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Antitrust Policy and Facebook's Acquisition of Small Rivals

Ji Min Jeon

University of Pennsylvania, sarahjeon0505@gmail.com

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Abstract

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Keywords

antitrust, facebook, monopoly, acquisitions, sherman act, FTC

Disciplines

Antitrust and Trade Regulation | Supreme Court of the United States

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Abstract

This paper examines how current antitrust law can be better interpreted to address Facebook's alleged unfair monopoly. It begins with an overview of applicable antitrust laws, then investigates how Section 2 of the Sherman Act can better be utilized. The paper delves into each component of the rule that is required to find a violation, compares the indirect and direct methods of proving monopoly power, proposes various methods of direct proof, and argues that agencies and courts should also include Facebook's acquisitions of smaller rivals in their analyses of the firm's anticompetitive conduct. The paper also briefly examines Section 7 of the Clayton Act and why the FTC may have relied on Section 2 of the Sherman Act instead. Ultimately, the paper finds that existing antitrust law is sufficient; however, agencies and courts should consider different ways of interpreting and applying them.

I. Introduction

With “Big Tech” firms such as Facebook, Google, and Amazon increasingly coming under public scrutiny for their alleged anticompetitive wielding of their market power, the adequacy of antitrust rules in addressing such matters has been brought into question. While there are many forms of anticompetitive conduct that may be analyzed, such as cutting off potential competitors’ access to APIs (as Facebook allegedly did)¹ or requiring browsers to make a firm’s search engine the preset default general search engine (as Google allegedly did),² it is particularly important to examine dominant digital platforms’ acquisition of small rivals, as it is alleged to be a key strategy employed by many dominant platforms to maintain their market power.³ It must also be noted that besides antitrust law, few mechanisms exist that can effectively check the power of such dominant firms.⁴ It is especially important to look at the acquisition of *small* rivals because they tend to fall under the radar when they happen. Indeed, at the time of acquisition many of the acquired companies have zero, or at least very small, market shares.⁵ Despite the Hart-Scott-Rodino (HSR) Act, which requires companies to file premerger notifications with the Federal Trade Commission and the Antitrust Division of the Justice Department for certain acquisitions,⁶ many smaller or less significant acquisitions fall below the transaction size threshold and thus take effect without proper inspection.⁷ However, it is precisely such small, differentiated rivals that may have turned into formidable competitors to dominant platforms, had the acquisitions not occurred. It can be argued that such small acquisitions by dominant platforms effectively stifle competition, allow firms to unfairly maintain their dominant status, and ultimately harm consumers. Therefore, we must examine current antitrust law and its effectiveness in addressing such small acquisitions.

This paper will examine the foundational antitrust laws and the Court’s interpretations of them regarding the Facebook case to determine whether current antitrust policy is effective at addressing the acquisitions of small rivals by dominant platforms. It will also analyze and compare alternative frameworks and methods brought forth by scholars in the field to ultimately propose recommendations regarding how antitrust policy can better be utilized to prove dominant platforms’, and specifically Facebook’s, possession of an unfair monopoly, after which further

¹ Substitute Amended Complaint for Injunctive and Other Equitable Relief ¶ 133, *FTC v. Facebook, Inc.*, 1:20-cv-03590-JEB (D.D.C. Sep. 8, 2021).

² Amended Complaint ¶ 156, *U.S. and Plaintiff States v. Google LLC*, 1:20-cv-03010-APM (D.D.C. Jan. 15, 2021).

³ *FTC, Non-HSR Reported Acquisitions by Select Technology Platforms, 2010–2019: An FTC Study*, (September 15, 2021), <https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf>

⁴ One may argue that broad-brush regulation should be the preferred method, but this paper will rely on the notion that antitrust law’s individualized approach is more adequate to such dominant digital platforms, considering that they have high degrees of differentiation.

⁵ Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 *Yale L.J.* 1952, 2042 (2021).

⁶ 15 U.S.C. § 18a

⁷ As of February 23, 2022, the threshold is \$101 million in transactions size. *FTC, HSR threshold adjustments and reportability for 2022* (Feb. 11, 2022), <https://www.ftc.gov/enforcement/competition-matters/2022/02/hsr-threshold-adjustments-reportability-2022>. Although the two main mergers discussed in this paper, those of Instagram and WhatsApp by Facebook, did in fact require HSR Act inspections, it is nevertheless worth noting that mergers of smaller size, especially those which may end up having anticompetitive implications, may never receive proper premerger inspection.

measures, such as orders of divestiture or enjoinments, can be taken to effectively check such course of conduct.⁸

It is worth mentioning that, of the many existing dominant platforms, this paper specifically focuses on Facebook’s acquisitions of small rivals for several reasons. First, with Facebook having engaged in more than 90 acquisitions, the sheer number of acquisitions Facebook has pursued allows one to comprehensively analyze a variety of acquisitions surrounding a single firm and make comparisons between them. In addition, Facebook has come under constant scrutiny for its acquisitions, with the recent cases brought against Facebook by the FTC and the States Attorney General focusing on such acquisitions, among other things. While it is yet to be determined whether such acquisitions were indeed anticompetitive, the fact that such implications were made suggests that the acquisitions may have anticompetitive connotations. Finally, with Facebook commonly considered to be one of the primary dominant platforms, and considering that it possesses an arguably dominant stake in the personal social networking services market, the approach antitrust law takes with it will set a precedent that will affect other “Big Tech” platforms as well as smaller firms that may become the next Facebook. On a cautionary note, while some of the findings of the paper may be generalizable to other dominant digital platforms, and despite much previous literature tending to group platforms such as Amazon, Google, and Facebook into a larger category of “multi-sided” or “two-sided” platforms,⁹ the author does not intend to draw conclusions regarding the larger space of dominant platforms in general, considering the paper’s focus on Facebook. Ultimately, this paper finds that the existing antitrust laws are sufficient to address Facebook’s alleged monopoly and proposes new methods to interpret the rules.

II. Antitrust Laws

Before delving further into the discussion, it is important to touch on the foundational antitrust laws, for these are the laws plaintiffs will argue that firms violated in their mergers and acquisitions.

To begin with, Section 2 of the Sherman Act condemns “every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations.”¹⁰ The long-standing requirement for monopoly maintenance under Section 2 is both (1) the possession of monopoly power in the relevant market and (2) 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 Regarding the first element, monopoly power means “substantial market power that is durable rather than fleeting – market power being the ability to

⁸ Although this paper will focus its analysis on how antitrust law can best be utilized to prove Facebook’s possession of an unfair monopoly, for a discussion on antitrust remedies against dominant platforms, See Herbert Hovenkamp, *supra* note 5, at 2005-2039.

⁹ See, e.g., Herbert Hovenkamp, *supra* note 5; Rob Frieden, *The Internet of Platforms and Two-Sided Markets: Implications for Competition and Consumers*, 63 Vill. L. Rev. 269 (2018); David S. Evans, *Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms*, Coase-Sandor Working Paper Series in Law and Economics, No. 753 (2016).

