

FTC AI Inquiry Signals Intensified Focus On Emerging Tech

By **Karen Lent, Michael Menitove and David Wales** (February 7, 2024)

On Jan. 25, the Federal Trade Commission launched an **inquiry** into Alphabet Inc., Microsoft Corp. and Amazon.com Inc.'s investments and partnerships related to growing artificial intelligence startups Open AI and Anthropic PBC.[1]

The announcement occurred the same day as the FTC's first-ever tech summit discussing competition risks around AI. Both moves represent the latest in a string of recent developments illustrating that the FTC and U.S. Department of Justice are closely monitoring this burgeoning technology.

In recent years, the escalating use of AI technology throughout commercial operations, i.e., pricing algorithms, had already attracted the attention of government enforcement agencies.

More recently, investigations, Senate hearings and public comments have further demonstrated the desire of those agencies and some elected officials to police competition in this rapidly expanding space.

FTC's Inquiry Reflects Expanding Scrutiny

The FTC issued compulsory orders to the five companies mentioned above requiring information regarding:

- The strategic rationale and practical implications behind the partnerships;
- Analysis of the transactions' competitive impact; and
- Competition for AI inputs and resources.[2]

The inquiry centers around three separate investments in Open AI and Anthropic totaling more than \$15 billion combined. While certain transactions trigger Hart-Scott-Rodino Act review, due to the nature of these partnership and investment structures, the companies were not required to report these investments to the FTC or the DOJ.[3]

At the end of the Trump administration, the FTC launched a similar inquiry focused on acquisitions by the Big Tech companies that were not reported under the Hart-Scott-Rodino Act. Soon after taking over as chair of the FTC, Lina Khan promised to use the agency's authority under Section 6(b) of the FTC Act to study certain industry practices, especially in the tech sector.[4]

As Khan explained, the FTC is using the current inquiry for a similar purpose: History shows that new technologies can create new markets and healthy competition. As companies race to develop and monetize AI, we must guard against tactics that foreclose this opportunity. Our study will shed light on whether investments and partnerships pursued by dominant companies risk distorting innovation and undermining fair competition.[5]



Karen Lent



Michael Menitove



David Wales

Khan has previously hailed the FTC's Section 6(b) authority as an important tool to deepen the agency's understanding of companies' business practices, identify and anticipate market trends, and even uncover existing violations of law.

This new inquiry appears to be primarily directed at educating the FTC on AI's competitive landscape and guiding future enforcement decisions.

How We Got Here

While the inquiry indicates an escalation in the agency's enforcement, in recent months, the FTC and other parts of the federal government have been signaling their increased focus on AI.

In July 2023, the FTC and DOJ released draft merger guidelines that stressed their growing interest in AI. The agencies identified the use of algorithms or AI "to track or predict competitor prices" as one factor that may demonstrate a merger's risk to render a market more susceptible to coordination.[6]

In October 2023, President Joe Biden signed an executive **order** establishing new standards for AI safety, security and innovation across industries.

In particular, the order warned of the technology's ability to be deployed in ways that could "lessen market competition" and declared that the federal government will stop "unlawful collusion" and address "risks from dominant firms' use of key assets such as semiconductors, computing power, cloud storage and data." [7]

In December 2023, the Senate Subcommittee on Competition Policy, Antitrust, and Consumer Rights held a hearing to discuss the impact of algorithms on competition and consumer rights.

Chair Amy Klobuchar, D-Minn., declared that if competitors decide to "delegate their independent pricing decisions to an algorithm, the result is little more than a sophisticated cartel hiding in code." [8]

FTC Leadership Speaks at First-Ever Tech Summit on AI

The issues of consumer protection and data collection practices as they relate to AI loomed heavy throughout the FTC's tech summit. The workshop consisted of three panels, outlining AI-related competition concerns surrounding chips and cloud computing, data and models, and consumer applications.[9]

Khan, as well as Commissioners Rebecca Kelly Slaughter and Alvaro Bedoya, delivered remarks to highlight the event, articulating what they view as critical at an inflection point of technology and antitrust law.

Khan opened by criticizing the FTC's "hands-off" approach to tech consolidation following the dot-com boom. She argued that the agency's hesitancy to prosecute anticompetitive mergers in the late 1990s resulted in what she described as a heavily consolidated tech industry today. Khan emphasized that the FTC is strictly scrutinizing AI markets to prevent similar consolidation.

Specifically, she pointed to three principles that will guide the agency's approach.

The first principle is creating policy incentives to mold business models. She noted that AI models train on data, which incentivizes surveillance, but this drive for data cannot reduce consumers' privacy and the FTC must enhance healthy competition in this space, perhaps through enforcement.

The second principle is aligning liability with capability and control. Khan indicated that enforcement where there is AI-related harm will look not just at the main offender, but also those upstream that provided the tools and/or financing that knowingly facilitated the downstream harm.

The third principle is crafting effective bright-line rules for management of AI data inputs. Khan noted that firms that deploy AI technology will be held accountable for consumer harm caused by that technology and may not avoid liability by blaming AI data inputs.

Slaughter and Bedoya delivered similar messages. Slaughter focused on the problem of entrenchment and the need for the agency to ensure adequate competition in both AI markets, and markets for key AI inputs such as chipmaking, chip design, cloud computing and data collection.

She also emphasized that there is no AI exception to the law and stressed that even partnership agreements that do not require notification may violate the Hart-Scott-Rodino Act, seemingly referencing the new Section 6(b) inquiry into AI partnerships.

Conclusion

Just as in other tech areas, the Biden antitrust enforcers are looking for ways to challenge investments and conduct in the AI field.

Businesses that have significant market shares and are using AI in their products or services should be sensitive to this increasing antitrust scrutiny.

Companies deploying AI-based technology should also consider how that technology was trained, biases that may exist, consumer data being used and/or collected, how AI affects competition, and potential harms that it could create.

In particular, companies that operate along multiple layers of the AI chain should evaluate whether they self-preference or discriminate against others up or downstream.

Karen M. Lent is a partner and head of the New York office's antitrust practice at Skadden Arps Slate Meagher & Flom LLP.

Michael H. Menitove is a partner at the firm.

David P. Wales is a partner at the firm.

Skadden law clerk Oliver F. Green contributed to this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Press Release, FTC, "FTC Launches Inquiry Into Generative AI Investments and Partnerships" (Jan. 25, 2024).

[2] Id.

[3] Bloomberg, "Alphabet, Amazon, Microsoft Face FTC Inquiry on AI Partners" (Jan. 25, 2024).

[4] Press Release, Office of the Chair of the FTC, "Remarks of Chair Lina M. Khan Regarding the 6(b) Study on the Privacy Practices of Six Major Internet Service Providers" (Oct. 21, 2021).

[5] Press Release, FTC, "FTC Launches Inquiry Into Generative AI Investments and Partnerships" (Jan. 25, 2024).

[6] U.S. Department of Justice & Federal Trade Commission, Draft Merger Guidelines (2023).

[7] Press Release, The White House, "Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence" (Oct. 30, 2023). See our November 3, 2023, client alert "AI Insights: Biden Administration Passes Sweeping Executive Order on Artificial Intelligence."

[8] The New Invisible Hand? The Impact of Algorithms on Competition and Consumer Rights, Hearing Before the Subcomm. on Competition Policy, Antitrust, and Consumer Rights, 117 Cong. (2023) (Statement of Amy Klobuchar).

[9] See FTC Tech Summit (January 25, 2024).