



## Insight

# FTC's Shifting View on Competition Policy and the Outlook for 2022

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### Executive Summary

- The Federal Trade Commission (FTC), tasked with protecting consumers from unfair methods of competition, is making a dramatic shift in how it enforces its antitrust mandate.
- The FTC, and antitrust law generally, has for decades focused on the welfare of consumers, but the agency is fast adopting a different view which holds that market concentration itself is a problem that can lead to societal harms.
- By looking solely at the concentration of markets and size of individual firms, regulators risk ignoring the significant benefits for consumers that come with size and integration such as lower prices or increased functionality of devices and services.
- In 2022, the FTC will likely continue to focus on market concentration by bringing further claims under both the general antitrust laws and its specific authority to regulate unfair methods of competition, as well as exploring the bounds of its rulemaking authority to target market concentration.

### Introduction

After taking over the [Federal Trade Commission](#) (FTC) in June, Chairwoman Lina Khan has made waves in the antitrust field with both process and policy reforms at the country's consumer protection authority. The “[consumer welfare standard](#)” has long guided the FTC and antitrust jurisprudence generally, meaning regulators and courts examine the practical effect a business or industry's conduct has on consumers when deciding an antitrust case. Now, however, the FTC is making a dramatic shift in how it enforces its antitrust mandate—from the decades-long adherence to the consumer welfare standard to the a “big is bad” approach that argues market concentration is a problem that can lead to many societal harms. While some see these changes as much-needed reforms to police the practices of the largest companies, others see the FTC's recent actions as a massive [regulatory overreach](#) that threatens to harm American competitiveness by attempting to “break up” successful firms into less competitive entities. Ultimately, consumers who benefit from increased offerings and lower prices could get left behind.

This insight examines the specific competition-focused actions taken by the FTC since Chairwoman Khan began her tenure and considers the additional actions and implications that are likely to stem from these changes in 2022 and beyond. As Congress continues the debate the state of antitrust law, it should carefully consider the FTC's shift in focus and the impact these changes will have on U.S. consumers.

## Differing Approach to Competition Policy: The New Brandeis

Under the consumer welfare standard, even if a firm integrates additional services or features into its offering that makes it more difficult for rivals to compete, the net result may be better services or lower prices for consumers. Though a rival may struggle to keep up, according to this standard, that is not enough in isolation to condemn a practice or firm.

While a longstanding keystone for the FTC, Chairwoman Khan wasted little time replacing the consumer welfare standard with the “New Brandeis” philosophy, incorporating the doctrine into the fabric of the agency. The [New Brandeis](#) school of antitrust argues that the competition laws should look beyond the specific effect that companies and practices have on consumers and instead, [according to Khan](#), explore other “political economic ends,” such as “our interests as workers, producers, entrepreneurs and citizens.” In other words, the New Brandeis school sees market concentration and the relative size of corporations as problems in and of themselves. Even if a practice provides significant benefits to consumers, the New Brandeis approach would condemn the practice if it leads to additional concentration in a given market.

While the FTC can’t change the underlying legal standards for the courts reviewing antitrust claims, the agency has taken steps to peel back the consumer welfare standard’s role in its processes. In particular, in July 2021, the FTC voted on a party line to rescind the [Section 5 policy statement](#), which the FTC under Democratic leadership had [issued in 2015](#). This statement outlined the basic antitrust principles guiding the FTC’s “unfair methods of competition” authority. While the agency’s governing statute covers a wider array of conduct than the antitrust laws, the underlying principle enshrined in the Section 5 policy statement has been the protection of consumers. As then-Chairwoman Edith Ramirez [explained](#), “[t]he promotion of consumer welfare is a cornerstone of the FTC’s antitrust enforcement, and these principles reaffirm the agency’s legal framework in carrying out that important mission.”

By rescinding the 2015 policy statement, the FTC signaled its desire to look beyond the welfare of consumers and to regulate the concentration of markets, regardless of the efficiencies created by that concentration. In a [statement on the rescission](#) and the backtracking on the consumer welfare standard, the majority explained that “[t]he current iteration of the rule of reason invites courts to assess whether particular business conduct is ‘unreasonable,’ including through determining whether the ‘procompetitive’ effects of the conduct outweigh any ‘anticompetitive’ effects. Famously unwieldy, the standard leads to soaring enforcement costs, risks inconsistent outcomes, and has been decried by judges as administrable or exceedingly difficult to meet.”

The FTC went further later in the year, rescinding the [1995 policy statement](#) on Prior Approval and Prior Notice Provisions and [withdrawing](#) from the 2020 Vertical Merger Guidelines. Both documents lay out similar principles: Consolidation can lead to less competition, but it can also generate efficiencies and innovations that deliver significant benefits for consumers. These decisions also led to the [announcement](#) that the FTC will develop new guidelines for both horizontal and vertical mergers in 2022 which will likely consider the New Brandeis thinking on antitrust. Finally, the FTC also [refiled a complaint](#) against Meta Platforms for its acquisitions of Instagram and WhatsApp. These actions highlight the general approach to competition taken by Chairwoman Khan: There is too much consolidation and concentration in the technology sector.