¹⁰ 15 U.S.C. § 2

¹¹ Memorandum Opinion, *FTC v. Facebook, Inc.*, 1:20-cv-03590-JEB, 8 (D.D.C. Jan. 1, 2022) (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 50 (D.C. Cir. 2001)).

raise prices profitability above those that would be charged in a competitive market.”¹² It is commonly understood that there are largely two methods of inferring market power: the direct method and indirect method. The direct method, according to the Supreme Court, requires the plaintiff to supply direct proof that a firm has in fact profitably raised prices substantially above the competitive level.¹³ It must be noted that other suggestions have been made as to direct methods of measurement of market power in the case that a product or service is provided free of charge and therefore has no price on which to base the analysis on. This paper will discuss such methods later.¹⁴ The indirect method is more widely used, in which plaintiffs and courts examine market structure in search of circumstantial evidence of monopoly power.¹⁵ In such cases, it has been the norm to define a market, demonstrate a firm’s share within the defined market, and demonstrate that there are sufficient barriers to entry.¹⁶ Again, this paper will discuss each element of the indirect method in more detail later. Regarding the second element, it must be noted that Section 2 does not punish the mere possession or exercise of monopoly power; rather, it addresses only the *anticompetitive* acquisition or maintenance of such power. That is, the mere possession of monopoly and unlawful monopolization are to be distinguished.¹⁷ It must also be noted that both the States Attorney General and the Federal Trade Commission (“FTC”) invoked Section 2 in their complaints against Facebook.¹⁸

Meanwhile, Section 1 of the Sherman Act states, “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”¹⁹ It must be noted that in effect, the conspiracy must comprise an agreement, understanding or meeting of the minds between at least two competitors or potential competitors.²⁰ That is, a Section 1 violation requires there to be at least two or more actors, and thus cannot be applied to unilateral monopolistic conduct or attempts – Section 2 is often applied instead in such unilateral cases, allowing antitrust enforcers to reach conduct engaged in unilaterally by a firm that has achieved, or dangerously threatens to achieve, monopoly power.²¹

Another important antitrust law when it comes to cases brought against dominant platforms is Section 7 of the Clayton Act, which prohibits mergers and acquisitions where “in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”²² It must be noted that while its coverage is not limited to firms of any particular size or market share, or to those with any particular kind of competitive relationship,²³ and that the Celler-Kefauver Act also

¹² *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act: Chapter 1*, The United States Department of Justice Archives, https://www.justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1#N_6, (last visited Apr. 11, 2022).

¹³ *Supra* note 11 at 8-9.

¹⁴ *Infra* Section III.B.

¹⁵ *Supra* note 11 at 9.

¹⁶ *Id.*

¹⁷ *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945) (Hand, J.)

¹⁸ *Supra* note 1, ¶¶ 235, 242; Complaint ¶¶ 256-262, *New York v. Facebook, Inc.*, No. 1:20-cv-03589-JEB (D.D.C. Dec. 9, 2020).

¹⁹ 15 U.S.C. § 1

²⁰ *Elements of the Offense*, The United States Department of Justice Archives, <https://www.justice.gov/archives/jm/antitrust-resource-manual-1-attorney-generals-policy-statement>, (last visited Apr. 11, 2022).

²¹ *Supra* note 12.

²² 15 U.S.C. § 18

²³ Herbert Hovenkamp, *supra* note 5, at 2040.

enabled Section 7 to reach vertical and conglomerate mergers as well as horizontal mergers,²⁴ courts have been criticized for reading the law too narrowly.²⁵

In addition, Section 5 of the Federal Trade Act declares “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce” unlawful.²⁶ The Supreme Court has said that all violations of the Sherman Act also violate the FTC Act. Although only a handful of cases in the past decade have relied on stand-alone Section 5 authority,²⁷ the FTC Act also reaches other practices that harm competition, but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act. It must be noted that only the FTC brings cases under the FTC Act.²⁸

This paper will focus its discussion on the effectiveness of Section 2 of the Sherman Act as well as Section 7 of the Clayton Act, which are the antitrust laws most relevant to acquisitions.

III. Utilizing Section 2 of the Sherman Act

With both the States Attorney General and the FTC having brought antitrust complaints against Facebook under Section 2 of the Sherman Act,²⁹ the law and its interpretations warrant further examination. The first step in proving the offense of monopoly maintenance under Section 2 is demonstrating the possession of monopoly power in the relevant market, where monopoly power is “the power to control prices or exclude competition.”³⁰ That is, “a firm is a monopolist if it can profitably raise prices substantially above the competitive level.”³¹ As discussed above, there are largely two methods of inferring market power: the indirect method and direct method. This section will first discuss the indirect method, in which courts rely on “circumstantial evidence of monopoly power,”³² and each of its elements, before examining methods of supplying direct proof of monopoly power.

A. Monopoly Power: Indirect Method

1. Market Definition

The first step in indirectly demonstrating possession of monopoly power is defining the relevant market. It is well established that an antitrust market includes “two components: the product market and the geographic market.”³³ In particular, a relevant product market includes

²⁴ American Antitrust Institute, *AAI PUBLIC INTEREST ADVOCACY WORKSHOP ON MERGERS: National Press Club - Washington, D.C. – October 11, 2013: SUMMARY OF SECTION 7 OF THE CLAYTON ACT*, <https://www.antitrustinstitute.org/wp-content/uploads/2018/09/Section-7.pdf>

²⁵ Herbert Hovenkamp, *supra* note 5, at 2041.

²⁶ 15 U.S.C. § 45

²⁷ Debbie Feinstein, Bureau of Competition, *A few words about Section 5*, Federal Trade Commission, <https://www.ftc.gov/enforcement/competition-matters/2015/03/few-words-about-section-5>, (last visited Apr. 11, 2022).

²⁸ *The Antitrust Laws*, Federal Trade Commission, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws>, (last visited Apr. 11, 2022).

²⁹ *Supra* note 18.

³⁰ *Supra* note 11, at 8.

³¹ *Id.*

³² *Id.* at 9.

³³ *Id.* at 10 (quoting *Sky Angel U.S., LLC v. Nat’l Cable Satellite Corp.*, 947 F. Supp. 2d at 102).

“all products reasonably interchangeable by consumers for the same purposes.”³⁴ A reiteration of this definition is all products “roughly equivalent to another for the use to which [they are] put”³⁵ That is, “courts look at whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other.”³⁶ A key notion in the determination of the boundaries of a relevant product market is interchangeability, or substitutability.

When it comes to Facebook’s case, the FTC has, at this point, succeeded in claiming that Facebook’s relevant product market is personal social networking (“PSN”) services. To do so, the FTC, which had the burden of defining the relevant market and providing the reasoning for the definition, had to do two things: “provide a definition of PSN services” and “further explain whether and why other, non-PSN services available to the public either are or are not reasonably interchangeable substitutes with PSN services.”³⁷ The FTC defined PSN services 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,” and listed three key elements of such services.³⁸

It must be noted here that, although the FTC did not use the exact term, the market of PSN services appears to be a “cluster market,” a market that consists of noncompeting goods.³⁹ Facebook, with its “variety of noncompeting services, including photo posting, video posting, messaging, bulletin boards, discussion groups, timelines of other users, business services, a dating service, as well as the ability to formulate and preserve a profile of personal data,” can be said to be a cluster of noncompeting services. The FTC also alludes to this fact by stating that PSN services have multiple “features.”⁴⁰ In order to locate power in a cluster market rather than in the respective markets of each individual good, however, it is not enough for a firm to simply sell multiple noncompeting products; rather, it must be plausible that the act of clustering in itself creates power in that customers prefer the grouping of products rather than any single one and that it makes it difficult for competitors to enter into competition with the cluster.⁴¹ When it comes to Facebook, it is plausible that users would prefer the services listed above to be centralized in a single platform than have to jump between different websites or apps to use different services. Accordingly, it would make it difficult for competitors with just one or a few of the services to compete with Facebook. That is, Facebook’s individual services do not compete in each of their respective markets such as the photo posting market or the messaging market; rather, it must be recognized that Facebook, as a collective of such individual services, competes in the cluster market of PSN services. Hovenkamp also points out that “in many cluster

³⁴ *Id.* (quoting Microsoft, 253 F.3d at 52).

