Alleging Monopoly Power in the Meta-Verse

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The social network Facebook was created in a Harvard dorm room and quickly grew with valuable investments from companies like Microsoft.[1] "The" Facebook was first offered on college campuses and then opened to the public.[2] Its continued user growth propelled Facebook to become one of the most valuable companies, reaching a $1 trillion equity value in 2021.[3] Facebook maintained a leading position through numerous acquisitions, by mining personal data for profit, and by establishing a critical mass of users.[4]

On December 9, 2020, the Federal Trade Commission (FTC) sued Facebook in the U.S. District Court for the District of Columbia. The FTC alleged that the tech company had been illegally maintaining its personal social networking monopoly for years through anticompetitive conduct.[5] This complaint was filed after a long investigation headed by a group of attorneys general[6] and specifically named the acquisitions of Instagram, WhatsApp, and imposition of anticompetitive conditions on software developers as unlawful tactics that Facebook used to

[1] Greiner et al., *Facebook at 15: How a College Experiment Changed the World*, CNN Business (Feb. 1, 2019), https://www.cnn.com/interactive/2019/02/business/facebook-history-timeline/index.html.
[2] *Id.*
[3] Josh Boyd, *This History of Facebook: From BASIC to Global Giant*, Brandwatch (Jan. 25, 2019), https://www.brandwatch.com/blog/history-of-facebook/; David Pierce, *Facebook Just Became a Trillion-dollar Company*, Protocol (June 28, 2021), https://www.protocol.com/bulletins/facebook-trillion-dollar-company.
[4]Natasha Singer, *What You Don't Know About How Facebook Uses Your Data*, The New York Times (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/technology/facebook-privacy-hearings.html; Minter Dial, *What Does Critical Mass Mean in Social Media?*, Social Media Today (Oct. 8, 2013), https://www.socialmediatoday.com/content/what-does-critical-mass-mean-social-media.
[5] *FTC Sues Facebook for Illegal Monopolization*, Federal Trade Commission (Dec. 9, 2020), https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization.
[6] *Id.*

further develop its monopoly.[7] The FTC alleged that Facebook monopolized the market for personal social networking and alleged that Facebook's market share and anticompetitive conduct established its monopoly power in this market.

U.S. District Court for the District of Columbia's Decision to Dismiss without Prejudice

Facebook moved to dismiss this action under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.[8] In assessing this motion, the court was required to "treat the complaint's factual allegations as true ... and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'"[9] While detailed factual allegations are not necessary to withstand a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.[10] The offense of monopolization under Section 2 of the Sherman Act requires the FTC to plausibly allege two elements: (1) the possession of market power in the market for personal social networking services and (2) exclusionary conduct, or the willful maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[11]

Relevant Product Market Analysis

District Court Judge Boasberg ruled that while the FTC pled a plausible market for personal social networking (PSN) services, it did not plead enough facts to plausibly allege that

[7] *Id.*
[8] *Fed. Trade Comm'n v. Facebook, Inc.*, No. 20-3590 (JEB), slip op. at 7 (D.D.C. June 28, 2021).
[9] *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000) (quoting *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979)).
[10] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
[11] *Fed. Trade Comm'n v. Facebook, Inc.*, No. CV 20-3590 (JEB), 2021 WL 2643627 (D.D.C. June 28, 2021)

Facebook had monopoly power in this market. 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," including Facebook Blue (Facebook.com), Instagram and one-time competitor Path. These PSN services are "allegedly defined, and distinguished, by" having three key elements: (1) they are built on a social graph of connections; (2) include a one-to-many 'broadcast' format for sharing personal experiences; (3) include features that allow users to gain more connections.[12] Allegedly, the 'broadcast' updates are generally personal in nature and allow users to update their connections and social graph at any time.[13] Presumably, PSN services contains a 'search' feature allowing users to find and connect with other users, with the social graph offering suggestions on connections.[14] These services are allegedly integral to the daily lives of millions of people.[15]

Specifically, the FTC alleged that the core purpose of PSN services is to develop and engage with personal connections and create a broad social network. An established personal social network creates network effects that make it difficult for a new competitor to enter the market.[16] A user's history of connections and engagement on an existing personal social network entrenches the user's preference for the existing network and will likely make him or her reluctant to switch to a network which may not afford the same broad base of personal connections. [17] Allegedly, PSN services are also distinct from other online consumption-focused services, primarily because those services are more passive and for posting specific media

