

Memorandum

Updated Antitrust Compliance Guidance: A Focus on Emerging Technologies

November 18, 2024

On November 12, 2024, the U.S. Department of Justice (“DOJ”) published updated guidance on how the DOJ’s Antitrust Division will evaluate corporate compliance programs when making charging decisions and sentencing recommendations relating to criminal antitrust violations, such as bid-rigging, price-fixing, and market allocation schemes.¹ Notably, the new guidance for the first time instructs Antitrust Division prosecutors to assess how companies manage risk related to artificial intelligence (“AI”) and other technologies.² With the Antitrust Division at the forefront of the DOJ’s recent and aggressive crack down on the alleged unlawful use of emerging technologies, these updates are yet another signal that companies would be well advised to closely scrutinize their use of and antitrust compliance surrounding these tools.

The updated guidance places a particular emphasis on scrutinizing an antitrust compliance program’s assessment of risks associated with the use of emerging technologies. Specifically, it asks prosecutors to evaluate whether antitrust compliance programs ensure that a company has:

- Implemented policies, procedures, and adequate controls to monitor the use, trustworthiness, and reliability of these technologies;
- Trained employees on permitted uses of these technologies; and
- Procedures in place to escalate potential misuses of these technologies.

This guidance is worthy of particular attention, as it comes on the heels of the Antitrust Division’s efforts to pursue AI pricing algorithms as a means to facilitate collusion among users to fix prices. In this regard, the DOJ recently filed suit against real estate company RealPage Inc. for its use of AI pricing algorithms to set rental rates. The DOJ also recently filed a statement of interest in the case of *Cornish-Adebiyi v. Caesars Entertainment*, highlighting their concern with the increasing use of algorithms to determine pricing and to facilitate collusive

¹ U.S. DOJ Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations*. Nov. 12, 2024.

² Antitrust Division prosecutors are also now instructed to assess if and how companies use ephemeral messaging and if companies use non-disclosure agreements to deter current and former employees from reporting potential antitrust violations without fear of retaliation. These changes are consistent with other recent DOJ pronouncements and initiatives. See U.S. DOJ Criminal Division, *Evaluation of Corporate Compliance Programs*. Sept. 2024; *Justice Department and the FTC Update Guidance that Reinforces Parties’ Obligations for Collaboration Tools and Ephemeral Messaging*, Jan. 26, 2024.

activity.³ Both the *RealPage* and the *Caesars* matters reflect the DOJ pushing the outer boundaries of antitrust law, with the DOJ expressing the unprecedented view that use of these AI tools enabled the alleged defendants to form an implicit agreement without ever directly communicating with one another, in some instances not even knowing who each other is, and/or merely where some aspects of a pricing tool are delegated to some third party.⁴

It also comes on the heels of warnings from antitrust regulators about the use of ephemeral messaging and other technologies to conceal collusive practices. The Antitrust Division and the Federal Trade Commission caution that they “expect that opposing counsel will preserve and produce any and all responsive documents, including data from ephemeral messaging applications designed to hide evidence. Failure to produce such documents may result in obstruction of justice charges.”⁵

The Antitrust Division’s updated guidance reinforces the need for companies that have adopted AI-based tools, ephemeral messaging, or other emerging technologies, or that plan to do so in the future, to both assess the antitrust risks posed by their use and whether their compliance program is tailored to mitigate those risks.

³ [Justice Department and Federal Trade Commission File Statement of Interest in Hotel Room Algorithmic Price-Fixing Case](#). March 28, 2024.

⁴ Statement of Interest of the United States at 3, *Cornish-Adebiyi v. Caesars Entertainment*, 2024 U.S. Dist. LEXIS 178504 (2024 D.N.J.) (No. 1:23-cv-02536-KMW-EAP). (“Although direct communications among competitors can establish an agreement among them, there is no rule requiring proof of such communications. Section 1 reaches tacit as well as express agreements, and it prohibits competitors from delegating key aspects of pricing decision making to a common entity, even if the competitors never communicate with each other directly.”)

⁵ [Justice Department and the FTC Update Guidance that Reinforces Parties’ Obligations for Collaboration Tools and Ephemeral Messaging](#), Jan. 26, 2024.

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