

The FTC's Effort to Break Up Facebook Misses Actual Concerns

By Kristen Limarzi

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The FTC is suing Facebook to force the social media giant to unwind its acquisitions of Instagram and WhatsApp. Gibson, Dunn & Crutcher partner Kristen Limarzi explains how the lawsuit fails to address the government's actual concerns with the platform.

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The Federal Trade Commission is seeking to unwind Facebook's decade-old acquisitions of Instagram and WhatsApp—a move the FTC argues is necessary to restore competition in social networking.

But according to many politicians and pundits, breaking up Facebook would also reduce harmful content and better protect user privacy. It might even save our democracy.

The goals of the antitrust laws are not so grand, but rather, singularly focused on protecting competition. Still, if breaking up Facebook could accomplish such lofty aims, it would merit serious consideration.

Unfortunately, a breakup does nothing to eliminate illegal content, to protect user privacy, or even to promote competition. It's a solution in search of a problem that only distracts from actual concerns and the potential for real progress.

ELIMINATING ILLEGAL CONTENT

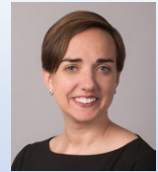
The threats of hate speech, misinformation, and incitements to violence on social media cannot be ignored or minimized, and distinguishing illegal speech from free expression

is a Herculean task. Separating Instagram and Facebook would mean that two corporations—rather than one—must balance promoting free speech while combating harmful content. But it fails entirely to provide either corporation with the tools to strike that balance.

Section 230 of the Communications Decency Act, which shields online platforms from liability for third-party content posted on their sites, has proved insufficient to combat illegal content, and there is growing consensus that the statute is in need of reform. Congress could amend Section 230 to impose on internet platforms a duty to take reasonable steps to prevent harm to users or the public. The reasonableness of those steps would depend both on the nature of the threat and the resources of the platform—ensuring that the regulation does not impose an undue barrier to entry for smaller competitors.

PROTECTING USER PRIVACY

Others contend a breakup would force social media platforms to protect user privacy. And while companies can and do compete on privacy as an aspect of quality, competition alone cannot achieve optimal privacy protections.



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That is because, while many of us say we value privacy, we are also willing to trade it away for very little.

Consolidation of data can improve the consumer experience as a platform anticipates our needs or makes useful suggestions. Because consumers have such disparate preferences when it comes to balancing privacy protections against convenience or other features, competition for those consumers does not always lead to optimal privacy protections.

Some might argue that users should not be forced to sacrifice privacy for an improved consumer experience. Perhaps, but then it falls to legislators and regulators to set the bar on privacy protections, because competition—whether it be between Facebook and Instagram or anyone else—will not achieve privacy protections that exceed our revealed preferences.

The FTC's own agreement with Facebook regarding privacy protections provides a road map for comprehensive federal privacy legislation that would protect a consumer's right to access, correct, control, and delete their data. Divesting Instagram does none of that.

PROMOTING COMPETITION

That brings us to the traditional realm of antitrust law—protecting and promoting competition. The FTC alleges that Facebook's acquisition of Instagram and WhatsApp eliminated two significant competitive threats, to the detriment of users. While Facebook disputes the accusation, the remedy question is distinct: assuming the acquisitions were unlawful, would a breakup best remedy the conduct?

If you think of competition only as a numbers game, then four competitors is better than three, five is better than four, and so on. By that logic, a breakup would, ostensibly, promote competition by forcing Facebook to compete against Instagram and WhatsApp to offer new features and improve the user experience.

But does anyone actually believe that innovation in this market will come from competition between Facebook and Instagram? IBM's dominance in mainframes wasn't whittled away by mainframe competition from Microsoft but, rather, rendered irrelevant by Microsoft's shift to personal computers. And while the government never actually broke up Microsoft, as the Justice Department's Antitrust Division initially sought,

Microsoft was still eclipsed by Google in the shift to web-based applications and then smartphones.

Ironically, this pattern of disruptive competition and paradigm-shifting technology is the very premise of the FTC's lawsuit. The FTC alleges that, even though Instagram and WhatsApp did not compete with Facebook at the time of their acquisition, both posed a threat to the social media provider because they allowed people to connect on the emerging mobile internet. In other words, those apps were poised—not to challenge Facebook in its existing business—but to take advantage of the paradigm shift to mobile.

Even if the FTC's allegations were true, divesting these companies now isn't likely to increase competition today. That competition will come from the next paradigm shifting entrant. Or perhaps it's already here, in the form of SnapChat and TikTok, both of which are transforming how people interact on social media.

That does not mean that the law has no role to play in promoting competition in technology markets. But artificially installing a competitor to Facebook isn't likely to help.

Instead, we should ensure that consumers can shift to innovative new providers by promoting tools that allow consumers greater control over their data, internet activity, and online experience. Such tools do not rely on a government agency or federal judge to pick winners and losers, but rather encourage new entrants to innovate so consumers can choose the next big thing.

In other words, tools that protect and promote competition.

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The author consults with Meta (Facebook) on related litigation, but not the specific litigation before the FTC.