NATIONAL TAXPAYERS UNION

# Issue Brief

AUGUST 31, 2021
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## The FTC's Amended Complaint Runs Headfirst Into the Same Problems As Their Initial Case

Under the helm of Lina Khan, the Federal Trade Commission (FTC) has taken an aggressive posture to rein in "Big Tech" and increase their authority. Chair Khan's biggest test now comes as the FTC has filed an amended complaint against Facebook alleging they are engaging in a "buy-or-bury" scheme in violation of antitrust laws. The FTC with 48 state attorneys general sued Facebook back in December, but the complaint was dismissed after the judge found the complaint legally insufficient. Specifically, the court stated, "the FTC's Complaint says almost nothing concrete on the key question of how much power Facebook actually had, and still has, in a properly defined antitrust product market."

Unfortunately, that ruling has not deterred the FTC, which is again seeking to unwind the acquisitions of Instagram and WhatsApp. However, the longer amended complaint still suffers from many of the same problems as the original. NTU lays out some key areas of concerns with the government's case:

- The complaint is a blatant departure from the consumer welfare standard and the light-touch approach from antitrust agencies;
- Despite being amended, the "personal social networking service" market that Facebook supposedly

## Key Facts:

- The radical departure from the consumer welfare standard inevitably harms consumers and shifts the focus of competition policy to boosting competitors.
- On its second attempt to demonstrate Facebook's market dominance, the FTC's complaint offers few, if any, improvements.
- In seeking to block and revisit more merger and acquisition deals, consumers will see the harmful effects of the "big is bad" standard play out in realtime.

has monopoly power over is absurdly narrowly defined, arbitrarily excluding companies consumers rightfully view as competitors to bolster the government's argument of outsized market power;

- The FTC evaluated the merger of WhatsApp and Instagram with Facebook under the Hart-Scott-Rodino premerger notification process and allowed it to proceed. Reversing course now further undermines the premerger process;
- The complaint is overtly political and the results-driven approach both increases uncertainty for businesses and harms consumers.

In many ways, the FTC's complaint either fails to reasonably make their case, or in some cases, the evidence presented contradicts the government's argument. The complaint does make passing mentions of consumer harm, but it generally focuses on what could have been if the FTC would have "gotten it right." It is also likely that the supposed remedy (unwinding the acquisitions of Instagram and WhatsApp) would have more negative consequences than benefits for consumers.

## Consumer Welfare Standard

The consumer welfare standard has served as the bedrock of antitrust for the better part of four decades. Essentially, the consumer welfare standard places important guardrails on antitrust enforcers by focusing competition policy on harms to consumers. This limits the government's ability to intervene for politically motivated reasons or to boost competitors. There is widespread consensus among legal experts and economists that the consumer welfare standard should guide antitrust policy.

In contrast, those in the neo-Brandesian or "hipster antitrust" movement view the "bigness" of companies as inherently bad and antitrust laws as a useful tool to reshape the economy. This vague standard is unworkable as it creates substantial uncertainty for companies, and it diverts the attention of enforcers from protecting consumers to promoting competitors.

It's unsurprising that the FTC would depart from the longstanding consumer welfare standard under Lina Khan's leadership. As the judge noted when dismissing the FTC's complaint against Facebook last year, the FTC essentially assumed the court would take the argument that Facebook was a monopoly at face value.

In the amended complaint, the FTC argues Facebook's acquisitions have given the company enough market power that they can and are harming consumers and advertisers. While the consumer welfare standard does account for harms to innovation and competition, the FTC presents a weak case that consumers were harmed by these acquisitions. The FTC would have the court believe that consumers are forced to utilize Facebook's services rather than choosing it. In other words, the government seeks to punish a company for providing services consumers overwhelmingly find value in.

