Legal Sidebar

The Facebook Antitrust Lawsuits and the Future of Merger Enforcement

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In December 2020, the Federal Trade Commission (FTC) and a group of 46 state attorneys general (state AGs) filed separate antitrust lawsuits against Facebook. Both lawsuits challenge the same conduct: Facebook's acquisitions of the photo-sharing service Instagram and the messaging app WhatsApp, and its treatment of software developers whose apps compete with Facebook products. Both complaints also seek noteworthy remedies—divestitures of Instagram and WhatsApp, plus limitations on Facebook's ability to engage in future mergers and acquisitions. This Sidebar reviews the lawsuits, flags the legal issues on which they will likely turn, and discusses proposals to amend the existing merger-enforcement regime.

The Lawsuits

The FTC and state AGs accuse Facebook of unlawfully monopolizing the market for "personal social networking services." Their factual allegations are similar. In a nutshell, the complaints assert that Facebook has cemented its dominance in social networking by purchasing promising rivals rather than competing with them.

The plaintiffs' first target is Facebook's 2012 acquisition of Instagram—then a rapidly growing photo-sharing app. The complaints reference several internal Facebook emails suggesting that the company viewed Instagram as a major competitive threat. After Facebook's efforts to develop its own standalone photo-sharing app stalled, it allegedly acquired Instagram to neutralize that threat. And Instagram continued its dramatic growth following the acquisition. Today, the photo-sharing service reportedly generates more than a quarter of Facebook's revenue and is among the most popular social-media platforms in the United States.

The plaintiffs next address Facebook's 2014 purchase of the messaging service WhatsApp—a promising *potential* competitor. According to the lawsuits, Facebook feared that WhatsApp would eventually enter social networking by adding features to its core messaging product, thereby threatening Facebook's dominance. Again, the plaintiffs cite several internal emails in which Facebook executives describe messaging services like WhatsApp as the "biggest threat" facing the company. Since the acquisition, Facebook has allegedly limited WhatsApp to messaging and prevented it from entering social networking.

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The lawsuits also challenge policies regarding access to "Facebook Platform"—a set of tools that enable third-party app developers to access Facebook data and create apps that interoperate with Facebook. The plaintiffs claim that Facebook Platform has become key infrastructure for developers, giving the company significant power over the trajectories of promising new apps. They further allege that Facebook has abused this power through a series of anticompetitive rules governing access to the platform. While the rules went through several iterations, their upshot involved denying access to developers whose apps competed with existing Facebook products. The lawsuits claim that this denial of access further entrenched Facebook's dominance by excluding rivals from resources that were critical to their growth. (While Facebook suspended the restrictions in December 2018, the complaints allege that the policies cemented the company's monopoly when they were in effect).

The Doctrine

Antitrust lawsuits are notoriously fact-specific, which makes the outcome of these suits difficult to anticipate at this stage of the litigation. But a few points about the legal doctrine stand out.

Monopoly Power

Unsurprisingly, monopolization plaintiffs must establish that a defendant has monopoly power. Typically, plaintiffs do this by showing that the defendant has a dominant market share. And that undertaking requires them to define the market in which the defendant competes. This is critical—antitrust lawsuits often live or die based on the scope of the relevant market. The legal test is easy to state but tricky to apply: a relevant market consists of the good or service at issue in a given case and all others that are "reasonably interchangeable" with it.

The lawsuits make two arguments here. First, they assert that Facebook competes in a market for "personal social networking services"—services that "enable and are used by people to maintain personal relationships and share experiences with friends, family, and other personal connections in a shared social space." Second, the FTC alleges that Facebook has monopoly power in this market based on a market share "in excess of 60%." (The state AGs are a bit more opaque on this latter point).

It is unclear whether either contention is right. One implication of the plaintiffs' proposed market is that Facebook does not compete with popular platforms like YouTube and TikTok—a claim that some might find surprising. The plaintiffs argue that the latter types of platforms are used primarily for sharing content among a wide audience of unknown users, rather than the kinds of communications with family and friends that characterize social networks. This may indeed be a key competitive distinction. But the subtle differences between online platforms make this inquiry slippery.

Existing methodology offers little here. The traditional approach to market definition looks to consumers' tendency to substitute a new product in response to a *price increase* for the product at issue. (This is how economists have operationalized the "reasonable interchangeability" standard). But Facebook and most of its plausible competitors don't charge for their services, so this analysis doesn't easily translate.

