

Insights

FROM BIG TECH CRITIC TO HEAD REGULATOR: LINA KHAN WILL LEAD THE FTC WITH BIPARTISAN SUPPORT

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Four days after Congress introduced five antitrust bills with significant levels of bipartisan support, President Biden appointed—and Congress overwhelmingly approved—notable Big Tech critic Lina Khan to be the Chair of a powerful federal agency that enforces the antitrust laws—the Federal Trade Commission. Khan’s appointment passed the Senate by a striking 62-28 vote, highlighting at least one area of bipartisan consensus: weariness from both Congress and consumers of Big Tech’s economic power and control of the marketplace.

Just 32 years old, Khan is the youngest person ever to become an FTC Commissioner, let alone Chair the FTC. A member of the “new Brandeis” school and leader of the “hipster” antitrust movement, Khan wants to expand the interpretation of existing antitrust laws to target issues like income inequality and protection of consumer choice by returning to a structure-oriented competition policy. She also supports the enactment of new legislation to broaden the reach of U.S. antitrust policy.

Khan gained notoriety in 2017 after publishing an academic article laying out the legal case for breaking up a notable Big Tech company under either new regulations or through antitrust law reform. She argued that the Chicago School approach to antitrust, which embraces consumer welfare as the “sole goal of antitrust” is problematic. The Chicago School approach—and modern federal interpretations of the antitrust laws—balances monopolists’ consumer harm (e.g., higher prices, less variety) with their consumer benefits (i.e., efficiencies). However, Kahn argued that this focus on defined consumer welfare has ignored the harm inflicted on platform markets when Big Tech monopolists utilize free services or low prices to enhance their market position. For Khan, the FTC and the Courts should conceptualize these free services and low prices as a form of predatory pricing, negatively affecting the market by pushing out competitors and abusing the power Big Tech has over American consumers.

The antitrust community is closely watching to see the impact of Khan’s elevation to Chair of one of the two federal antitrust enforcement agencies, which is also the most powerful consumer protection organization in the United States. Coupled with pending antitrust legislation proposals targeting antitrust enforcement at acquisitions by “extremely large” companies and in particular Big

Tech, Khan's appointment may have a significant impact on technology-based businesses. As Chair, Khan will steer the direction of the FTC and lead antitrust and consumer protection law enforcement focused on Big Tech companies. With a conservative-dominated Supreme Court, decades of antitrust legal precedents, and an under-resourced agency, Khan faces obstacles in implementing her ideas if she cannot gain congressional backing for the new antitrust legislation. However, her bold vision, strong academic background, and youthful energy present an opportunity to reinvigorate regulators and politicians alike to reexamine and reconceptualize antitrust laws.

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