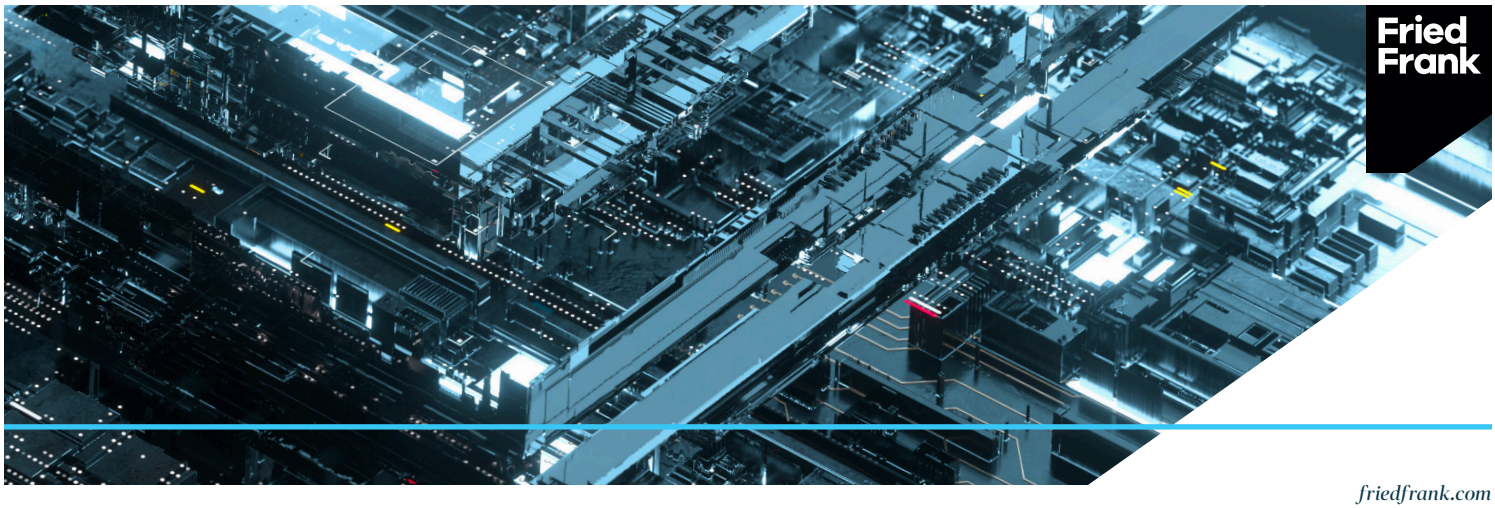


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AI and Competition: Three Antitrust Issues Enforcement Agencies Are Watching

On June 29, 2023, the FTC published a blog post outlining potential competition concerns in the developing generative AI industry. The post followed a series of statements by senior Biden Administration officials earlier this year making clear an intent to protect competition in the emerging AI-tech sector, using lessons learned from the past two decades of enforcement decisions in the technology industry. Moving forward, here are three key antitrust issues where we expect the FTC and the DOJ to focus:

#1: Competition for Key Inputs

According to the blog post, the FTC will be scrutinizing whether companies with control over the "key building blocks" for generative AI use this power to unreasonably limit competition for generative AI products. Specifically, the FTC listed data and data collection tools, engineering and other talent, and computational resources as key inputs necessary to compete and to which new entrants or small players may lack ready access. For data—the raw material necessary to build and refine the base models for generative AI applications—the FTC, as well as the DOJ, will be watching to see if companies condition access in a way that limits competition for the downstream end product. For labor inputs, the agencies will look for efforts to unfairly or collusively limit worker mobility. This concern is consistent with the FTC's recent proposed rulemaking seeking to ban most non-competes. For agreements between prospective employers, the Silicon Valley no poach cases from 2010 provide a historical example of behavior that the DOJ will pursue aggressively, including now through possible criminal prosecution. Finally, for computational resources, the agencies will again focus on whether companies competing for generative AI products control key upstream resources, such as cloud computing, and are able to withhold or condition access for these or other key inputs, such as specialized chips.

#2: Monopolistic Behavior and Exclusive Dealing

The Biden Administration has made expanding enforcement of Section 2 of the Sherman Act, which prohibits certain monopolistic conduct, a top priority since taking over in 2021. Animating this initiative is the belief that underenforcement in the previous decades has allowed for the proliferation of monopolistic behavior across a broad spectrum of the American economy, including and especially the tech sector. With this backdrop, senior Administration officials have made it abundantly clear that they are focused on the AI industry when thinking about exclusionary practices designed to achieve or maintain dominant positions. Among other tactics, the agencies will be looking for tying arrangements (i.e., conditioning the sale of necessary product A on

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the purchase of the separate product B) that are designed to monopolize the market for either product. As the agencies scrutinize the industry in search of monopolistic behavior, they also will focus on the related practice of exclusive dealing, where buyers of a product or service are induced to purchase exclusively from one supplier to the detriment of competitors and unreasonably harming competition. These arrangements can be direct (e.g., contractual provisions) or may be inferred from the circumstances. As an example, the FTC blog post suggests that cloud providers supplying generative AI services could potentially charge unreasonably high data transfer fees that effectively serve to lock in their customers.

#3: Acquisitions Involving Nascent Competitors

The Biden administration has been highly focused on M&A activity in the tech sector, especially deals involving nascent or potential future competition. As part of this initiative, the agencies have scrutinized deals both inside and outside the bounds of the traditional horizonal or vertical framework. Instead, the agencies have looked at "market realities" for potential harm, especially with emerging areas like AI. FTC Chair Lina Khan has said repeatedly that the agencies intend to be vigilant when new technologies emerge and serve to threaten longstanding incumbents in adjacent markets. Similarly, in describing digital platforms' attempts to protect their monopoly positions, Assistant Attorney General Jonathan Kanter warned that "in digital markets, a nascent competitive threat can offer any novel or differentiated product in an adjacent market. Moats surround the entire castle, which means buying up firms anywhere in the ecosystem." Companies engaging in M&A activity in the AI-tech sector should be aware that the lack of current competitive overlap or vertical relationships does not necessarily mean that the transaction will avoid close scrutiny.