³⁵ *Id.* (quoting Queen City Pizza, Inc. v. Domino’s Pizza, Inc., 124 F.3d 430, 437 (3d Cir. 1997)).

³⁶ *Id.* at 11. (quoting United States v. H & R Block, Inc., 833 F. Supp. 2d at 51).

³⁷ Memorandum Opinion, FTC v. Facebook, Inc., 1:20-cv-03590-JEB, 21, (D.D.C. June 18, 2021).

³⁸ Complaint for Injunctive and Other Equitable Relief ¶¶ 52-55, FTC v. Facebook, Inc., 1:20-cv-03590-JEB (D.D.C. Dec. 9, 2020).

According to the FTC, personal social networking services are distinguished by three key elements, in that (1) “personal social networking services are built on a social graph that maps the connections between users and their friends, family, and other personal connections,” (2) “personal social networking services include features that many users regularly employ to interact with personal connections and share their personal experiences in a shared social space, including in a one-to-many “broadcast” format,” and (3) “personal social networking services include features that allow users to find and connect with other users.”

³⁹ Herbert Hovenkamp, *Digital Cluster Markets*, Col. Bus. L. Rev., 26 (2022).

⁴⁰ *Supra* note 38.

⁴¹ *Id.*

markets, the precise aggregation of products and services changes over time and, in any event, is not very important.”⁴² That is, while the FTC, instead of enumerating the services that are included in the cluster market of PSN services, employed the vague, encompassing terms of “features” and “social graph,”⁴³ this is not necessarily an issue. Rather, it is important to recognize that it is the clustering of such services, even if the individual items may change, that provides value to consumers, creates entry barriers, and constitutes its own market of PSN services.

The FTC also addressed the issue of detailing which categories of services fall within the boundaries of PSN services and which do not based on substitutability. While the initial complaint only argued that online video or audio consumption-focused services, mobile messaging services, and specialized social networking services were not reasonable substitutes,⁴⁴ it is notable that the amended complaint added others to the list, perhaps in preparation for the market share analysis that was to be carried out in response to the Court’s criticism of the FTC’s first complaint that Facebook’s market share was not adequately explained.⁴⁵ In particular, the amended complaint alleged, and Facebook did not object, that “PSN is distinct from, and not reasonably interchangeable with, online services that focus on the broadcast or discovery of content based on users’ interests rather than their personal connections. Prominent examples are Twitter, Reddit, and Pinterest. These services do not focus on connecting friends and family.”⁴⁶ That is, such services are differentiated from Facebook in how people discover content or make connections on their respective platforms. It is also particularly notable that regarding “online video or audio consumption-focused services,” perhaps in anticipation of an argument centered around the growing platform, the FTC appended a discussion on TikTok, which it argues is “a prominent example of a content broadcasting and consumption service that is not an acceptable substitute for personal social networking services. TikTok users primarily view, create, and share video content to an audience that the poster does not personally know, rather than connect and personally engage with friends and family. The purpose for which users employ TikTok, and the predominant form of interaction on the platform, is not driven by users’ desire to interact with networks of friends and family.”⁴⁷

The FTC supported such a definition and the classification of substitutes and non-substitutes by arguing that Facebook’s own statements and internal documents indicate that it recognizes that Facebook is providing PSN services and that it understands the distinction between PSN services and other services.⁴⁸

Taking such non-substitutes out of the equation, the FTC alleged that the PSN market in the United States includes only Snapchat, Google+, Myspace, Path, MeWe, Orkut, and Friendster. Somewhat striking is Facebook’s lack of objection. It is plausible that it could have argued that other services, such as Twitter, is a substitute to some degree, considering that many people also use Twitter to keep up with personal connections.⁴⁹ In the event that this argument

⁴² *Supra* note 39, at 24.

⁴³ *Supra* note 38.

⁴⁴ *Id.* ¶¶ 58-60.

⁴⁵ *Supra* note 37, at 2.

⁴⁶ *Supra* note 1, ¶ 174.

⁴⁷ *Id.* ¶ 176.

⁴⁸ *Id.* ¶ 177.

⁴⁹ Twitter itself states: “Twitter is a service for friends, family, and coworkers to communicate and stay connected through the exchange of quick, frequent messages.” *What is Twitter?*, Twitter Help Center, <https://help.twitter.com/en/resources/new-user->

was upheld by the Court, this may have been in Facebook’s favor in the calculation of market share. Nevertheless, as of now, the Court has found that the FTC has plausibly established the definition and boundaries of PSN services.

Even from the first step of defining the relevant market, the indirect method reveals some limitations. To begin with, defining a relevant market is a binary concept; that is, it can only count a product as inside or outside a market.⁵⁰ This is clear in the FTC’s painstaking efforts to lay out and explain which firms fall into the relevant market and which do not. While this binary nature may not present a problem in markets in which products are largely identical, such as the market for electricity or virgin aluminum, it poses a significant problem in differentiated markets, in which products may not be complete substitutes of each other but may still possess a degree of substitutability. Of course, however, binary market definitions cannot “meter rates of substitution”⁵¹ to account for the varying degrees of substitutability. Despite the courts having stated that the process of defining a market involves determining “whether and *to what extent* purchasers are willing to substitute one for the other (emphasis added),”⁵² it is impossible to state that a certain product is, say, 50% inside a market and 50% outside of it and thus should contribute only 50% of its market share to a firm’s market share analysis. As such, such market definitions have the risk of being either too narrow, in which only complete functional substitutes are included, or too broad, in which differentiated products that may present different advantages to users, are included. Even when it comes to Facebook’s relevant market of PSN services, one could argue that a broader market definition of “social media” platforms in general, which would include Twitter and TikTok, should be utilized, especially considering that while such platforms might not provide users with completely substitutable functions, they could be somewhat substitutable competitors with Facebook in the eyes of advertisers in the social advertising space. On the other hand, a narrower market could be argued for in that platforms such as Snapchat,⁵³ which was included in the FTC’s definition of the PSN market, are not complete functional substitutes to Facebook.

