

# Kill it before it grows

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The case initiated by US Federal Trade Commission, supported by the public prosecutors of 46 States, against Facebook for abuse of its dominant position is another phase in the “war on Tech giants”. The case follows cases initiated on both sides of the Atlantic like the case against Amazon (European Commission), Google (US Department of Justice), Apple (European Commission), Facebook (German Bundes Kartell Amt), amongst others. The common factor in these cases is the role of big data, more specifically whether the data these companies gather about their users enables them to block smaller competitors and potential entrants. The difference of the recent case against Facebook is that the US authorities are now using heavy armory by demanding a break-up of Facebook.

The underlying argumentation is interesting as it somewhat undermines the basic principles of merger control. The authorities claim that Facebook maintains a monopoly through strategic acquisitions and imposes restrictions of competitors to access the platform. Examples of recent acquisitions are Instagram (acquired in 2012 for US\$ 1 billion), Oculus (acquired in 2014 for US\$ 2 billion) and WhatsApp (acquired in 2014 for US\$ 19 billion). These acquisitions are, according to the authorities, part of an illicit strategy to block competition from entering the market.

The thing is that these acquisitions were assessed at the time by the competent competition authorities on their potential impact on the market. They cleared these acquisitions as they raised, at the time, no substantial risk for competition. One can argue that a lot has changed since then, both in the technological economy as in the way the big players are faced by the competition authorities and governments. At the time companies like WhatsApp and Instagram were much smaller with no substantial turnover and the crucial role of data was less evident (and – likely of importance as well – the Russian interference of the US presidential elections in 2016 through social media had not occurred yet). On the other hand, authorities are supposed to take a forward-looking approach when asked to analyse such transactions and predict in their analysis the potential effects thereof in the short to medium term future. And it was obvious at the time that Facebook saw substantial commercial and strategic benefits from these operations. Why else would they pay US\$ 19 billion for a company that offered free chat services?

If the FTC succeeds in its claim it will mean basically that the clearance will be undone while at the same time restricting future acquisitions by Facebook. This approach is in line with the report issued last October by the US House of Representatives regarding the position and threat of the four Big Tech companies, suggesting modifications to the antitrust laws to enable a more general prohibition on smaller acquisitions.

Facebook’s reaction, that the authorities are re-writing history and that the FTC position basically means that a previous merger clearance is never final, is understandable. If Facebook is

currently blocking competition from its platform to maintain a dominance, or violating users' privacy, the authorities should regulate such conduct by sanctions, prohibitions, and conditions. Unwinding acquisitions previously cleared seems disproportional, undermines the principles of legitimate expectations and legal certainty, and may disincentive innovation to the detriment of the consumers. The underlying goal to create competing "baby Facebooks" is moreover an example of "market making" that goes beyond the competence of a general competition authority like the FTC, let alone the States' public prosecutors. But then, as recent history shows, in the United States they are in general less fond of regulating and containing and more willing to take drastic steps to eliminate a potential threat.

Facebook have expressed moreover doubts as to whether a break-up is even possible, regardless of any legal objections. It has further integrated Whatsapp and Instagram over the last years, making it more difficult to "unscramble the eggs". The integration seems a deliberate move to protect it from a forced break-up. Moreover, if we have learned anything in the last years of digital evolution, it is that nothing seems impossible, especially not in Silicon Valley. A break-up destroys capital and users' value but does not seem technically impossible.

Facebook may be seen by some as the digital devil controlling our opinions and thoughts, it has undoubtedly created very valuable products and services that are preferred by its users over that of the competition. The current success of Whatsapp and Instagram are for a large part the result of its integration with the Facebook platform and the investments and innovations made by Facebook. And let's not forget that although it's the biggest and therefore the preferred social media platform, competition is "just one click away". What is hip and cool now, may be out of fashion in no time.