it comes to innovation-driven sectors.

To respond to new market realities and bridge perceived enforcement gaps, several European authorities have introduced new tools, such as alternative merger control thresholds (e.g., Germany and Austria) or call-in powers (e.g., Italy). Others, like France and Belgium, do not hesitate to rely on their existing antitrust tools to scrutinize below-threshold transactions under similar rules to the Sherman Act.[7] Still, mindful of potential undesirable impacts, the European Union's highest court recently emphasized the importance of maintaining a "*predictable control system, taking into account the need for legal certainty*."[8] Meanwhile, calls to foster "European champions" and boost EU competitiveness[9] may help temper further merger control complexity.

Adding another layer of challenge is the rise of other areas of enforcement. Alongside traditional merger control, dealmakers must now contend with a growing array of foreign direct investment ("FDI") regimes,[10] which increasingly involve broad jurisdictional tests and leave large discretion to governmental authorities. The recent EU Foreign Subsidies Regulation ("FSR")[11] has further complicated matters, disrupting deals involving companies backed by non-EU public funding. While the first in-depth enquiries concerned Chinese state-owned companies or foreign sovereign funds, the shifting geopolitical and trade landscape is likely to pull a broader set of buyers and investors, including those from the United States, into the EU Commission's spotlight.

Across the Atlantic, mixed signals from US regulators demand equal attention. While the recent overhaul of the Hart-Scott-Rodino ("HSR") regime[12] increased documentation and disclosure requirements, market-oriented legislators are intent on dismantling the reform.[13] The resulting policy swing could create additional uncertainty for cross border-transactions.

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[7] See French Competition Authority's decision No 24-D-05 of 2 May 2024 (meat-cutting sector) and the Belgian Competition Authority's press release No 3-2025 of 22 January 2025 (*Dossche Mills/Ceres*).
[8] European Court of Justice, 3 September 2024, C-611/22 P and C-625/22 P, *Illumina Grail*.
[9] Mario Draghi's report dated 9 September 2024, *The Future of European competitiveness*.
[10] Including the expected reform of the EU FDI Screening Mechanism.
[11] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.
[12] FTC Finale Rule on Premerger Notification; Reporting and Waiting Period Requirements, 10 October 2024.
[13] See our Legal Update, *New HSR Rules and 2023 Merger Guidelines – Here to Stay?*, Mayer Brown (February 27, 2025).

Against this backdrop, the risk of deals being delayed, drastically altered, or even abandoned is increasing.[14] Companies—especially in highly exposed sectors such as tech and pharmaceuticals—must proactively assess potential regulatory hurdles. It has become more important than ever to initiate antitrust and regulatory analyses as early as reasonably practicable in the process, ensuring ample time for information gathering, Q&A, and analyses. This is particularly crucial for FDI, FSR, and HSR filings, as assessing filing requirements and the transaction's feasibility require an increasingly deep understanding of local businesses, extensive financial data collection, and close coordination between antitrust experts, and with clients. Antitrust advisors can also play a key role in negotiating transaction terms, helping companies craft new closing conditions that address notably the new call-in risks, prolonged review timelines, and overall risk management between buyer and seller. The possibility of leveraging the authorities' new tools to fend off hostile takeovers or block competing bids; rival projects can also transform these legal obstacles into strategic opportunities.

DISRUPTION FROM ESG POLICY

Companies also face increasing threats of disruption from policy makers' divergent goals across nations and political parties. A good case study for this phenomenon is companies' collective ESG initiatives, where striving for a greener economy and stronger human rights meets the constraints of competition law. The divide is most evident between the European Union and the United States.

In Europe, national[15] and EU instruments[16] on sustainability reporting, due diligence, and carbon-intensive product imports explicitly invite companies to collaborate to jointly address climate and human rights issues in the (common) supply chain. Achieving meaningful change, however, often requires environmental and ethical standards to be set industry-wide, implying collaboration among numerous competitors. Such cooperation may touch on sensitive competitive factors, potentially limiting consumer choice or (even marginally) increasing prices. For instance, competitors might agree to phase out energy-inefficient washing machines or guarantee fair wages within food or fashion supply chains.

The EC revised its Horizontal Guidelines[17] to explicitly cover ESG-related cooperation between competitors, identifying these forms of collaboration as unlikely to raise antitrust concerns. Some national competition authorities have also signaled they do not want competition rules to stand in the way of agreements that contribute towards a more sustainable society, encouraging competitors to submit projects for informal antitrust assessment (e.g., the *Cocoa Forum* and *Bananas* cases in Germany[18] as well as several ESG-initiatives reviewed by the Dutch competition authority).

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[14] As it was the case for the *Dossche Mills/Ceres* and the *Illumina/Grail* transactions.
[15] See German Supply Due Diligence Act of 22 July 2021, and the French Law No 2017-399 of 27 March 2017.
[16] Corporate Sustainability Reporting Directive (Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022), Taxonomy Regulation (Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020), Corporate Sustainability Due Diligence Directive (Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024) and Carbon Border Adjustment Mechanism (Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023).
[17] Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (C/2023/4752).
[18] See FCO press releases of 18 January 2022 and 13 June 2023 on these initiatives.

