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Biden’s Executive Order on AI: Antitrust Considerations Raised

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Artificial intelligence (AI) is the new frontier in technology, proving itself useful in numerous novel applications daily. But expansion of such a new and powerful technology comes with risks—something that regulators and private litigants have realized. In recent months, various states like New York and Colorado have enacted laws to curb bias in its implementation. The FTC recently announced an investigation into OpenAI, over fears of data sharing and resulting harm to consumers. Unions have begun protesting AI when employers use it as a means of employee supervision. Private lawsuits and government investigations have also begun to proliferate, with recent examples ranging from claims against a health care insurer who allegedly denied claims improperly by using AI, to a group of authors suing for copyright infringement.

Last week the FTC approved an omnibus resolution to investigate AI use in products and services.

On Oct. 30, the White House weighed in on these issues through an executive order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (AI executive order). In the wide-ranging AI executive order, the White House provides a road map for its policy positions and administrative priorities with respect to the rapidly developing and expanding advent of artificial intelligence. The AI executive order covers a number of broad topics related to the development of AI, including setting standards for safety and security; protecting Americans’ privacy; advancing equity and civil rights; giving preference to certain groups, such as consumers, patients, students and workers; advancing American leadership on AI worldwide; and ensuring the government uses AI responsibly. In addition to these policy priorities, the AI executive order devotes an entire section to “promoting innovation and competition” in AI, noting that “irresponsible use” of AI could, among other harms, “stifle competition.”

The AI executive order’s innovation and competition policy priority is consistent with other policy announcements of the Biden administration—to highlight competition and stress its importance wherever possible. For example, the White House published an executive order in 2021 stressing the importance of antitrust enforcement, and directing all federal agencies to consider competition concerns wherever possible in their respective issue areas. Following the 2021 executive order, the administration has emphasized greater antitrust scrutiny of mergers and acquisitions, and has emphasized anticompetitive conduct as a purported driver of inflation over the past two-plus years. It should come as no surprise that the AI executive order also seeks to emphasize competition, both in the AI market, and the markets impacted by AI.

Within the innovation and competition policy priority, the AI executive order seeks to encourage innovation by expanding AI research grants and to streamline visa procedures to ensure that AI research and development continues to flourish in the United States. From a competition perspective, the executive order seeks to “promote a fair, open, and competitive AI ecosystem” by preferencing small businesses to innovate for AI breakthroughs and directing the Federal Trade Commission (FTC) to exercise its antitrust authority over the AI space.

More specifically, the AI executive order directs each agency developing AI policy to consider competition both in markets for AI and in related markets. Such consideration should be taken with an eye to concentration of market share for inputs, aiming to prevent "dominant firms" from disadvantaging startups and thereby lessening competition. Further, the FTC has been directed to come to an opinion as to whether it is empowered under the FTC Act to regulate competition in AI. Given the FTC's recently well-documented agenda of broadening its powers, it is expected that the FTC will make such a finding. A subsection of the executive order is also devoted to the semiconductor industry, because semiconductors "power AI technologies." To that end, the executive order directs the U.S. Department of Commerce to take a number of steps in its implementation of the CHIPS Act—including to make "competition-increasing" decisions when funding semiconductor research and development.

Although nothing in the executive order will have an immediate impact on antitrust enforcement, it is noteworthy that the Biden administration continues to stress competition and antitrust enforcement in nearly all of its policy publications. Consistent with other Biden administration policies, the executive order makes clear that the Biden administration views large players as threats to competitive markets. Perhaps the most interesting aspect of the executive order is its directive to the FTC: If the FTC determines it has antitrust jurisdiction over AI under the FTC Act, would such a determination be challenged in the courts? The FTC's approval last week of an omnibus resolution for the next 10 years authorizing the use of compulsory process in nonpublic investigations involving products and services using AI would seem to answer that question. Stay tuned.

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