Facebook Rulings Are a Setback for Antitrust Regulators but May Spur Amendments

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On June 28, 2021, Judge James E. Boasberg of the U.S. District Court for the District of Columbia granted Facebook's motions to dismiss two parallel antitrust complaints filed by the Federal Trade Commission (FTC) and a group of state enforcers. The complaints accused Facebook of illegally monopolizing the market for "Personal Social Networking Services" (PSN Services) in violation of Section 2 of the Sherman Act by (i) acquiring the nascent startups Instagram and WhatsApp, and (ii) adopting policies to prevent interoperability between Facebook and other apps that it considered threats in order to thwart potential or actual competitors.[1] The states' action also claimed that Facebook's acquisitions of Instagram and WhatsApp violated Section 7 of the Clayton Act.[2]

Judge Boasberg dismissed the states' suit in its entirety with prejudice, but he dismissed the FTC's complaint without prejudice, giving the agency 30 days to file an amended complaint. The states' claims involving the purchases of Instagram and WhatsApp were barred by laches, the judge ruled, because the transactions were made in 2012 and 2014, respectively, and the states did nothing about them until filing their complaint in December 2020.[3] The laches doctrine does not apply to the United States, so it did not bar the FTC's action.

In both cases, the court also found that the plaintiffs could not sustain their Section 2 claims based on Facebook's interoperability policies because (i) a general policy to refuse access to competitors is legal, (ii) accusations based on Facebook's revoking access to certain competitors were untimely because they dated back to the 2013-15 period and (iii) neither plaintiff pled sufficient facts to support a conditional dealing theory. In his dismissal of the FTC complaint, he ruled that the FTC did not plead enough facts to plausibly allege that Facebook has monopoly power in the market for PSN Services, a necessary element of the FTC's Section 2 claim.[4]

Pronouncements that these decisions will prevent the government from breaking up Facebook may overstate the impact. Indeed, many officials are pushing the FTC to broaden its claims against Facebook in its revised pleading. House and Senate lawmakers have already sent a letter to FTC Chair Lina Khan, asking the FTC to continue its enforcement efforts against the company, but the decisions do suggest that government enforcers will face an uphill battle to limit the power of dominant technology firms under the current antitrust laws. Thus, legislators are expected to continue their efforts to update antitrust laws to address the competitive concerns they have with Big Tech.

The FTC Case: *Federal Trade Commission v. Facebook, Inc.*, No. 20-3590 (JEB) (D.D.C. June 28, 2021)

The FTC filed suit against Facebook on December 9, 2020, alleging that the company was illegally maintaining a monopoly over the market for PSN Services in violation of Section 2 of the Sherman Act through its acquisitions of potential rivals Instagram and WhatsApp, and its alleged imposition of anticompetitive conditions on other software developers.[5] The FTC sought a permanent injunction that would require Facebook to

[1] *FTC v. Facebook, Inc.*, No. 20-3590 (JEB), slip op. at 1 (D.D.C. June 28, 2021) [hereafter *FTC v. Facebook, Inc.*]; *New York v. Facebook, Inc.*, No. 20-3589 (JEB), slip op. at 1 (D.D.C. June 28, 2021) [hereafter *New York v. Facebook, Inc.*].

[2] *New York v. Facebook, Inc.*, slip op. at 1.

[3] *Id.* at 2.

[4] *FTC v. Facebook, Inc.*, slip op. at 2.

[5] Press Release, Fed. Trade Comm'n, "FTC Sues Facebook for Illegal Monopolization" (Dec. 9, 2020).

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divest Instagram and WhatsApp, prohibit Facebook from enforcing certain conditions on software developers and would require it to give notice and obtain prior approval for future mergers and acquisitions.[6] Facebook moved to dismiss the complaint on the basis that the FTC did not plead sufficient facts to plausibly establish that Facebook has monopoly power, a required element of all Section 2 claims, in the market for PSN Services.[7]

The court held that the FTC pled a plausible market for PSN Services, which the FTC defined as "online 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,"[8] including Facebook Blue (Facebook.com), Instagram and one-time competitor Path.[9] But the court could not ascertain the basis for the FTC's allegation that Facebook controls over 60% of that market,[10] or how the FTC was measuring market share (*e.g.*, by advertising revenue, monthly users, daily users or time spent on the services).[11]

The court emphasized that, since the market at issue was so unusual, it could not measure market share by more traditional means, such as by revenue or units sold.[12] Therefore, the FTC's assertions of Facebook's dominant market share without further details were "too speculative and conclusory."[13] The court added, "It is almost as if the agency expects the Court to simply nod to the conventional wisdom that Facebook is a monopolist."[14] By dismissing the case without prejudice, the court gave the FTC the opportunity to cure these defects in the pleading.[15]

