FACEBOOK'S MONOPOLY IN SOCIAL NETWORKING MARKET: A CRITICAL TEST FOR ANTITRUST LAWS

Abstract

Against the backdrop of the growing influence of Facebook in the social networking market, this paper attempts to determine the contours of the current anti-trust regime and whether it is competent or even willing to regulate social media giants such as Facebook. Taking the debate forward from the *Microsoft Anti-Trus*t case, this paper attempts to trace whether Facebook, as a monopolist regime has been following a similar pattern, and if so, whether there exists enough will in states to prosecute it for its anti-competitive practices.

I Introduction

IN THE present day, it would be hard to imagine a world without social networking platforms. Such vital mechanism, used to make transferring information faster, cheaper and easier for businesses and consumers around the world. Social networks are considered as the most important transforming phenomena on the internet since last decade. At the same time, the dominant stature of big tech companies, particularly Facebook, is coming in conflict with antitrust laws.[1] Investigations for violations of antitrust laws by the Facebook are on in the United States and European Union.[2]

As one of the most valuable company of the world,[3] Facebook is under attack not only for its failure to protect consumers' data and violation of privacy, but for monopolizing the social network market also. This paper attempts to analysis the application of antitrust laws to new economy industries. Part I of this paper explains the concept of monopoly, the legal provisions relating to regulation of monopolist behaviours in the United States and judicial responses to such behaviours. Part II this paper provides an insight into Facebook's monopolist behaviours and the possible grounds for its prosecution. Part III briefly deals with the *Microsoft* case and traces a similar pattern of Facebook. Lastly, Part IV of this paper concludes that, it is important not to depend upon one firm or one company irrespective of the fact that such company or firm is very capable and valuable.

II Antitrust laws and 'new economy'

The last two decades of the 20th Century witnessed a tremendous growth in technological innovations which transformed the lifestyle of the people throughout the world. These

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1 See Spencer Weber Waller, 'Antitrust and Democracy', *Florida State University Law Review* 46(4) 807-860 (Summer 2019), *available at*: www.heinonline.org (last visited on May 20, 2021).

2 See Cecilia Kang and Mike Isaac, 'U.S. and States say Facebook Illegally Crushed Competition', *available at*: https://www.nytimes.com/2020/12/20/learning/lesson-of-the-day-us-and-states-say-facebook-illegally-crushed-competition.html (last visited on May 20, 2021); also see Charles Riley, 'Google and Facebook Run into More Trouble over Data in Europe', *available at:* https://edition.cnn.com/2019/12/02/tech/google-facebook-data-europe/index.html (last visited on May 20, 2021).

technological innovations have also created a new market which is different from the earlier market. These new industries have pioneered in production of information goods such as software contents or expertise.[4] Primary examples of these industries are the manufacturers of software, internet-based businesses, as well as communication equipment and services designed to support them.[5]

Traditional industries are characterised by: multi-plant and multi-platform production, stable market, heavy capital investment, modest rates of innovations and slow and infrequent entry or exist.[6] On the other hand, the new industries are characterized by negligible marginal costs, value-based pricing, great focus on intellectual property protection, modest capital investments, very high rate of innovations, very quick and frequent entry or exist, consumer lock-in-efforts[7] and networks effects[8] providing for economies of scale in consumption.[9] Because of these significant differences in characteristics of above mentioned two industries, the new industries in aggregate are often referred to as the "new economy'.[10] The combined effects of economies of scale, consumer lock-in and network effects leads to create important tendencies towards monopoly in high technology market of new economy.

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3 See Marty Swant, 'The World's Most Valuable Brands', www.forbes.com, also see 'The 100 Largest Companies in the World by Market Capitalization in 2020', *available at* : https://www.forbes.com/the-worlds-most-valuable-brands/#6aca7c04119c (last visited on May 21, 2021).

4 See Richard A. Posner, "Antitrust in the New Economy" 68 *Antitrust L.J*. 925, 2000.

5 See Diana Farrel, 'The Real New Economy', *available at:* https://hbr.org/2003/10/the-real-new-economy, *also see* 'Addressing the Tax Challenges of the Digital Economy, "The Digital Economy, New Business Models and Key Features", *available at*: https://read.oecd-ilibrary.org/taxation/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report_9789264241046-en#page53(last visited on May 22, 2021).

6 See *supra* note 4.

7 Consumer lock-in is also called vendor lock-in or proprietary lock-in, it makes a customer dependent on a particular vendor for products and services. This practice enables the customer to use another vendor's product or services without paying a substantial switching cost. This practice creates barriers for firms to enter the market, thus attracts antitrust actions. See M Eurich and Michael Burtscher, "The Business-to-Consumer Lock-in Effects", *available at:* https://cambridgeservicealliance.eng.cam.ac.uk/resources/Downloads/Monthly%20Papers/2014AugustPaperBusinesstoConsumerLockinEffect.pdf (last visited on May 15, 2021).

8 Network effects occur when, the value of owing a good service increases in relation to the number of consumers who already own it. The telephone system and computer system are good examples. As the number of individual who own phone or computer rises, the phone or computer ownership becomes more valuable to potential consumers. See Robert Pitofsky, "Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy", 16 *Berkely Tech.L.J.* 535, 538-39 (2001).

