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Big, But Not Bad – Facebook Is Hardly a Predatory Monopolist

While Facebook is arguably a big player in the social media realm, does that necessarily equate to branding it an illegal monopolist? The short answer is no as Facebook would need to be big and bad to flirt with an antitrust violation.

By Carl W. Hittinger and Jeanne-Michele Mariani

Last November, in a taped interview with the HBO news show Axios, President Donald Trump made a vague passing comment about the Department of Justice potentially looking into antitrust violations against the social media giant, Facebook, a concept which has gained some traction among government watchdogs. While Facebook is arguably a big player in the social media realm, does that necessarily equate to branding it an illegal monopolist? The short answer is no as Facebook would need to be big and bad to flirt with an antitrust violation. As will be discussed, the social media market remains open to competitors and there is no evidence to suggest that Facebook has used predatory tactics to close off the relevant market from would-be competitors. And while the company does indeed hold relevant market share, as more competitors enter the crowded social media space, it finds itself constantly working to maintain what share it already has, as opposed to dominating the market through an illegal monopoly.

From an antitrust perspective, to be considered an illegal monopoly, an entity must first have sufficient power in the relevant market and be the leading firm therein. In a classic monopoly situation, one would look at whether a single entity was the sole provider for a particular good or service, and if it had exclusive rights over that valuable good or service as well as the ability to control the price. In such a situation, the monopolist would be violating the antitrust laws only if it then engaged in predatory conduct by abusing its monopoly power, like for example, charging uncompetitive prices or excluding competitors from the market by creating artificial barriers to entry. In other words, big is not bad unless big acts badly.

This is where any antitrust case against Facebook starts to fall apart. It is arguably impossible to define the relevant market such that Facebook would be considered a monopoly. The social media market as a category is nebulous at best and competitors abound. Reddit, Twitter and Snapchat, among others, are all competitors to Facebook. Even certain dating apps allow users to not only browse for dates, but also to meet new friends or even potential business partners. Moreover, the market could be said to be even wider than similarly situated social media sites. The market could potentially be defined as the internet itself, as everyone is free to enter that market and sell its potential idea of community to consumers. Online chatrooms, blogs, writing rooms, music apps and sharing platforms, such as LinkedIn, Pinterest and YouTube, all exist for the purpose of connecting like-minded individuals and then sharing content between those individuals – some content of which there is no Facebook version or equivalent. Facebook must regularly and aggressively compete with these dissimilar platforms for both consumers and advertising revenue. Even print publications with online versions, ones that may target an entirely different type of consumer, such as *The New York Times*, is a competitor with Facebook when it comes to garnering more advertising dollars. The amount of work Facebook has to do just to maintain its market share, is a far cry from one what would expect from a monopoly. And of course, as the internet is the marketplace for the free exchange of ideas, Facebook is competing against the consumer herself, as she has the ability to create her own website or app and compete for users – after all, that is exactly how Facebook originated.

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When looking at the market like this, it is arguably so vast as to be undefined, and thus Facebook could never be considered a monopoly, even if it is larger, or at times, more popular than other competitors – factors which do not a monopoly make. If all of the world chooses to use Facebook instead of Twitter or techies decide they rather not innovate within the social media sphere, those are not prosecutable violations against Facebook. A consumer cannot be forced to use one product over another and competitors cannot be forced to enter the market. Simply put, if Facebook has market power due to unimpeded consumer choice or the considered failure of other potential competitors to enter the market unimpeded by Facebook, then it is guilty of no violation. Facebook does not control access to the social media market – it does not set any price for consumers as there is no price, and it does not have exclusive rights over the consumers who engage in social media – they are free to use Facebook or any other social media site while bearing no premium for doing so.

