



International Center  
for Law & Economics

What Lina Khan's appointment means for the House antitrust bills

June 22, 2021

[Samuel Bowman](#)

Lina Khan's appointment as chair of the Federal Trade Commission (FTC) is a remarkable accomplishment. At 32 years old, [she is the youngest chair ever](#). Her longstanding criticisms of the Consumer Welfare Standard and alignment with the neo-Brandeisian school of thought make her appointment a significant achievement for proponents of those viewpoints.

Her appointment also comes as House Democrats are preparing to mark up [five bills designed to regulate Big Tech](#) and, in the process, vastly expand the FTC's powers. This expansion may combine with Khan's appointment in ways that lawmakers considering the bills have not yet considered.

This is a critical time for the FTC. It has [lost a number of high-profile lawsuits](#) and is preparing to expand its rulemaking powers to [regulate things like employment contracts and businesses' use of data](#). Khan has also [argued in favor of additional rulemaking powers around "unfair methods of competition."](#)

As things stand, the FTC under Khan's leadership is likely to push for more extensive regulatory powers, akin to those held by the Federal Communications Commission (FCC). But these expansions would be trivial compared to what is proposed by many of the bills currently being prepared for a [June 23 mark-up](#) in the House Judiciary Committee.

The flagship bill—Rep. David Cicilline's (D-R.I.) [American Innovation and Choice Online Act](#)—is described as a platform “non-discrimination” bill. [I have already discussed what the real-world effects of this bill would likely be](#). Briefly, it would restrict platforms' ability to offer richer, more integrated services at all, since those integrations could be challenged as “discrimination” at the cost of would-be competitors' offerings. Things like free shipping on Amazon Prime, pre-installed apps on iPhones, or even including links to Gmail and Google Calendar at the top of a Google Search page could be precluded under the bill's terms; in each case, there is a potential competitor being undermined.

In fact, the bill's scope is so broad that some have argued that the FTC simply would not challenge “innocuous self-preferencing” like, say, [Apple pre-installing Apple Music on iPhones](#). [Economist Hal Singer has defended the proposals on the grounds that](#), “Due to limited resources, not all platform integration will be challenged.”

But this shifts the focus to the FTC itself, and implies that it would have potentially enormous discretionary power under these proposals to enforce the law selectively.

Companies found guilty of breaching the bill's terms would be liable for civil penalties of up to 15 percent of annual U.S. revenue, a potentially significant sum. And though the Supreme Court recently ruled unanimously against the FTC's powers to levy civil fines unilaterally—which the FTC opposed vociferously, and may get restored by other means—there are two scenarios through which it could end up getting extraordinarily extensive control over the platforms covered by the bill.

The first course is through selective enforcement. What Singer above describes as a positive—the fact that enforcers would just let “benign” violations of the law be—would mean that the FTC itself would have tremendous scope to choose which cases it brings, and might do so for idiosyncratic, politicized reasons.

This approach is common in countries with weak rule of law. [Anti-corruption laws are frequently used to punish opponents of the regime in China](#), who probably *are* also corrupt, but are prosecuted because they have challenged the regime in some way. Hong Kong's National Security law has also been used to target peaceful protestors and critical media thanks to its [vague and overly broad](#) drafting.

Obviously, that's far more sinister than what we're talking about here. But these examples highlight how excessively broad laws applied at the enforcer's discretion give broad powers to the enforcer to penalize defendants for other, unrelated things. Or, to quote Jay-Z: [“Am I under arrest or should I guess some more? / ‘Well, you was doing 55 in a 54.’”](#)

The second path would be to use these powers as leverage to get broad consent decrees to govern the conduct of covered platforms. These occur when a lawsuit is settled, with the defendant company agreeing to change its business practices under supervision of the plaintiff agency (in this case, the FTC). The Cambridge Analytica lawsuit ended this way, with Facebook agreeing to change its data-sharing practices under the supervision of the FTC.

This path would mean the FTC creating bespoke, open-ended regulation for each covered platform. Like the first path, this could create significant scope for discretionary decision-making by the FTC and potentially allow FTC officials to impose their own, non-economic goals on these firms. And it would require costly monitoring of each firm subject to bespoke regulation to ensure that no breaches of that regulation occurred.

Khan, as a critic of the [Consumer Welfare Standard](#), believes that antitrust ought to be used to [pursue non-economic objectives](#), including [“the dispersion of political and economic control.”](#) She, and the FTC under her, may wish to use this discretionary power to prosecute firms that she feels are hurting society for unrelated reasons, such as because of political stances they have (or have not) taken.

Khan's fellow commissioner, Rebecca Kelly Slaughter, has argued that antitrust should be [“antiracist”](#); that [“as long as Black-owned businesses and Black consumers are systematically underrepresented and disadvantaged, we know our markets are not fair”](#);

and that the FTC should consider using its existing [rulemaking powers to address racist practices](#). These may be desirable goals, but their application would require contentious value judgements that lawmakers may not want the FTC to make.

Khan herself has been less explicit about the goals she has in mind, but has given some hints. In her essay "[The Ideological Roots of America's Market Power Problem](#)", Khan highlights approvingly former Associate Justice William O. Douglas's account of:

"economic power as inextricably political. Power in industry is the power to steer outcomes. It grants outsized control to a few, subjecting the public to unaccountable private power—and thereby threatening democratic order. The account also offers a positive vision of how economic power should be organized (decentralized and dispersed), *a recognition that forms of economic power are not inevitable and instead can be restructured.*" [italics added]

Though I have focused on Cicilline's flagship bill, others grant significant new powers to the FTC, as well. The [data portability and interoperability bill](#) doesn't actually define what "data" is; it leaves it to the FTC to "define the term 'data' for the purpose of implementing and enforcing this Act." And, [as I've written elsewhere](#), data interoperability needs significant ongoing regulatory oversight to work at all, a responsibility that this bill also hands to the FTC. Even a move as apparently narrow as data portability will involve a significant expansion of the FTC's powers and give it a greater role as an ongoing economic regulator.

It is concerning enough that this legislative package would [prohibit conduct that is good for consumers, and that actually increases the competition faced by Big Tech firms](#). Congress should understand that it also gives extensive discretionary powers to an agency intent on using them to pursue broad, political goals. If [Khan's appointment as chair was a surprise](#), what her FTC does with the new powers given to her by Congress should not be.

[View Article](#)