[12] *Fed. Trade Comm'n v. Facebook, Inc.*, No. 20-3590 (JEB), slip op. at 10 (D.D.C. June 28, 2021).
[13] *Id.* at 15.
[14] *Id.* at 16.
[15] *Id.* at 11.
[16] *Id.* at 19.
[17] *Id.*

content for a wide variety of unknown users, rather than personal connections.[18] For example, the FTC's alleged market excluded professional networking website LinkedIn and audio and video sharing website YouTube.[19] Furthermore, the FTC alleged that PSN services different from mobile messaging services in how information is disseminated.[20] As Mark Zuckerberg describes, PSN messaging is like "the digital equivalent of a town square", whereas mobile messaging apps are more like "the digital equivalent of a living room".[21]

The decision rejected Facebook's argument that the Complaint contained an internal contradiction, insofar as the FTC's market definition excluded services like Circle and Vine, yet one of the core allegations in this case was that Facebook's revocation of API permissions from those apps harmed competition.[22] This argument paralleled a point raised in the infamous Microsoft case. There, Microsoft argued that the District Court had been wrong to exclude "middleware" software from the relevant product market for computer operating systems, because much of the Government's Section 2 case turned on "Microsoft's attempts to suppress middleware's threat to its operating system monopoly."[23] But in *Microsoft* the D.C. Circuit found that no contradiction existed, as Microsoft's actions were designed to suppress nascent competition from middleware that was not yet part of the market dominated by Microsoft. By the same token, the District Court held that Facebook's actions taken against Vine and Circle may have been anticompetitive even though those firms were not yet Facebook Blue's competitors in a properly drawn product market.[24] The Court also rejected Facebook's assertion that the FTC

[18] *Id.* at 17.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 20.
[22] *Id.*
[23] *United States v. Microsoft Corp.*, 253 F.3d 34, 54 (D.C. Cir. 2001)
[24] *Fed. Trade Comm'n v. Facebook, Inc.*, No. 20-3590 (JEB), slip op. at 10 (D.D.C. June 28, 2021).

failed to plead any specific facts about the cross-elasticity of demand between PSN services and potential substitutes. At this stage, "the FTC may permissibly plead that certain factors of both the service at issue and its potential substitutes — e.g., their price, use[,] and qualities — render them not reasonably interchangeable in the eyes of users."[25] By recognizing three key elements alleged to distinguish PSN services, Court defined potential substitutes more narrowly and excluded professional networking services such as LinkedIn, and messaging services like WhatsApp.

Monopoly Power Analysis

The District Court faulted the FTC for doing little more than simply asserting Facebook has a 60% share of the market and that it will likely hold that monopoly power in the future. The Complaint offered no measure or metrics for this analysis. According to the District Court, "[I]t is almost as if the agency expects the court to simply nod to the conventional wisdom that Facebook is a monopolist."[26] A key concern addressed by the opinion was the novelty of the PSN market. Because Facebook does not charge its users, the FTC could not rely on direct proof from high prices. The FTC instead relied on indirect proof based on a high market share that is protected by barriers to entry. However, the court could not ascertain the basis for the FTC's allegation that Facebook controls over 60% of the PSN market, or the manner in which the FTC was measuring market share (*e.g.*, by advertising revenue, monthly users, daily users or time spent on the services). No doubt part of the problem stemmed from the fact that there is no revenue associated with Facebook's PSN services. Additionally, the FTC's complaint made no mention of what competitors accounted for the other 40% share of the market. While plaintiffs

[25] *Id.* at 11.
[26] *Id.* at 14.

need not detail each of a monopolist's competitors at the at the pleading stage, the Court found "striking" the FTC's "choice to identify essentially none . . . "[27]

With regard to the evidence needed to establish Facebook's share of the relevant product market, the Court noted that the number of users a service has may be insufficient. This metric may not account for people with accounts on multiple services or for the amount of time they spend on each service.[28] The opinion also stated that looking only at the amount of time spent on Facebook's apps and websites could inflate its share of the personal networking market, because it offers other services.[29] The FTC's failure to provide more concrete factual allegations of market share led the District Court to dismiss the FTC's Section 2 allegations without prejudice.

