

Unscrambling the omelette: Facebook litigation and misuse of market power

MARQUE

In the latest strike in the global battle between regulators and the tech giants, the US Federal Trade Commission (FTC) has commenced proceedings against Facebook. The FTC alleges that Facebook has engaged in years of anticompetitive conduct to maintain its monopoly over personal social networking.

With over 2.7 billion monthly active users and more than \$18.5 billion profit last year, Facebook is clearly dominant and great empires are not maintained by playing it safe. The question is whether its actions were simply shrewd and assertive business decisions, or whether they strayed into illegally anticompetitive conduct.

There are two main parts of the case against Facebook.

- **Anticompetitive acquisitions:** The accusation is that Facebook targeted and acquired its potential competitive threats rather than competing with them, in particular Instagram and WhatsApp.
- **Anticompetitive platform conduct:** The allegation is that Facebook is placing anticompetitive conditions on third party software developers, making it difficult or impossible for them to interface with Facebook unless they agree to restrictive conditions to refrain from offering competing functionalities.

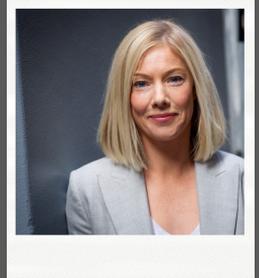
The FTC will be seeking orders that may require Facebook to divest Instagram and WhatsApp, banning Facebook from imposing anticompetitive conditions on software developers or requiring Facebook to seek prior approval for future acquisitions.

The case has to overcome some serious hurdles. The acquisitions were actually reviewed and given the all-clear from the regulator at the time, so they will now have to argue why that was the wrong decision. The Court may also be reluctant to break up the company given the technical integration of some of the platforms last year. But the biggest challenge is the need to show that Facebook bought its rivals with the express purpose of killing its competition.

Now, this would be easier for the prosecution if the case was taking place in Australia. The test for misuse of market power used to be similar to that in the US – requiring a business to take advantage of its market power for a specific purpose (such as destroying a competitor). But this all changed in 2017 to the new ‘effects’ test, which only requires that a business with market power engages in conduct with the purpose, effect or likely effect of substantially lessening competition. The reason is that, absent a smoking gun email that says ‘our plan to destroy the competitor is succeeding’, it is tough to prove an anticompetitive purpose.

Still, it’s going to be interesting to watch the US case and to see whether it gives the ACCC any ideas.

Questions? Give us a call.



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