In sharp contrast, the United States has been more skeptical to ESG collaboration: Anticipating backlash, six large US banks recently quit the Net Zero Banking Alliance – effectively burying the initiative.[19] Trump II's agency appointments also may signal upcoming antitrust enforcement against ESG protocols. For example, newly appointed FTC Chairman Andrew Ferguson previously tweeted that "*[c]oncerted refusal to deal can violate the antitrust laws. We've seen similar things with ESG. . . . Antitrust enforcers should take this seriously*."[20] Further, the United States has seen state antitrust enforcement against ESG initiatives, with Republican-led states recently filing suit against firms for alleged climate activism that reduced coal production.[21] So, further antitrust enforcement in the ESG space should be expected, widening the gulf of enforcers' priorities across the Atlantic.

While antitrust rules share common principles globally, the conflicting signals sent by EU and US authorities pose significant disruption for multinational companies pursuing joint sustainability efforts. With a view to their (joint) ESG initiatives, firms need to balance reputational concerns (of in-action) with the risk of substantial fines for cartel violations (in the event of ill-advised over-action). In this rapidly evolving environment, antitrust experts can assist companies by structuring ESG collaborations that comply with regulatory frameworks on both sides of the Atlantic.

RESPONDING TO DISRUPTION AND DISRUPTORS

While the potential for disruption creates opportunities for new market entrants, the sudden appearance of a disruptor can lead incumbent firms to consider taking swift and decisive action to reclaim or solidify their position in the marketplace. However, responding to the threat posed by disruption can raise its own set of antitrust concerns that must be weighed alongside the business considerations.

POTENTIAL EXCLUSIONARY PRACTICES

An incumbent firm responding to disruption might think to seek some measure of exclusivity from its suppliers or its key customers in order to prevent or discourage them from doing business with a new market entrant. Alternatively, the incumbent might demand "most favored nation" (MFN) status with its suppliers in order to ensure that suppliers do not offer better terms to an upstart. While these arrangements can be permissible under the antitrust laws, and even pro-competitive in many circumstances, they can create antitrust concerns when implemented in response to a competitive threat—particularly if the incumbent firm implementing these strategies has a monopoly or dominant position in the relevant market. Thus, when it comes to exclusivity, it's important to keep in mind that antitrust concerns are generally less significant for: (1) contracts with short durations or which are easily terminated; (2) exclusive deals with distributors rather than customers; and (3) exclusive deals that have other demonstrably pro-competitive benefits, such as arrangements that increase output, achieve economies of scale, or prevent free riding.[22]

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[19] *Six Big US Banks Quit Net Zero Alliance Before Trump Inauguration*, The Guardian.
[20] Andrew Ferguson, X.com (Nov. 8, 2024), https://x.com/AFergusonFTC/status/1855065186899742796.
[21] *Investment management firms sued by Republican states over climate push*, Reuters.
[22] *Simon & Simon, PC v. Align Tech.*, Inc., 533 F. Supp. 3d 904, 916 (N.D. Cal. 2021).

At the extreme, an agreement among incumbent firms not to do business with a new market entrant or to otherwise thwart its entry into the market could constitute a "group boycott." In the United States, so-called "naked" group boycotts, where an agreement among competitors has no other purpose than to competitively disadvantage the target of the agreement, are frequently condemned as unlawful.[23] In fact, in a recent private antitrust lawsuit filed against a leading AI platform, the DOJ and FTC have sought to clarify that group boycotts involving competing firms are properly analyzed under the per se rule.[24] Therefore, incumbent firms should take care that the terms of any agreements or arrangements they have with other market participants do not present the appearance of shutting out a disruptor from the marketplace.

PROTECTING INTELLECTUAL PROPERTY

Disruption from the introduction of new technology may infringe upon an incumbent firm's intellectual property, either by copying aspects of incumbent firms' products or services or through the unauthorized use of an incumbent firm's website, platform, or software. But in taking steps to protect their intellectual property rights, dominant companies should be aware that claims of "sham" litigation initiated without probable cause to block the entrance of a rival is potentially actionable under the antitrust laws.[25] In fact, major companies in the semiconductor, pharmaceuticals, and machinery manufacturing industries are currently facing allegations of initiating sham litigation to maintain market dominance.[26] Similarly, in certain circumstances, the enforcement of patents obtained by a dominant firm through fraud can itself be the basis for an unlawful monopolization claim.[27] These issues should be thoroughly vetted before litigation is initiated by a dominant firm against an upstart.

KEY TAKEAWAY

Antitrust and competition is an ever-evolving field that requires businesses to remain vigilant as disruption of all kinds continues to pressure and shift the status quo. Businesses now, more than ever, should take care to consult early with antitrust experts to create plans and guidelines for how to engage with and respond to rapidly changing markets.

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[23] *Honey Bum, LLC v. Fashion Nova, Inc.*, 63 F.4th 813, 820 (9th Cir. 2023).
[24] *Musk v. Altman et al.,* Case No. 4:24-cv-04722, Statement of Interest of the United States and Federal Trade Commission (filed Jan. 19, 2025, in the U.S. District Court for the Northern District of California, Oakland Division).
[25] *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993).
[26] *Realtek Semiconductor Corp. v. MediaTek, Inc*., No. 23-CV-02774-PCP, 2025 WL 744038 (N.D. Cal. Mar. 7, 2025); *Mylan Pharms. Inc. v. Teva Pharms. Indus. Ltd.*, No. CV 21-13087 (JXN) (JSA), 2025 WL 756793 (D.N.J. Feb. 27, 2025); *Danieli Corp. v. SMS Grp., Inc.,* No. 2:21-CV-1716, 2024 WL 4792744 (W.D. Pa. Nov. 14, 2024).
[27] Hovenkamp, Herbert J., "The Walker Process Doctrine: Infringement Lawsuits as Antitrust Violations" (2008). *All Faculty Scholarship*. 1784.

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