The court went on to state that, even if the FTC were to plead sufficient market power, the court would only allow the complaint's allegations concerning Instagram and WhatsApp, but not Facebook's platform-related conduct.[16] The FTC predicated those Section 2 claims on the company's general policy from 2013 of refusing to allow third-party apps to access its application programming interface (APIs), used for sharing data between Facebook and other apps, if the apps compete with Facebook Blue.[17] Facebook enforced that policy by revoking API permissions for some apps that previously were granted API access.[18] The FTC contended that such actions represented unlawful conditional dealing or unlawful refusals to deal.[19]

In rejecting the API access claims, the court cited the holding in *Aspen Skiing*[20] that a monopolist has "the right to refuse to deal with other firms"[21] unless "the only conceivable rationale or purpose" for the refusal to deal is "to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition."[22] Judge Boasberg concluded that, in order for a refusal to deal claim to be actionable, it "must involve specific instances in which that policy was enforced (i) against a rival with which the monopolist had a previous course of dealing; (ii) while the monopolist kept dealing with others in the market; (iii) at a short-term profit loss, with no conceivable rationale other than driving a competitor out of business in the long run."[23]

The Facebook court held that the FTC could not satisfy that standard in its case since the policy enacted in 2013 applied to all competitors, and was not a series of specific refusals to deal with competitors with which Facebook had a prior history of dealing.[24] Moreover, the FTC's complaint did not support a "conditional dealing" theory because Facebook was not interfering in any relationship between its rivals and third parties; rather, the company was merely unilaterally refusing to aid its rivals.[25] Facebook's general policy of withholding API access, therefore, was lawful.[26]

Finally, the court stated that, even if Facebook had specifically refused to deal with actual or potential perceived competitors with which it had previously cooperated, those claims were untimely since the last alleged instance was more than five years ago, and Section 13(b) of the Federal Trade Commission Act requires that a defendant "is violating, or is about to violate" the antitrust laws.[27] On this issue, the Facebook ruling followed the recent Third Circuit holding in *Shire ViroPharma*[28] requiring ongoing conduct to support a Section 13(b) action.[29]

[6] *Id.*

[7] *FTC v. Facebook, Inc.*, slip op. at 2.

[8] *Id.* at 21 (citation omitted).

[9] *Id.* at 27.

[10] *Id.* at 29.

[11] *Id.*

[12] *Id.* at 2.

[13] *Id.*

[14] *Id.* at 31.

[15] *Id.* at 32.

[16] *Id.* at 32-33.

[17] *Id.* at 33.

[18] *Id.*

[19] *Id.*

[20] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

[21] *FTC v. Facebook, Inc.*, slip op. at 38 (quoting *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1184 (9th Cir. 2016)).

[22] *Id.* at 38 (citing *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1184 (9th Cir. 2016)).

[23] *FTC v. Facebook, Inc.*, slip op. at 41.

[24] *Id.* at 39-40.

[25] *Id.* at 47.

[26] *Id.* at 39.

[27] *Id.* at 42.

[28] *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019).

[29] *FTC v. Facebook, Inc.*, slip op. at 42 (citing *Shire ViroPharma, Inc.*, 917 F.3d at 156).

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In contrast to the refusal-to-deal claim, the court ruled that the FTC's challenge to the Instagram and WhatsApp acquisitions was not time-barred if the government can satisfy the other requirements, such as proof of market share. If the elements of a violation are established, the government may sue "at any time" to unwind acquisitions made many years earlier, Judge Boasberg ruled.[30]

The States' Case: *New York v. Facebook, Inc.*, No. 20-3589 (JEB) (D.D.C. June 28, 2021)

On the same day the FTC sued Facebook, New York led a bipartisan coalition of attorneys general from 46 states, the District of Columbia and Guam in filing a parallel lawsuit against the company, similarly alleging that it had been illegally maintaining monopoly power through its Instagram and WhatsApp acquisitions and denying platform services to potential or actual competitors.[31] In addition to the Section 2 claims that the FTC raised in its complaint, the states also alleged violations of Section 7 of the Clayton Act through Facebook's purchases of Instagram and WhatsApp.[32] In its motion to dismiss the states' case, Facebook argued once again that the Section 2 platform-related accusations failed as a matter of law due to insufficient allegation of market power, and the Section 2 and Section 7 claims related to Facebook's acquisitions were barred by the doctrine of laches.[33]

Even though the states' complaint largely mirrored the allegations in the FTC's complaint, the court dismissed the entire case with prejudice, so the states cannot amend the acquisition-related claims. The court ruled that the states' claims regarding Instagram and WhatsApp, unlike the FTC's allegations, were barred by the doctrine of laches, which may apply where a plaintiff "unreasonably delays in filing a suit and as a result harms the defendant."[34] Many courts have held that the Clayton Act's four-year statute of limitations on damages actions should be the guide for determining the laches period on an antitrust action.[35]While the laches doctrine does not apply to the United States,[36] it does apply to the states. The court said it was not aware of any case in which a state or private party "was awarded equitable relief after such long post-acquisition delays in filing suit."[37]

