Insight

Meta Case Highlights the Diverging Approach to Antitrust Enforcement

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Executive Summary

- The Federal Trade Commission (FTC) recently challenged Meta's acquisition of a virtual reality (VR) developer primarily on the grounds that it would substantially lessen competition in the dedicated VR fitness app market.
- The FTC's case is the latest example of the agency's New Brandeis approach to antitrust policy, which is concerned with firm size in isolation, rather than simply the welfare of consumers, regardless of the competitive effects of a merger.
- The FTC's case also largely ignores substitutable products when defining the VR fitness app market (defining the relevant market is a critical task for the agency when adjudicating such antitrust cases), as well as the competitive effects of banning companies attempting to gain access to a new market through the acquisition of another company.
- As Congress contemplates changes to competition policy, it must carefully consider how regulators may attempt to stretch their granted authority to pursue objectives beyond the welfare of consumers.

Introduction

The Federal Trade Commission (FTC) recently challenged the merger of Meta and virtual reality (VR) app developer Within, primarily arguing that the acquisition of Within's VR subscription fitness service would substantially lessen competition in the VR fitness market. The FTC's core argument departs significantly from traditional antitrust theory regarding mergers and competition. Rather than looking at whether the merger would benefit or harm consumers—pursuant to the FTC's long-standing practice—or whether the merger would increase concentration in a narrowly defined market, the FTC's challenge hinges on whether Meta should develop its own VR fitness app to compete with Within. But this approach departs from previous cases, and the FTC may use it to test the waters of just how far it can push a "big is bad" approach to antitrust policy.

Determining whether the Meta merger would substantially lessen competition will require a thorough analysis of the facts and economics of the case. All observers, however, should consider that FTC's process and approach, which would be a departure from existing standards, could leave consumers worse off. For example, if the FTC ignores the benefits of acquisitions for both the acquiring and acquired firm, it may result in fewer firms starting in the first place and further entrenchment of the incumbents. The FTC can and should bring challenges to mergers that may substantially lessen competition, but Congress must also keep careful oversight of the agency when it begins to drastically alter its enforcement to the detriment of consumers and competition.

Ignoring Substitutability to Redefine Markets

The FTC's case primarily hinges on whether fitness and dedicated VR fitness apps constitute a distinct market in which other options for fitness will not place competitive restraints on Meta's offerings. When reviewing a merger, antitrust regulators must first establish the relevant market. Yet determining the relevant market is not a simple task. If a company with a dominant market share tries to extract monopoly rents in a market with substitutable products, it will likely be unable to do so, meaning the relevant market likely encompasses more than just that specific product.

Under current law, it does not matter if a firm controls every dedicated fitness VR app if it cannot extract monopoly rents, principally because pressure from substitutable products limits monopolistic behavior. To determine whether these pressures exist, courts generally use the small but significant non-transitory increase in price (SSNIP) test, which looks whether a firm could impose a price increase of about 5 percent for at least a year without competitive repercussions. If a firm can't make such an increase in price, it usually means there are alternative products that consumers could choose to buy. If that is the case, the firm cannot act like a monopolist: The market is keeping its behavior in check.

Nevertheless, the FTC wants to define the relevant market solely within the scope of dedicated fitness VR apps (or in the alternative all VR fitness apps) on the grounds that Meta is leading in VR tech and purchasing a VR fitness app would leave consumers with almost no alternatives. Yet Meta is by no means monopolizing the fitness industry. There are plenty of substitutes: fitness apps for a smart phone, gyms, treadmills, sports, and even taking the dog for a walk. The FTC, so focused on Meta's VR investments and overall size, ignores these alternatives.

Forcing Meta to Develop its Own App

Even if the FTC can show that dedicated VR fitness apps constitute a distinct market, under the consumer welfare standard, it would need to show that Meta's acquisition of Within would substantially limit competition or create a monopoly. Meta doesn't offer its own dedicated VR fitness apps, however, and thus its acquisition of Within wouldn't actually change the options available to consumers or the relative market shares of the apps in the market. Nevertheless, the FTC's position seems to be that it doesn't matter whether Meta currently competes in the market, because if they do enter the market after buying its most successful firm, the size of the company and their investments in VR tech will effectively prevent rivals from competing.

But this is a short-sighted view of how competition arises in these markets. First, rival companies can identify consumer preferences in the market and will compete when entry barriers are sufficiently low. While network effects will certainly make entry more difficult, tech markets in particular have seen countless startups replace seemingly dominant firms in the past. Second, to incentivize startup investment, having an offramp like Meta or other big technology companies limits risk. As a result, investors may be more willing to take a risk on a start-up and thus introduce additional competition to the market. Finally, if Meta integrates Within's apps, it may create a more seamless experience for users, improving quality in the market and giving consumers more options for VR moving forward.

Whether a transaction substantially limits competition doesn't depend solely on the number of firms or size of the firms in the market. Instead, mergers may lower the number of firms in a market but make them more competitive against rival firms and prevent them from gaining monopoly power. This isn't always the case, but the FTC should carefully consider the competitive nature of this market rather than simply viewing the size of a firm as a per se problem. Instead, the latest lawsuit from the FTC suggests that the agency will primarily look at the size of Meta post acquisition and attempt to block any deal that may contribute to concentration.

What does Congress need to know?

The Meta case exemplifies how the FTC is attempting to expand its authority into areas beyond the traditional consumer welfare standard of antitrust law. With existing judicial precedent and statutory guidance, the agency can only go so far. Nevertheless, Congress has begun exploring changes to antitrust law that would give the FTC more leeway to pursue these alternative theories to regulation. If Congress gives FTC regulators broader authority, however, modern competition policy, which focuses on the welfare of consumers, could give way to other considerations based largely on the concentration in a market and firm size. As Congress considers these reforms, it should evaluate the extent to which enforcement agencies under the Biden Administration are already stretching the bounds of their proper authority and determine how any proposed legislation may give agencies the leeway to ignore the consumer welfare standard and take antitrust policy in a damaging direction.