

10-17-2022

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A New Age of Antitrust: How the Latest FTC Leadership is Rewriting the Rules

By Sara Rutherford*

The US Federal Trade Commission (FTC) has come under recent scrutiny after its newest leadership passed sweeping process and policy changes that upend years of the status quo.¹ These changes come after President Biden nominated and the Senate confirmed the FTC's newest Chair, Lina Khan, in June 2021 to replaced Commissioner Joseph Simons who resigned in January of the same year.² Khan is considered a "progressive reformer" and serves as the youngest appointed FTC Chair in history.³ She is also a well-known critic of Big Tech having famously written "Amazon's Antitrust Paradox" for the Yale Law Journal in 2016 where she calls for a "[restoration] of traditional antitrust."⁴ After law school, Khan worked for former Commissioner Rohit Chopra as a House antitrust subcommittee staffer where she authored a report calling for sweeping antitrust law reform and harsh criticisms of tech giants Apple, Amazon, Google, and Facebook.⁵

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¹ Bryan Koenig, *Lina Khan Is Rewriting the FTC's Rulebook*, LAW360 (Feb. 9, 2022), <https://www.law360.com/articles/1463315/lina-khan-is-rewriting-the-ftc-s-rulebook>.

² Press Release, Fed. Trade Comm'n, *Lina M. Khan Sworn in as Chair of the FTC* (June 15, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/06/lina-m-khan-sworn-chair-ftc>.

³ David Gosset & Kaj Rozga, *Major Leadership & Policy Changes at the FTC – What They Mean for Antitrust and Consumer Prot. Enf't in Technology Markets*, DAVIS WRIGHT TREMAINE LLP (July 14, 2021), <https://www.dwt.com/insights/2021/07/biden-ftc-antitrust-initiatives>; David McCabe & Cecilia Kang, *Biden Names Lina Khan, a Big Tech Critic, as FTC Chair*, N.Y. TIMES (June 15, 2021), <https://www.nytimes.com/2021/06/15/technology/lina-khan-ftc.html>.

⁴ Koenig, *supra* note 1; Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2016).

⁵ Koenig, *supra* note 1.

When Khan assumed the role of Chair in 2021, the five-member Commission switched to a Democratic majority, with many subsequent 3-2 votes occurring along party lines.⁶ Khan's vision for the FTC became clear in the agency's first publicly open meeting in over twenty years.⁷ Of the many changes that were made, two concerning the FTC's authority over investigations of competition and consumer protection violations have received the most censure.⁸

First, the Commission rescinded a 2015 policy statement that acted as a check on the agency's power under Section 5 of the FTC Act which bans "unfair methods of competition."⁹ The 2015 statement limited the Commission's power to attack companies for alleged violations by introducing the "consumer welfare standard," a balancing test of anticompetitive conduct against potentially pro-competitive benefits, when determining if competition has truly been harmed.¹⁰ Reformers, like Khan, see this check on power as a barrier to proper enforcement of competition laws.¹¹ With this Obama-era policy statement now rescinded, the FTC has broader authority to bring standalone unfair competition claims that otherwise do not fall under traditional antitrust laws, like the Sherman and Clayton Acts.¹² Section 5 of the FTC Act has long been controversial due to

⁶ Cat Zakrzewski & Tyler Pager, *Biden Taps Big Tech Critic Lina Khan to Chair the Fed. Trade Comm'n*, WASH. POST (June 15, 2021),

<https://www.washingtonpost.com/technology/2021/06/15/khan-ftc-confirmation-vote/>.

⁷ Kirk Nagra et. al., *FTC's First Open Meeting Highlights Aggressive Enf't Priorities and Partisan Divide*, WILMER HALE (July 13, 2021),

<https://www.wilmerhale.com/en/insights/blogs/wilmerhale-privacy-and-cybersecurity-law/20210713-ftcs-first-open-meeting-highlights-aggressive-enforcement-priorities-and-partisan-divide>.

⁸ Gosset & Rozga, *supra* note 3.

⁹ *Id.*; Statement of Enf't Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015),

https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

¹⁰ Gosset & Rozga, *supra* note 3.