Social media is also an expendable product within an expendable market – a very interesting fact when talking about antitrust law. Participation in social media is a personal choice. One can join or not join and the effect of that choice bears little on any other aspect of that person's ability to conduct his day-to-day activities. If one leaves Facebook, he may lose out on efficiency of sharing information in some sense, but unlike in a traditional monopoly, the roles of the consumers and the company are reversed – Facebook needs users to function, users do not equally need Facebook to function. Facebook is not the sole provider of something we require, like food or shoes, but instead, a source of a type of informative entertainment where user participation provides Facebook its substance. That is because the content that Facebook traffics in is personal – it is a consumer's pictures, a consumer's particular thoughts, a consumer's posts, etc. If a person chooses to leave Facebook, her content goes with them, Facebook has no control over it and Facebook is the one who loses the data not the consumer.

As explained in an article by David S. Evans and Richard Schmalensee, Facebook owes much of its success to the consumer, specifically the positive feedback between customers, known as network effects. Network effects create positive externalities that essentially boost a company without the company having to do much after it has successfully gained a share of the market. It is the idea that the utility that a user derives from a good increases as more individuals consume that good.

Once a product becomes more valuable to consumers as more people use it, that company experiences a positive network effect. Purveyors of the idea that "big equals bad" often think that that these benefits gained from network effects will be enough to prevent a consumer from leaving that particular good or network, thereby creating an artificial barrier to entry in favor of an all-powerful monopoly. But focusing on the success story of a company in this way leaves out the idea that building share does not keep an online platform relevant – companies have to understand what is driving that share and how to keep consumers attached to their platform over other options. The history of social media is replete with examples of allegedly untouchable companies becoming irrelevant over time. Success at one point, Evans and Schmalensee argue, is the wrong way to assess a monopoly as consumers can easily migrate to the next big thing, and when they do, they often take the entire network with them – which is known as a negative network effect.

The Data Transfer Project, a new project to protect consumer data and of which Facebook is a signatory, ensures as much, as it allows a consumer to pick up his data from one site and import it to another site without experiencing any walls that may have been put up by the original vendor to acquire sole control over the consumer. Without the availability of data portability one site may have been able to leverage its consumer base over another site in order to receive more revenue from advertising companies, thereby arguably restraining the market through the restraint of capital. Now, however, with consumers being able to more easily convert their experiences from one site to another, even that is less of a threat.

And after all of that, for argument sake, suppose someone came up with a creative definition of monopoly to capture Facebook, then could a civil case or government prosecution garner legs? Probably not. Beyond a viable market definition, the Sherman Act requires plaintiffs to point not to the lack of competitors but to the lack of competition; that is, are consumers being harmed or is there a reasonable possibility that they could be harmed by the acts of the named competitor in the market? Under Section 2 of the act, if a plaintiff successfully establishes that competition has been harmed, the alleged monopolist may still assert a procompetitive justification – a nonpretextual claim that its conduct is indeed a form of competition because it involves, for example, greater efficiency or enhanced consumer appeal.

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If the plaintiff cannot rebut this claim, then it must prove that the procompetitive benefit of the conduct is somehow outweighed by the anticompetitive harm. Finally, in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of Section 2, the focus is upon the real effect of that conduct, not just upon the intent behind it.

In trying to prosecute Facebook for an antitrust violation, any plaintiff would certainly face an uphill battle. If a plaintiff argued that Facebook had harmed competition by buying up smaller companies in order to increase its market share, then Facebook could argue as a means of a procompetitive justification, that it did so because it can now offer its users more services with more efficiency at a higher level of quality. For example, Instagram, Facebook's most profitable acquisition, went from 50 million users to 600 million after it was sold. Reason being that Instagram changed dramatically, offering users who engage with the photo-sharing website, more ways to enhance photos, share content and avoid content by individuals or companies that they rather not see. The merger arguably improved user experience instead of detracting from it. And even with this merger, other companies are still free to enter the photo-streaming market, and other competitors, such as Snapchat, still exist even after being approached by Facebook regarding a merger. Simply put, Facebook is not going to run afoul of the antitrust laws by having a desire to be the market leader and then taking legitimate steps to do so, so long as innovation continues to be at the heart of its business and once more market power is obtained, it is not protected by predatory means. Playing fair in the sandbox is still considered acceptable and shooting for the stars is still a virtue. Stay tuned.

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