Insight

FTC vs. Meta: Analysis of Anticompetitive Conduct

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Executive Summary

- The Federal Trade Commission (FTC) is currently challenging Meta Platforms' acquisitions of Instagram and WhatsApp under Section 2 of the Sherman Act, which forbids illegal monopolization.
- While much of the initial focus of the case has been on the question of monopoly power, the agency must also show that Meta engaged in anticompetitive conduct to acquire, attempt to acquire, or maintain monopoly power in a given market.
- The analysis regarding anticompetitive conduct has evolved over the last century to weigh procompetitive justifications against anticompetitive harms, but as the Meta case highlights, a reverse back to a "big is bad" mindset of antitrust law could abandon this standard to leave consumers, and competition as a whole, worse off.

Introduction

In August, the Federal Trade Commission (FTC) refiled an antitrust complaint against Facebook, rebranded as Meta Platforms in October 2021, alleging the company illegally maintained a monopoly in violation of Section 2 of the Sherman Act. Much has been written on the case, particularly regarding the question that ultimately doomed the original complaint: the definition of the market. Assuming the amended complaint survives the motion to dismiss, the court's analysis would go beyond determining whether Meta has monopoly power and look at the second element of a Section 2 claim: whether Meta illegally maintained that monopoly through anticompetitive conduct.

With recent legislation and trends on the Hill, including a shift away from the consumer welfare standard — and general disdain on both sides of the political aisle toward the size of Big Tech — it will be important for lawmakers contemplating changes to the antitrust laws to understand the evolution of the court's jurisprudence on this question. Most notably, courts have shifted from a "big is bad" mindset in the early 20th century to an approach that compares the competitive benefits to the anticompetitive harms, ultimately determining that with size comes efficiencies from which consumers benefit. The Meta case highlights why consumer effects shouldn't be lost in the analysis, as well as the inherent problems with a shift back to "big is bad" antitrust jurisprudence.

Section 2 of the Sherman Act: Monopoly Power and Anticompetitive Conduct

For single firm conduct of maintaining a monopoly, plaintiffs must always prove two key elements. First, the firm must have monopoly power in a given market. This, in practice, means the firm could raise prices or lower output with no competitive repercussions due to control of the market. In the Meta case, the FTC alleges that Facebook has a monopoly over personal social networking services, a vague market definition that resulted in the first complaint dismissal. While significant questions about the existence of monopoly power remain in the updated complaint, there has been less focus on the second element: whether Facebook has engaged in anticompetitive conduct.

Simply being a monopoly is not a crime. Every business attempts to monopolize a given market by simply competing. Antitrust law focuses on situations in which a firm uses anticompetitive conduct to acquire or maintain monopoly power, rather than succeeding through legitimate competition. In the Meta case, the FTC alleged that the acquisition of Instagram and WhatsApp, as well as some restrictive policies relating to access to Facebook Blue's APIs, were anticompetitive because Meta engaged in that conduct not to provide a better service, but to prevent rivals from breaking into the market.

The court will examine and decide whether the specific actions of Meta satisfy the second element of this antitrust analysis. Existing case law lacks consistency regarding anticompetitive conduct, however, and it can be difficult to find a common theme among decisions. This largely stems from differing mindsets in the early decisions interpreting the Sherman Act and more recent, competition-focused analysis regarding anticompetitive conduct.

What Is Anticompetitive Conduct?

Early decisions from the courts implied that almost any conduct engaged in by a monopolist satisfied the second prong of this analysis, relying largely on the "big is bad" mindset pervasive in the first half of the 20th century. In *United States v. Aluminum Co. of America* ("Alcoa"), the Second Circuit examined the conduct of a firm that bought a share of inputs necessary for aluminum production so large that the federal government argued it stifled competition. More relevant to the discussion here, Judge Hand asked whether the intent of the firm mattered; specifically, whether simply buying needed supply could itself be a violation of the Sherman Act if the purchaser was a monopolist. According to Judge Hand, any answer other than "yes" would "emasculate" the act, defeating the purpose for which it was created. In other words, the legitimate business needs of a firm matter less than whether that firm has monopoly power.

Despite Alcoa remaining good law (in that it hasn't been overturned), courts appear to have moved past this mindset toward a more nuanced analysis designed to look at relative competitive considerations. Instead of simply determining whether a firm has monopoly power and assuming conduct is anticompetitive, courts now look to the pro-competitive justifications for given conduct. For example, even if a firm holds monopoly power in a given market, antitrust law imposes no general duty to deal with rivals. The exclusive nature of an offering or service can provide significant value to consumers, and firms can assert these procompetitive justifications as a means of avoiding antitrust scrutiny. At the same time, even if the firm is under no affirmative duty to deal with its competitors, actions such as refusing to accept a rival firm's offer to purchase a product can be a violation of Section 2 *if* the anticompetitive harms outweigh the procompetitive benefits. In *Aspen Skiing*, for example, a firm that refused to allow a competitor to purchase ski passes for the firm's mountains and then include them in a bulk offering violated the Sherman Act largely because there were few procompetitive reasons to forgo sales at the expense of a rival firm.

