

December 20, 2023

Hon. Lina M. Khan, Chair
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, D.C. 20580

Hon. Jonathan Kanter, Assistant Attorney General
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Dear Chair Khan and Assistant Attorney General Kanter:

As many of us noted in a letter to you dated November 17, 2023, recent market developments have raised major concerns surrounding Big Tech companies' investments in Artificial Intelligence (AI).¹ In the days since, turmoil at OpenAI – and news that Microsoft is joining the company's board of directors – have demonstrated that things have gotten even worse as Big Tech continues to move fast to consolidate the space.

With a reported investment of \$13 billion, Microsoft is the largest investor in OpenAI, the company behind the prominent ChatGPT chatbot. Microsoft is reportedly integrating OpenAI's technology into other products, including word processing² and search.³

Since the firing and then rehiring of OpenAI's CEO and restructuring of the company's board, Microsoft has now joined OpenAI's board of directors.⁴ Though Microsoft is a nonvoting observer on the board, this move indicates a greater level of access and control for Microsoft over the management and future trajectory of OpenAI.

¹ Letter to FTC Chair Lina Khan and AAG Jonathan Kanter on November 17, 2023, https://s3.amazonaws.com/demandprogress/images/11-17_DOJ_FTC_AI_Letter.docx.pdf

² CNN Business, "Microsoft is bringing ChatGPT technology to Word, Excel and Outlook," Samantha Murphy Kelly, March 16, 2023, <https://www.cnn.com/2023/03/16/tech/openai-gpt-microsoft-365/index.html>

³ Microsoft, "Reinventing search with a new AI-powered Microsoft Bing and Edge, your copilot for the web," Yusuf Mehdi, February 7, 2023, <https://blogs.microsoft.com/blog/2023/02/07/reinventing-search-with-a-new-ai-powered-microsoft-bing-and-edge-our-copilot-for-the-web/>

⁴ Bloomberg News, "OpenAI Will Add Microsoft as Board Observer, Plans Governance Changes," Rachel Metz, November 29, 2023, <https://www.bloomberg.com/news/articles/2023-11-30/openai-will-add-microsoft-as-board-observer-plans-governance-changes>

Regulators overseas have taken note. This week, Britain's antitrust watchdog, the Competition and Markets Authority, announced that it would examine whether the relationship between Microsoft and OpenAI amounts to a de facto merger.⁵

In its November 2022 Policy Statement Regarding the Scope of Unfair Methods of Competition,⁶ the FTC made clear that it understands unfair methods of competition to include those that "violate the spirit of the antitrust laws," and cited as an example "interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act."⁷ Legal observers have understood this to encompass interlocking board observers,⁸ and with good reason. As Commissioner Slaughter and former Commissioner Chopra noted in 2020, "Typically, a board observer is like a regular member of a board of directors, but without a formal vote. While they don't have a vote, they certainly have a say. Like regular board members, board observers often participate in confidential discussions about strategy. Board observers can advocate for a preferred outcome. Board observers can even get access to key data."⁹

Moreover, access to sensitive board discussions and other corporate intelligence will translate into special power to selectively leak information and run interference to control company decision-making out of public view. That is a power that Microsoft surely wishes it had from the outset when its top brass reportedly learned of the OpenAI CEO's initial ouster at virtually the same time as the public,¹⁰ because it did not have any members on OpenAI's board.

⁵ Wall Street Journal, "Microsoft-OpenAI Partnership Draws Scrutiny From U.K. Regulator," Kim Mackrael, December 8, 2023,

<https://www.wsj.com/business/microsofts-partnership-with-openai-to-be-probed-by-u-k-regulator-61e2379d>

⁶ Federal Trade Commission, "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act Commission File No. P221202," November 10, 2022,

https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf

⁷ We recognize that the Commission does not ordinarily possess jurisdiction over nonprofit corporations. 15 U.S.C. § 44. However, the Commission has also acknowledged that it may nonetheless exercise jurisdiction "over non-profit organizations that operate for the profit of their for-profit members, including by providing substantial economic benefits to those members." *See*:

https://www.ftc.gov/system/files/documents/public_statements/1049563/ramirez_swiss_privacy_shield_letter.pdf

This precisely describes OpenAI, Inc., which, though formally organized as a 501(c)(3) nonprofit organization, operates its \$86 billion subsidiary, OpenAI Global, LLC, as a for-profit entity. OpenAI also undoubtedly works for the profit and benefit of its investors such as Microsoft. *See* Bloomberg News, "OpenAI Is a Strange Nonprofit," Matt Levine, November 21, 2023,

<https://www.bloomberg.com/opinion/articles/2023-11-21/openai-is-a-strange-nonprofit>.

