This article briefly reviews the antitrust concerns commentators have raised and identifies a few areas to watch as the use of the technology expands — particularly at the International Standards Organization (ISO) and the Federal Trade Commission (FTC). It also notes the possibility for developing blockchain standards that may foster efficiency, compatibility and interoperability of diverse technologies through the adoption of “FRAND licensing” concepts.

BLOCKCHAIN AND ANTITRUST

A blockchain is typically defined as a decentralized ledger of transactions that can be transmitted across a peer-to-peer network. Companies across an array of industries are investing in blockchain-based platforms that can be used to transact business. Common examples of blockchain “use cases” include using it to track the movement of goods along a supply chain, to record recurring transactions between large financial institutions, to clear securities trades, or to log patient data for sharing among health care organizations.

Two features of blockchain technology have led commentators to flag the potential for antitrust concerns. First, blockchain technology can be used to allow multiple parties to share large databases of commercial information. As such, blockchain applications can enable competitors to share information about goods or services. Information sharing among competitors can give rise to concerns about price-fixing or other concerted action that can be used to stifle competition. Commentators have thus remarked that competing businesses using blockchain technology to share information could become subject to antitrust scrutiny, depending on how they use it.

Second, blockchain-based platforms typically rely on a governance structure that utilizes rules for shared decision-making among platform participants; and, so-called “permissioned” blockchain systems require a grant of access to partake. Commentators have noted that concerted action—or action by those with market power—to use that decision-making structure to exclude or harm competition in a defined market, could give also raise antitrust concerns.

OECD AND ISO

In April 2018, the Organisation for Economic Cooperation and Development (OECD) published a policy paper on blockchain and competition law. The paper surveyed various ways in which blockchain technology could be used to restrict competition, such as collusion and refusal to deal (as well as the possibility of legacy firms preventing the adoption of disruptive applications of the technology).

Beyond those risk areas, however, the paper also laid out an area for pro-competitive coordination. It noted that there may be "a need for a technical standard for interoperability to be defined by a standard setting organisation so that blockchains used by different firms can interact with one another." In other words, as with other areas in which businesses rely on standard setting to ensure the compatibility and interoperability of their technologies, companies using blockchain similarly may need to develop common technical standards to do the same.

One corollary to such standards, the OECD’s paper noted, is the possible need to develop FRAND licensing—i.e., a requirement that businesses contributing their technology to a standard provide licenses to others on fair, reasonable, and non-discriminatory terms. In the blockchain context, that type of regime might mean imposing rules or standards for the governance structure used for blockchain decision-making—such as requiring that decision-making be implemented in a way that is fair to all-comers. Doing so could mitigate the concern that more powerful market participants, or coordinated actors, could unfairly exclude others from access to a critical blockchain platform.

Whether the FRAND concept takes hold in the blockchain arena will be an area to watch.
The OECD paper also notes that the ISO is already developing standards for blockchain technology. Specifically, in 2016 ISO formed ISO/TC 307, which is focused on standardization of blockchain and distributed ledger technologies. The group has 10 different standard types under development, in areas ranging from terminology to security to interoperability. For blockchain enthusiasts, it will be valuable to watch as ISO’s work progresses in this area.

FTC

Finally, the FTC regulates in the areas of antitrust and consumer protection. In March 2018, the FTC announced in a blog post that “It’s Time for a Blockchain Working Group.” That blog post noted that the FTC had recently brought charges against the organizers of a scheme that fraudulently promised payments for recruiting cryptocurrency investors. The charges fell under the FTC’s consumer protection aegis—not antitrust—but the blog post called out antitrust (i.e., “competition policy”) as an area of potential focus for the regulator. Not much detail was provided, however: the post highlighted the possibility of legacy businesses thwarting innovation by disruptive technologies as a potential antitrust concern, but otherwise did not review the types of antitrust issues that may become a focus.

Since then, the FTC has not made significant news in the blockchain/antitrust arena. But the FTC did recently announce a series of hearings—starting this fall—focused on the intersection of technology and antitrust law. Those hearings will encompass more than blockchain, but some of the public comments submitted touch on the technology. The hearings, and any resulting action, will be worth watching to see if they shed any light on where the FTC may go in the area.

CONCLUSION

As the use of blockchain technology expands, the potential for antitrust issues to arise is an area to watch. Key areas to keep an eye on — as this article lays out — will be any developments around standard setting and FRAND licensing (including guidance from ISO or other standardization projects), as well as guidance from the FTC.