Anticompetitive Conduct Analysis

Even if the FTC were to replead and allege sufficient market power, the Court held that the FTC could pursue only some of its allegations regarding Facebook's allegedly anticompetitive conduct. The Court would allow only the complaint's allegations concerning Instagram and WhatsApp, but not Facebook's platform-related conduct, which involved past conduct and thus would not support injunctive relief under Section 13(b) of the FTC Act.[30]

Acquisitions of WhatsApp and Instagram

The FTC alleged that Facebook's acquisition of WhatsApp was based on its potential to enter the PSN services market.[31] As alleged, Facebook's senior leadership feared that the mobile messaging feature of WhatsApp would lead to the company becoming a serious threat in the

[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*

market.[32] The executives allegedly shared these fears across many emails with Facebook's Director of Product Management writing that ""[T]his is the biggest threat to our product that I've ever seen in my 5 years here at Facebook; it's bigger than G+, and we're all terrified. These guys actually have a credible strategy: start with the most intimate social graph (I.e. [sic] the ones you message on mobile) and build from there."[33] As WhatsApp's popularity soared in Europe and Asia due to its compatibility with almost all major smartphone operating systems, Facebook launched Facebook Messenger App as a direct attempt to prevent WhatsApp's growth.[34] The FTC contended that after Facebook realized the resources needed to compete with WhatsApp, it reached out multiple times with offers to acquire in order to neutralize it as a potential competitor.[35]

The FTC alleged that Facebook initially tried to compete with Instagram by attempting to improve its mobile capabilities, but when it realized that it could not, it fell back into the 'it's better to buy than compete' mindset.[36] The FTC alleged that Facebook's acquisition of Instagram was primarily to neutralize a nascent competitor.[37] The FTC demonstrated Facebook's concern over Instagram's rapid success through emails sent through senior management and Zuckerberg himself.[38] Facebook was afraid that its mobile network capabilities would not be able to compete with those about to be offered by Instagram.[39] Moreover, Facebook acquired Instagram for $1

[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* at 4.
[37] *Id.* at 21.
[38] *Id.*
[39] *Id.*

billion just as Instagram was reaching a massive scale and about to mount a real competitive threat.[40]

The FTC claimed that by acquiring Instagram, Facebook prevented Instagram from cannibalizing Facebook Blue and neutralizing a significant threat to its personal social networking monopoly.[41] The FTC also alleged that the acquisition made it harder for other competitors to compete in this arena.[42] With the two major acquisitions, the complaint alleged that Facebook used anticompetitive conduct rather than competition on the merits to maintain its monopoly in PSN services market.[43] The District Court found these facts sufficient to allege anticompetitive conduct, the second required element of a monopolization claim under Section 2.

Interoperability Policies

The Court found that the FTC could not sustain its Section 2 claims based on Facebook's interoperability policies. It did so for three reasons; (1) the general rule that refusing access to competitors is legal, (2) the allegations about Facebook's revocation of access to competitors were untimely, and (3) the FTC did not plead sufficient facts to support a conditional dealing theory.[44]

To begin with, the Court found that Facebook's "refusal-to-deal" policies are legal and that a monopolist generally has the right to refuse to deal with other firms as well as refuse to cooperate with its rivals.[45] "Today it is clear that a firm with lawful monopoly power has no general duty to help its competitors and thus no duty to extend a helping hand to new entrants or

[40] *Id.*
[41] *Id.* at 5.
[42] *Id.*
[43] *Id.* at 21.
[44] *Fed. Trade Comm'n v. Facebook, Inc.*, No. 20-3590 (JEB), slip op. at 1 (D.D.C. June 28, 2021).
[45] *Id*. at 18.

help rivals survive or expand…".[46] The Court has acknowledged that these controversial policies have some potential effect on harming competitors, however, it has noted several reasons as to why these policies must be upheld.[47]

First, forcing firms to distribute resources that give them an advantage in their specialized markets would disincentivize investment.[48] The Court found that firms would become less motivated to invest or produce in their respective markets if they were forced to share their resources with their rivals.[49] This would potentially have a negative impact on consumers as the quality of products and rate of innovation would decline.[50] Second, if firms were forced to share their knowledge, federal courts would become responsible for determining what is to be shared and what is not.[51] The Court wanted to avoid this dilemma as it puts federal courts in a situation where they lack expertise.[52] Lastly, the Court noted the risk of collusion that comes with forcing businesses to share resources..[53]

Nevertheless, the Court recognized an exception to the "no-duty-to-deal" rule.[54] This exception was established by the Supreme Court's decision in *Aspen Skiing*. In *Aspen Skiing*, the Supreme Court held that despite the "no-duty-to-deal" rule, Aspen Skiing violated the Sherman Act because it acted in a predatory fashion.[55] In *Aspen Skiing*, petitioner ended a joint marketing program with respondent and then created a business plan with the intent to drive respondent out