¹¹ *Id.*

¹² Koenig, *supra* note 1; Press Release, Fed. Trade Comm'n, *FTC Rescinds 2015 Policy that Limited Its Enf't Ability Under the FTC Act* (July 1, 2021), <https://www.ftc.gov/news->

its wide-ranging authority expanding outside the conventional limits of antitrust laws; now the FTC can utilize Section 5's authority completely unbridled.¹³

Second, the FTC voted to remove limitations on opening investigations, and subsequent compulsory process, for seven economic sectors including "technology companies and digital platforms."¹⁴ Previously, the agency required a majority Commission vote to initiate investigations and subpoena company information, but now FTC staffers can submit legally binding investigative demands with only one Commissioner's approval.¹⁵ By relaxing these limitations, Khan is prioritizing investigations into "harms against workers and small businesses" and "ramping up enforcement against illegal mergers."¹⁶ Khan claims this decision will cut back delays and "red-tape bureaucracy," allowing staff to focus their investigative efforts in the midst of a merger boom.¹⁷

Still early in her tenure, Khan is already making waves in Big Tech by targeting Meta, formerly known as Facebook, when the FTC sought to block the company's acquisition of Within Unlimited, a virtual reality start-up.¹⁸ In the July 2022 complaint, the FTC alleges the acquisition, if consummated, would substantially decrease competition in the market for virtual reality (VR) fitness apps.¹⁹ The metaverse is a "fully realized digital world that exists beyond the one in which we live" accessible via VR technology and

events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act.

¹³ Gosset & Rozga, *supra* note 3.

¹⁴ *Id.*

¹⁵ Koenig, *supra* note 1.

¹⁶ Press Release, Fed. Trade Comm'n, *FTC Authorizes Investigations into Key Enft Priorities* (July 1, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-authorizes-investigations-key-enforcement-priorities>.

¹⁷ *Id.*

¹⁸ Cecilia Kang, *FTC Chair Upends Antitrust Standards with Meta Lawsuit*, N.Y. TIMES (July 28, 2022), <https://www.nytimes.com/2022/07/28/technology/ftc-lina-khan-meta.html>.

¹⁹ Complaint at 3, *FTC v. Meta Platforms, Inc.*, No. 3:22-CV-04325 (N.D. Cal. July 27, 2022).

apps, a market which Meta hopes to further enter.²⁰ Even though the metaverse is nascent, not-yet-mainstream technology, the FTC argues antitrust law can be applied because the VR app market is already highly concentrated, even without waiting for complete market maturity to see which companies are the largest players.²¹

While clearly the FTC is concerned with Meta's presence in the budding VR app market, their argument is heavily theoretical because it relies on the potential for future harm to competition, not proof of already asserted harm.²² In the past, most behavior flagged by the FTC involved large companies purchasing other similarly sized companies in mature, competitive markets.²³ However, the FTC generally approved of large companies purchasing start-ups in still-developing markets, such as Google's acquisition of YouTube in 2006 and Facebook's acquisition of Instagram in 2012.²⁴

Khan's decision to attack Meta goes directly against decades of FTC standards leaving many worried about the technology industry's future.²⁵ "Regulators predicting future markets is a very, very dangerous precedent and position," said Aaron Levie, executive at Box, a cloud-based software company.²⁶ Other critics believe if the FTC succeeds innovation would suffer. Entrepreneurs would become wary of building out ideas, and venture capitalists would shy away from funding start-ups without the

²⁰ Kang, *supra* note 18.

²¹ *Id.*; Complaint at 23, 27, FTC v. Meta Platforms, Inc., No. 3:22-CV-04325 (N.D. Cal. July 27, 2022).

²² Kang, *supra* note 18.

²³ *Id.*

²⁴ *Id.*; Bloomberg News, *Google Wins Antitrust Approval*, CHI. TRIBUNE (Nov. 4, 2006), <https://www.chicagotribune.com/news/ct-xpm-2006-11-04-0611040141-story.html>; see Press Release, The Fed. Trade Comm'n, *FTC Closes Its Investigation Into Facebook's Proposed Acquisition of Instagram Photo Sharing Program* (Aug. 22, 2012), <https://www.ftc.gov/news-events/news/press-releases/2012/08/ftc-closes-its-investigation-facebooks-proposed-acquisition-instagram-photo-sharing-program>.

²⁵ Kang, *supra* note 18.

²⁶ *Id.*

potential promise of later being bought by a larger company.²⁷ Fortunately for those in tech, it appears the FTC has the difficult task of convincing a judge that their predictions of competition in the metaverse are correct, and that Meta's acquisition would unfairly hurt future competition.²⁸

Edited By Allison Frisella

²⁷ *Id.*; Gary Shapiro, *I lead the Consumer Technology Ass'n and I've never commented on an FTC lawsuit until now. Lina Khan's new case against Meta is laughable*, FORTUNE (Aug. 3, 2022), <https://fortune.com/2022/08/03/consumer-tech-cta-ftc-lawsuit-lina-khan-case-v-meta-acquisition-gary-shapiro/>.

²⁸ Kang, *supra* note 18.