Insight

Antitrust Actions Beyond the Federal Government: The Potential Impact of State and Private Litigation

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Executive Summary

- While most policymakers and observers are focused on the federal antitrust cases, both states and private actors are bringing their own antitrust suits that have the potential to alter antitrust and competition policy.
- These state actions may end up diverging from both one another and the federal cases and could lead to confusion that undermines market confidence.
- Private cases brought by companies could also lead to precedents that prioritize the impact on specific competitors rather than the benefits to consumers.
- Policymakers at all levels should maintain a principled approach to antitrust and not see antitrust as a tool to accomplish other policy goals or punish an unpopular industry.

Introduction

Recently the Federal Trade Commission (FTC) and Department of Justice (DoJ) brought antitrust claims against Facebook and Google respectively, but calls to "break up Big Tech" are coming from far more than federal policymakers, and so too are the antitrust claims. Eleven Republican attorneys general joined the DoJ antitrust case against Google and 48 state and district attorneys general filed an antitrust case against Facebook on the same day as the FTC. Additionally, nine other states joined Texas in filing additional antitrust claims against Google concerning advertising, 38 states, districts, and territories have joined a case led by Colorado claiming Google engages in self-dealing to preserve its dominance in search and search ads, and a case filed by Epic Games alleges that Apple is engaging in anticompetitive behavior with its app store practices. While observers have largely focused on the federal level—both the proposed changes to federal antitrust standards and the results of federal antitrust actions—states and private litigants also have a substantial ability to impact both the technology industry and the trajectory of competition law as a whole.

State Antitrust Investigations and Complaints

In addition to the federal investigations, groups of state attorneys general have investigated potential antitrust violations against Google and Facebook. The states' investigation into Facebook resulted in a separate complaint from the FTC's. While some states joined the DoJ complaint against Google, more investigations by state attorneys general are ongoing meaning additional cases from these states are also likely to come later. But we are seeing a proliferation of multi-state litigation separate from the federal actions regarding antitrust claims against tech giants. . While states can provide additional resources for antitrust investigations and have their own interests in consumer protection, the current state-level cases alleging antitrust violations by "Big Tech" do not reveal a strong argument of monopolistic behavior and, like the federal cases, could create more disruption

to both competition policy and innovation than benefits to consumers.

This is not the first time the states have been involved in antitrust investigations or calls to break up tech companies. During the 1990s, a group of 20 states, joined the DoJ in the investigation and an antitrust case against Microsoft After just over 3 years of litigation and following the Court of Appeals for the D.C. Circuit overturning a lower court's ruling against Microsoft**,** Microsoft and the federal government settled. While this settlement avoided some of the potentially concerning penalties and interference in a competitive market that the courts could have brought, it still had an impact both on Microsoft's opportunities in certain emerging areas such as mobile and in the overall competitive landscape. Nevertheless, some states felt the settlement was insufficient. Massachusetts led a group of nine states that argued the judge's agreement of the settlement did not adequately address Microsoft's monopolization or resolve the anti-competitive behavior related to tying, but they failed to convince the court.

States are once again taking an aggressive view on antitrust in the tech industry, but the divergence in arguments could lead to more confusion and disruption in an industry that has provided consumers with beneficial and free services. Currently, the attorneys general of many states disagree with one another and the federal government regarding the nature of anticompetitive behavior and consumer harm by the tech giants' actions. As we are starting to see with the new claim led by Texas Attorney General Ken Paxton, this split is likely to result separate cases with different theories of antitrust that seek not to apply current standards but embrace more expansive policy uses of this powerful tool. Often the animus behind these claims is not clear evidence of anti-competitive behavior but a desire to solve other concerns regarding tech policy, such as data privacy or alleged anti-conservative bias. This desire to solve non-competition-related issues could give rise to divergent theories of antitrust action that are incompatible with one another and not based in the traditional elements of consumer welfare and competition policy.

With a growing number of likely divergent claims, the current tech antitrust battles could continue for some time and lead to more confusion around the application of antitrust to this dynamic sector of economy. This may appear to be a short term problem, but uncertainty around the application of competition policy could impact numerous sectors of the economy. Regulators already appear to be increasing scrutiny of acquisitions related to the technology sector well-beyond the tech giants. Multiple court cases with a wide-range of theories that do not follow traditional antitrust applications could further the uncertainty or thought that previously justified actions might be subject to greater scrutiny. If a court chooses to embrace the creative and expansive theories at the center of these state-led cases, it could set precedent that changes the application of antitrust law in the future not only for the technology industry, but in many other areas of the economy as well. Regardless of the impact of these cases—and there is reason to think that these antitrust actions would not remedy the underlying policy concerns—the uncertainty and broad reach created by these competing state cases would likely stifle economic growth and innovation.

Litigation by Other Companies and Claims of Anti-Competitive Behavior

Actions brought policymakers are not the only claims of anti-competitive behavior that could set bad antitrust precedent and change business models. In some cases, competitors and rivals have accused and even brought litigation alleging anti-competitive action. Recently, this has been seen in a case involving Epic Games, the maker of the popular app Fortnite, and Apple. This separate, private litigation may not appear to be directed at changing policy but could still have consequences on the market if successful.

This summer Epic Games began offering direct payment systems in its popular game Fortnite, violating the rules of Apple's App Store. Shortly after, Apple threatened to terminate the company's developer account for

this violation and removed Fortnite with the violating action from its app store. Epic then sued Apple alleging among its claims that Apple unlawfully maintains monopoly power for the distribution of apps on its mobile operating system and in-app payments, in violation of both federal and state of California competition law. It requested injunctive relief regarding the operation and rules of Apple's App Store. Apple has countersued Epic Games with claims including unjust enrichment and breach of contract based on the violating actions.

While the cases brought by state and federal government may indicate concerning intentions to change underlying antitrust policy and its application, a successful private litigation could also change beneficial business practices and set bad precedent. For example, if Epic were to succeed, its suit could result in changes to the app store that deter platforms from offering such a marketplace by reducing the benefits and changing the costs and profits behind offering such a service. Removing these marketplaces would make it more difficult for consumers to find apps and more costly for developers to market their products and connect to consumers. As the App Association, a trade group of app developers, has noted, the emergence of app stores has been mutually beneficial developers and platforms as well as consumers by enabling discovery, download, and use. The result has been that these markets have enabled a flourishing economy for mobile apps and new markets for developers to connect to consumers.

Further, neither consumers nor developers are currently locked into these marketplaces when it comes to mobile apps. A range of other options exist, whether it is competitive platforms including the popular Android system or using web browsers to access a program directly. As a result, far from ameliorating the alleged harm, if such injunctive relief was granted it could create new problems. The requested changes could lead Apple and other platforms to move away from offering app stores, removing the benefits many consumers and developers find in these convenient offerings.

While private litigation may not lead some to the same concerns regarding the potential for overall shifts in antitrust policy, successful cases could still yield significant consequences beyond just the parties involved. The requested changes to business practices could result in a competitor eliminating a current business practice to benefit itself but harm consumers and the marketplace more generally.

Conclusion

While the federal cases and their implications for antitrust policy will receive the bulk of the attention, the potential impact and disruption of cases brought by states and competitors cannot be ignored. Even if federal policymakers maintain the current antitrust standards, other cases could yield precedent that diminishes consumer welfare in the market. It is important that courts and policymakers at all levels of governance maintain a principled approach to antitrust rather than presuming big is bad or pursuing an industry due to its political unpopularity or to achieve unrelated policy goals.