Further departing from the consumer welfare standard, the amended complaint spills considerable ink detailing how Facebook supposedly buried app developers. As Mark Jamison of the American Enterprise Institute argues, protecting the core value of a business is hardly unjustifiable:

> "Regarding the burial of rivals, the FTC argues that Facebook used to give its resources for free to potential rivals, but now limits access. Is that unreasonable? Should we expect Berkshire Hathaway to give rival investment firms free access to its financial analyses? Or for Tesla to give away its technologies and data?"

Acquisitions are not inherently good or bad. The consumer welfare standard directs regulators to assess the trade off of mergers and acquisitions based on how they impact consumers. Instead, the FTC's case focuses on how Facebook was able to grow and become profitable. Much like the shaky argument of market power over a relevant market, the government is hoping the court will simply accept the claim that consumers are being harmed without presenting adequate evidence.

## Market Definition & Market Power

To make its case, the government must prove that a defendant company has "monopoly power" over a relevant market, and that the company engaged in exclusionary conduct to maintain or enhance their power. The FTC alleges that Facebook deprived users and advertisers of the benefits of competition through acquisitions and anticompetitive behavior. The previous complaint was dismissed due to the FTC's failure to demonstrate Facebook had significant market power over a relevant market. Despite revisions, the amended complaint arbitrarily excludes competitors from their defined market and undermines their own claim about the market Facebook in which competes.

According to the FTC, Facebook's main and only sizable competitor is Snapchat. This would be news to consumers and numerous social media companies who rightfully see themselves as alternatives to Facebook. For example, the FTC argues that companies like TikTok, LinkedIn, Reddit, Twitter, Pinterest, YouTube, and other services do not compete in the same market as Facebook. The market, argues the FTC, are social networks designed to communicate with close friends and family, and in this market, according to the FTC, there are no suitable substitutes to Facebook.

As the Information Technology & Innovation Foundation notes, this makes little sense:

> Contrary to what the FTC argues in its complaint, with an average of 338 "friends," Facebook users hardly consider their "Facebook friends" as family and close friends. Indeed, features such as Facebook Pages, public groups, and of course followers on Instagram, prove that Facebook users interact with individuals they don't know. Ignoring that users can, interchangeably, post information either on Facebook, Twitter, or LinkedIn—or post a video on Facebook, TikTok, or YouTube—leads the FTC to narrowly delineate the relevant market to make Facebook look like the monopolist it wants.

The behavior of Facebook also undermines the claim they don't compete with these other social media platforms. Clubhouse, an audio social media platform, gained popularity last year, and shortly after, Facebook announced they would launch a new audio feature. TikTok, the short video social media platform, was the most downloaded app in 2020. Instagram recently announced they would launch Instagram Reels, a short-form video product. Copying other platform's services is a common practice for technology companies, and it supports the argument that Facebook views these other platforms as competitive threats. This practice benefits consumers as it encourages competing companies to continually build a better mousetrap.

Facebook is a two-sided business with both users and advertisers utilizing their platform. As "evidence" of Facebook's market power over personal social networking, the FTC points to the company's profitability in advertising. The FTC's argument that Facebook has significant control over advertising seems to point to Facebook operating in the advertising market rather than in personal social networking.

In paragraph 48, the FTC argues that "social advertising" is distinct from other advertising, attempting to narrow the market to a fraction of the actual size. This makes little sense. Various mediums of advertising compete with each other to attract advertisers. Companies can choose billboards, television, radio, search engines, social media, or other forms of advertising based on their own needs. While the government argues these are not substitutes, that notion fails the smell test. Again, the government is forced to carve out a very narrow market to bolster its case, even if it does not match up with market realities.

Consumers choose how to spend their time, and social media platforms compete for the eyes and attention of their users. Social media companies adapt and continually roll out new features to attempt to keep users engaged with their service. This provides users with more services and is what makes platforms attractive venues for advertisers. While the FTC claims various social media platforms compete in different markets from one another, consumer habits point to the contrary.

