

# Antitrust Enforcement in Action: Insights from the Regulators

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Over the past six months, the FTC and DOJ have pushed a unified message regarding antitrust enforcement. First, regulators will not back down despite a string of losses in court. Second, regulators are prioritizing updating the [merger guidelines](#) and [Hart-Scott-Rodino \(HSR\)](#) filing requirements. Third, greater protections for labor markets remains a top priority for both agencies. FTC Chair Lina Khan and DOJ Assistant Attorney General Jonathan Kanter have repeated these themes, signaling that the agencies' enforcement priorities are not only aligned but also resolute.

## AN AGGRESSIVE AND ACTIVE APPROACH TO ANTITRUST ENFORCEMENT

The FTC and the DOJ continue to defend their aggressive approach to antitrust enforcement, even in the face of a string of losses. Despite Microsoft's big win over the FTC's challenge to its acquisition of gaming company Activision Blizzard<sup>[1]</sup>, the FTC stubbornly keeps fighting, appearing before a three-judge panel in the Ninth Circuit Court of Appeals on December 6 to argue that the now-consummated \$69 billion deal should be undone.

Not only will agencies continue their aggressive enforcement strategy, the Assistant Attorney General Kanter also recently reaffirmed the DOJ's preference for litigating cases to a decision rather than seeking settlements. While [testifying](#) before the House Judiciary Committee in November 2023, he stated, "we are not going to . . . put the risk of a failed remedy on the shoulders of the American public." The DOJ's focus remains on "convincing courts to protect competition." Industry leaders should not expect either agency to back down from an aggressive enforcement strategy, and thus, should remain vigilant and proactive in their antitrust compliance programs.

## REVISING THE MERGER GUIDELINES AND REGULATIONS TO MEET THE NEEDS OF MODERN MARKETS

The FTC and DOJ are currently revising proposed changes to the merger guidelines in response to public comments. The updated merger guidelines remain at the forefront of both agencies' priority list. According to [Chair Khan](#), the proposed changes modernize the guidelines by addressing "enforcement blind spots" and "lay[ing] out a framework for policing mergers in a range of different contexts," with particular attention paid to "labor, platforms, serial acquisitions, partial acquisitions, and non-horizontal acquisitions."

In addition, in June 2023, the FTC published proposed amendments to the Hart-Scott-Rodino (HSR) premerger notification rules which would require firms to provide additional information in their filings. While testifying before the House Judiciary Committee in July 2023, Chair Khan pushed back against legislators’ criticisms that requiring firms to furnish additional information would be burdensome. She stated that the revised rule would lessen the strain on FTC resources.

Market participants should expect much of the FTC and DOJ’s focus to remain on these merger guidelines as well as updates to the HSR filing requirements. Although the public comment periods for both have ended, moving forward, industry leaders should refer to the draft guidelines and regulations as guideposts when entering deals to ensure future compliance.

## COMPETITION IN LABOR MARKETS REMAINS A TOP PRIORITY

Notably, both the FTC and the DOJ have taken various opportunities to restate their commitment to enforcing anticompetitive conduct in labor markets. Chair Khan and Assistant Attorney General Kanter pointed out at Fordham’s 50th Annual Conference on International Antitrust Law and Policy in September 2023 that the proposed updates to the merger guidelines would allow agencies to evaluate the impact of a merger on labor as a stand-alone basis to challenge a transaction. Additionally, in January 2023, the FTC proposed a rule that would ban employers from imposing nearly all noncompete restrictions on workers.

Together, both agencies have opened investigations into labor markets and will continue to subject competition within the labor market to heightened levels of scrutiny. If they have not already done so, industry leaders should review their labor and employment contracts, reducing reliance on noncompete and “no-poach” provisions whenever possible.

## OTHER NOTABLE INSIGHTS

In addition to these priorities, Assistant Attorney General Kanter has also highlighted the DOJ’s focus on international cooperation. For example, the DOJ announced in September 2023 a joint initiative with Mexico’s Federal Economic Competition Commission and Canada’s Competition Bureau for safeguarding competition during the 2026 FIFA World Cup. Given the DOJ’s active collaboration with global counterparts, industry leaders should consider expanding antitrust compliance training to include trainings on international regulations.

Chair Khan also spoke separately about the FTC’s current and future approach to protecting competition in emerging technology markets at the Stanford Institute for Policy Research in November 2023. Chair Khan stated that the FTC is closely tracking how businesses are utilizing artificial intelligence to compete in the market. Having already seen signs of market concentration in artificial intelligence, the FTC will continue “scrutinizing any bottlenecks” caused by firms capturing control over key inputs or distribution channels in nascent technology industries. Participants in the artificial intelligence and machine learning markets should take the FTC’s consolidation and bottlenecking concerns into consideration as part of their growth and development strategies.

*Law Clerk Becca Ou co-authored this blog post.*

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<sup>[1]</sup> See Preliminary Injunction Opinion (Dkt. 305), *FTC v. Microsoft Corp.*, No. 3:23-cv-02880 (N.D. Cal.).  
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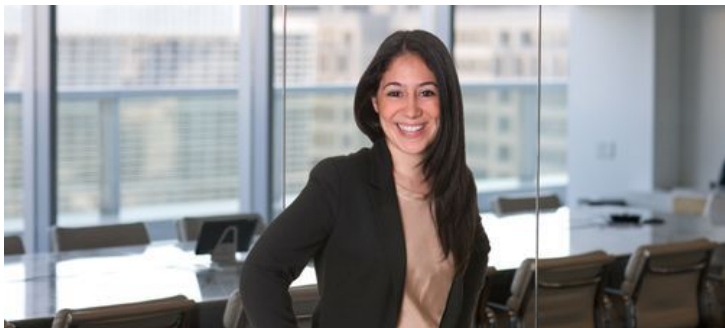
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