While so far, the FTC, the Court, and Facebook have agreed on the definition and boundaries of Facebook’s relevant product market, the binary nature of such a definition makes it susceptible to future contention. Some have argued that to the extent market shares are used they should be calculated using different plausible definitions of the relevant set of substitutes.⁵⁴ However, this could create complications down the line when calculating market shares. For instance, if one market definition revealed that the firm had a 50% market share, and another established a 70% market share, it would most likely be in the interest of the defendant to argue for use of the first definition and be in the interest of the plaintiff to argue for use of the second.

faq#:~:text=Twitter%20is%20a%20service%20for,are%20searchable%20on%20Twitter%20search., (last visited Apr. 11, 2022). While some may argue that such “personal” social networking is not the main value Twitter confers to users, that is not of concern in this discussion, in which the key idea is “substitutability.” That is, even if a product’s main value proposition is not directly in line with the market in question, if consumers are willing to substitute one product for the other, they should both be considered to be in the same market.

⁵⁰ Herbert Hovenkamp, *supra* note 5, at 1961.

⁵¹ *Id.*

⁵² *Supra* note 36.

⁵³ While Facebook users can post various forms of content to their newsfeed, such as text or photos, and while such content does not disappear unless removed, Snapchat users mainly post content in the form of pictures, which disappear after a short period of time. While such differences may render the two platforms not complete substitutes to users, regardless, Snapchat fits within the boundaries of FTC’s definition of the PSN market.

⁵⁴ David S. Evans, *Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms*, Coase-Sandor Working Paper Series in Law and Economics, No. 753, 31 (2016).

While it is usually inevitable that disputes regarding the appropriate method of market share calculation will arise throughout the course of an antitrust litigation, allowing multiple market definitions would reveal complications that would not be present if one definition was settled upon.

In addition, it must be noted that whether a certain firm falls within the boundaries is subject to change. That is, a nascent firm which did not have functionalities that were substitutable for the product in question's uses at the time the market definition and boundaries were set in a litigation could add such features and become a substitute in later years. In fact, the FTC alleges that it was for this reason that Facebook acquired WhatsApp; despite WhatsApp being a mobile messaging app at the time of acquisition, the FTC alleges that Facebook feared that WhatsApp would enter the personal social networking market at competitive scale and undermine or displace Facebook's personal social networking monopoly.⁵⁵ That is, while it is impossible to know for sure the counterfactual of what would have happened had Facebook not acquired WhatsApp, one can speculate that WhatsApp, had it entered the PSN market, would have changed Facebook's market share in the market by doing so. While this paper will touch on Facebook's acquisition of WhatsApp again later on,⁵⁶ in this section it is important to recognize that firms are not perpetually confined to their location inside or outside a market; such positions are subject to change. This is an especially critical point in the social networking service space, where growth can happen relatively quickly.⁵⁷ With antitrust litigations usually taking place over multiple years, it is plausible that the need to redefine the market and recalculate market shares may arise, perhaps even multiple times, as the competitive landscape changes.

2. Market Share

The second step in indirectly demonstrating monopoly power is calculating a firm's market share in the relevant product and geographic market defined in the first step. While traditionally, such market share would be calculated by dividing a company's revenue over a certain period of time by the market's total revenue over the same period, it is impossible to utilize this method with regard to Facebook's share of the PSN market, considering that Facebook does not generate any direct revenue from the provision of such services.⁵⁸ Instead, the FTC utilized the three consumption metrics of time spent, daily active users ("DAUs"), and monthly active users ("MAUs")⁵⁹ to demonstrate that Facebook held a consistently high share in each of the metrics and that it thus maintained a dominant share of the United States PSN market.⁶⁰ The FTC cited multiple reasons why such metrics were reliable measures of market share. To begin with, it argued that such numbers are related to a PSN service's attractiveness, and therefore its competitive significance.⁶¹ It is reasonable to infer that a service with more users and on which users spend

⁵⁵ *Supra* note 38, ¶ 108.

⁵⁶ *Infra* Section III.C.

⁵⁷ For example, Tik Tok gained on average about 20 million new users per month over the period of September 2016 to mid-2018. Esteban Ortiz-Ospina, *The rise of social media*, Our World in Data, <https://ourworldindata.org/rise-of-social-media>, (last visited Apr. 11, 2022). Facebook is also alleged to have shown high growth rates: the FTC alleges that between May 2007 and May 2008, Facebook's monthly active users grew 34%. *Supra* note 1, ¶ 43.

⁵⁸ For a discussion on how Facebook generates revenue, see *infra* Section III.A 4.

⁵⁹ *Supra* note 1, ¶¶ 190-204.

⁶⁰ The FTC alleged that each market share calculation demonstrated that Facebook had at least a 65% market share since 2012. *Id.*

⁶¹ *Supra* note 1, ¶ 192.

more time is one that is preferred by users and has a larger share of the market. The FTC corroborated its use of such methods by mentioning that such metrics are commonly used and reported on by both Facebook and other PSN services to assess both their own performance as well as rivals' competitive significance.⁶² Finally, the FTC pointed out foreign antitrust authorities' use of such metrics in their respective conclusions of Facebook's possession of market power.⁶³

Although Facebook argued against use of all the aforementioned metrics, the Court concluded that the FTC had plausibly alleged Facebook's maintenance of a dominant market share, taking the assumptions in the allegation as true.⁶⁴ While this does not mean that the Court concluded that the FTC had sufficiently proved Facebook's dominant market share and while Facebook could of course disprove such allegations as the litigation progresses, it is nevertheless important that the Court deemed such measures of market share appropriate in alleging Facebook's dominant market share.

However, some limitations and risks of the indirect method arise in the second step of demonstrating market power as well. As Facebook noted in its Motion to Dismiss, the data used in calculating market share metrics may be unreliable.⁶⁵ While the Court stated that at the current juncture it did not have the basis to address the issue of reliability, this issue is a valid one that is sure to arise in the later stages of this litigation. For example, it is highly likely that Facebook will contest FTC's complete reliance on Comscore data again down the line. In preparation of such an attack, the FTC should be ready to argue for why Comscore is a reliable data source by presenting examples of major digital platforms utilizing it, or procure data from other sources as well to show that Facebook is shown to have a dominant market share across various data sources.

3. Barriers to Entry

The third and final step in demonstrating market power is establishing that there are sufficient barriers to entry which protect the firm's possession of a dominant share of a relevant market. That is, it is not enough to simply show that a firm has a dominant market share; it must also be proven that it is durable due to certain features of the market. It has been established that "for antitrust purposes, a barrier to entry is best defined as any factor that permits firms already in the market to earn returns above the competitive level while deterring outsiders from entering."⁶⁶

The FTC alleges, and the Court concluded that such allegations were sufficient at the stage of evaluating Facebook's Motion to Dismiss, that "Facebook's dominant position in the U.S. personal social networking market is durable due to significant entry barriers, including direct network effects and high switching costs."⁶⁷ Direct network effects refer to "user-to-user effects that make a personal social network more valuable as more users join the service."⁶⁸ The FTC applies this definition to the PSN market, in that with a "core purpose" of the market being to "connect and engage with personal connections," such services become more valuable the more

⁶² *Supra* note 1, ¶¶ 193-195.

⁶³ *Supra* note 1, ¶ 203.

⁶⁴ *Supra* note 11, at 20.

⁶⁵ *Id.* at 17.

