May 5, 2023

Appeals Court Affirms Dismissal of States' Antitrust Complaint Against Meta Platforms

- The D.C. Circuit recently upheld a lower court's dismissal of an antitrust complaint brought by numerous states against Meta Platforms.
- The court held that plaintiffs' claims seeking the divestiture of Instagram and WhatsApp were barred by the defense of laches and that plaintiffs failed adequately to allege a monopolization claim.
- The decision is significant because, among other things, it addresses whether an alleged monopolist has a duty to deal with a competitor under the antitrust laws, and does so in the context of a social media platform.
- The decision also takes a narrower view of monopolization than what the Antitrust Division of the Department of Justice advocated in this case and suggests that "courts should proceed cautiously" when confronting innovative products or practices.

Last week, a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit affirmed a district court's dismissal of an antitrust complaint brought against Meta Platforms in December 2020 by forty-six states, the District of Columbia and the Territory of Guam. The plaintiffs claimed that Meta Platforms' (then Facebook's) acquisitions of Instagram and WhatsApp substantially lessened competition in violation of section 7 of the Clayton Act. The complaint also claimed that the acquisitions and various policies related to the Facebook platform constituted unlawful maintenance of a monopoly in an alleged market for "personal social networking services" in violation of section 2 of the Sherman Act.

In June of 2021, the district court dismissed the plaintiffs' complaint, finding that while the plaintiffs had standing to sue, the "challenges to Facebook's acquisitions . . . are barred by the doctrine of laches," which "precludes relief for those who sleep on their rights." The acquisitions at issue took place in 2012 and 2014, yet plaintiffs did not file their complaint until late 2020. The plaintiffs appealed.

Most of the appeals court's opinion addresses Meta's laches defense. However, the court also found that plaintiffs' allegations with respect to Facebook's policies and practices failed to state a claim for monopolization under section 2 of the Sherman Act. Indeed, the court characterized the lawsuit as both "old" and "odd." It wrote that the suit was old because plaintiffs waited so long after events central to their suit took place, and odd "because the States' suit concerns an industry that, even on the States' allegations, has had rapid growth and innovation with no end in sight."

Laches. The court of appeals upheld the dismissal of the states' section 7 claims as barred by the doctrine of laches. According to the court, the "defense of laches 'requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'"

As a preliminary matter, the court held that the action by the plaintiff government entities is subject to a laches defense. The plaintiffs argued that the doctrine of laches did not apply because they are "sovereigns." However, according to the court, "the availability of laches in at least some government suits is supported by Supreme Court decisions." Moreover, laches applies to a "person" who brings suit under section 16 of the Clayton Act (which allows a "person, firm, corporation, or association . . . to sue for . . . injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws"). The plaintiff government entities, the court observed, are "persons" for purposes of section 16. Indeed, they *had* to be in order to bring the suit because section 16 does not allow injunctive suits by "sovereigns." The appeals court noted that "the States come close to arguing themselves out of court when they insist on being treated not as natural 'persons,' but instead as 'sovereigns.'"

The court went on to hold that Meta established its laches defense because the causes of action accrued when Facebook acquired Instagram (in 2012) and WhatsApp (in 2014) but plaintiffs did not bring suit until 2020 – even though they were on notice of the acquisitions, including because the "Federal Trade Commission conducted a lengthy, publicly reported, investigation to determine whether Facebook's acquisition of Instagram would violate the antitrust laws." The court of appeals agreed with the lower court that using the four-year statutory limitation period for antitrust damages actions as a guideline for laches was appropriate. The court also agreed that Meta would be prejudiced because, according to plaintiffs' allegations, it "has made business decisions and allocated firm resources based on holding Instagram and WhatsApp, and it has also integrated their offerings to some extent into its core business."

Monopolization. In their monopolization claim, the plaintiffs challenged two Facebook platform "practices and policies, adopted years ago and now abandoned," in addition to the Instagram and WhatsApp acquisitions. Notably, the court took judicial notice of Facebook's actual policies – which were quoted in a separate complaint brought against Facebook by the FTC and corroborated by "multiple other sources" – as opposed to the plaintiffs' characterization of those policies in their complaint.

