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Facebook competition lawsuit links privacy as anti-competitive harm to users

AUTHORS

 Dany H. Assaf

 Molly Reynolds

 Ronak Shah

A

Ally Lawrence

On December 9, twin U.S. lawsuits against Facebook were launched that will shape the competition and privacy landscape for years to come. They were initiated by the U.S. Federal Trade Commission (FTC) and a coalition of Attorneys General from 48 U.S. states and territories[1]. They both allege that Facebook is illegally maintaining its monopoly in the U.S. personal social networking services market through a persistent pattern of anti-competitive conduct which includes acquiring nascent rivals, most significantly Instagram and WhatsApp.

What you need to know

- These lawsuits follow a recent trend of worldwide government inquiries and anti-trust lawsuits and investigations seeking to address market dominance and future innovation in Big Tech. The Facebook challenges come at the same time as three U.S. anti-trust cases against Google alleging that, among other things, Google monopolized the search and search advertising markets through an array of anti-competitive and exclusionary practices that allowed it, like Facebook, to also create a “moat around its kingdom”.
- The FTC and the coalition of states are seeking remedies that could require Facebook to divest Instagram and WhatsApp, or effectively “break up” Facebook’s businesses, as well as other remedies to “restore competitive conditions”, including prohibiting Facebook from imposing anti-competitive conditions on software developers to access its APIs and data.
- These actions also recognize diminishing user privacy protections as an important type of consumer harm in and of itself. Specifically, the States’ claims point to Facebook’s degradation of privacy protections and options as a specific form of anti-competitive user harm directly resulting from Facebook’s market dominance and lack of meaningful competition.

- Traditionally, market harm is measured primarily in terms of prices but, with offerings priced at zero, consumer harm will also be measured in terms of quality. What is unique about the Facebook cases in particular, is the prominence of the quality of privacy safeguards as a critical aspect of service quality and its erosion as an important indication of market power and lack of effective competition. Given the convergence of competition, privacy and consumer protection law, here are a few guideposts from these cases to keep in mind looking ahead:
  - M&A transactions that involve aggregation or acquisition of either sensitive consumer information or large quantities of personal information should consider:
    - In digital markets, even complementary product or service acquisitions may raise significant issues if the target's offering could be considered a potential competitor because its offering is a potential "wedge" into the acquiror's market and/or because it had the potential to create a network or social graph to map and connect users who could have become future customers.
    - Even if a service is offered for free, a merger could result in a material erosion of important and valuable data privacy features in terms of product quality, deeming it anti-competitive.
    - A series of small acquisitions could raise significant issues if it is found to be part a practice of buying or killing incipient competitors and/or squelching competitive innovation.
    - Any post-closing amendments to privacy policies and user data handling practices should carefully consider the impacts of those changes from a consumer choice and privacy perspective (e.g., preferences regarding content being shown; availability, quality and variety of data protection; change in product functionality or use; user experience; users' control of their information).
- Dominant digital players must be careful in crafting exclusivity arrangements and conditions for third-party partnerships or access to their platforms to avoid allegations of abuse of marker dominance.
- Organizations that hold a significant amount of consumer data, unique consumer data sets or particularly sensitive consumer data should be aware of an increased focus on their conduct by regulators and ensure they are meeting privacy and data protection obligations, including being transparent about their data collection and handling practices, to combat any perception of abuse of dominance.
  - Where organizations use or combine data that is collected from other sources (e.g., third parties, affiliates, other platforms), organizations should ensure they have users' consent to process their information for contemplated purposes.

The lawsuits

The FTC and the States Attorney General cases allege that Facebook is illegally maintaining its dominance through years-long anti-competitive practices in the personal social networking services market.

While initiated separately, the 48 Attorneys General, who launched that States' claim, now seek to consolidate their case with the FTC's. On December 18, the Attorneys General filed a motion to consolidate in the U.S. District Court for the District of Columbia, arguing that the States' claim and the FTC's claim have common issues of fact and law.

The FTC's claim

The FTC claim alleges three main elements to Facebook's course of anti-competitive conduct: its acquisition of Instagram, its acquisition of WhatsApp, and the anti-competitive conditions to permitting access of its platform.

Facebook acquiring Instagram

The FTC alleges that by acquiring Instagram, Facebook eliminated it as competitive threat to its social network dominance. It alleges Instagram was a digital service offering that could have been a viable "wedge" into broader social activity and sharing on mobile to mature into a competing personal social network. The FTC's claims are based on the proposition that network effects grow around social products, like photo sharing, and because there are only a finite number of different social mechanics to invent, by buying Instagram, a competitor was neutralized.

Facebook acquiring WhatsApp

Similarly, the FTC alleges that Facebook feared WhatsApp for similar reasons and decided to acquire it rather than compete to neutralize another significant competitive threat to its personal social networking monopoly. In addition, the FTC claims that Facebook has harmed innovation by keeping WhatsApp limited to providing mobile messaging rather than allowing it to offer competing personal social networking functions.