Academics have responded to this difficulty by proposing that regulators look to *quality-adjusted* prices in zero-price markets. That approach would evaluate whether consumers would switch to a given platform in response to drop-offs in the quality of Facebook's services—perhaps on dimensions like privacy, data protection, or general user experience. If consumers would switch, a platform is part of the relevant market. If not, it stays out. This is relatively novel territory as far as the doctrine goes. But the FTC and state AGs may adopt this approach—both complaints rely in part on quality harms to consumers. The bottom line: market definition is likely to be a key threshold issue in the lawsuits.

The plaintiffs' market-share evidence may also be a point of contention. The FTC alleges that Facebook has monopoly power based on its market share "in excess of 60%." Under the case law, this is borderline. While existing doctrine doesn't identify a necessary threshold here, the Supreme Court has never found a defendant with less than 75 percent market share to have monopoly power. Lower federal courts have also generally required that monopolization plaintiffs allege a market share of at least 70 percent. The plaintiffs may therefore run into some trouble if they try to establish monopoly power via market-share evidence alone.

However, the FTC and state AGs can supplement this evidence. While plaintiffs typically rely on a defendant's market share to establish monopoly power, they can bolster their case with direct evidence that a defendant charges supra-competitive prices. Again, standard techniques probably won't be available because Facebook doesn't charge its users. But one commentator has sketched an alternative approach, arguing that the company's monopoly power can be directly inferred from declines in user privacy—a quality harm—shortly after the disappearance of major rivals. This would be an innovative strategy, but parts of the complaints suggest that the plaintiffs may try it.

Competing Narratives

Besides monopoly power, the lawsuits will focus on whether Facebook's acquisitions of Instagram and WhatsApp in fact harmed competition. The complaints quote at length from internal company emails to make the case that Facebook acquired the companies to suppress competitive threats. Some of the messages—like CEO Mark Zuckerberg's declaration that "it is better to buy than compete"—are optically awkward for Facebook. But the company can take some consolation in the fact that *intent* is not an element of a monopolization claim. The FTC and state AGs will therefore have to rely on these types of "hot docs" as circumstantial evidence of the acquisitions' anticompetitive *effects*.

This inquiry into competitive harms will in part be a contest between two narratives. The plaintiffs' story goes something like this: Facebook identified Instagram and WhatsApp as promising young competitors that threatened its dominant position, acquired the firms instead of competing with them, and has since run the companies in ways that minimize their competition with core Facebook products.

Facebook's position is different. The company has pointed to Instagram's rapid post-acquisition growth as evidence of the benefits of Facebook's investments in the firm. In this narrative, Facebook acquired a small app with few employees and little revenue, provided it with key infrastructure and financing, and nurtured it into one of the largest social networks in the world. Similarly, Facebook argues that its WhatsApp acquisition has been decidedly pro-consumer. Before the deal, WhatsApp was a subscription-based platform. Afterwards, Facebook made it free. The lawsuits may hinge on which of these two accounts the court finds more persuasive.

Refusals to Deal

The plaintiffs' allegations involving access to Facebook Platform get into different doctrinal territory. As a general matter, companies are free to choose their business partners and counterparties; there is no general duty to deal with rivals. But the Supreme Court has held that *monopolists* may have such a duty in certain limited circumstances. Specifically, the Court has concluded that dominant firms may violate the law when they terminate profitable courses of dealing with competitors while continuing to do business with other parties.

The plaintiffs may be able to frame the restrictions on Facebook Platform—which allegedly excluded only rival app developers—in these terms. However, the Supreme Court has also described this requirement as being "at or near the outer boundary" of monopolization law. And Facebook can defeat such a claim by establishing a procompetitive justification for the restrictions (*i.e.*, the protection of

intellectual property from infringement by competitors). It's difficult to say which side has the better case without more evidence.

Monopoly Broth

As noted, the FTC and state AGs have three principal targets: Facebook's Instagram acquisition, its WhatsApp purchase, and its policies governing Facebook Platform. All three are packaged together in a monopolization claim. This bundling of the plaintiffs' allegations raises the question of how the court will assess Facebook's separate actions. One option would involve an independent evaluation of each one in more or less compartmentalized fashion. Another would entail a broader inquiry into the combined effect of Facebook's conduct on the competitive landscape.

