

Axinn Antitrust Insight: Lina Khan Sworn in as New FTC Chair

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PRACTICE AREAS

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On June 15, 2021, Lina M. Khan was confirmed to fill a vacant seat on the Federal Trade Commission by a Senate vote of 69-28, providing the Commission a full slate of five commissioners and a Democrat majority. Soon thereafter, in a move that surprised many, President Biden selected Khan as the FTC's Chair, and she was sworn in. Khan's selection as Chair is an indication that aggressive antitrust enforcement is a priority of the Administration.

Khan, a Columbia Law School professor, has focused "on how the current antitrust regime is unequipped to capture the power of dominant digital platforms" and is seen as a key member of the "New Brandeis" antitrust movement seeking to displace the consumer-welfare standard that has guided antitrust law for decades. She also has served as an attorney advisor to Commissioner Rohit Chopra and as counsel to the House Judiciary Committee's Subcommittee on Antitrust. Khan, who graduated from Williams College in 2010 and from Yale Law School in 2017, is the youngest FTC Chair in the agency's history.

While at the House of Representatives, Khan led the Investigation of Competition in Digital Markets, which published a report in 2020 focusing on "the dominance of Amazon, Apple, Facebook, and Google." That report asserted that the "antitrust agencies failed, at key occasions, to stop monopolists from rolling up their competitors" and urged "[f]orceful agency action." Many practitioners and scholars disagreed with the report's sweeping conclusions, including current FTC Commissioner Christine Wilson.

Khan's scholarship propounds similar themes as the House report. In 2017, The Yale Law Journal published *Amazon's Antitrust Paradox*, Khan's student Note, which explored allegedly "anticompetitive aspects of Amazon's structure and conduct." Her 2018 article, *The New Brandeis Movement*, criticized the consumer welfare standard's focus on consumers rather than a broader set of constituents, such as workers, suppliers, innovators, and independent entrepreneurs.

While much of Khan's prior work has focused on the digital economy, as FTC Chair Khan's mission is not limited to any one sector and her enforcement philosophy may affect companies across the range of industries subject to FTC review. Chair Khan will have the ability to select personnel with similar views for key management positions tasked with implementing her priorities and agenda. Khan also has argued that the FTC has rulemaking authority for unfair methods of competition, which the Commission might pursue in an attempt to impose bright-line rules on certain antitrust conduct, such as when non-compete agreements are permissible.

With Khan's appointment as Chair, there is a risk of a significant shift at the FTC with this change of administration compared to other transitions in the recent past. Companies should expect Khan to pursue an agenda in line with the New Brandeis movement's philosophy, i.e. a greater focus on (i) the welfare of smaller competitors as opposed to consumers, as well as (ii) non-price dimensions of competition and less emphasis on economic efficiency. Simply put, arguments that a merger is lawful because it results in lower prices for consumers may not have the same persuasive force with Khan as with previous Commissions. Ultimately, Khan's success in carrying out an expanded approach will depend in part on the courts' willingness to find in favor of the FTC even where a merger or other conduct results in lower prices for consumers, or where the action presents novel theories of harm that expand the boundaries beyond recent precedent.