Simply put, there are 24 hours in a day, and consumers must decide how to allocate their own time. The profitability of the defendant company does not prove that it holds, outsized market power, as the FTC alleges. The competitive nature of social networking has created a marketplace in which advertisers naturally view services that allow them to reach more consumers as more valuable. This undermines the notion that Facebook is not in competition with LinkedIn, YouTube, and other social media platforms. While they may not be "perfect substitutes," they provide competition when it comes to where users spend their time.

It is not new for antitrust enforcers to attempt to narrowly define a market to support their claim that a defendant company has outsized market power. On its second attempt to demonstrate Facebook's market dominance, the FTC's complaint offers few, if any, improvements. While the government asserts that various competitors are actually in narrow, distinct markets, this claim is not supported by consumer habits and market behavior.

## Mergers and Acquisitions

At the heart of the complaint, the FTC alleges that Facebook's acquisitions were anticompetitive as the basis for the forcing the separation of Instagram and WhatsApp. Mergers and acquisitions (M&A) have been the subject of increased scrutiny for both regulators and lawmakers. M&A are essentially about balancing tradeoffs and should be judged on their own merits. While some M&A deals can be anticompetitive, many provide tangible benefits to consumers.

As Jennifer Huddleston, Director of Technology and Innovation Policy at the American Action Forum describes, there are many ways acquisitions can be pro-consumer, including allowing more consumers to gain access to a product feature or idea. This is the case with WhatsApp. WhatsApp, prior to being acquired by Facebook, charged a monthly fee to use their service, but it is now free for consumers, allowing more people to utilize this service.

Again, the government steps on its own toes when it comes to describing the acquisition of WhatsApp. In paragraph 120, the FTC alleges Facebook bought WhatsApp rather than compete with it, inherently acknowledging that WhatsApp also competes in the personal networking market. However, in paragraph 171, the FTC also states that mobile messaging services are distinct and not reasonably interchangeable with personal social networking. The government is simultaneously arguing that WhatsApp, which allows consumers to send text, audio, and video messages over the internet, was a competitive threat to Facebook, which is why it was presumably acquired, while also excluding this same category of service from the relevant market they claim Facebook is monopolizing. Essentially, the FTC is saying WhatsApp both added to Facebook's "monopoly" and also that this service did not compete with Facebook in the same market.

The FTC alleges that Facebook has had a monopoly since 2011 and presumably believes that the acquisitions of Instagram (2012) and WhatsApp (2014) should have been blocked. This sort of revisionist thinking also surfaced following the Department of Justice declining to sue Google in 2013. The crux of this argument is that regulators *should have known* what was going to happen. However, a great deal more humility is warranted when it comes to regulators' predictive prowess.

While regulators may believe that Instagram would have continued to grow and eventually provide a sizable rival to Facebook, it's possible that is a generous interpretation. Instagram was two years old, not turning a profit, and had 13 employees when acquired. While they did rapidly gain new users, that has been the case with other social media platforms that have seen meteoric rises followed by a rapid exodus as consumers' attention is diverted elsewhere. In 2014, Yik Yak, an anonymous social media platform, reached their peak valuation at $400 million, and by the end of 2016, user downloads dropped by 76 percent and Yik Yak announced the app would be shutting down. Antitrust enforcers may believe that Instagram *could* have continued to thrive, though this is a hypothetical as it's impossible to separate the fact that Instagram benefited from Facebook's infrastructure and experience. Absent this value-add, it's simply a guessing game of whether Instagram would have continued to grow at the same rate, sold to a different company, remained stagnant, or closed up shop.

The notion that regulators should be in the position of predicting the direction of the economy is cause for concern. A merger between Blockbuster and Hollywood Videos, two large video rental stores, fell apart after the FTC questioned the anticompetitiveness of the deal. Of course, Netflix, Hulu, and other streaming services essentially have made the brick-and-mortar video rental service obsolete.