9 See Chris Butts, 'The Microsoft Case 10 Years Later: Antitrust and New Economy Firms", 8 (2) *Nw. J. Tech. and Intell. Prop* 275 (2010).

10 *Ibid.*

Today, this new economy has become an integral part of the large population of the world. The questions, therefore, have become louder that whether the market regulations that evolved around the traditional economy make sense when applied to the new economy? The answer of this question is very important because its positivity will open the door for successful prosecutions of tech giants including Facebook.

Regulation of monopolist behaviours in United States

In 1890, when the Sherman Act, 1890 was enacted, the economy of the United States was tangled in few very large and powerful businesses.[11] The transportation and communication revolution of the middle 1800s led to large businesses, which created jobs but also destroyed many through business expansion.[12] Congress received numerous petitions to put the trusts and the railroads under the regulation of the federal government, and thus the Sherman Act, 1890 was enacted.[13] According to Justice Harlan:[14]

> The Act was a response to a deep feeling of unrest…among the people generally, a universal conviction that although slavery had been abolished, the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of few individuals and corporations controlling, for their own profits and advantages exclusively, the entire business of the country, including the production and sale of the necessaries of life.

Section 2 of the Sherman Act, 1890 regulates monopolist actions and it provides that:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons,[15] to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony [and is similarly punishable.

In simple words, section 2 of the Sherman Act prohibits not only any form of monopolization but attempts or conspiracy of monopolization of trade or commerce.

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11 Big business trusts like American Tobacco, Standard Oil, Trans Missouri etc were major name which controlled the major share of economic activities at that time, see David Millon, 'The Sherman Act and the Balance of Power', 61 (5) *Southern California Law Review,* 1225 (July 1988), also see Charles A. Boston, 'The Spirit Behind the Sherman Antitrust Law' 21 (5) *Yale Law Journal* 345 (Mar. 1912).

12 See Keith N. Hylton, *Antitrust Law: Economic Theory & Common Law Evolution,* Cambridge University Press, UK, 1st edn. 38 (2003).

13 See *supra* note 11.

14 See *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 83 (1911), also see Rostow Eugene V., "Monopoly under the Sherman Act: Power or Purpose" 45(6) *Illinois Law Review* 745 (Jan-Feb, 1949).

15 Sherman Act, 1890, s. 8 reads: says that "person" includes corporations and association under the laws of the United States.

Further, the Federal Trade Commission Act, 1914 forbids "unfair methods of competition"[16] and the Clayton Act, 1914 condemns tying arrangements, exclusive dealing contracts and mergers that may "substantially lessen competition or tend to create a monopoly".[17] But before discussing the implications of section 2 for new industries, it is importance to understand the features of 'monopoly'.

The economic definition of monopoly simply refers to a market with sole producer. However, that is not useful concept for antitrust laws, because there are few sole producers in real world. Antitrust courts have defined monopoly power as "the power to control price or to exclude competition".[18] Three features characterize a monopoly market: (a) the firm in market is motivated by profits; (b) it stands alone and barriers prevent new firms from entering the industry (*i.e.,* high barriers of entry); and (c) the actions of the monopolist itself affect the market price of its output- it is not a price – taker.[19]

Monopoly is held to be inefficient because, under it price will be higher than marginal cost[20] so that, even if some consumers value an item more than it costs to make, they may not choose to buy it. Moreover, there is no tendency for costs to be at their lowest possible level in the long term, because the pressure of more efficient, incoming competitors does not exist.[21] It is not surprising, given these results, the most nations choose to control monopolies, which defined as any firm dominant in a particular industry.

Under antitrust laws, the terms "'monopoly power" and "market power' are treated as identical concepts. In *Matsushita Electric Industries Co.* v. *Zenith Radio Corp.*,[22] Justice Powell's majority opinion appeared to use both terms to mean the power to price profitability above cost.[23] United State Supreme Court's other opinions also appear to treat market power and monopoly power as identical concepts.[24]

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16 See 15 U.S.C. S. 45 (1982).

17 See 15 U.S.C. section 12- 27 (1982).

18 See *Standard Oil Co.* v. *United States* 221 U.S. 1 (1911); *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

19 See Graham Bannock, R.E. Baxter, *Dictionary of Economics*, Penguin Books, London, 7th edn., 262 (2003).

20 It is the increase in the total costs of a firm caused by increasing its output by one extra unit. If all costs are fixed, the marginal cost of the first unit of output will be very high, but all subsequent units can be made for nothing. Marginal cost represents the opportunity cost, or the total sacrifice to society from producing an item. See *id.* at 239.

21 *Supra* note 19 at 263.

22 475 U.S. 574 (1982).

23 *Id.* at 1358.

24 See *Hanover Shoe* v. *United Shoe Mach. Corp.*, 392 U.S. 481 (1968), *United States* v. *Grinnell Corp.*, 384 U.S. 495 (1969), *Fortner Enterprises* v. *United States Steel Corp.*, 394 U.S. 495 (1969).

