

FTC Chair Khan Gives a Look Behind the Curtain of United States Merger Reform

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In remarks given last week at the 2022 International Competition Network Conference in Berlin, Germany, FTC Chair Lina Khan gave a keynote address in which she described the “broad and sweeping reassessment” of United States competition law. Unsurprisingly, much of the focus of Chair Khan’s remarks focused on the much-anticipated and -watched revision of the merger guidelines currently being undertaken by the FTC and the Antitrust Division of the Department of Justice. In just four pages of prepared remarks, Chair Khan provided a significant peek into where the agencies seem to be heading.

Chair Khan characterized as a “goal of paramount significance” to ensure that the merger frameworks reflect “contemporary commercial realities.” She asserted that prior guidelines froze in place economic and descriptive theories about markets that need to be revised to “fit new facts and evidence” so that the “tools be dynamic and holistic rather than static and atomistic.”

The second key goal Chair Khan identified is ensuring that the guidelines are faithful to the statutory standard that “merger enforcement is intended to stop, in its incipency, trends toward concentration.” The Chair promised “to fully hew to the law, including by applying the incipency standard and examining whether a deal ‘may tend to create a monopoly.’” She indicated that the agencies were considering greater reliance on strong presumptions beyond what the current guidelines provide and identifying additional factors that “may be predictive of future harms, including direct evidence of competitive effect and industry trends and patterns of consolidation.”

Chair Khan then turned to three substantive areas that are particular areas of focus — digital markets, labor markets, and non-horizontal mergers.

With respect to digital markets, the Chair pointed to certain features —“including zero-price dynamics, the competitive significance of data, and the network externalities that can swiftly lead markets to tip.”

Reflecting the Biden administration’s emphasis on antitrust enforcement in labor markets, Chair Khan quoted U.S. Department of Treasury estimates that lack of competition may be costing workers up to 20% of their wages.

Turning to the non-horizontal mergers, where most observers expect an uptick in enforcement efforts, Chair Khan identified the need to sharpen the agencies' insights. Harking back to enforcement activities in the 1960s and 1970s, she indicated that the agencies must examine "a range of strategies and effects, including extension strategies and portfolio effects" that may warrant enforcement action."

The Chair referenced the thousands of comments the agencies received, as well as the series of listening sessions they have conducted regarding the merger guidelines. She reiterated that she hoped the agencies would have a final document by the end of the year.

When the agencies launched their merger review process, we suggested that the agencies had a pretty good idea of where the revision was heading. While the Chair's remarks lacked the detail that the final document will contain, this "peek" reinforces the strong perception that the revised guidelines will be broader, deeper, and more hostile to more mergers than the guidelines they will replace. What remains to be seen is whether the underlying rationale and evidence justifying the expansion and changes will be convincing to the courts so that the new guidelines will be given the weight that the current guidelines receive.

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