Big Tech Antitrust Scrutiny Across the Atlantic

US Antitrust Case Targets Meta's Acquisitions of Instagram and WhatsApp

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At a time when Europeans are eagerly awaiting the European Commission's rigorous enforcement of the new tech rules designed to tackle digital platform power, this week's developments across the Atlantic reminded us that big tech scrutiny has not only been on the European agenda in recent years. On Monday, 14 April 2025, a trial began at the U.S. District Court of the District of Columbia that is expected to last a while. The court will hear the Federal Trade Commission's (FTC) complaint against Meta, alleging that the social media titan has violated U.S. antitrust laws by acquiring WhatsApp and Instagram. The case is a landmark for more reasons than just the novel legal issues at stake, dealing with mergers that were reviewed and cleared a decade ago. It also demonstrates that the U.S. enforcers are still determined to break big tech power. And, evidently, the trial is taking place in turbulent times, when it is difficult to draw a clear line between politics and law enforcement – especially because the same judge has to rule on both anti-monopoly cases against U.S. tech companies and cases against the US administration regarding the deportation of Venezuelan migrants under wartime statutes – as the New York Times reports.

Meta's "better-buy-than-compete"-strategy during the smartphone transition

Meta's (then Facebook's) acquisitions of WhatsApp and Instagram (among others) came at a time when the online world was transitioning from desktop to mobile with the rise of smartphones between 2010 and 2014. This transition caused Meta difficulties, according to the FTC. Meta's strategy to address the shortcomings of Facebook's performance on mobile devices involved the acquisition of (potential) rivals and other strategies (see paras. 62 et seq. of the complaint). The complaint quotes Mark Zuckerberg himself, as saying in an internal email that "it is better to buy than compete." And indeed, Meta appeared to prioritize identifying potential competitors and threats to its social networking monopoly when it decided to acquire Onavo in 2013, a company that offered not only virtual private networking service but also tracked online activities of its users. Meta, as quoted in the complaint, considered Onavo to be "really cool for identifying acquisition targets" because user tracking would allow Meta to identify fast-growing alternatives to its services (para. 69 of the complaint).

Merger control loopholes

The acquisition of Onavo was only one of many examples of Meta's acquisition strategy. Meta acquired Instagram, the mobile application for photo-based social networking in 2012 and the mobile messaging app WhatsApp in 2014. Both acquisitions passed merger review without major setbacks, neither in Europe nor in the US. In Europe, the Instagram merger was not even reviewed by the European Commission or the Bundeskartellamt, as the turnover of Instagram was below the notification thresholds of merger rules at the time, which must be met for the merger to be reviewed. Germany and Austria learned from the case and introduced additional merger control thresholds based on the transaction value – i.e., the price paid for the acquisition – to capture the target's market potential. Problem solved? Not quite. The Düsseldorf Oberlandesgericht has deemed merger control to be inadmissible in some cases reviewed based on meeting the transaction value threshold (most notably Facebook/Kustomer) due to a lack of domestic relevance. The Commission shied away from the introduction of a transaction value threshold on the EU level and

instead invented a new merger review competence in the pharma case Illumina/Grail based on Article 22 of the Merger Control Regulation. The European Court of Justice, however, did not buy this self-empowerment of the Commission, that it can review mergers caught by neither national nor EU merger control rules by way of referral by Member States.

The FTC's complaint - ex-post merger control through the back door?

The FTC complaint has come a long way to reach the hearing stage last Monday. The complaint, which was originally filed in December 2020, was initially dismissed by the court in June 2021 following Meta's motion to dismiss. The court based its decision largely on the FTC's failure to provide sufficient facts and found that the FTC had taken much time, given that the core of the complaint relates to acquisitions that took place in 2012 and 2014. However, the door was left open for the FTC to try again, as the court explicitly limited its order to dismiss the complaint, not the case itself.

In a second attempt, filed on 19 August 2021, the FTC was successful, when the court denied Meta's second motion to dismiss. The FTC based its amended complaint on Section 2 of the Sherman Act, which prohibits unlawful monopolization, in conjunction with Section 5(a) of the FTC Act prohibiting unfair methods of competition – the U.S. equivalent to the EU abuse of dominance law under Art. 102 TFEU. Section 2 of the Sherman Act requires U.S. antitrust authorities to find anticompetitive conduct, monopoly power and harm to competition and consumers.

Meta's alleged anticompetitive conduct has two prongs, (1) its acquisition and continued control of WhatsApp and Instagram and (2) its conditional dealing policies towards business users interoperating with the Facebook platform. The high level of interest in the case has largely been driven by the first prong. What is typically the subject of merger control – the ex-ante review of proposed acquisitions – has become an ex-post monopolization case.

The debate on the reassessment of past mergers is not new. For EU competition law, the European Court of Justice clarified in its Towercast judgment (C-449/41) that national competition authorities can apply Art. 102 TFEU ex post to mergers that have escaped the turnover-based notification requirements. In other words, national competition authorities in the EU can review mergers ex post under abuse of dominance law, even if the acquisition in question was not subject to ex ante merger control by the competent authorities due to low turnover figures.