A firm's monopoly power is assessed by three methods, which have been discussed forthwith.

i) Market Share: - The traditional method of measuring monopoly power, and the method commonly used by courts today, is to examine market share.[25] This requires definition and identification of the relevant market. Given a definition of the relevant market, a firm's market share is equal to the firm's sales volume in the relevant market divided be total sales (by all firms) in the market.[26] In case of Facebook, several measures have tried to capture Facebook's market share. The OCED suggests the 'shares of control over data' as the metric for market power in the platform such as Facebook.[27] In 2019 the German Competition Authority found that Facebook dominated the German social media market, using 'daily active users' as a reference.[28] Regardless of measures used all tests give Facebook an astonishing market share, with rate of 70 percent, 85 percent and even 95 percent.[29]

ii) Profit Margins: - Another method of testing for monopoly power is to look for evidence of large profits. In many Part 2 cases, courts have cited large profits as evidence of monopoly power.

Facebook reported $ 70.7 billion of revenue in 2019.[30] That represents an increase of almost 15 billion US Dollars compared to the previous year.[31] The profitability of the industry should attract the entry of the potential competitors and bring profits. However, competitors like Twitter or Snapchat make either very little or no profits yet[32]. As the United Kingdom Competition Authority explained 'this indicates that Facebook may be benefitting from the efficiencies which it enjoys due to its scale and its incumbent

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25 *Ibid.*

26 See, Philip Areeda and Louis Kaplov*, Antitrust Analysis: Problems, Text, Cases*, 4th edn., (572-3) 1988; also see, *supra* note 7 at 230. Market share estimates can vary substantially depending on the definition of the relevant market. Areeda's text offers the following example: suppose there are 99 producers of pleasure boats and one producer of canoes. If the relevant market is canoes, then the canoe producer has a 100 % market share. If the relevant market is pleasure boats, then the canoe producer has a 1 % market share. This is the main and vital reason behind huge expenditure of money and spending great efforts by the parties in litigation efforts to get the court to accept their definition of the relevant market.

27 See OCED Big Data Report at 6- 7, *available at*: https://www.oecd.org/competition/big-data-bringing-competition-policy-to-the-digital-era.htm (last visited on May 10, 2021).

28 See Facebook Case No. B6 – 22/16, 2019, *available at*: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5https9 (last visited on June 3, 2021).

29 See America's Concentration Power: Social Networking Sites, OPEN MARKET INSTITUTE, https://concentrationcrisis.openmarketinstitute.org.

30 See Facebook Sec Filings: Annual Report (2020), *available at:* https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/4dd7fa7f-1a51-4ed9-b9df-7f42cc3321eb.pdf (last visited on May 30, 2021).

31 *Ibid.*

32 *Ibid.*

position in social media. If competition was more effective, we would expect to see Facebook's profitability to be eroded by competitors'.[33]

iii) Ability to control prices: - This is the most effective method to assess the monopoly power. This method aims to get some assessment of a firm's ability to raise price without being constrained by the competitors. The most widely accepted approach is now embodied in the Justice Department Merger Guidelines.

The core concept underlying the notion of market power or monopoly power is a firm's ability to increase profits and to harm consumer by charging prices above competitive level.[34] A single firm or group of firms that is not constrained by competitors from a sufficient number of equally efficient existing and potential competitors can profitably raise price or prevent price from falling in two ways.

First the firm or group of firms may raise or maintain price above the competitive level directly by restraining its own output ("control price").[35] Second, the firm of group of firms may raise price above the competition level by raising its rival's costs and thereby causing them to restrain their output ("exclude competition").[36] Research from economists and antitrust lawyers at the Chicago University also alert that platforms like Facebook use their dominant position to buy out every competitor or foreclose and control all potential innovations in the market.[37]

After appreciating the economic aspects of monopoly, it is also pertinent to have a survey of the response of the courts of Unites States towards the monopolistic behaviours. The first case decided under section 2 of the Sherman Act was *Standard Oil Co.* v. *United States*.[38] In this case, Standard Oil of New Jersey controlled 80 percent or more of all refining capacity in the United States. It has been said that the company achieved its position through oppressive tactics including bribery of public officials, exclusive dealings, harassing lawsuits, and price cutting in order to eliminate small rivals.[39] The issue before the Supreme Court was whether the acts Standard Oil used to gain monopoly power were illegal *per se*, or illegal only if they were unreasonable. The court held that section 2 condemned monopoly power when it was abused, or used unreasonably. The court ordered the dissolution of the company to break the monopoly power. In other words, acquiring a dominant position in the market is not itself illegal

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33 See UK Competition Authority 2019 Digital Report, *available at:* https://www.gov.uk.

34 See *Jefferson Parish Hosp. Dist. No.2* v. *Hyde*, 466 U.S. 2, 27, 46 (1984).

35 See Thomas G. Krattenmaker, Robert H. Lande, 76 'Monopoly Power and Market Power in Antitrust Law' *The Georgetown Law Journal* 41-270 (1997).