⁶⁶ *Supra* note 11, at 21 (quoting Microsoft, 253 F.3d at 51). It must be noted that neither FTC nor the Court adhere strictly to the definition of entry barriers. That is, they limit their discussion to the PSN market, and do not explicitly state how certain traits of the PSN market, in which users are charged a price of zero, are connected to the provision of advertising services, in which they can be alleged to in fact "earn returns above competitive level."

⁶⁷ *Supra* note 1, ¶ 164.

⁶⁸ *Id.* ¶ 212.

connections one can find on them, making it difficult for a new entrant to displace an established personal social network in which users' friends and family already participate.⁶⁹ The FTC further alleged that a Facebook executive and Mark Zuckerberg himself recognized the presence of such network effects, an allegation which the Court seemed to highly value.⁷⁰ The notion that digital platforms enjoy network effects is rarely disputed,⁷¹ and the Court expressed that Facebook also did not meaningfully contest.⁷²

On another note, the FTC also alleges that Facebook's users face high switching costs, which also present another significant entry barrier for other firms into the PSN market. That is, over time, Facebook's users build a collection of connections and content. However, they cannot easily transfer this collection to another PSN service.⁷³ For instance, Facebook users cannot easily transfer their collection of posts and photos to, say, Google+; it would require a significant time investment to make connections on Google+ with everyone they were already connected with on Facebook, and data related to posts, such as the dates they were posted or comments that other users left on them, would be virtually impossible to transfer. This lack of portability⁷⁴ leads to high switching costs,⁷⁵ which creates significant consumer lock-in and barriers to entry. According to the FTC, not only are switching costs high, but they can increase over time—a "ratchet effect"—as each user's collection of content and connections, and investment of effort in building each, continually builds with use of the service.⁷⁶ That is, the more time and effort a user vests into a PSN service, building content and connections within it, the more difficult they will find it to switch to another PSN service, where they would have to build a new collection of content and connections. The FTC alleges that Facebook also recognized the presence of such ratchet effects.⁷⁷

Although not touched upon by the FTC, it must be mentioned, assuming that both network effects and high switching costs are present in PSN markets, that network effects and high switching costs may create synergistic effects. That is, due to high switching costs, users will continue to use a certain service. The continued presence of such users will present network effects, making the service more valuable to other users and inducing them to join. The addition of more connections will then further increase the switching costs. Taking the FTC's allegations as true, the relationship between such network effects and high switching costs may further erect significant barriers to entry.

Unlike the discourse on network effects, there is some debate in whether switching costs in PSN markets are indeed high; in fact, some have argued that switching costs are low in that a user can switch from one platform to another easily and cheaply.⁷⁸ This is true to a degree. Unlike other markets such as that of cellular networks, in which a user would usually need only one

⁶⁹ *Id.*

⁷⁰ *Supra* note 11, at 22-23.

⁷¹ *See, e.g.,* Lina M. Khan, *Sources of Tech Platform Power*, 2 *Geo. L. Tech. Rev.* 325 (2018); OECD, *Rethinking Antitrust Tools for Multi-Sided Platforms* (2018), www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm.

⁷² *Supra* note 11, at 22.

⁷³ *Supra* note 1, ¶ 213.

⁷⁴ Herbert Hovenkamp, *Antitrust Interoperability Remedies*, U of Penn, Inst for Law & Econ Research Paper No. 22-14, *Col. L. Rev. Forum* (2022).

⁷⁵ *See Id.* for a discussion on potential remedies to the lack of portability. Hovenkamp suggests that one could be to "require Facebook to keep this data in an accessible format, comprising a package that could be claimed by its owner and transferred to other firms who have set themselves up to take advantage of it."

⁷⁶ *Id.*

⁷⁷ *Id.* ¶ 215.

⁷⁸ Herbert Hovenkamp, *supra* note 5, at 2035.

provider and would incur both monetary and time costs to switch from one to another, the PSN market is one in which a user can have accounts on multiple PSN services and easily switch from viewing or posting on one service to another; all it would take to do so is to open a different app or web page. Indeed, one scholar points out that Americans switched from Friendster to MySpace and then from MySpace to Facebook, due to such low switching costs.⁷⁹ On the other hand, it could be argued that simply switching one's attention between apps or web pages and switching one's collection of content and connections to another service are different matters, with the former presenting a low switching cost and the latter presenting a high switching cost. To gain further insight into how high or low consumers perceive the switching costs to be, a qualitative analysis, such as the administration of surveys, may be helpful.

4. Facebook as a Multi-Sided Market

It must be noted that much literature surrounding antitrust and digital platforms has categorized Facebook as a multi-sided (or at least two-sided) digital platform.⁸⁰ Hovenkamp defines a digital platform as a website, app, or other digital venue that interacts commercially with one or more groups of users, and specifically a “two-sided” digital platform as one that facilitates activities involving at least two interdependent groups of users.⁸¹ As Shelanski, Knox & Dhilla point out, many digital platforms are three-sided and so can be characterized both as matching two sides that each generate positive externalities (users and content providers), whilst also providing an audience for a third side that might not deliver positive externalities (advertisers).⁸² While it is debatable whether users and content providers on Facebook can be considered two separate sides, this paper will utilize the term “multi-sided” to encompass both definitions.

It is important to point out that neither the FTC nor the Court has explicitly used the terms “multi-sided platform” or “two-sided platform” to characterize the PSN market. Nevertheless, they do recognize that Facebook's business model is based on mining the personal data of its users and selling behavioral advertising.⁸³ That is, they understand that there are multiple parties involved in the monetization of its product: users who use Facebook to access its core function of PSN services, and advertisers who wish to display their ads to specific sets of users. The FTC also alleges that Facebook's monopoly power has caused harm to not only users, but also advertisers, and even proceeds to list the multiple benefits to advertisers of additional competition.⁸⁴ However, its discussion of whether Facebook possesses monopoly power is limited to the PSN market; that is, although the FTC does lay out a definition of social advertising, it does not attempt to calculate Facebook's share in this market.⁸⁵ Traditional antitrust cases have contemplated one-sided markets and thus corresponding monopoly power analyses were regarding the market in which revenue occurred. However, in the case of Facebook, monopoly power analyses were carried out regarding the “side,” PSN services, which generated little to no direct revenue (some have even argued that

⁷⁹ David S. Evans, *supra* note 49, at 22.

⁸⁰ *Supra* note 62. It must also be noted that there is debate on whether to categorize such platforms as single multi-sided markets or multiple markets which are interrelated. OECD, Rethinking Antitrust Tools for Multi-Sided Platforms (2018), 13, www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm.

⁸¹ Herbert Hovenkamp, *supra* note 5, at 1957.

⁸² OECD, Rethinking Antitrust Tools for Multi-Sided Platforms (2018), 11, www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm.

⁸³ *Supra* note 1, ¶ 45.

⁸⁴ *Supra* note 38, ¶ 167.