Facebook maintaining and enforcing anti-competitive conditions for platform access

The FTC claims Facebook Platform, an infrastructure which encouraged software developers to build apps and tools that integrate with Facebook, used its market power to deter and suppress competitive threats to its personal social networking monopoly. It argues it did this through practices that deterred software developers from developing features which would pose a competitive threat to Facebook, and where such competitive threats were identified, terminated their access to the application programming interfaces (APIs) on which those services relied.

The States' Attorney General claim

While substantially similar to the FTC's claim, the States' claims against Facebook are notable for two reasons:

1. in addition to Facebook's acquisition of Instagram and WhatsApp, the States outline a series of other transactions that point to Facebook's "buy or bury" anti-competitive tactics to maintains its monopoly; and

2. the States' focus on the erosion of user privacy protections and options as further evidence of its monopoly power.

Facebook's "buy or bury" strategy

It is alleged by the States, that in response to threats by other applications, Facebook's strategy was to buy or bury rival companies which presented a viable competitive threat to its monopoly. This was done using a two-step approach—first, Facebook would attempt to acquire the competitor, and if unsuccessful, it would use its dominance to block these potential competitors' access to key inputs.

Degrading users' privacy

The States' claim against Facebook further highlights the intersection of privacy and competition. The States argue that Facebook's unlawful monopoly power gave it "wide latitude" to: set the terms on how users' personal information is collected, used, and protected; determine how and when content is displayed to users; and control how users engage with their connections and what content they see when they interact with them.

The States further argue, that as Facebook's control of the personal social networking market grew through acquisitions, its incentives to protect user privacy diminished. Early in its history, Facebook had used privacy as a competitive differentiator. Initially, Facebook was sensitive and responsive to users' feedback on privacy as it strived to distinguish itself from Myspace, then the dominant player. But once the competitive threats from Myspace, and then Instagram and WhatsApp, abated, Facebook then reneged on its pre-acquisition promises or became more aggressive about collecting data on its users' off-platform activity and pushing users to make more information. The States allege, that with every privacy policy update, Facebook steadily increased the richness of the data it collected and retained while expanding what it did with that data and limiting the user options.

The States pointed to Facebook's inaction regarding fake accounts, the proliferation of ads, and collection of additional personal information consumers might otherwise be reluctant to share as tangible examples of user harm due to Facebook's degradation of data protection and privacy options.

Canadian comparison

In comparison to the United States' ability to retroactively divest or dissolve a merger, the Canadian Competition Bureau's reach is more restricted. The merger provisions of the *Competition Act* allow the Commissioner of Competition (Commissioner) to apply to the Competition Tribunal (Tribunal) to dissolve a merger that prevents or lessens competition substantially. However, the *Competition Act* requires such an application to be made within one year of that merger being substantially completed. As such, the Commissioner would be unable to unwind the Instagram and WhatsApp mergers under the *Competition Act's* merger provisions based on the same facts as presented.

However, apart from the merger provisions, the *Competition Act's* abuse of dominance provisions provide another avenue for the Commissioner to challenge Facebook's conduct, including past mergers. These provisions are aimed at preventing a dominant firm from engaging in conduct intended to eliminate or discipline a competitor or deter entry or expansion by competitors. A practice of systematic acquisitions aimed at eliminating nascent competitors could fall within the scope of this provision[2].

Under the dominance provisions, the Tribunal may make an order prohibiting the dominant firm from engaging in the practice. It may also make any remedial order that is reasonable and necessary (including ordering a divestiture of assets or shares) to restore competition and may order the dominant firm pay an administrative monetary penalty of up to $10 million (for first-time offenders).

The abuse of dominance provisions also have a limitation period, albeit three years. Accordingly, if the Commissioner could prove that a series of mergers were part of a single continued practice of anti-competitive acquisitions which continued until less than three years prior to an application, he could attempt to seek such a remedy. As of yet, a merger has never been unwound by way of abuse of dominance provisions.

Implications for business

The recent actions of the FTC, the Department of Justice, and the coalition of State Attorneys General demonstrate that regulators are taking a broader view of the interplay between privacy, consumer choice, and competition in monopolization cases, which is also emerging as a global theme.

Going forward, businesses that are engaged in the digital economy should be aware that the Competition Bureau's enforcement initiatives will continue to be focused on this sector. Increased enforcement by foreign anti-trust regulators will likely continue to exert pressure on the Competition Bureau to enhance its enforcement efforts. As such, businesses in the digital economy contemplating M&A transactions or engaging in conduct that could affect competitors should recognize that they are more likely to face scrutiny from the Competition Bureau.

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[1] Complaint for Injunctive and Other Equitable Relief, Federal Trade Comm'n v. Facebook, Inc., No. 20-cv-03590 (D.C. Dec. 9, 2020); and Complaint, State of New York v. Facebook, Inc., No. 20-cv-03589 (D.C. Dec. 9, 2020).

[2] For example, in *Laidlaw*, Tribunal found sufficient support to find an overarching purpose to monopolize the market through a pattern of acquisitions itself, which led to the finding that the serial acquisitions were a single continued practice of anti-competitive acts. See *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.*, (1992), 40 C.P.R. (3d) 289 (Comp. Trib.) ["*Laidlaw*"].

To discuss these issues, please contact the author(s).