36 *Ibid.*

37 See Pedro Aranguez-Diaz, 'A New Opportunity for Digital Competitors: Facebook, Libra and Antitrust' 50(1) *Stetson Law Review* 204 (Fall 2020).

38 221 U.S. 1 (1911).

39 *Supra* note 12 at 186.

unless it is abused. Therefore, the dominant position of Facebook in the social networking market is also not illegal *per se*.

The next important case was *United States* v. *United States Steel Corp.*[40] Here immediately after its formation, the United Steel controlled 80 to 95 percent of domestic production of some lines. But when the government brought the action against the company the overall share of iron and steel had declined to 50 percent. The government claimed that the corporation's size is "an abhorrence to the law".[41] Rejecting this claim the court said that the "law does not make size an offence".[42] The court held that the United States Steel had not violated section 2 for the following reasons. First, the company's market share and supporting testimony convinced the court that the United States Steel no longer had monopoly power.[43] Second, the company had not adopted oppressive tactics to eliminate or injure competition.[44] Third, alleged anti-competitive activities of the company such as pricing agreement between the company and its rivals were abandoned by the company before the government's suit.[45]According to this judgment, large size of a firm, like Facebook, is not an offence under law. However, if such size is used to harm competition, it triggers the application of antitrust law.

Another important case is *United States* v. *Aluminum Co. of America,*[46] which is also famous as Alcoa case. In this case, *Alcoa* obtained its dominance in the production of virgin aluminium through a monopoly guaranteed by a patent. Even after the expiry of that patent, it continued to hold its dominant position by using various anti-competitive practices such as cartel arrangements, limiting productions *etc*. The government charged that Alcoa's position violated section 2. Judge Hand held that Alcoa had violated section 2: First, its size prevented competition from taking place, and second, it did not "passively acquire" its position.[47]

The core of Judge Hand's argument consists of three parts. First, price fixing by all firms in a market is illegal; hence when a monopolist set its price, it violates the Sherman Act. Second, when a monopolist acquires monopolist position passively, is legal, *i.e.* monopoly acquired through superior skill, foresight and industry. In case of Alcoa, Hand concluded that its monopolist position is not result of superior skill, industry or foresight. Alcoa actively pursued its power by expanding capacity more rapidly than warranted by demand conditions, thus removing profits opportunities for new entrants.

40 251 U.S. 417 (1920).

41 *Id.* at 450.

42 *Id.* at 451.

43 *Id.* at 442, 444.

44 *Id.* at 455.

45 *Id.* at 445.

46 148 F.2d 416 (2d Cir. 1945).

47 *Supra* note 12 at 190.

And third part asserts that the efficiency is one of the goals of the Sherman Act.[48] It refers to conception of competition that seeks to maintain a steady state in which a large number of independent producers exist.

The'Alcoa doctrine' was further refined in *United States* v. *Griffith*,[49] where the court suggested, as an alternative to the non passive acquisition test of Alcoa, that the monopolist acts in an exclusionary manner. The court said that "use of monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful". The novel part of this formula is the "advantage" part. Thus, leveraging monopoly power in one market to gain an advantage in another market is a type of abuse or exclusion that violates section 2.

In *United States* v. *United Shoe Machinery Corp,*.[50] the issue was whether United Shoe's position violated section 2 of the Sherman Act. Judge Wyzanski held that it did. He observed that:

> The fact shows that the defendant has, and exercises, (1) such overwhelming strength in the shoe machinery that it controls the market, (2) this strength excludes some potential, and limits some actual, competition, and (3) this strength is not attributable solely to defendant's ability, economies of scale, research, natural advantages, and adaptation of inevitable economic laws.

Although *Alcoa doctrine* sounds good in theory, but it requires courts to determine the economic reasonableness of various expansion strategies adopted by the firms. Since this type of review is outside of the traditional areas of judicial expertise, the probability of an erroneous decision is higher than in the usual case. This concern was addressed in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*,[51] where it was held by the court that a monopolist does not have duty to cooperate with smaller rival in a marketing arrangement. However, if the defendant intents to destroy a rival, it is violation of section 2 of the Sherman Act. The plaintiff must show that the sole motivation behind the defendant's conduct was the elimination of competition.

Now, a four-part test is used to assess illegal monopolist behaviours (i) did the defendant's activities or behaviours have anti-competitive effects?,[52] (ii) did the defendant's conduct in fact cause harm to competition in the market?,[53] (iii) whether the defendant has any pro-competitive justification against the plaintiff 's anti-competitive allegation or not,[54]

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48 *Supra* note 12 at 190-191.

49 334 U.S. 100 (1948).

50 110 F. Supp. 295 (D. Mass. 1953).

51 472 U.S. 585 (1985).

