

Khan Confirmation to FTC Foreshadows More Aggressive Antitrust Agenda

Update

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Earlier this week, Columbia Law School professor Lina Khan was confirmed by the U.S. Senate to fill the 5th seat on the Federal Trade Commission, giving Democrats a 3-2 majority on the competition and consumer protection agency. The Senate vote was 69-28 in favor. Within hours of her confirmation, Khan was sworn in and President Biden named her as the new Chair of the FTC, with Acting Chairwoman Rebecca Kelly Slaughter returning to her position as a commissioner. At 32 years old, Khan is the youngest FTC chair in the agency's history.

Khan has been a fierce advocate for more robust antitrust enforcement, particularly against Big Tech, which helped to generate bipartisan support for her confirmation. However, her addition has much broader implications beyond the focus on Big Tech, as the Democrats on the FTC now have the majority votes needed to advance the more aggressive antitrust enforcement agenda that the other two Democratic commissioners had been arguing for during the Trump Administration while in the minority. This timing also coincides with sweeping antitrust reform proposals in Congress, with several bills recently introduced in the Senate and the House of Representatives.

Lina Khan first gained public recognition with her note titled "Amazon's Antitrust Paradox," published in the Yale Law Journal in January 2017. In that note, Khan argued that Amazon's market dominance and business strategies posed anticompetitive concerns that the existing consumer welfare framework in antitrust, which focuses on short-term effects on price and output, fails to properly recognize and police. Khan then worked in current FTC Commissioner Rohit Chopra's office, where they wrote an article calling for the FTC to expand the use of its rulemaking power to target "unfair methods of competition." She also worked with the House Subcommittee on Antitrust, Commercial and Administrative Law, where she played a lead role in the Democratic majority staff report on competition in digital markets. The report

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was highly critical of several Big Tech companies, including Amazon, Apple, Facebook, and Google, and called for a significant overhaul of the antitrust laws

Since January, following the departure of former Republican Chairman Joseph Simons, the FTC had been operating with a 2-2 partisan split, with recent actions highlighting the growing rift among the Commissioners along ideological lines regarding fundamental competition policy and enforcement issues. Most notably, this rift was evident in the 7-Eleven / Speedway merger proceeding, where a 2-2 gridlock at the FTC resulted in a highly unusual closing by the transaction parties despite not having obtained official approval from the FTC.

It is unclear how long this new FTC majority will last, as Commissioner Chopra has been nominated to head the Consumer Financial Protection Bureau, which would create a new vacancy on the FTC. Meanwhile, President Biden has yet to name a new chief for the U.S. Department of Justice's Antitrust Division.

Nevertheless, it is not an exaggeration to suggest that this could mark the beginning of a major shift in U.S. antitrust enforcement towards a much more aggressive stance against mergers and various forms of business conduct.