Current antitrust jurisprudence regarding anticompetitive conduct focuses almost entirely on this comparison, and results in much better outcomes for consumers. With integration and "bigness" come efficiencies and offerings that may not be possible but for the conduct in question, and determining that any conduct designed to improve a firm's position per se violates Section 2 if done by a monopolist will effectively foreclose these developments. Again, in some cases the anticompetitive harms will outweigh the procompetitive justifications for that conduct, but the analysis is critical for defending the competitive process as a whole rather than individual competitors.

At the same time, older cases stemming from the "big is bad" standard remain good law, and these decisions can still be relied on by courts when examining Section 2 claims. Ultimately, "bigness" is not per se illegal, but regulators should understand the competitive effects of conduct before trying to legislate to this bygone era of antitrust jurisprudence.

Did Facebook's Acquisitions Violate Section 2?

Considering the current state of competition jurisprudence, the Meta case exemplifies the importance of this analysis, and why legislators shouldn't ignore the competitive effects of conduct. This section examines the specific claims of acquisitions as exclusionary conduct, under the assumption that the FTC can prevail on the question of monopoly power. The FTC has also brought challenges regarding specific interoperability requirements, but the initial opinion dismissing the original complaint rejected the idea that the policies could warrant a Section 2 claim. Therefore, this analysis focuses exclusively on the primary question of the acquisitions. Regardless of the court's decision, however, this standard should continue to guide competition policy moving forward.

The main thrust of the case is the allegation that Facebook's (now Meta) acquisition of Instagram violated Section 2 because the acquisition was designed to inhibit competition in the photo-sharing sector. According to the FTC, Facebook's acquisition was not undertaken to improve its own product but rather to neutralize competition in the photo sharing sector, especially in mobile devices. Due to the network effects of social media, and the difficulty of breaking into a market in which one platform already has significant market share, Facebook could effectively dominate the industry.

Despite the FTC's allegations that there are no procompetitive justifications for the acquisition, the evidence suggests otherwise. In 2012, Facebook co-founder Mark Zuckerberg wrote a memo detailing some of the reasons why Facebook Blue was falling behind Instagram, the most notable being that consumers wanted to take the best possible photos and Instagram provided more tools for consumers to do so. Facebook's acquisition of Instagram existed to fill that gap, providing additional capacity to their users and more features that consumers want. Facebook could have spent years trying to develop similar capabilities, but users benefit more from the immediate integration between the two services. While it is true that the acquisition makes creating or operating a rival photo-sharing app more difficult for competitors, consumers enjoyed real benefits from the deal.

The FTC also alleges that the acquisition of WhatsApp, the largest mobile messaging app service in the world, violates Section 2. The transaction, which took place in 2014, totaled $19 billion in what is one of Facebook's most expensive acquisitions to date. The price tag of the acquisition raised eyebrows at the time, as WhatsApp had reported losses of $138 million, had a small workforce, and brought $10.3 million in revenue in 2013. The complaint alleges that after acquiring WhatsApp, Meta has made the product worse for consumers, as it has eroded users' previous privacy standards and stifled competition from rivals with better privacy practices.

The evolution of WhatsApp and other competitors after the acquisition seems to contradict the FTC allegations. To date, the company has yet to find an appropriate monetization strategy, heavily relying on Facebook financial and technical capabilities in order to experiment with different business models. This kind of risky experimentation would be difficult to execute as an independent company, particularly as its initial financial backing was from venture capital investors who are usually looking for safer, profit-assuring approaches. This has also translated into a benefit for consumers: Prior to the transaction, end-users had to pay an annual $1 subscription for the service.

The FTC's arguments on the erosion of competition between messaging apps seem to hold little weight in light of the rise of new alternatives. This is most noticeable when looking at the ascension of Signal, a privacy-focused messaging app created by Brian Acton – one of WhatsApp's co-founders – after disagreeing with some of Meta's decisions on WhatsApp's privacy policies. The app has seen continuous growth, currently sitting at about 40 million users since its launch in 2015.

Facebook had procompetitive justifications for these acquisitions, and developed a more complete offering for consumers because of them. At the same time, acquiring competitors helped entrench Facebook's position as a market leader, and the competition policy should always be considered when conduct could result in harm to competition. The current analysis incorporates these competing factors, and whether the pro-competitive justifications mitigate the competitive harms remains a question for the courts. Nevertheless, if we return to the "big is bad" standard, a firm like Facebook would not be able to integrate new services into its offerings, regardless of the benefits to consumers. To ensure that antitrust law doesn't unnecessarily hinder such investments, the consumer welfare standard, along with the analysis of the competitive effect of the conduct, must remain a key consideration as Congress contemplates changes to policy.

Conclusion

Antitrust law has evolved significantly over the last century, and scrutiny is now focused on the effect of a company's conduct on competition as a whole and consumers in particular. Recent legislation and discussions on the Hill indicate a desire from some to shift back toward a mindset in which large firms should be regulated simply due to size. As the Meta case highlights, however, current competitive effect analysis provides significant value to competition as a whole: With size comes efficiency and integrations that consumers want. Regardless of whether courts find that Meta's conduct violates the Sherman Act, policymakers should preserve the analytical framework that balances the factors of the procompetitive justifications and anticompetitive harms of the conduct.