52 See *Spectrum Sports Inc.* v. *Mc Quillan*, 506 U.S. 447, 458 (1998).

53 See *Brooke Group* v. *Brown and Williamson Tobacco Corp.*, 509 U.S. 209, 225-26 (1993).

54 See *United States* v. *Microsoft Corp.*, 253 F.3D 34, 59 (D.C. Cir.2001).

(iv) whether pro-competitive effects of alleged conducts can outweigh anti-competitive effects or not.[55]

III Antitrust laws and dominant Facebook

Social networks, considered electronic communications, service providers have become vital platform through which modern consumers communicate. Facebook is reigning platform not only in the lives of the Americans, but in the lives of 2.2 billion people around the worldwide.[56] Though the social network market was highly competitive in the beginning, but later on it got concentrated in favour of one.[57] In 2007, there were hundreds of social networks including competitive offering from Google, Yahoo and of course Myspace.[58]

However, in the recent years, the market has consolidated in Facebook's favour.[59] Consumers effectively face a singular choice- use Facebook and submit to the quality and stipulations of Facebook's product or forego all use of the only social network used by most of their friends, family and acquaintances.

Facebook offers its communication platform to the consumers "free of cost". Consumers do not pay any fee to open an account or to use its account for any length of time.[60] Therefore, the violation of antitrust laws by using its monopolist position by Facebook is very unique.

Traditionally, there is direct and an indirect evidence of monopoly power. For example, price hikes without competition could be direct evidence. And a company's share in the industry could be indirect evidence. However, since Facebook has always been "free" to users, it cannot be argued that it has driven up prices and driven out competitors by dominating the marketplace. In words of Dina Srinivasan: [61]

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55 Also see Samuel Noah Weinstein, "*United States* v. *Microsoft Corp*." 17(1) *Berkeley Technology Law Journal* 273–294 (2002), *available at: jstor*, www.jstor.org/stable/24120107 (last visited on May 20, 2021).

56 See Company Information, NEWSROOM.FB.COM (Oct, 2018), *available at:* https://newsroom.fb.com/company-info/.

57 See Andrew Perrin, 'Social Media Usage: 2005 – 2015', Pew Research Centre, *available at:* www.pewresearch.org. also see *infra* note 58, 59.

58 See Danah M Boyd & Nicole B. Ellison, "Social Network Sites: Definition, History and Scholarship" 13 *Journal of Computer-Mediated Comm*. 210(2007).

59 See Esteban Ortiz-Ospina, 'The Rise of Social Media', (2019), *available at:* https://ourworldindata.org/rise-of-social-media (last visited on May 20, 2021).

60 See Pedro Aranguez Diaz, 'A New Opportunity for Digital Competition: Facebook, Libra and Antitrust', 50 (1) *Stetson Law Review* 204 (Fall 2020).

61 See Dina Srinivasan, "The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in spite of Consumers' Preference for Privacy", *available at:* scholarship.lwas.berkeley.edu/bbl/vol16/iss 1/2/.

> In digital markets where consumers do not pay a price, antitrust enforcement must become comfortable with a paradigm that focuses on quality. Never before have we had to grapple with one of the most valuable companies in the world, a half trillion-dollar market cap company, that provides important communications services to over 2 billion consumers but charges no price.

The antitrust concerns arise when one look into the revenue wallet of the company. Facebook sells advertising to marketers. Digital advertising forms the bedrock of Facebook's current revenues and profits. Facebook generates nearly all of its revenue from the sale of advertising. Advertising revenues contributed 98% of Facebook's 40+ billion in revenue in 2017.[62] The enormous growth Facebook's advertising revenue worldwide from 2009 to 2018,[63] has increased manifold from 764 million US Dollars to 55,013 million US Dollars.

The interesting point is that the prices of advertisements sold today directly correlate with the data derived from tracing consumers. Facebook leverages information,[64] it knows about users to sell more impression-targeted ads and more action-based ads. Facebook then uses their capability to sell advertising on behalf of other market participants like Hearst, the Washington Post, or Time Inc. Facebook's power here is so absolute that duopoly of Facebook and Google accounts for 90-99% of year-over-year growth in the United States digital advertising market.[65]

In words of Republican Ashely Moody, who is also Attorney General of Florida, [66]

> Is something really free, if we are increasingly giving over our privacy information? Is something really free if online ad prices go up based on one company's control?.

The cost of advertisements depends on various factors. First it depends upon the interested person's choice whether he wants CPC ("cost per click") or CPM ("cost per thousand impressions").[67] The cost of CPC is lower than CPM. For example, in 2016,

62 See Annual Report Pursuant to s. 13, 15(d) of the Securities Exchange Act 1934, (2017).

63 See staista.com/statistic/271258/facebook-advertising –revenue-worldwide/.

64 See John M.Yun, 'Antitrust after Big Data', 4 *Criterian Journal on Innovation*, 407- 429; also see Allen P. Grunes and Maurice E. Strucke, 'No Mistake about it: The Important Role of the Antitrust in the Era of Big Data', 14 *Antitrust Source* 1.3 (April 2015).

65 See Peter Kalta, 'Google and Facebook are Booming. Is the Rest of Digital Business Sinking?', *available at*: https://www.vox.com/2016/11/2/13497376/google-facebook-advertising-shrinking-iab-dcn; *Mansoor Iqbal,* "Facebook Revenue and Usage Statistics" (2020), *available at*: www.businessofapps.com (last visited on June 2, 2021).