[46] *See* Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 375-76 (7th Cir. 1986).
[47] *Fed. Trade Comm'n v. Facebook, Inc.*, No. 20-3590 (JEB), slip op. at 18 (D.D.C. June 28, 2021).
[48] *Id*.
[49] *Id*.
[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] *Id*. at 19.
[55] *Id*.

the market by deliberately harming itself.[56] As a result of this abusive behavior, petitioner lost its protection under the "no-duty-to-deal" rule as it was using its "general right to choose with whom it deals as part of a larger anticompetitive enterprise – i.e., an enterprise aimed at harming competition, and therefore consumers, by entrenching a dominant firm and enabling it to extract monopoly rents once the competitor is killed off."[57]

The District Court interpreted *Aspen Skiing* as creating a three-part test to determine whether a business's refusal to deal has violated Section 2. "First, there must be a preexisting voluntary and presumably profitable course of dealing between the monopolist and rival with which the monopolist later refuses to deal".[58] Second, the refusal to deal must "involve products that the defendant already sells in the existing market to other similarly situated customers."[59] Lastly, "the monopolist's discontinuation of the preexisting course of dealing must suggest a willingness to forsake short-term profits to achieve an anti-competitive end."[60] Here, the Court found that the parts of the FTC's complaint failed to allege the first required element under the *Aspen Skiing* test.[61] Absent allegations of voluntary previous dealings with Facebook's competitors, Facebook had no general duty to provide API access to its rivals.[62]

The FTC alleged several instances where Facebook terminated preexisting voluntary relationships and thus plausibly fell within the holding of *Aspen Skiing*. However, these alleged events occurred in 2013 and failed to present an "actionable violation that is ongoing or about to occur".[63] Section 13(b) of the FTC Act empowers the Commission to "seek an injunction

[56] *Id*.
[57] *Id*.
[58] *Id*. at 19-20.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *Id*.
[63] *Id*.

whenever the Commission has reason to believe that any party is violating or is about to violate a provision of law enforced by the FTC."[64] This statute does not give the FTC permission to bring a lawsuit because of an action performed in the past unless the claim shows that the defendant is "committing" or "about to commit another violation."[65] Furthermore, the FTC claimed that if the Court were to rule in favor of Facebook here, then Facebook would in turn reestablish anticompetitive policy practices that were abandoned when it was being criticized in 2018.[66] Yet, this argument fell short as the Court stated that it was too "conditional" and "conclusory" to satisfy the imminence requirement of the FTC act, The FTC failed to sufficiently allege ongoing harm based on acts done by Facebook about eight years ago.[67]

Conditional Dealing

The FTC continued to plead its case by alleging that Facebook's policies violated an antitrust rule known as "conditional dealing".[68] The term "conditional dealing" is used to refer to terms like "tying" or "exclusive dealing".[69] In an event of "tying", businesses attempt to coerce third parties into buying a package of goods in order to receive the goods that they want.[70] In these events, businesses tend to abuse their leverage against their competitors and force them out of businesses. Likewise, "exclusive dealing" occurs when a business puts a condition on a sale that prohibits the buyer from dealing with its competitors.[71] The Court held that the refusal-to-deal policy adopted by Facebook is substantially different than the conduct barred by the

[64] 15 U.S.C. § 53(b).
[65] *FTC v. Shire Viro Pharma Inc.*, 917 F.3d at 153, 160 (2019).
[66] *Fed. Trade Comm'n v. Facebook, Inc.*, No. 20-3590 (JEB), slip op. at 21 (D.D.C. June 28, 2021).
[67] *Id.* at 22.
[68] *Id*. at 23.
[69] *Id*.
[70] *Id*.
[71] *Id*.