The case law doesn't offer a definitive map here. Some decisions take the latter approach and evaluate the "synergistic effect" of the defendant's challenged behaviors. In the words of one court: "[i]t is the mix of various ingredients . . . in a monopoly broth that produces the unsavory flavor." However, other judges have been more skeptical of the notion that different types of independently lawful conduct can add up to illegal monopolization. The court's resolution of this question may therefore have ripples beyond the Facebook lawsuits.

The plaintiffs' possible reliance on a "monopoly broth" theory also dovetails with an issue that has generated discussion within the antitrust bar. Recently, regulators and practitioners have floated the possibility that monopolization doctrine may be a better vehicle than the Clayton Antitrust Act for unwinding serial acquisitions by a dominant firm. There are potential advantages and disadvantages to both approaches. Under Section 7 of the Clayton Act—which prohibits acquisitions that may "substantially lessen" competition and can be used to reverse consummated transactions—plaintiffs need not prove that a defendant has monopoly power. However, Clayton Act plaintiffs challenging *a series of acquisitions* face the risk that no single deal will be deemed sufficiently objectionable when considered in isolation. In such cases, monopolization law—which offers the possibility of "monopoly broth" or "course of conduct" liability—may furnish regulators with a more promising litigation strategy (provided, of course, that they can establish monopoly power). The Facebook lawsuits may be test cases for this theory: while the FTC has limited itself to a monopolization claim, the state AGs have alleged both monopolization and violations of the Clayton Act.

Issues for Congress

The Facebook litigation will likely take several years to play out. But commentators have proposed several steps Congress could take in the interim to address perceived deficiencies in the merger-review regime.

Changes to Potential Competition Doctrine. Some analysts have advocated changing the legal standards governing acquisitions of potential competitors, like Facebook's purchase of WhatsApp. Under current law, plaintiffs face fairly demanding evidentiary hurdles to establish that a target company poses a competitive threat to an acquirer when the firms do not operate in the same market. The precise formulations here vary. One court has required plaintiffs to establish that a target "would likely" enter the acquirer's market but for the merger and that entry would have a "substantial likelihood" of deconcentrating the market. Another has demanded "clear proof" of entry but for the acquisition. Members of Congress of both parties have endorsed lowering these burdens to make it easier for regulators to block mergers of potential rivals.

Heightened Scrutiny of Big Tech Acquisitions. Other commentators have proposed rules directed specifically at Big Tech firms. One option would involve shifting the burden of proof to defendants in mergers involving dominant tech platforms—that is, requiring Big Tech firms to establish that their

proposed acquisitions do not harm competition. (One recently introduced bill—the Competition and Antitrust Law Enforcement Reform Act—would do just that for certain categories of mergers involving large firms in *any* sector of the economy). Congress could also lower the size thresholds that trigger pre-merger review by the antitrust agencies for deals involving large tech companies. While both the Instagram and WhatsApp deals *were* reviewed, observers have supported such changes as prophylactic measures to prevent future anticompetitive transactions that might otherwise slip under the radar. Finally, others have gone further and supported categorical bans on acquisitions by Big Tech platforms.

Increased Funding for the Antitrust Enforcers. Some experts have urged Congress to provide the FTC and Department of Justice (DOJ) with more resources to police mergers. These commentators have pointed to recent increases in the number and complexity of transactions that the regulators are charged with evaluating, coupled with declines in the agencies' inflation-adjusted antitrust budgets. Members of Congress on both sides of the aisle have expressed support for such proposals. In the 117th Congress, the aforementioned Competition and Antitrust Law Enforcement Reform Act would implement this suggestion with increases in the agencies' annual antitrust budgets amounting to roughly $300 million each.

Conclusion

Facebook is the second defendant in the government's effort to rein in alleged anticompetitive conduct by Big Tech firms, after the DOJ filed monopolization charges against Google in October. Amazon and Apple may also be in the crosshairs: the Google and Facebook cases emerged from investigations of all four companies initiated in the summer of 2019. As of the publication of this Sidebar, the Biden Administration has yet to name its head of the DOJ's Antitrust Division—a choice that may shape the outcome of the Amazon and Apple inquiries. In any case, bipartisan interest in antitrust reform and the power of Big Tech may prompt congressional action, regardless of how the investigations and litigation unfold.

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