While the FTC cannot force courts to move away from the consumer welfare standard, the FTC’s shift away from consumer-focused antitrust policy will likely continue in 2022 as the FTC brings additional enforcement actions against companies and offers new regulatory guidance.

## Expansion of Rulemaking Authority

In addition to the general shift away from consumer welfare, the FTC and Chairwoman Khan laid the groundwork for an expansion of the agency's authority to issue substantive rules addressing competitive harms. Under the FTC Act, the FTC has [rulemaking authority](#) to “carry out the provisions of the Act.” While the FTC had previously used informal rulemaking procedures to generate substantive rules, Congress saw the actions of the agency as a massive overreach and [imposed strict procedures](#) that the agency must follow (known as “Magnuson-Moss rulemakings”). In addition, the FTC also imposed rules on its own conduct, in-line with the congressional mandates, to ensure impartiality and fairness in any future rulemakings.

In the first open meeting under the new leadership, the FTC [voted on party lines](#) to reform those self-imposed rules for Magnuson-Moss rulemaking. While in compliance with the specific provisions of the statute, some see these changes as a potential power grab for the FTC chair, which will now have more control over the rulemaking process; the changes would also remove some of the impartiality required by the old rules.

What's more, the agency is exploring the bounds for rulemaking of “[unfair methods of competition](#)” (UMC) without going through the strict procedures Congress imposed on the agency. The agency's theory is that the Magnuson-Moss rulemaking procedures specifically cover the rulemaking process for “unfair or deceptive acts or practices” (UDAP), and as Chairwoman Khan herself has argued, the FTC can use its original rulemaking authority to pass [UMC rules](#) to target issues unrelated to consumer welfare such as [non-compete clauses](#). Many [disagree with this assessment](#), however, arguing that the informal rulemaking authority was never meant to grant broad, substantive competition rulemaking authority to the FTC and that the Magnuson-Moss rulemaking procedures were designed to govern UMC rulemakings as well.

## Expectations Moving into 2022

The FTC's actions indicate a strong shift in competition theory, and as a result, the agency will likely explore different avenues for targeting the consumer welfare standard. For example, the FTC's pull-back on vertical merger and prior approval guidelines suggests that the agency will likely bring additional challenges to mergers, which is supported by the announcement of new guidelines. Essentially, any acquisition that creates additional concentration, especially by the large technology companies on which Chairwoman Khan has focused during her academic career, will likely be subject to challenges from the FTC. Practically speaking, however, the FTC can only go so far under existing law. Even if the FTC issues new guidelines for both horizontal and vertical mergers and the FTC challenges more mergers, the underlying legal standard—to which courts are beholden—for that review has not changed. As a result, the FTC will still need to show how the proposed acquisitions are likely to harm competition and consumers.

Alternatively, the FTC could explore the bounds of the stand-alone unfair methods of competition authority. Considering the ambiguity in the language of the statute, the FTC could attempt to stretch authority to target practices such as mergers that have sufficient competitive justifications or otherwise don't violate existing antitrust law. Further, even if the FTC may ultimately lose a case in court, using this authority to bring claims could lead to settlements, which by themselves are problematic but would achieve many of the FTC's goals.

In addition to bringing cases and developing new guidelines, the FTC will also likely explore the different substantive rulemaking options to target practices that, while not necessarily harmful to consumers, may lead to increased concentration or otherwise harm some aspect of society such as employee rights. As Chairwoman Khan has argued, the FTC could attempt to use the agency's general rulemaking authority to quickly promulgate

the rules, which would likely receive [deference from reviewing courts](#) when inevitably challenged. There is much debate on the legality of such an approach, however.

If the general rulemaking authority fails, the FTC could attempt to navigate the more stringent Magnuson-Moss processes to target the specific behaviors in question. The changes to the process by the FTC in 2021 could set up the agency to utilize these procedures, as the chair would now have more control to shape the process to achieve the specific rules. Yet most agree the Magnuson-Moss process only grants the FTC the authority to make rules relating to the FTC's UDAP authority, not UMC. The FTC could attempt to get around this by targeting behaviors or practices that lead to concentration using the UDAP authority, but doing so would take significant time and potentially fail to achieve the agency's goals. Further, with political winds potentially shifting, a lengthy rulemaking process, even done through some of the streamlined processes established by Chairwoman Khan, could bleed into future years when leadership has a consumer-welfare approach to competition policy.

## **Conclusion**

The FTC set the stage in 2021 for some major action, and in 2022 we should expect that setup to begin to pay off. The “New Brandeis” school of antitrust, which sees size as a problem itself has begun to take root throughout the agency, and as a result the welfare of consumers may get left behind. While courts are still beholden to the consumer welfare standard of antitrust, the FTC's new approach under Chairwoman Khan will likely lead to more claims and cases under a “big is bad” philosophy. The FTC's emerging standards, meanwhile, could produce harmful consequences—consumers often enjoy the fruits of market concentration and vertical integration—with few actual benefits in return.