66 See Casey Newton and Zoe Schiffer, "Google and Facebook's antitrust Problem is getting more serious", Sep 10, 2019, *available at*: https://www.theverge.com/interface/2019/9/10/20858028/google-antitrust-investigation-state-attorneys-general-facebook(last visited on May 20, 2021).

67 See Betsy McLeod, "How Much Does it Cost to Advertise on Facebook?", *available at*: bluecorna.com/blog/how-much-facebook-advertising-costs/; also see Alfred Lua, "How Much Does Facebook Advertising Cost? The Complete Guide to Facebook Ads Pricing", *available at:* buffer.com/library/facebook-advertising-cost.(last visited on May 2, 2021).

CPC was 0.27 Dollars where CPM was 7.19 Dollars.[68] Further, other factors such as advertisement objectives, advertisement quality, bidding type and amount, audience, concerned industry *etc.*, also decide the cost of advertisements.[69] The interested person is also required to choose one of the objectives from Facebook's advertisement platform. Because it decides whom Facebook wants show advertisement and it drastically affects the cost.[70] For instance, a car service business owner wants to start a Facebook campaign; the targeted people will include car owners. Now imagine that Facebook needs to choose between two people to show the advertisement to, which match his targeting. The first person is very "clicky" (click on lots of advertisement) but never complete a lead form. The second person does not click on lot of ads at all but tends to fill out lead forms when they do click on one. Here if such interested person's objective is to get traffic to his website, Facebook will choose the "clicky" person to show his advertisement. On the other hand, if his objective is to get leads, Facebook will choose the person most likely to convert. The smaller the pool, the costlier the process.[71]

However, rapid technological innovations provided the facilities of 'ad-blocker' to the consumers and very quickly a large number of consumers adopted these programs.[72] To combat this hurdle, Facebook again innovated its ability to force consumers the presence of behaviourally targeted advertisement.[73] Equipped with this unique ability, Facebook approached publishers with a proposition. Facebook offered publishers the ability to publish content not on their own websites, but inside the wall of the impenetrable Facebook, where Facebook could ensure the delivery of such advertisement.[74] The cost of such advertisement is much higher in advertising market. Despite normally being competitors in the advertising market, participating publishers like The New York Times, worked in tandem with Facebook to sell the advertising. If a participating publisher sells advertising, it keeps 100 percent of the ad-revenue.[75] If Facebook sells, the advertising for The New York Times, Facebook retains a 30 percent cut. Facebook had the power to force invasive advertising on consumers through a capability that other publisher like The New York Times did not have. Facebook, thus, can successfully fight against user's preference for privacy and can earn huge profit.[76]

68 *Ibid.*

69 *Ibid.*

70 *Ibid.*

71 *Ibid.*

72 See *supra* note 61.

73 This is Facebook's Instant Article Program (July 2018), https://instnatarticles,fb.com.

74 *Ibid.*

75 Facebook does not receive zero consideration in return. Facebook can monitor and measure the behavior of readers of Instant Articles and monetize this data in various ways. See *supra* note 60.

76 See *supra* note 61, also see *supra* note 63.

However, the most important factor behind rising costs of advertisement is absence of competitors, who can compete on the same prices. As has been mentioned above, the social network market was competitive at beginning, but it consolidated in favour of Facebook.[77] This consolidation started with the acquisition of Parakey in 2007, but after acquisitions of Instagram and WhatsApp, Facebook has become an example of a perfect monopolist in social networking market.[78] Facebook brought upstart companies before they could reach to the point to give competition to it. Apart from buying, it also copied features from rival's apps.[79]

The absence of competitors in social networking market can be well illustrated from the fact that at hearing before the Senate, when Mark Zuckerberg, the chief executive of Facebook, was asked to name Facebook's biggest competitor- a company providing similar service that consumer can go to if they are unhappy with Facebook, he could not name one.[80]

Recalling the three important characteristics of monopolist, discussed in previous section of the paper, *i.e.,* high profit motivation, stands alone in the market and not a price-taker but price-maker. Facebook illustrates all three characteristics. Further, in the light of *Alcoa doctrine*, the size of Facebook is so large that it itself prevents the competition in the market. Again, dominant position acquired by Facebook is not the result of a "superior product or business acumen or historical accident", but of "wilful acquisition of a rival's firm". The chronology of acquisitions by Facebook is proof of this fact that Facebook made very conscious affords to maintain this monopoly.[81] The most striking example is acquisition of Instagram. Instagram emerged at a time when users were switching from desktop computers to smart phones and increasingly embracing photo-sharing.[82] Facebook recognised it as an existential threat to his monopoly power. When it was unable to compete with Instagram, it chooses to buy the app to eliminate the threat.[83] In an email Zuckerberg said:[84]

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77 *Supra* note 57.

78 Major acquisitions done by Facebook are Parakey (2007), Octazen Solution, Divvyshot , Chai Labs, Hot Potato (2010), Snap Tu, rel8tion (2011), Instagram, Face.com (2012), Atlas Advertise Suit, Onavo (2013), WhatsApp, OculusVR, Ascenta (2014), see Faceboook's Most Important Acquisitions, investopedia.com/articles/investing/02115/facebook-most-important-acquisition.aps.

