

Client Alert

What Does Lina Khan's Appointment as FTC Chair Mean for Your Business?

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On June 15, 2021, within hours of her Senate confirmation as a Federal Trade Commission (FTC) Commissioner, 32-year-old Lina Khan was appointed by President Biden to serve as the youngest FTC Chair in history.

Khan has established herself as a progressive antitrust activist and a leader of the “New Brandeis Movement”¹ that advocates for a revival of more aggressive U.S. antitrust policies and enforcement from the earlier part of the 20th century. Khan’s most widely-recognized and influential work, “[Amazon’s Antitrust Paradox](#),” published in the *Yale Law Journal* in 2017 (while she was a Yale law student), argues that the current US antitrust paradigm (heavily influenced by the Chicago School) is too narrowly focused on consumer welfare and “is unequipped to capture the architecture of market power in the modern economy.”² Because the consumer welfare standard focuses on short-term price and output effects, it is ill-equipped to address the purported harms to competition that big tech platforms raise. In her article, Khan maintains that platform markets, such as Amazon, have evaded antitrust liability because they focus on long-term growth over short-term profits – in short, they can make predatory, below-cost pricing a rational and profitable strategy, and can control the infrastructure on which their rivals depend without raising prices or reducing output in the short-term.

Khan’s concerns that big tech platforms are exercising unchecked market power continued in her role as counsel to the House Subcommittee on Antitrust, Commercial and Administrative Law and its investigation and report on [Competition in Digital Markets](#) that compared Google, Facebook, Amazon, and Apple to the oil barons and railroad tycoons of old. The report recommended sweeping regulatory and legislative reforms in three areas:

- **Restore competition to the digital economy** by, among other things, structurally separating dominant tech firms (e.g., requiring Facebook to spin off WhatsApp and Instagram or requiring Google to divest its DoubleClick ad servicing business) and imposing “line of business” restrictions to prevent their control of key channels of distribution, acquisition of nascent threats,

¹ Lina Khan, *The New Brandeis Movement: America’s Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131 (2018).

² Lina M. Khan, Note, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710 (2017).

self-preferential behavior, and restriction of rivals' access to data to advantage their other lines of business;

- **Strengthen existing antitrust laws** to make it easier for federal enforcers and private plaintiffs to challenge anticompetitive conduct and mergers through, among other things, preferencing overenforcement of antitrust laws to underenforcement, enacting presumptions that vertical mergers are anticompetitive when either of the parties are dominant firms in a concentrated market, and broadening the FTC's and the US Department of Justice's (DOJ) legal authorities to challenge market power and legal abuse (especially with regards to the acquisition of nascent competitors); and
- **Encourage additional federal, state, and private antitrust enforcement**, including by increasing the FTC and DOJ's budget, encouraging rulemaking and enforcement against "unfair method[s] of competition," and eliminating forced arbitration clauses to facilitate more private enforcement of antitrust laws.³

Although Khan is best known for advocating for greater antitrust enforcement against digital platforms, her expansive antitrust enforcement philosophy is not limited to big tech. As described by Khan and Professor Tim Wu (who, in March 2021, was appointed to the National Economic Council as a special assistant to President Biden for technology and competition policy), the New Brandeisian school of antitrust asserts that a range of practices previously considered to be competitively benign may in fact merit further investigation and challenge. In particular, they argue that:

- Vertical restraints and vertical mergers should be subject to greater scrutiny;
- Non-compete agreements should be presumptively unlawful;
- Predatory pricing and bidding should face greater scrutiny;
- Monopoly leveraging should be actionable;
- Monopolists should have a duty to provide critical infrastructure to competitors;
- The DOJ and FTC should adopt stronger structural presumptions that mergers that result in significant concentration are harmful; and
- Workers of all types (e.g., freelancers, not just employees) should benefit from an antitrust exemption for collective bargaining.⁴

As such, while there is no doubt that Khan's FTC will add to its current roster of big tech investigations (which include the ongoing Amazon Marketplace investigation and the FTC's lawsuit seeking to require Facebook's divestiture of Instagram and WhatsApp), we also expect the FTC will focus on non-digital transactions that increase market concentration, especially in sensitive industries such as healthcare and pharmaceuticals.

With Khan's appointment, the FTC now has a Democratic majority that will support an aggressive antitrust agenda. Businesses should expect heightened scrutiny of transactions that may have been viewed as competitively benign in prior administrations, including:

- Mergers involving vertical integration, especially if the acquirer and target have market power in related product markets; and

³ SUBCOMM. ON ANTITRUST, COM. & ADMIN. L. OF THE COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 376–405 (Comm. Print 2020).

⁴ Professor Tim Wu, *The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech*, MEDIUM: ONEZERO (Nov. 18, 2019), <https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7>. Khan and University of Utah economist Marshall Steinbaum collaborated with Wu to create the Utah Statement to define the tenets of the New Brandeisian school of thought in response to a critic's challenge. Paul Gabrielsen, *What is the "Utah Statement?"*, UTAH: ATTHEU (Jan. 2, 2020), <https://attheu.utah.edu/facultystaff/what-is-the-utah-statement/>.

- Transactions that give companies control over the essential infrastructure on which their rivals depend.

An example transaction involving both a vertical integration and essential infrastructure is the proposed Illumina/Grail transaction, which has been challenged by the FTC, and in which the combined company could foreclose rival multi-cancer early detection test developers from obtaining necessary reagent components to manufacture the tests.⁵ In such circumstances, Khan argues that a dominant firm controlling essential infrastructure either should be subject to both a presumption of predatory pricing when pricing products below costs and a prophylactic ban on vertical integration, or should be regulated as a public utility or through the essential facilities doctrine to negate the firm's ability to preference its goods over its rivals' goods or exclude rivals from its platform.⁶

Commissioner Rohit Chopra, one of three Democrats forming the 3-2 majority, is expected to depart the FTC to head the Consumer Financial Protection Bureau at some point in the future. Following his departure and until his replacement is confirmed, Chair Khan will face temporary challenges in pursuing an aggressive enforcement agenda. During this period, we could see deadlocks between Republican and Democratic Commissioners that benefit merging parties, as we saw in the 7-Eleven/Speedway transaction where the deadlocked Commission was unable to reach agreement with the merging parties on divestitures or, alternatively, sue to block the transaction before it closed. However, Chopra's replacement also will be a Democrat and, once confirmed, Chair Khan will once again have the necessary votes to carry out what could be an ambitious agenda.

Going forward, we expect that more transactions will be subject to extended reviews (Second Requests) and more merger challenges will be brought in court that will further strain the FTC's already stretched resources. Furthermore, merging parties should expect the FTC to pay closer attention to transactions that change the structure of competition (such as by eliminating a nascent competitor) even if they do not result in highly concentrated markets. The FTC also will scrutinize acquisitions by companies that are seeking to extend their market position through vertical integration, access to critical infrastructure, or control over other valuable assets such as data.

Merging parties should be prepared to engage early in advocacy efforts with the FTC to explain and validate the procompetitive rationale for their transaction and its competitive effects based on a broader range of metrics (not just short-term price and output effects), including innovation, service levels, market access, and data and privacy rights. The FTC will be applying a wider lens to transactions going forward, and merging parties should do the same.

⁵ Administrative Complaint, Illumina, Inc., docket no. 9401 (FTC Mar. 30, 2021).

⁶ Khan, *supra* note 2, at 790-802.

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