⁸⁵ *Id.*

it generates negative direct revenue⁸⁶), while the “side” in which Facebook actually generates revenue, the provision of advertising services, was largely left untouched. However, many have argued that in such market power analyses of multi-sided digital platforms, one must also account for the other “sides” of a platform as well, taking their interdependencies into account.⁸⁷

This begs the question of whether, despite Facebook being a multi-sided platform, it is sufficient to prove market power on one side when utilizing the indirect method. That is, must agencies and courts engage in the exercise of defining the market, calculating market share, and demonstrating barriers to entry in the other, advertising “side” of the market on top of carrying out such analyses regarding the PSN “side”? To answer this question, it is important to first understand Facebook’s business model. Evans’ characterization of online multi-sided platforms sums it up nicely: such platforms, including Facebook, make the platform “free” to one group of participants, or even subsidize those participants, and earn profits from the other groups of participants who they do charge.”⁸⁸ Evans argues that the real price to users can even be considered negative, in that consumers do not pay for obtaining the content or services yet receive value by coming to these platforms.⁸⁹ On the other side, advertisers pay to present advertising or other marketing messages to the consumers that are aggregated on the platform; this is where Facebook makes revenue – in fact, Facebook’s public earnings reports show that Facebook earned virtually all of its revenue from advertising in 2021.⁹⁰

In the case of Facebook, it is reasonable to believe that monopoly power on the PSN side of the market would translate to market power in advertising. That is, the core value of Facebook to advertisers is Facebook’s sheer user base and its ability to present highly targeted advertisements. Assuming that Facebook has monopoly power in the PSN market, it is logical to conclude that thanks to its long-preserved dominant status, not only does it have the largest number of “eyeballs” which advertisers seek, but also that it has consistently accumulated more data than competitors over the years to strengthen its targeting abilities. This would reasonably make it the preferred platform by advertisers – why would they go to other platforms when Facebook is obviously the best choice in terms of user base and targeting? As such, Facebook’s monopoly power in the PSN market would allow it to enjoy market power in the advertising market.

Some have argued that the interrelationship between the multiple sides of a platform means that it is not possible for a multi-sided platform to have market power on only one side of the market.⁹¹ While they are not stating that it is always sufficient to show market power in just one side to conclude that a firm has market power as a platform, in Facebook’s case, it is hard to conceive of a situation in which monopoly power in the PSN market would not translate to market power in the related advertising market. As such, considering Facebook’s business model in which the willingness to pay of advertisers depends on Facebook’s dominance of the PSN market, this paper argues that when using the indirect method of proving monopoly power, proving Facebook’s monopoly power in just the PSN market is sufficient.

⁸⁶ David S. Evans, *supra* note 49, at 20.

⁸⁷ See, e.g., David S. Evans, *supra* note 49; Rob Frieden, *The Internet of Platforms and Two-Sided Markets: Implications for Competition and Consumers*, 63 Vill. L. Rev. 269 (2018)

⁸⁸ David S. Evans, *supra* note 49, at 3.

⁸⁹ *Id.* at 22. Of course, it could be argued that while users do not pay a monetary cost, they “pay” with their attention, which is often involuntarily directed to advertisements displayed within the service, or with their data, which can be utilized by the platform or sold to other parties.

⁹⁰ Meta Reports Fourth Quarter and Full Year 2021 Results, https://s21.q4cdn.com/399680738/files/doc_financials/2021/q4/FB-12.31.2021-Exhibit-99.1-Final.pdf

⁹¹ OECD, *supra* note 70, at 16.

B. Monopoly Power: Direct Method

An alternative method of demonstrating monopoly power is direct measures, which rely on empirical measurement of output responses to price changes.⁹² The Court in the Facebook case stated that employing the direct method requires the plaintiff to supply direct proof that a firm has in fact profitably raised prices substantially above the competitive level.⁹³ Hovenkamp explains that such direct proof relies on estimates of firm elasticity of demand, evidenced mainly by a firm's price-cost margins or output responses to price changes.⁹⁴ However, it is recognized that proof of high prices may not be the only means of demonstrating monopoly power; proof of pricing discontinuity, which refers to a sudden change in the firm's pricing or output behavior following the allegedly anticompetitive act,⁹⁵ or comparison between the industrial sector under consideration and a competitive benchmark,⁹⁶ may be other methods to establish direct proof.

Such direct measures have some obvious advantages over the indirect method. With the direct method rendering market definition and market share calculation unnecessary, it circumvents the tedious, often inaccurate process of enumerating firms that fall within a market and do not. Unlike the indirect method which has the critical disadvantage of being binary, the direct method can account for varying degrees of substitutability, in that it can factor in, for example, the rate at which consumers change their responses to changes in price.

It must be noted that although the FTC focused on proving Facebook's monopoly power via the indirect method, it nevertheless employed some direct proof as well. To begin with, the FTC alleges that Facebook enjoys inelastic demand. That is, even when Facebook was involved in a series of scandals, such as the Cambridge Analytica affair and Facebook's two settlements with the FTC over privacy abuses,⁹⁷ it did not lose significant users or engagement to competitors.⁹⁸ The FTC also alleges that Facebook is able to harm users by decreasing product quality, for example by abusing their privacy, without losing significant user engagement, and that "Facebook's ability to withstand significant user dissatisfaction while experiencing a minimal loss of user engagement indicates inelastic demand and market power." While the Court has not weighed in on whether the FTC has adequately alleged direct evidence, and while it could be argued in other cases that inelastic demand can simply be the product of a superior, differentiated service, it is also reasonable that regarding Facebook, which was found to have significantly harmed user privacy (Facebook agreed to Consent Orders in both 2012 and 2019 with it paying a \$5 billion penalty in 2019⁹⁹), the lack of loss to the business is suspicious. It is plausible that in a competitive market, such conduct would have diverted users to a comparable service with better privacy policies; the fact that this was not the case could certainly be indicative of monopoly power.

⁹² *Supra* note 5, at 1958.

⁹³ *Supra* note 11, at 8-9.

⁹⁴ Hovenkamp, *supra* note 39, at 26.

⁹⁵ Daniel A. Crane, *Market Power Without Market Definition*, Notre Dame L. Rev. 90, no. 1. 61 (2014).

⁹⁶ Jerry A. Hausman & J. Gregory Sidak, *Evaluating Market Power Using Competitive Benchmark Prices Instead of the Herfindahl-Hirschman Index*, 74 ANTITRUST L.J. 387, 388 (2007).

⁹⁷ Gilad Edelman, *Lina Khan's Theory of the Facebook Antitrust Case Takes Shape*, Wired (Aug. 19, 2021 7:10 PM), <https://www.wired.com/story/lina-khan-theory-facebook-antitrust-case-takes-shape/>.

⁹⁸ *Supra* note 1, ¶ 206.

⁹⁹ *Id.* ¶ 207.

The FTC also alleges that Facebook has “enjoyed enormous profits for an extended period of time, suggesting both that it has monopoly power and that its personal social networking rivals are not able to overcome entry barriers and challenge its dominance.”¹⁰⁰ That is, in a competitive market, the large margin should have drawn rivals to the market in the hopes of gaining a share of the profit. The FTC alleges that Facebook’s maintenance of a high profit and market capitalization for 10 years shows that Facebook possesses protected monopoly power.¹⁰¹ Of course, a high margin is not always indicative of monopoly power – it is plausible that it could be due to a superior product or service. A firm enjoying the high margin for an extended period is not foolproof evidence of monopoly power either – if a firm with high margin and market capitalization engages in innovation, it may be able to enjoy high profits for a long time due to its possession of products that are superior to that of rivals. However, it can be argued that Facebook’s sustained high profits, especially when compared with equivalent figures from rivals¹⁰² and especially considering the fact that the platform receded in quality when it came to data protection, suggest Facebook enjoyed monopoly power.