79 For example, it copied Link Button and NewsFeed features from FriendFeed, which was acquired by it in 2009, *Ibid.*

80 See Richard Blumenthal and Tim Wu, "What the Microsoft Antitrust Case Taught us", *available at:* nytimes.com/2018/03/18/opinion/Microsoft-antitrust-cases.html.(last visited on May 20, 2021).

81 See *supra* note 52.

82 See Shruti Dhapola, 'Explained: The Antitrust Suit Againts Facebook',available at: https://indianexpress.com/article/explained/us-ftc-antitrust-lawsuit-against-facebook-whatsapp-instagram-7101497/ (last visited on June 5, 2021).

83 *Ibid.*

84 *Supra* note 80.

> "…in the time it has taken us to get over act together on this. Instagram has become a large and inviable competitor to us on a mobile photos…If it is acquired by another company or left on its own, it might leave Facebook very behind in both functionality and brand on how one of the core use cases of Facebook will evolve in the mobile world…It is really scary, Facebook should consider paying a lot of money for Instagram"

Same story was repeated with WhatsApp. When Facebook realised that WhatsApp was a clear global leader in mobile messaging, it bought out the competition.[85] Further, Facebook also restricted it 'third party software developers' platform' by exercising strict control over its application programming interfaces or APIs. Twitter's short video app 'Vine' is perfect example of Facebook's eliminate competition strategy. It shut down API access for Vine, effectively restricting its ability to grow.[86]

Although these factors provide solid grounds for antitrust prosecution against Face book, unfortunately matter is not that simple as it appears. The core money involved in this issue is so large that it can seriously affect the digital account of the United States. It cannot be denied that social media platforms especially Facebook, enable global economic activities by helping to unlock new opportunities through connecting people and businesses, lowering barriers to marketing and stimulating innovations.[87] According to Hootsuite's The Global State of Digital Report in 2019 Facebook helped business organizations to earn US$ 228 billion in sales. Apart from sales, the app-driven economy also generated more than 3 million jobs in the marketing technology industry.[88] Therefore, the government and concerned agencies are very conscious in taking any step. Again, although monopoly has numerous disadvantages, but it cannot be denied that because of their large size and huge resources, monopolist firms are able to produce economies of scale and are able deliver on big and risky projects.

IV The Microsoft case: The guiding light for Facebook's prosecution

The Microsoft antitrust case, which started in 1997 and was eventually settled in 2000, brought the issue of new economy industries regulation under antitrust laws to the attentions of not only academics and legal professionals, but the public as a whole. In this case, the government alleged that the Microsoft had used its technology to maintain an illegal monopoly. At times, Microsoft was the largest and most prominent of the

85 *Supra* note 2.

86 *Supra* note 82.

87 See 'The Global Economic Impact of Facebook', *available at*: file:///C:/Users/Downloads/deloitte-uk-global-economic-impact-of-facebook.pdfwww2.(last visited on June 2, 2021).

88 See 'Facebook Created 3 million Jobs; generated $ 227 bn Revenue for European Brands in 2019', *available at:* https://martechseries.com/social/social-media-platforms/facebook-apps-created-3-million-jobs/(last visited on May 20, 2021).

new economy firms and the antitrust case was the first to highlight the question whether traditional antitrust regulations would promote the public good when applied to new economy firms.[89]

In this case, it was alleged that Microsoft was trying to maintain its operating system monopoly by destroying challenges from Netscape Navigator, a browser, and Sun Java a cross-platform programming language. Both Navigator and Java were species of "middleware" software programme that could serve as platform for other software applications.[90] According to the plaintiff's theory, middleware posed two distinct threats to the Windows' monopoly. First, because the middleware applications themselves could be used as software platforms, they competed directly with Windows. Second, middleware was designed to run more than one operating system would allow software developers to write program that worked on any number of the systems potentially leading to a lowering of the application barrier to entry.[91] According to the plaintiff, Microsoft engaged in various kinds of anti-competitive activities in its efforts to destroy the threats posed by Navigator and Java. These acts included securing exclusive dealing contracts with Original Equipment Manufacturer ("OEM") and Internet Access Providers ("IPA") barring these entities from using Navigator in addition to Internet Explorer ("IE") and pressuring Apple Computer to drop its use of Navigator. In addition, the Microsoft had illegally tied "IE" to Windows in an effort to destroy competition in the browser market.[92]

The district court held that Microsoft had a monopoly in the market for Intel-Compatible PC operating systems and that the company engaged in a variety of anti-competitive practices to maintain that monopoly power. These practices were aimed at destroying the "middleware threat". They included an attempt to convince Netscape not to release a version of its browser that might have served as a substantial platform for applications; exclusive contracts with OEMs, IAPs, and Apple Computer that forced these parties to favour IE over Netscape; bundling of IE and Windows to reduce rival browser share. Further, the Microsoft's creation of its own version of a Java Virtual Machine ("JVM") and the contracts it used to force Independent Software Vendors ("ISV") to use this version. Having found both monopoly power and anti-competitive conduct, Judge Jackson held that Microsoft violated section 2 of the Sherman Act by illegally maintaining its monopoly in the operating system market.[93]

The Circuit Court also held that the Microsoft engaged in anti-competitive acts including the restrictions imposed by it on OEM through licenses for Window, which the court

89 *Supra* note 9.