Moreover, the court concluded that the states' delay in filing suit over the acquisitions was unreasonable and unjustified.[38] The purchases were publicly announced and widely publicized, and concerns were voiced then about their effects on competition.[39] The states sat on their rights and did "nothing over the last half decade," the judge wrote.[40]

The court further noted that substantial prejudice to Facebook would result if it were now to order the divestiture of Facebook's acquisitions, the traditional remedy in challenges to acquisitions.[41] In the years since the purchases, Facebook made many business decisions based on owning Instagram and WhatsApp.[42] It integrated those products' into its core business, combining WhatsApp user data across services, for instance, and matching user accounts on Facebook Blue and Instagram to improve ad targeting.[43] Although these efforts do not constitute full business integration, Facebook's actions since the acquisitions persuaded the court that economic prejudice would result from the states' delay in filing a challenge.[44]

Potential Implications of the Court's Dismissals

While the FTC has been granted a second chance to state aaits claims related to Instagram and WhatsApp — with an opportunity to bolster its complaint through additional and more specific allegations of Facebook's purported monopoly power, the dismissals by Judge Boasberg are a clear setback to antitrust regulators seeking to check the power of Big Tech, especially regulators who view technology platforms' interoperability, or lack thereof, as the basis for future antitrust actions.

These decisions also have the potential to galvanize lawmakers from both sides of the aisle who are attempting to increase antitrust enforcement against technology platforms through new legislation. On June 24, 2021, four days before the Facebook dismissals, the House Judiciary Committee passed out of committee a bipartisan package of four bills that seeks to more strictly regulate Big Tech companies and increase the enforcement powers of the FTC and the Department of Justice with respect to them. Collectively, the bills target technology platforms with more than 50 million active monthly users in the United States or 100,000 business users, or platforms controlled by a company with a market capitalization of $600 billion or more.[45]

[30] *FTC v. Facebook, Inc.*, slip op. at 51-53.

[31] Press Release, Office of Attorney General, "Attorney General James Leads Multistate Lawsuit Seeking to End Facebook's Illegal Monopoly" (Dec. 9, 2020),.

[32] *New York v. Facebook Inc.*, slip op. at 1-2.

[33] *Id.* at 18.

[34] Id. at 40 (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002)).

[35] *Id.* at 40-41.

[36] Despite this, the court in its FTC dismissal raised the possibility that the long period between the mergers and the lawsuit could be relevant to the remedy. *FTC v. Facebook Inc.*, slip op. at 53.

[37] *New York v. Facebook Inc.*, slip op.at 43.

[38] *Id.* at 44.

[39] *Id.*

[40] *Id.* at 66.

[41] *Id.* at 45.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 45-46 (citing *Pro-Football, Inc. v. Harjo*, 567 F. Supp. 2d 46, 59, 62 (D.D.C. 2008)).

[45] Matthew Perlman, "House Lawmakers Float Bipartisan Big Tech Bills," *Law360*, (June 11, 2021).

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One of these bills, the Platform Competition and Opportunity Act, would prevent dominant technology platforms from acquiring competitive threats or completing acquisitions that solidify their market power, which the FTC and state attorneys general claim Facebook did by buying Instagram and WhatsApp.[46] Another bill, the Augmenting Compatibility and Competition by Enabling Service Switching, or ACCESS Act, would create rules for interoperability and user data portability among competing platforms.[47] The other two bills, the American Choice and Innovation Online Act and Ending Platform Monopolies Act, aim to prevent technology platforms from disadvantaging competitors using their service or leveraging their other businesses to the determinant of competition.[48]

Immediately after Judge Boasberg issued his opinions, key congressional leaders cited them as evidence that changes to the existing antitrust laws are needed. Representative Ken Buck, the ranking Republican on the House Judiciary Committee's antitrust subcommittee, tweeted that "Congress needs to provide additional tools and resources to our antitrust enforcers to go after Big Tech companies engaging in anticompetitive conduct."[49] Senator Amy Klobuchar, head of the Senate antitrust subcommittee, used the rulings to emphasize the need for action through legislation: "[W]e shouldn't count on regulators and the courts alone to save us. Keeping our markets competitive, open and fair? It will require the Congress to act."[50]

Which laws will ultimately be passed, and how they will affect large technology companies, remain to be seen, but it is clear that Big Tech companies will continue to be in the crosshairs of federal and state regulators, whether in spite of or because of judicial opinions like Judge Boasberg's.

[46] Platform Competition and Opportunity Act, H.R. 3826, 117th Cong. (2021).

[47] ACCESS Act, H.R. 3849, 117th Cong. (2021).

[48] American Choice and Innovation Online Act, H.R. 3816, 117th Cong. (2021); Ending Platform Monopolies Act, H.R. 3825, 117th Cong. (2021).

[49] Rep. Ken Buck (@RepKenBuck), Twitter (June 28, 2021, 3:27 p.m.).

[50] Sen. Amy Klobuchar (@amyklobuchar), Twitter (June 29, 2021, 6:05 p.m.).

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