The FTC considers the acquisitions and continued control of WhatsApp and Instagram to be anticompetitive for largely the same reasons. According to the FTC, both acquisitions do not constitute competition on the merits because Meta used the same playbook in both cases to neutralize a threat to its social networking monopoly (paras. 105, 127 of the complaint): First, Meta failed to develop equally successful competing services after identifying the threats posed by emerging photo-sharing apps such as Instagram and mobile messenger apps such as WhatsApp (paras. 83, 115). Second, Meta realized that M&A was the only solution to eliminate competition (paras. 87, 129). Third, it ceased its own development efforts to create a competing service (para. 98). In both cases, the FTC argues that the acquisition deprived consumers of the benefits of competition in the form of an additional provider characterized by competitive decision-making and innovation, competition on user-oriented services such as privacy or ad-free services and further competitive pressure on Meta's social networking service (paras. 105, 127).

The FTC's preliminary wish list of remedies at the end of the complaint is long and ambitious. It starts by asking the court to order Meta to divest or restructure its business, including but not limited to a structural separation of Instagram and WhatsApp or prior notice and approval of any acquisitions that Meta plans to make in the future, among other things (section XI of the complaint).

Meta's defense

Describing the FTC's complaint as a "weak case" that "ignores reality", Meta went on the offensive the day before the trial began. Judging from a public state-

ment, the defense strategy seems to cover several angles. Meta seems determined to convince the court that it faces significant competitive pressure from providers such as YouTube and TikTok, which the FTC did not consider to be in the same social media market as Meta. To determine monopoly power, the FTC relies on Meta's dominant share of the relevant market. In addition, Meta argues that it has made life of users better, not worse, by improving Instagram and WhatsApp for free. More fundamentally, Meta emphasizes the need for legal certainty: in a world where acquisitions can be reversed even 10 years after being reviewed and cleared up, investment would be at risk. But Meta is also trying its hand at politics, it seems. In its statement, it positioned itself as a "great American company" facing break up in times when the U.S. administration is backing away from the sale of Chinese-owned Tik Tok.

The bigger picture

Exploring new ways to address digital platform monopolies through the toolbox of antitrust law is warranted considering increasing power asymmetries in digital markets. The argument on deal certainty is a valid one, but it must be subject to limitations where single acquisitions add up to an overarching, anticompetitive strategy. In particular in evolving technology markets where traditional antitrust law and economics have long struggled to establish the required theories of harm to show effects on competition. The number of cases where such an ex-post review of mergers would be conducted will be very limited in any event. The court now has the chance to establish the benchmarks for the U.S. competition authorities to bring such a case.

The FTC case against Meta will certainly face major obstacles. The complaint shows that it relies heavily on internal emails from Meta executives, including Mark Zuckerberg, about acquisitions and innovation efforts dating back a decade. The judge already had expressed doubts about the sufficiency of the facts when the complaint was first filed. The amended complaint made it to trial but lost the support of one of the commissioners. Christine Wilson filed a dissenting statement, insisting it was for policy reasons rather than staff-related reasons. Similar to Meta's defense, the dissenting commissioner argued that the integrity of the ex-ante merger review process should not be undermined by ex-post reviews of mergers that were cleared and fully complied with. Her dissent also referred to Meta's recusal petition to remove former FTC Commissioner Lina Khan from the case. Khan, who was forced to resign by the current U.S. administration, is the author of "Amazon's Antitrust Paradox" and has been praised and criticized for taking an aggressive stance in reviving antitrust enforcement against big tech companies. The FTC decided against removing Khan from the case. Wilson again dissented. At the time of writing, the FTC website lists two Commissioners only, instead of five. Next to Khan, two other commissioners, Rebecca Kelly Slaughter and Alvaro Bedoya had been asked to leave.

The road ahead

Despite the potential weaknesses of the case, the disagreement among the (former) FTC commissioners and a doubtful judge, the case shows that Big Tech is not completely insulated from antitrust scrutiny in the U.S. and that competition authorities are still determined to crack down on anticompetitive practices, even if they must break new (legal) ground to do so. The U.S. may have decided against a platform regulation similar to the EU's Digital Markets Act (DMA) which imposes ex ante obligations for designated big tech platforms to ensure fair and contestable digital markets. The DMA does, for example, include an obligation for designated platforms to notify all their proposed acquisitions, as asked by the FTC in its remedy proposal. However, the FTC complaint against Meta is not the only U.S. antitrust case against Big Tech. The U.S. Department of Justice has successfully challenged Google's monopolization on online search, with structural separation of Chrome or Android on the table. Complaints against Apple and Amazon are also pending. Most of these cases were initiated under the first Trump administration. Whether this can be seen as a sign of encouragement for the European Commission's ongoing enforcement under the Digital

Markets Act against U.S. tech giants is, however, too early to tell. Antitrust enforcement in the U.S. is strongly depending on the political will of the administration. It seems that Big Tech, despite all its schmoozing, cannot completely rely on the man in the Oval Office.

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