"conditional dealing" rules.[72] Unlike firms who required "tying and "exclusive dealing", Facebook solely acted within its the scope of its legal rights when refusing competitors access to its platform.[73]

However, the Court noted one instance in which Facebook's conditional access to its platform may have amounted to unlawful conditional dealing. The FTC alleged that Facebook was allowing App developers access to its APIs in exchange for agreements to not deal with other social-networking platforms.[74] The Court held that if these events were to be true, then Facebook would have more than likely breached Section 2; as "such conduct might well have had a significant effect in preserving Facebook's monopoly by keeping user engagement with competing social-networking services below the critical level necessary for any rival to pose a real threat to its market share."[75] Nonetheless, the Court still found that the FTC failed to adequately plead that such events occurred.[76] The policies mentioned in the complaint did not establish any limitations on Facebook's competitors to deal with third parties.[77] The policies only prohibited freestanding apps from extracting Facebook's user data to a competing social network.[78]

In conclusion, the FTC failed to show any violation of Section 2 based on Facebook's alleged policy decisions, as the Court found that Facebook was simply acting within the bounds of its legal authority.[79] The Court based its decision on Facebook's right to refuse to deal with its

[72] *Id*. at 24.
[73] *Id*.
[74] *Id*.
[75] *Id*.
[76] *Id*.
[77] *Id*.
[78] *Id*.
[79] *Id*. at 18.

competitors, and on the fact that the FTC failed to plead sufficient facts to satisfy an ongoing violation of the holding of *Aspen Skiing* or the "conditional dealing" rule.[80]

Conclusion

After the dismissal of its initial complaint, the FTC filed an amended complaint on August 19, 2021. While the original complaint included just one count for monopolization based on the allegations about Facebook's merger activity and the developer restrictions, the new complaint now includes one count just for the acquisitions and a second count for Facebook's alleged "continued course of conduct", which encompasses Facebook's acquisitions as well as its product development policies.[81]

The amended complaint bolstered the FTC's monopoly power allegations by providing detailed statistics showing that Facebook had dominant market shares in the U.S. personal social networking market and abused its dominant status to eliminate threats to its position.[82] According to the amended complaint, Facebook has had at least 80% of the market for personal social networking based on time spent on its apps, 70% based on daily users and 65% based on monthly users since 2011.[83] The complaint alleged that the next closest rival is Snapchat, whose user base and level of engagement "are only a fraction of the size" of Facebook's. The amended complaint added several metrics to quantify Facebook's control over the personal social networking market, including the number of daily and monthly active users and the amount of

[80] *Id*. at 20.
[81] Amended Complaint, *Fed. Trade Comm'n v. Facebook, Inc.*, No. 20-3590, 63-68 (Aug. 19, 2021), https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf.
[82] *FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed Attempts to Innovate,* Federal Trade Commission (Aug. 19, 2021), https://www.ftc.gov/news-events/press-releases/2021/08/ftc-alleges-facebook-resorted-illegal-buy-or-bury-scheme-crush.

[83] Matthew Perlman, *FTC Hopes Updated Facebook Complaint Plugs Holes in Case*, Law360 (August 20, 2021), https://www.law360.com/articles/1415007.

time users spend on its services. The FTC asserts that these metrics "individually and collectively" provide significant evidence of Facebook's monopoly power, contending that a personal social network's competitive significance depends on the number of users it has and how intensively its users interact with the service. Furthermore, it contends that Facebook itself utilizes these statistics for its own analysis, as do other companies operating in the market.

The FTC also provided new direct evidence of Facebook's power to control prices and exclude competition. The FTC alleged that after repeated attempts to develop mobile features for the Facebook app, the company relied on an illegal buy or bury scheme to maintain its monopoly power.[84] The amended complaint restated the anticompetitive conduct of unlawful acquisitions of Instagram and WhatsApp, conditional dealing with app developers, and limiting interoperability while emphasizing that Facebook employed these anti-competitive methods because it was unable to compete.[85] The Acting Director for the FTC's Bureau of Competition, Holly Vedova, has noted that "Facebook lacked the business acumen and technical talent to survive the transition to mobile. After failing to compete with new innovators, Facebook illegally bought or buried them when their popularity became an existential threat. This conduct is no less anticompetitive than if Facebook had bribed emerging app competitors not to compete. The antitrust laws were enacted to prevent precisely this type of illegal activity by monopolists…."

The amended complaint claims that during the emergence of mobile communication, Facebook, had advantages only in desktop and did not have the acumen to compete fairly with emerging mobile technology.[86] The amended complaint also thoroughly detailed Facebook's market share through a new analysis of users. If the case advances to the discovery stage of

[84] *Id.*
[85] *Id.*
[86] *Id.*

litigation, then the FTC may be able to force Facebook to disclose additional data to support its market definition analysis. The new allegations address the shortcomings of the FTC's initial complaint and mount a particularly formidable challenge to Facebook's acquisitions of Instagram and WhatsApp.