All in all, holistically taking the FTC’s allegations into account, the FTC reasonably alleges that Facebook users’ inelastic demand to high-profile scandals or significant reductions in quality, as well as Facebook’s long withstanding high profits, are pieces of direct evidence of Facebook’s monopoly power.

In addition to the methods brought forth by the FTC, there are other ways of procuring direct evidence of monopoly power. One is the SSNDQ (Small but Significant Non-transitory Decrease in Quality) test, which is a modification of the SSNIP (Small but Significant and Non-transitory Increase in Price) test. Because the SSNIP test requires the product in question to charge a positive price, such analysis is impossible when a product is priced at zero; an increase in price would necessarily be calculated as an infinite increase. Instead, the SSNDQ test measures the profitability of a marginal degradation of value offered,¹⁰³ recognizing that in the context of zero price markets, competition on price can be replaced by competition on quality,¹⁰⁴ and that in the context of digital platforms, this is even likely.¹⁰⁵ Specifically, in the case of multi-sided digital platforms like Facebook, the SSNDQ test would measure the extent to which the reduction of quality on one side (the provision of PSN services) would decrease the attractiveness of the platform to those on the other side (advertisers). That is, one must account for the interactions between the two sides; it is not enough to simply assess the extent to which decreases in quality would divert users of PSN services to other platforms, it must also consider the extent to which this would affect advertisers’ perception of the platform’s attractiveness. It is at this point that an advantage of the SSNDQ test is revealed: according to Evans, in considering that diversion there is no business or economic reason to limit the inquiry to online platforms that provide the same service. It is an empirical question whether consumers would turn their attention to completely different services.¹⁰⁶ In other words, there is no need to engage in discussion of whether two services fall into the same category; the question asked is one of the

¹⁰⁰ *Id.* ¶ 208.

¹⁰¹ *Id.*

¹⁰² The FTC alleges “Snapchat, for example, has never recorded a profit.” *Id.* ¶ 209.

¹⁰³ OECD, *supra* note 70, at 14.

¹⁰⁴ OECD, *Summary of Discussion on the Roundtable on Quality Considerations in Zero Price Markets (Annex to the Summary Record of the 130th Meeting of the Competition Committee held on 27-28 November 2018)*, DAF/COMP/M(2018)2/ANN7/FINAL, 2 (Apr. 22, 2020)

¹⁰⁵ David S. Evans, *supra* note 49, at 25.

¹⁰⁶ *Id.* at 26,

degree to which consumers will divert their attention to other platforms, even if they are not substitutes.

Of course, the SSNDQ test is not without its limitations. To begin with, quality can be harder to quantify than price, especially in zero price markets. While it has been suggested that some dimensions of quality that can be used include privacy, data security, advertising content, ease of switching and choice in complement markets, innovation, ease of use, and functionality,¹⁰⁷ there is not a consensus on which dimensions are the most appropriate, especially considering that many multi-sided platforms are highly differentiated. Another issue regards the operationalization of such dimensions.¹⁰⁸ Not only is there an issue of quantification, but also one of having to consider the heterogeneous preferences of consumers.¹⁰⁹ That is, a small decrease in quality may cause one consumer to divert their attention to another platform, but it may not seem as significant in another consumer's eyes. It has been suggested that consumer polls or surveys could be a possible technique¹¹⁰ to both quantify qualitative variables and account for the heterogeneity in preferences. Finally, the multi-sided nature of platforms such as Facebook complicates the analysis, in that there is another step of analysis that must be conducted to account for the interdependence of the two sides. Perhaps due to such limitations, the direct method has been slow to be implemented by courts, with the European Commission even warning that the "SSNDQ test represents more a conceptual guide than a precise tool to apply."¹¹¹

While the SSNDQ test, when applied to the case of Facebook, would largely be concerned with quality in the PSN services side, direct evidence of monopoly power can also be procured in the advertising side.

As an aside, it is worth noting that what is understood by some scholars to be true in the general category of "multi-sided digital platforms" is not always true regarding Facebook. Specifically, although Evans states that "market power on each side of a multisided platform, whether in the form of increasing prices or decreasing quality, is constrained by the risk of losing sales on the other sides,"¹¹² that is, that "a price increase, or quality decrease, to one group of participants reduces the demand not only by that group but also by the other groups who then have fewer participants with which to interact,"¹¹³ this is not necessarily the case in platforms such as Facebook in which the two sides consist of users and advertisers. Specifically, a price increase in advertising, and a reduction in demand for advertising, would not also decrease demand for Facebook's PSN services. In this case, in which the anticompetitive conduct of raising prices is directed only at the advertiser and not at users, agencies and courts can apply a more traditional one-sided analysis.¹¹⁴

Taking this into account, the more traditional method of directly proving direct power, in which a firm must be found to have profitably raised prices above the competitive level, can be applied to the advertising side, especially considering that Facebook makes most of its revenue

¹⁰⁷ OECD, *supra* note 92, at 2.

¹⁰⁸ OECD, *supra* note 70, at 14.

¹⁰⁹ OECD, *supra* note 92, at 3.

¹¹⁰ *Id.* at 5.

¹¹¹ European Commission, *Support study accompanying the Commission Notice on the evaluation of the definition of relevant market for the purposes of Community competition law* 64 (2021).

¹¹² David S. Evans, *supra* note 49, at 1.

¹¹³ *Id.* at 3.

¹¹⁴ OECD, *supra* note 82, at 193.

from advertisers.¹¹⁵ Although many scholars have argued that power assessments on multi-sided platforms require considering the reactions that occur on the opposite side,¹¹⁶ in the case of Facebook, it is reasonable that proof that it was able to profitably raise prices above the competitive level in advertising would be indicative of market power. That is, it could be stated that it is because Facebook enjoys monopoly power in the market for PSN services, and because a higher price in advertising would not decrease demand for its PSN services, that Facebook is able to charge a higher price. It must be noted that Facebook has in fact been able to charge higher prices for its ads: in the full year 2021, average price per ad increased by 24% year-over-year,¹¹⁷ and in Q4 2017 the average price per ad jumped by 43%.¹¹⁸ With price-per-ad being a quantifiable and trackable measure, this method of proof seems to be a viable option.

C. Anticompetitive Conduct

Regardless of whether one proves a firm's monopoly power via the indirect method or the direct method, simply proving monopoly power is not enough; one must also prove that the firm engaged in anticompetitive 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."¹¹⁹ When it comes to mergers, a monopolist's acquisition of "an actual or likely potential competitor is properly classified as anticompetitive, for it tends to augment or reinforce the monopoly by means other than competition on the merits."¹²⁰ That is, for an acquisition by a monopolist to be classified as "anticompetitive," it must be demonstrated that the acquired firm was an actual or likely potential competitor. In addition, anticompetitive effect, that is, that the acquisitions "harm the competitive process and thereby harm consumers,"¹²¹ must also be demonstrated.

