

Changing the Federal Trade Commission's Course

By Aurelien Portuese | The George Washington University



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Federal agencies are getting ready for possible shake-ups as the presidential election draws near. The Federal Trade Commission (“FTC”) is one of the organizations that demands the most overhaul. Despite the FTC's original mission of fostering competition and protecting American consumers, the agency has lately come under fire for allegedly limiting competition and exhibiting signs of internal dysfunction. There is an immediate need for significant changes because this situation has worried both market participants and elected officials.

Taking a page out of the European Union's playbook, U.S. antitrust policy underwent a radical shift under the leadership of FTC Chair Lina Khan. But the FTC's confidence and ability to enforce its rules have taken a hit because of this effort and a series of defeats in federal courts. Consumers and companies in the U.S. stand to lose a lot if Chair Khan's plan to undermine the Federal Trade Commission succeeds.

I. The Courts' Challenges to the FTC's Aggressive Agenda

During Chair Khan's time at the FTC, several high-profile lawsuits were unsuccessful. The FTC has lost multiple cases in federal court in the last several months alone. Under the Biden Administration, the FTC has lost every merger challenge. From Microsoft's acquisition of Activision Blizzard to Meta's acquisition of Within and Novant Health's acquisition of Community Health Systems, the few victories in courts were enforcement actions brought by the Department of Justice's Antitrust Division — the FTC lost all of its challenges.

Recently, the FTC was unable to re-file a claim that Walmart owed monetary damages for violating the FTC's telemarketing sales rule after a federal court in New York prejudicially rejected it. This decision fits into a larger trend of defeats,

casting doubts about the FTC's credibility when it comes to its enforcement actions.

These court defeats show that Chair Khan's plan is flawed at its core²: U.S. antitrust law has historically prioritized economic efficiency and consumer welfare over market structure and the protection of smaller competitors, in contrast to EU antitrust policy. The courts have not been swayed by Chair Khan's efforts to mold U.S. policy into a model like the EU's, demonstrating the gap between her goals and the current legal system. After antitrust bills that Chair Khan supported failed to pass in Congress — bills that would have brought U.S. antitrust policy closer to EU's Digital Markets Act, which regulates digital platforms — the FTC's leadership has controversially pushed for competition rulemaking in a wide range of issues.

Chair Khan wrote extensively and argued that the FTC has such rulemaking authority. The Court has recently decided the opposite by setting aside the FTC's ban on non-competes that relied on such controversial rulemaking authority. In a post-*Chevron* world, the rulemaking authority of the FTC — and with it, Chair Khan's agenda to push the FTC's regulatory boundaries — is under jeopardy for good.

II. Ethical Concerns About the FTC's Management

There are significant ethical and legal concerns regarding Chair Khan's heavy reliance on unpaid consultants in her effort to reform U.S. antitrust enforcement. The FTC's actions and strategies have been greatly influenced by these consultants, who frequently share her ideological goals. This avoidance of transparency and accountability may be in violation of federal laws that regulate the use of unpaid labor in governmental functions.

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² Press Release, Fed. Trade Comm'n, FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act (July 1, 2021).

The hiring of these outside experts exemplifies a larger problem inside Chair Khan's FTC: a failure to adhere to the established rules of law and agency procedure. Chair Khan endangers the credibility of the FTC's decision-making procedures by avoiding conventional sources of counsel and knowledge.

A disturbing cozying up with interest groups has also been shown by Chair Khan's leadership at the FTC. Her interactions with these groups seem to be motivated more by ideological alignment than by dispassionate analysis. For example, her pharma report³ and keynote speech to the National Community Pharmacists Association (NCPA) cast doubt on her objectivity. Commissioner Melissa Holyoak's dissent rightly emphasizes the insufficient evidence for the FTC's Report to conclude that Pharmacy Benefit Managers operate in an uncompetitive environment enabling them to charge monopoly prices.

Because of this apparent bias, the FTC can no longer be considered an impartial regulator. Conducting investigations in an impartial and fair manner is crucial to the agency's credibility. The public loses faith in the FTC and its impartiality when the chair shows favoritism toward particular groups.

