

# The Pendulum Swings: Lina Khan's Confirmation Hearing Signifies a Potential Shift Toward Increased Antitrust Enforcement at the FTC

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The nomination of Columbia Law Professor Lina Khan to the Federal Trade Commission last month raised speculation as to whether there might be a new era of antitrust enforcement under the Biden Administration. If confirmed, Ms. Khan would fill former FTC Chairperson Joseph Simon's vacant seat, leaving one more remaining vacancy for President Biden to fill after Democratic Commissioner Rohit Chopra leaves to lead the Consumer Financial Protection Bureau.<sup>[1]</sup> Biden's next appointment is anticipated soon, and would mark the shift to a 3-2 Democratic majority at the Commission, paving the way for reinvigorated enforcement.<sup>[2]</sup> During her confirmation hearing before the Senate Commerce Committee last week, Ms. Khan provided further indications of increased enforcement efforts at the FTC.<sup>[3]</sup>

## CHALLENGES FACING THE FTC

Ms. Khan was well received by the Committee, in large part, because of the bipartisan concerns surrounding "big tech" companies.<sup>[4]</sup> (See our prior posts about current proposed legislation, including the [Competition and Antitrust Law Enforcement Reform Act of 2021](#) and the [Trust-Busting for the Twenty-First Century and Break Up Big Tech Acts](#), and Congressional [investigations](#) and [hearings](#) targeting big tech.) Antitrust concerns involving technology companies with dominant platforms have been central to Ms. Khan's scholarship and prior agency experience. Ms. Khan became well known among the antitrust community and more broadly after publishing a student note while in law school arguing that the focus of traditional antitrust enforcement was insufficient to address problems raised by large technology companies with significant market power.<sup>[5]</sup> Her work as an FTC staffer for Mr. Chopra also involved an empirical review of digital markets to determine whether the antitrust laws are keeping pace with business realities and offering adequate protection.

Senators at Ms. Khan's hearing asked about her approach to social media behemoths, tech gatekeepers, a concentrated digital ad market, and the related privacy concerns with behavioral ad-based business models. In her responses, Ms. Khan frequently returned to the deep information asymmetries that exist between tech firms and regulators. She suggested that the FTC, at the very least, must take additional steps to exert its investigative authority and use its information-collecting capabilities to help level the playing field—a field that includes black-box, proprietary algorithms that make it difficult for regulators or competitors to know what is going on and that also incentivizes the use and monetization of personal data.

A related challenge that Ms. Khan emphasized during the hearing was the overall increase of concentration in a number of markets, not just the tech industry. Ms. Khan's work has focused on monopolization, and in particular, situations in which a company dominates one market, then adjacent markets, and continues to expand into markets in other industries through vertical integration. Ms. Khan noted that this concentration and control of the supply process exposes the "fragility" of markets that are impacted by other highly concentrated ones.

Ms. Khan explained that a concern moving forward is how to ensure the FTC has the resources it needs for large-scale enforcement actions that might be needed to respond to the increased concentration. She noted that the antitrust agencies have been "slow to catch up" to the underlying business realities of how markets work and have not been able to keep pace with the increasing size of companies, proposed mergers, and the U.S. economy generally. Ensuring enforcement agencies like the FTC and Department of Justice Antitrust Division have adequate resources would be a top priority for her if confirmed.

## THE PATH FORWARD

Ms. Khan detailed two potential paths for how the FTC might respond to highly concentrated markets. The FTC can enforce competition laws and ensure markets are competitive through traditional enforcement actions, or it can recognize that there are certain economies of scale and network externalities that will keep these markets dominated by a few companies, and instead consider applying a *different* set of rules. Ms. Khan noted that generally the FTC should choose one approach or the other, but that room exists for "reach[ing] for a different set of tools" depending on the type of market involved. When pressed on how she would use the FTC's rulemaking power to potentially "circumvent" judicial rulings, Ms. Khan remained diplomatic and stated that she held no "philosophical view" on whether the FTC could do this. Yet, it remained clear—both from what she did say and what she did not say—that Ms. Khan would welcome new thinking at the Commission. It is perhaps this non-traditional approach and willingness to look beyond traditional enforcement tools that the Biden Administration hopes to see implemented at the FTC and has earned Khan the reputation of an anti-monopoly pioneer.<sup>[6]</sup>

While it remains an open question what effects Ms. Khan's antitrust heterodoxy may have on the Commission as a whole, some critics sense an resurgence of Neo-Brandeisianism that could result in more vigorous enforcement—and court battles. Indeed, just last week a unanimous Supreme Court reined in FTC authority to seek certain remedies, specifically holding that restitution is not available in FTC enforcement actions under Section 13(b) of the Federal Trade Commission Act.<sup>[7]</sup> Ms. Khan's more progressive approach to enforcement, if adopted Commission-wide, could make antitrust litigation a more important battleground in the federal courts for companies seeking to challenge an FTC enforcement action or regulation. Another consideration is how the Commission may navigate Ms. Khan's possible recusal in any cases presenting the appearance of partiality due to her prior work as an academic and with the House of Representatives' Antitrust Subcommittee.

When asked about what she would do differently from the Obama Administration's merger-review process, Ms. Khan explained that there were missed enforcement opportunities because of information asymmetries, but also because of the incorrect assumption that the digital market is so fast-moving and would be naturally disciplined by new entry and competition. Knowing now that significant externalities exist, Ms. Khan said that the current administration must be much more vigilant with its merger review. While Senator Blackburn requested a more detailed post-hearing response to what Ms. Khan would do differently, Ms. Khan's confirmation signals a significant departure from the Obama Administration's hands-off approach to mergers and acquisitions, especially in the tech industry.<sup>[8]</sup>

It is also clear that, as a commissioner, Ms. Khan would be a zealous enforcer as she works to promote market dynamism and widespread prosperity through antitrust laws. The Senate Commerce Committee hearing record will remain open for two weeks, during which time senators can ask additional questions of the nominees before voting to advance the nomination to the full Senate.

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[1] Bryan Koenig, Law 360, Mar. 22, 2021, available at: <https://www.law360.com/articles/1367515/biden-officially-picks-amazon-critic-lina-khan-for-ftc-post>.

[2] *Id.*

[3] Cat Zakrzewski, The Washington Post, Lina Khan's nomination hearing signals a new era of tough antitrust enforcement for the tech industry, April 21, 2021, available at: <https://www.washingtonpost.com/technology/2021/04/21/lina-khan-ftc-nomination-hearing/>.

[4] *Id.*

[5] Lina M. Khan, Amazon's Antitrust Paradox, 126 Yale L. J. 564 (2017).

[6] David Streitfeld, The New York Times, Amazon's Antitrust Antagonist Has a Breakthrough Idea, Sept. 7, 2018, available at: <https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html>.

[7] *AMG Capital Mgmt., LLC v. FTC*, No. 19-508, 2021 U.S. LEXIS 2108 (Apr. 22, 2021).

[8] See Zakrzewski, *supra* at n. 3.

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