⁸ Wilson Sonsini Goodrich & Rosati, "FTC Reinterprets FTC Act to Include Broad Powers Related to "Interlocking Directorates," Michelle Yost Hale, Beau Buffier, and Jonathan M. Jacobson, November 14, 2022,

<https://www.wsgr.com/en/insights/ftc-reinterprets-ftc-act-to-include-broad-powers-related-to-interlocking-directorates.html>

⁹ Federal Trade Commission, "Statement of Commissioner Rohit Chopra Joined by Commissioner Rebecca Kelly Slaughter In the Matter of Altria Group, Inc. and JUUL Labs, Inc." April 2, 2020,

https://www.ftc.gov/system/files/documents/public_statements/1570265/statement_of_comm_chopra_in_the_matter_of_altria-juul.pdf

¹⁰ New York Times, "Microsoft Hires Sam Altman Hours After OpenAI Rejects His Return," Mike Isaac, Kevin Roose and Cade Metz, Nov. 20, 2023,

<https://www.nytimes.com/2023/11/20/business/openai-altman-ceo-not-returning.html>.

The Big Five tech giants—Meta, Apple, Google, Microsoft, and Amazon—are focused on taking substantial ownership stakes in several AI firms (and in rolling up others)¹¹ in order to consolidate their power, minimize the chance of being displaced by start-ups that deploy new technology, and seek dominance over this evolving and increasingly potent technological domain.

Apple is the leading purchaser of AI startups with 21 acquisitions since 2017.¹² Google (21 since 2010), Meta (18 since 2010), Microsoft (17 since 2010), and Amazon (10 since 2010) are not far behind.¹³ And following your offices' crackdowns on anticompetitive mergers, the major tech companies may be attempting to avoid further antitrust scrutiny by taking large minority stakes in the leading AI companies instead of outright acquisitions.

Big Tech's increasing consolidation of AI contravenes the spirit of President Biden's Executive Order on Promoting Competition in the American Economy¹⁴ as well as his Executive Order on Artificial Intelligence.¹⁵ This ongoing consolidation within such an important, emerging field – by just five of the largest corporations on Earth – is deeply troubling.

We respectfully urge your offices to investigate Big Tech's concentration in the AI space and to take appropriate action to enforce our antitrust laws. We once again thank you for your leadership on antitrust enforcement, and we appreciate your attention to these concerns.

Sincerely,

American Economic Liberties Project
Athena
Blue Future
Center for Digital Democracy

¹¹ Bloomberg News, "Meta, Alphabet and Microsoft Are Ready to Spend Big on AI, Despite Cost Cuts," Alex Barinka, April 27, 2023, <https://www.bloomberg.com/news/newsletters/2023-04-27/meta-alphabet-and-microsoft-are-ready-to-spend-big-on-ai-despite-cost-cuts>

¹² Quartz, "Apple may be quiet on AI, but it's also the biggest buyer of AI companies," Michelle Cheng, September 26, 2023, <https://qz.com/apple-may-be-quiet-on-ai-but-it-s-also-the-biggest-buy-1850872570>

¹³ CB Insights, "The big tech company leading in AI acquisitions," September 27, 2023, <https://www.cbinsights.com/research/big-tech-ai-acquisitions/>

¹⁴ The White House, "Executive Order on Promoting Competition in the American Economy," July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>

¹⁵ The White House, "FACT SHEET: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence," October 30, 2023, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/>

Demand Progress
Democracy for America Advocacy Fund
Friends of the Earth
Greenpeace
HollywoodDemocrats.com
Institute for Local Self-Reliance
Jobs with Justice
Main Street Alliance
MoveOn
NextGen Competition
Open Markets Institute
Other 98%
Our Revolution
Progress America
Public Citizen
Revolving Door Project
RootsAction.org
TakeItBack.Org
UltraViolet