Disregard for the legal counsel of career employees has been one of the most disturbing features of Chair Khan's term. Chair Khan has undermined an essential component of the FTC's operations by ignoring the Bureau of Economics and other knowledgeable individuals. The FTC's credibility and its ability to perform in court are directly affected by this internal matter of sidelining. To make sure the FTC is acting in a way that is both legally and economically reasonable, it needs legal counsel from career staff. By ignoring this advice, Chair Khan is preparing the FTC for failure, as shown by its recent litigation track record.

III. Congressional Scrutiny and Plummeting Staff Morale

While Chair Khan oversaw the FTC, morale took a nosedive.⁴ Staff morale has reportedly been declining, which indicates that employees are becoming more and more disillusioned with the leadership of the agency. As a result of Chair Khan's ideological agenda, career professionals, such as those working in the FTC's Bureau of Economics, have had their expertise disregarded. The FTC's effectiveness is diminished, and the agency's institutional knowledge and capabilities are put at risk by this practice of marginalizing experienced staff.

Additionally, Congress has criticized Chair Khan's strategy.⁵ Her leadership of the FTC has been the subject of much criticism from lawmakers, who have voiced their concerns about the agency's alignment with EU policies and its aggressive litigation strategies. The FTC's relationship with Congress has been further strained because Chair Khan has remained mostly unresponsive to these concerns.

Not only does the FTC's inaction hinder its capacity to operate efficiently, but it also alienates important stakeholders. To make sure the FTC follows its mission and helps the public, congressional oversight is essential. Chair Khan is cutting the FTC off from an important source of accountability and support by turning a blind eye to these concerns.

IV. Constitutional Challenges to the FTC as Its Agenda's Backfire

Because of the FTC's regulatory overreach, constitutional challenges to the FTC's regulatory powers have started to mount – an unprecedented response from market

³ Press Release, Fed. I Trade Comm'n, FTC Releases Interim Staff Report on Prescription Drug Middlemen (July 9, 2024)

⁴ H. R., Abuse of Power, Waste of Resources, and Fear: What Internal Documents and Testimony from Career Employees Show About the FTC Under Chair Lina Khan, Interim Staff Report of the Committee on the Judiciary U.S. H. R. (February 22, 2024), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-02-22%20Abuse%20of%20Power%20Waste%20of%20Resources%20and%20Fear_0.pdf.

⁵ H. R., Oversight of the Federal Trade Commission, Judiciary Committee (July 13, 2023); H. R., Budget Hearing – Fiscal Year 2025 Request for the Federal Trade Commission (May 15, 2024); H. R., Innovation, Data, and Commerce Subcommittee Hearing: 'The Fiscal Year 2025 Federal Trade Commission Budget', Energy & Commerce Subcommittee (July 9, 2024).

participants' treatment under Chair Khan's leadership. Indeed, *Axon* challenged the constitutionality of the FTC's internal judge⁶ and *Meta* challenged the very constitutionality of the FTC's statutory powers.⁷ Both challenges were unsuccessful but these unprecedented threats to the FTC's regulatory powers illustrate how an aggressive agenda can backfire.

For the FTC to get back on track, it needs to remember what it stands for: upholding antitrust laws with the help of reasonable economic analysis and previous court decisions, being open and accountable, and conducting investigations without bias. If the FTC wants to regain public trust and continue serving the American people, it must resolve these concerns.

V. Conclusion

Chair Khan certainly has good intentions, but the road to hell is paved with good intentions.

Sound legal and economic principles must inform U.S. antitrust policy, rather than pushing an ideological agenda and Europeanizing U.S. antitrust policy by borrowing the EU's precautionary, anti-innovation principle. What is at stake is not only the FTC's very existence and its legitimate powers, but most importantly, the competitiveness and innovativeness of the American economy.

Both Republican nominee for Vice President, JD Vance, and the Democratic party support Chair's Khan aggressive agenda despite its unintended consequences for the credibility of the FTC's enforcement actions and its unintended consequences for consumers and innovation. Ahead of the upcoming presidential elections, it is time for a bipartisan rethink of the cost for the Agency and for the country of the FTC's unfortunate track record over the last couple of years.

⁶ *Axon Enterprises, Inc. v. FTC*, 598 U.S. 175 (2023).

⁷ *Meta Platforms Inc. v. FTC*, 2024 WL 1121424 (D.D.C. 2024).