How Generative AI May Aid Merger Clearance Process

By **Kenneth Koch and Brian Blush** (July 1, 2024)

For in-house attorneys and outside counsel specializing in mergers and acquisitions, the Hart-Scott-Rodino Act's second request process is a familiar but challenging hurdle.

The Federal Trade Commission or U.S. Department of Justice issues second requests to conduct detailed antitrust reviews, necessitating extensive document production and data analysis. This process often delays transactions, increases costs and introduces uncertainty.

Given the increasing volume and complexity of data involved, traditional methods of compliance and document production are proving inadequate. Generative artificial intelligence capable of analyzing and searching large datasets offers solutions to streamline the merger clearance process.

By automating key aspects of data analysis, document review and compliance checks, generative AI can significantly reduce the time and effort required to respond to second requests.

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Past, Present and Future of AI

Historically, AI and machine learning capabilities, including technology assisted review, or TAR, have been used to enhance document review processes by identifying relevant documents more efficiently than manual reviews.

TAR utilizes supervised machine learning to improve the accuracy and speed of document reviews based on predefined criteria and human input. However, generative AI represents a significant advancement over these technologies.

While TAR relies heavily on pretrained models and requires continuous human feedback to refine its accuracy, generative AI can independently analyze patterns and context within documents, offering a more dynamic and autonomous approach to document review.

Generative AI can rapidly process and analyze vast amounts of documents and data with high accuracy. Tools powered by large language models can review millions of documents to identify relevant information, patterns and anomalies pertinent to antitrust reviews.

This efficiency helps legal teams compile and organize necessary documentation swiftly, reducing the overall response time.

This new technology can be employed for predictive analytics to anticipate focus areas of second requests. By analyzing historical data and patterns from previous antitrust investigations, AI tools can help companies prepare more targeted responses.

This proactive approach minimizes the back-and-forth with regulatory agencies, thereby speeding up the review process.

Privilege identification in the responsive population is one of the most challenging aspects of

the second request process, where much of the review takes place. Generative AI can play a crucial role in this area by automating the identification of privileged documents, significantly reducing the time required for this labor-intensive task.

Generative AI can be trained to recognize and flag privileged communications by analyzing patterns and context within documents. This capability helps legal teams swiftly identify privileged documents, ensuring that they are properly logged and excluded from production.

Creating and normalizing privilege logs is a time-consuming task. New AI tools can automate this process by generating detailed and standardized logs, thus saving significant amounts of time and reducing the potential for human error. This ensures a consistent and thorough approach to privilege logging.

The future of using AI in Hart-Scott-Rodino Act second requests looks promising, with potential advancements that could further streamline the process.

The question of when the FTC and the DOJ will allow next-generation AI to identify documents responsive to second requests instead of the current practice of training a model and producing everything is pivotal.

As AI technology advances, it is conceivable that regulatory agencies will adopt these tools to improve the efficiency and accuracy of their reviews.

Imagine a future where the second request could be fed into an AI system, and the documents are automatically processed and sorted for responsiveness and privilege. This approach, combined with AI-driven privilege identification, could make managing second requests much more practicable.

Complexities Introduced by New Guidelines

Given that the FTC is modifying rules that can make second requests even more time-consuming, adopting AI solutions could be essential to keeping up with these changes.

The revised 2023 merger guidelines introduce several complexities that can significantly affect the second request process, making it more time-consuming and costly. One notable aspect is the emphasis on evaluating competition among firms using diverse metrics and evidence.

The guidelines highlight that the agencies may employ a variety of analytical tools to assess competition, such as strategic deliberations, historical events and customer substitution patterns.[1]

This means that respondents must provide comprehensive data and analyses across multiple dimensions, which can increase the volume and complexity of the information required.

Moreover, the guidelines discuss the risk of coordination and the elimination of a maverick firm, which can also complicate the review process. Agencies will scrutinize how a merger might increase the likelihood of coordination among remaining firms, making it necessary for respondents to provide detailed evidence demonstrating that such risks are minimal.[2]

This requirement can lead to more extensive data collection and analysis, further lengthening the response time.

Another critical area is the assessment of the merged firm's ability to limit rivals' access to essential products or services, which could harm competition.[3]

The agencies will examine factors such as the availability of substitutes, the competitive significance of the related product, and the potential exclusion of rivals. Respondents must be prepared to address these concerns comprehensively, necessitating detailed market analyses and strategic evaluations.

The Role of Generative AI in Addressing New Challenges

Generative AI can address these challenges by offering advanced data analysis and predictive capabilities. For instance, AI can help identify potential risks of coordination by analyzing historical data and patterns of firm behavior. By providing insights into how firms have interacted in the past, AI can assist in predicting future behaviors and identifying potential areas of concern.[4]

Additionally, AI tools can streamline the process of gathering and organizing evidence related to customer substitution and market dynamics. By automating data collection and analysis, generative AI can reduce the time and effort required to compile comprehensive responses to second requests.

This efficiency is crucial in addressing the increased demands posed by the new guidelines.

The integration of generative AI into the merger review process offers significant potential to transform mergers and acquisitions transactions.

By automating labor-intensive tasks, enhancing decision making and increasing transparency, AI can help companies navigate the complexities of second requests more efficiently. As regulatory agencies continue to update and refine their guidelines, adopting AI solutions will be essential for companies seeking to complete mergers and acquisitions transactions swiftly and cost-effectively.

The ability of generative AI to process vast amounts of data accurately and predictively will be a key asset in meeting the evolving demands of the merger review process.

What We Can Do Now

While the future is bright with AI, it's helpful for counsel and their clients to start leveraging this new technology now in responding to these burdensome requests.

As an example, there is value in coupling generative AI with the traditional TAR workflows in active and upcoming matters.

While utilizing the FTC- and DOJ-approved TAR 1.0 models to identify the production population that needs to go out the door, embrace this next generation of AI for assistance with gathering a true understanding of what is in these large production populations to quickly identify key concepts and issues that may need to be discussed with the client and regulator.

This coupled with streamlining privilege review will help make what seems to be this increasingly complex, impossible task more manageable.

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[1] U.S. Department of Justice and the Federal Trade Commission (2023) Merger Guidelines .

[2] Id.

[3] Id.

[4] Id.