Josh Withrow, NTU Foundation Director of Technology Policy, in analyzing numerous previous antitrust follies, notes:

> The cases of Blockbuster and Internet Explorer are just a few of many examples of "expert" regulators completely misjudging how a company's market dominance would affect consumers in the future. Indeed, in a free market, the moment in time when public cries of "monopoly!" are loudest is in retrospect often when a company is at or past its peak.

With the move to unwind Facebook's acquisitions, the FTC also further undermines the M&A process. Companies who have their M&A approved by the government have a reasonable expectation that the government will not reverse course if the deal turns out to benefit consumers and the company bottom line. As Commissioner Christine Wilson notes in her dissenting statement to the Facebook complaint, "I believe it is bad policy to undermine the integrity of the premerger notification process established by Congress and the repose that it provides to merging parties that have faithfully complied with its requirements."

This would not be the first time the FTC under Lina Khan's leadership has undermined private sector confidence in the agency's willingness to engage in data-driven and impartial enforcement. In a 3-2 vote with both Republican Commissioners dissenting, the FTC rescinded a bipartisan policy statement from 2015 placing critical guardrails on the FTC's authority to intervene using their Section 5 authority. In August, the FTC sent warning letters to companies engaged in mergers and acquisitions to proceed at "their own risk."

It's clear that the current FTC intends to both place more restrictions on future M&A and reevaluate past ones. This has a chilling effect on innovation and growth as companies are unsure when the crosshairs of antitrust laws will turn to them. Mergers, particularly vertical mergers, can increase market efficiency and benefit consumers. Many M&A deals are either procompetitive or competitively benign. Judging each deal on the merits and evaluating the tradeoffs for consumers, not competitors, as the consumer welfare standard directs, is the best approach for consumers. In seeking to block and revisit more M&A, consumers will see the harmful effects of the "big is bad" standard play out in realtime.

## Politicized Antitrust Enforcement

The progressive left and populist right have both taken a hardline approach when it comes to "Big Tech." Unfortunately, this newest complaint is likely a win-win for advocates of using antitrust laws to hamper America's technology companies. If the government succeeds, they will have shown they can and will use all available levers to rein in large companies. It could also serve as a blueprint for future legal challenges.

If they fail, it will likely breathe new life into efforts in Congress to aggressively change our antitrust laws specifically to address "Big Tech." In 2020, when the court dismissed the initial complaint against Facebook, Representative Ken Buck (R-CO), currently Ranking Member of the House antitrust subcommittee, argued, "Congress needs to provide additional tools and resources to our antitrust enforcers to go after Big Tech companies engaging in anticompetitive conduct." Senator Amy Klobuchar (D-MN), Chair of the Senate Subcommittee on antitrust, tweeted out her support for the FTC's amended complaint.

However, a win-win for those in the "break up Big Tech" camp does not translate to a win for consumers. There are underlying issues in the technology sector that lawmakers can and should address through light-touch, targeted legislation. No one is arguing that technology companies are above reproach, but the sledgehammer approach of breaking up American companies is less about addressing consumer-related problems and more about punishing companies for perceived wrongdoings. Further politicizing antitrust enforcement to punitively go after just a handful of companies leaves taxpayers in the crossfire.

## Conclusion

The FTC does provide more details than their initial complaint, but the amended version still falls into many of the same pitfalls as before. Unfortunately, a radical departure from the consumer welfare standard will inevitably lead to harmful consequences for consumers. The FTC complaint depicts users as essentially held hostage to Facebook's services. Instead of lemmings, consumers are rational and capable of making their own choices. While politicians may not agree with those choices, it's not the government's role to overrule free market principles to choose a desired winner. Regrettably, taxpayers must sit back as their tax dollars are used to antagonize companies for partisan goals. Regardless of the winner of this particular case, the loser will continue to be the consumer if antitrust enforcement abandons the consumer welfare standard.

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