90 *Ibid.*

91 *Supra* note 54.

92 *Ibid.*

93 *Ibid.*

held reduced the usage of rival browsers through contractual limitations rather than on the basis of a superior Microsoft product.[94]

The things that may be taken from the *Microsoft* case are; First, antitrust regulations evolved to regulate traditional industries and market is sufficient and effective to be applied to 'new economies industries'. Second, howsoever valuable a firm may be, but it should not be allowed to have absolute control over market. If Microsoft would not have been stopped at that time, today there would not have been any trace of Facebook, Google, Apple, Amazon and other tech firms.

Another very important implication of this case is its departure from conventional litmus test of 'high price' to 'stifling of competition' to assess consumer's harm.[95] The *Microsoft* case departed from that convention, defining harm broadly as stifling competition by upstart rivals and thus impeding the arrival of innovative new products and services.[96] The main focus of the case was Netscape, the commercial pioneer in browsing software. The Microsoft regarded the newcomer as a treat to its grip on the market for desktop personal computer software and its operating system, windows. Microsoft employed anticompetitive practices *i.e.* bundling, to have a great share of market. The additional charge for internet was zero. This point resonates Facebook's position. To acquire a dominant share of the market and to maintain that position, Facebook also employed anticompetitive practices including creating barriers, denying access to its platform to other players, and copying features of rivals.[97]

Further, this case has recognised the concept of 'network effect' for regulation of new industries. In the *Microsoft* case, the district court based its finding that Microsoft unlawfully maintained monopoly on what it termed the 'application of barriers to entry' which it described as arising from a 'positive network effect'.[98] Network effect can have significant implications for competition. When two networks compete head-to-head, the larger one offer a cost or quality advantage, which the nature of the network effects attracts additional consumers to it. This feedback mechanism tends to cause the large network to grow further, while the smaller network shrinks.[99] Facebook has also used network effects to keep its popularity. The large masses of people of Facebook attract complementary products and services.[100] Thus when Facebook opened up their site to outside developers, lots of software developers created apps for Facebook to access

94 *Supra* note 54.

95 *Supra* note 80.

96 *Ibid.*

97 *Ibid.*

98 See Gregory J. Warden, 'Network Effects and Conditions of Entry: Lessons from the Microsoft Case', 68(1) *Antitrust Law Journal,* 87-111 (2001), *available at: JSTOR*, www.jstor.org/stable/40843512. (last visited on May 20, 2021).

99 *Ibid.*

100 See 'Network Effects and the Popularity of the Facebook', *available at:* blogs.cornell.edu. (last visited on May 15, 2021

the large crowd of users. These vast amounts of apps then attracted more amounts of apps then attracted more users, which attracted more developers, in which NYT calls a 'virtuous cycle'.[101] Thus the concept of strong network effect can also be used to prove the monopolist position and its abuse by the Facebook.

Lastly, antitrust cases are decides not only on facts and evidences but also legal theory and the climate of the times. Opponents of Microsoft (Netscape and its allies) faced vary hard task to enlist public support for their cause. Microsoft was a tech star, Bill Gates was a Champion, and it products were used by hundreds of millions of people, so why punish such success[102]? However, gradually government, corporate entities and common people became convinced that Microsoft's power should be curbed to keep door open for innovators. Today, Facebook faces more antagonism than Microsoft did at the outset. It is under fire for undermining privacy, distributing disinformation and thwarting competition, which warrant antitrust response.

V Conclusion

The purpose of the antitrust laws is to promote competition and also to enhance consumer welfare. If we look at its purpose of promoting competition, then several questions follow. What kind of competition? Competition in which the best competitor wins or a regime that encourages numerous competitors? Both "survival of the fittest" and "protection of small businesses" are notions consistent with the general goal of promoting competition. The "survival of the fittest" objective would lead us to give the greatest weight to efficiency as the desirable result of antitrust enforcement. However, this argument that efficiency should be treated as a second-order concern of the antitrust law requires a conception of competition that seeks to maintain a steady state in which a large number of independent producers exist.

Today, circumstances of social networking market reveal failure of both objectives of antitrust laws. As an anchor of social network market, Facebook failed to ensure efficiency in the market. Leakage of data despite the consumer's priority of its protection shows serious inefficiency in providing services. Further, wilful and conscious acquisitions are evidence of intention to acquire and maintain monopoly in social network market. Both grounds warrant for prompt antitrust responses. Since matter relates to the billion of consumers around the world and around a trillion dollars in monetary terms, antitrust authorities have to undergo the most difficult and crucial tests.

It is worth noting that the pattern of *Facebook* case and the *Microsoft* case are very similar and experiences of latter teach us that we should not entrust our future to one company, irrespective of the fact that the company is very valuable and capable.

Mausam[*]

101 *Ibid.*

102 See *supra* note 80.

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