The court first dealt with Facebook's "competitor integration policy," which stated that "Apps on Facebook may not integrate, link to, promote, distribute, or redirect to any app on any other competing social platform." The court "analyzed the policy under cases discussing 'exclusive dealing,'" despite plaintiffs' labelling of the policy as "conditional dealing." The court found that the policy did not to constitute exclusive dealing as a matter of law: "Here, the competitor integration policy limits only how canvas apps on Facebook operate, and leaves app developers entirely free to develop applications for Facebook's competitors." (Canvas apps are applications that allow Facebook users "to play a game or take a personality quiz," for example.) Also, according to the court, the states failed adequately to allege that the policy "caused substantial market foreclosure," another requirement of an exclusive-dealing claim.

The states also challenged Facebook's policy prohibiting the use of "Facebook Platform to promote, or to export user data to, a product or service that replicates a core Facebook product or service without our permission." (Facebook Platform is a "suite of software tools" made available to developers.) According to the court, this was a policy "prohibiting developers from using Facebook's Platform to duplicate Facebook's core products." The court said that this "amounts to a claim based upon the defendant's refusal to cooperate with its competitors," and held that this was not a section 2 violation. The court wrote that to "consider Facebook's policy as a violation of [section] 2 would be to suppose that a dominant firm must lend its facilities to its potential competitors," which "runs into problems under the Supreme Court's *Trinko* opinion." The court went on to write that "courts should proceed cautiously when asked to deem novel products or practices anticompetitive. Many innovations may seem anti-competitive at first but turn out to be the opposite, and the market often corrects even those that are anti-competitive. Similarly, if courts required firms to lend their facilities to competitors, courts would have to manage corporations' business affairs, a role for which the judiciary is ill suited."

Notably, the court declined to adopt the position advocated by the Antitrust Division of the U.S. Department of Justice (DOJ) in an amicus brief. The DOJ argued that the challenged policy was an "anticompetitive condition[]" (which it said is "subject to a flexible, fact-based analysis") rather than a unilateral refusal to deal to be analyzed under *Trinko*. (Relatedly, in a speech discussing the plaintiffs' case a few weeks before the release of the court's decision, an Antitrust Division official asserted that a situation where a "monopolist will deal with a company only if the company . . . refrain[s] or limit[s] its dealing with others" is

not a "refusal to deal" – and therefore is not subject to the *Trinko* standard.) The court's characterization of the challenged policy as a unilateral refusal to deal with a competitor that is to be analyzed under *Trinko* rather than an "anticompetitive condition" appears to be significant. As the court of appeals wrote, the "*Trinko* Court . . . stated that there are only a 'few existing exceptions from the proposition that there is no duty to aid competitors,'" and none of those few exceptions was present here.

The DOJ also argued in its amicus brief that the district court erred by "disaggregating" the allegations of the plaintiffs' monopolization claim (i.e., the alleged anticompetitive acquisitions and the individual platform policies) rather than evaluating them as "an overall anticompetitive scheme." The appeals court, however, did not find error in the district court's separate analysis of the various courses of alleged conduct; and the appeals court itself analyzed each separately.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Andrew C. Finch
+1 212-373-3417
afinch@paulweiss.com

William B. Michael
+1 212-373-3648
wmichael@paulweiss.com

Jessica E. Phillips
+1 202-223-7338
jphillips@paulweiss.com

Kyle Smith
+1 202-223-7407
ksmith@paulweiss.com

Joshua H. Soven
+1 202-223-7482
jsoven@paulweiss.com

Aidan Synnott
+1 212-373-3213
asynnott@paulweiss.com

Brette Tannenbaum
+1 212-373-3852
btannenbaum@paulweiss.com

Practice Management Attorney Mark R. Laramie contributed to this Client Memorandum.