To apply such rules to Facebook's case, the FTC alleged, and the Court agreed that the FTC had adequately done so, that Instagram and WhatsApp were competitors to Facebook prior to their acquisition, and that the acquisitions had harmed consumers in that consumers were provided lower service quality on privacy and data protection, Facebook engaged in less innovation on their own and acquired products following the acquisitions, and consumers and advertisers were faced with less choice.¹²² While whether the Court will find the facts true is up in the air, it is notable that despite the FTC mentioning Facebook's acquisitions of other firms as well, it also conceded that it does not allege that those acquisitions "each standing alone[] violated the antitrust laws."¹²³ In accordance with the concession, the Court limited its discussion to only Facebook's acquisitions of Instagram and WhatsApp.

¹¹⁵ *Id.* at 26.

¹¹⁶ *See, e.g.*, Herbert Hovenkamp, *supra* note 5, at 1962; *supra* note 82.

¹¹⁷ Meta Reports Fourth Quarter and Full Year 2021 Results, *supra* note 78.

¹¹⁸ Lina M. Khan, *Sources of Tech Platform Power*, 2 *Geo. L. Tech. Rev.* 325 (2018) (quoting Max A. Cherney, Facebook Earnings Send Stock to Record After Massive Ad Price Increase, *MKT. WATCH* (Feb. 1, 2018, 12:58 PM), <https://www.marketwatch.com/story/facebook-earnings-stock-touches-record-aftermassive-ad-price-increase-2018-01-31> [<https://perma.cc/YW32-J4E5>]).

¹¹⁹ *Supra* note 11.

¹²⁰ *Id.*, at 26 (quoting Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, vol. III, 701a, at 200 (4th ed. 2015)).

¹²¹ *Id.* at 29 (quoting Microsoft, 253 F.3d at 58).

¹²² *Id.* at 26-34.

¹²³ *Id.* at 27.

This reveals a shortcoming of applying Section 2 of the Sherman Act to acquisitions. That is, it can be difficult to prove that an acquired firm was a competitor or potential competitor. Especially when it comes to nascent firms with promising technologies, while they may have had the potential to develop into formidable rivals, at the time of these acquisitions few show more than speculative promise.¹²⁴ Although speculation, it is reasonable to think that this was one of the reasons the FTC focused on Facebook’s acquisitions of Instagram and WhatsApp in its case – with the two firms having had large, fast-growing user counts at the time of acquisition, it may have been more straightforward to prove that they were indeed competitors or potential competitors. Even in the cases of Instagram and WhatsApp, however, Facebook has presented counterarguments that they were not competitors, and that it is impossible to speculate on the counterfactual.¹²⁵

However, this should not deter agencies and courts from giving more attention to Facebook’s other acquisitions. That is, Facebook’s acquisitions of services such as FriendFeed¹²⁶ and Glancee¹²⁷ should be looked at in more detail; for instance, one could look at their growth rates and why other companies had wanted to acquire them to infer the likelihood of whether they could have grown into potential competitors. Even if, as the FTC conceded, these acquisitions each standing alone may not violate the antitrust laws, the courts should look at such acquisitions holistically; a continued course of conduct in which Facebook attempted to acquire firms it itself deemed to be potential competitors should raise suspicion as to its anticompetitive conduct.

IV. Utilization of Section 7 of the Clayton Act

It is worth noting that while the States Attorney General also invoked Section 7 of the Clayton Act,¹²⁸ the FTC did not, choosing to rely solely on Section 2 of the Sherman Act instead.

Compared to Section 2 of the Sherman Act, under which many different forms of actions can be condemned as long as they constitute monopolization or attempts of monopolization, Section 7 of the Clayton Act focuses specifically on mergers and acquisitions. Section 7 has a comparative advantage over Section 2 in that it does not require proof of monopoly power.¹²⁹ However, while Section 2 charges may (although not always) allow arguments relating to “course of conduct,” in which a plaintiff argues that the defendant’s behaviors, when combined, have a synergistic effect that adds up to illegal monopolization,¹³⁰ Section 7 charges must focus on specific mergers and acquisitions. That is, plaintiffs invoking Section 7 face the risk that no single deal will be deemed sufficiently objectionable when considered in isolation.¹³¹ Applying Section 7 to Facebook, which employed a tactic of acquiring smaller rivals, it may be difficult to adequately prove that the effect of its acquisitions of WhatsApp or Instagram, let alone those of even smaller rivals such as FriendFeed and Glancee, were to “substantially lessen

¹²⁴ Herbert Hovenkamp, *supra* note 5, at 2042.

¹²⁵ *Supra* note 11, at 30-32.

¹²⁶ *New York v. Facebook, Inc.*, No. 1:20-cv-03589-JEB (D.D.C. Dec. 9, 2020), ¶ 85-86.

¹²⁷ *Supra* note 1, ¶ 75.

¹²⁸ *Supra* note 126, ¶ 277.

¹²⁹ Congressional Research Service, *The Facebook Antitrust Lawsuits and the Future of Merger Enforcement*, (2021).

¹³⁰ *Id.*

¹³¹ *Id.*

competition.”¹³² As such, when it comes to Facebook, it may make more sense to, as the FTC did, focus on arguing that Facebook engaged in a course of conduct which violated Section 2 of the Sherman Act rather than risk arguing for individual violations of Section 7 of the Clayton Act.

V. Conclusion

This paper has thus far examined the existing antitrust laws and how they have been, and can be, utilized to address Facebook’s possibly anticompetitive acquisitions of small rivals. As this paper has demonstrated, when it comes to analyzing market power, both the indirect and direct method have shortcomings. As such, this paper proposes that agencies and courts utilize both methods, and multiple approaches of each. For instance, one could use multiple metrics as the FTC did to establish market share pertaining to the indirect method, as well as multiple approaches including the SSNDQ test and consumer surveys to find monopoly power via the direct method. If it is the case that fragmented pieces of evidence of monopoly power is found in both methods, it becomes more likely that Facebook indeed possesses monopoly power. If it is the case that different approaches provide different conclusions, it will become a matter of evaluating the conclusions holistically, accounting for the advantages and limitations of each approach. Regarding anticompetitive conduct, more attention should be paid to Facebook’s acquisitions of smaller rivals, not just that of WhatsApp and Instagram. While some judges have been skeptical of concluding that the amalgamation of various behaviors can add up to illegal monopolization,¹³³ Facebook’s 94 acquisitions,¹³⁴ with many of the acquired firms left to become obsolete or even discontinued, should be examined holistically as a course of conduct.

American antitrust law does not need a new rule, nor should broad-brush regulation be the preferred method to tackle such dominant digital platforms as Facebook. With multi-sided digital platforms being extremely differentiated, regulation, with its broadness, may be ineffective at checking specific anticompetitive behaviors of a certain firm, or it may prevent firms from engaging in practices which, in their specific context, are in fact beneficial to the consumer. As such, courts should rely on antitrust law and its case-by-case approach. The existing antitrust laws are broad enough in their wording to be able to be applied to digital platforms; however, agencies and courts should consider different ways of interpreting and applying them in accordance with our changed world.

¹³² 15 U.S.C. § 18

¹³³ *Supra* note 129.

¹³⁴ Wikipedia, *List of mergers and acquisitions by Meta Platforms*, https://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Meta_Platforms, (last visited Apr. 24, 2022).