

Historical Precedent in the Making: Case Grows for Antitrust Against Big Tech



Risun Udawatta | Research Analyst

Published on September 10, 2019

The political resentment towards Silicon Valley is reaching heart palpitating levels, and calls for antitrust investigations of Big Tech have proliferated. Apple, Facebook, Google and Amazon have all come under the crosshairs of the public and governments, who've alleged that these companies have engaged in anti-competitive behavior. These companies, once the poster children for the innovation of Silicon Valley, are now being accused of doing the exact opposite to maintain their market dominance. With the recent investigations launched by several state Attorneys General, this article will cover the key laws concerning antitrust regulation, the case against Big Tech, and, ultimately, the potential implications of any antitrust rulings.

What is Antitrust?

The United States' economy is theoretically based on the sacred principle of competition amongst sellers. The policy behind an open marketplace is rooted in the concern for our consumers, particularly the goals of [lower prices, higher quality products and services, more choices, and greater innovation](#). Antitrust, therefore, consists of the laws meant to ensure that the U.S. economy stays an open and free market by safeguarding competition.

Antitrust is governed by [three](#) main federal acts: The Sherman Antitrust Act of 1890 ("Sherman Act"), The Federal Trade Commission Act of 1914 ("FTC Act"), and The Clayton Antitrust Act of 1914 ("Clayton Act"). Below is a brief overview of these pieces of legislation:

Sherman Act: The Sherman Act is the main antitrust law. It established that any person who "shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony" (Section 2 of the Sherman Act). In other words, the Sherman Act deemed monopolization illegal if the person took anti-competitive actions to acquire, preserve, or enhance its monopoly. By implication, it also established that merely having a monopoly is not enough to be guilty of a felony.

An important principle here is that the legal burden to prove antitrust violations requires demonstrating that the actions taken by a person have anti-competitive consequences. Additionally, there must be consumer harm (or attempted harm) in order to prove an antitrust violation – examples of harm include higher prices, limitations of choices of variety and quality, or slowdown in innovation (key tenets of an open market).

FTC Act: The FTC Act established, as the name implies, the Federal Trade Commission, whose mission is to [“protect consumers and competition by preventing anticompetitive, deceptive, and unfair business practices.”](#) The FTC Act additionally banned unfair methods of competition and unfair or deceptive acts or practices. Violations under the Sherman Act also constitute violations under the FTC Act, but in cases of FTC Act violations, the Federal Trade Commission will bring cases against companies in order to seek monetary redress, prescribe rules that define unfair and deceptive acts, and make legislative recommendations to Congress and the public.

Clayton Act: The Clayton Act was enacted to cover the holes that the Sherman Act failed to address, particularly regarding mergers and acquisitions and “interlocking directorates” (the same person making decisions for competing companies). The Clayton Act prohibits M&A that substantially [“lessen\[s\] competition or tend\[s\] to create a monopoly.”](#)

These three federal laws, in combination, are what the Department of Justice and Attorneys General use to investigate companies for antitrust violations. In the 1990s, the DOJ and several state Attorneys General used these laws to go after Microsoft, which was the last major antitrust case against a technology firm in the United States.

Microsoft Corp. v. United States

On May 18, 1998, the DOJ, joined by the Attorneys General of 20 States and the District of Columbia, filed an antitrust lawsuit against Microsoft. The lawsuit alleged that Microsoft engaged in an anti-competitive act by including Internet Explorer for free on its Microsoft Operating System to marginalize Netscape (a competing web browser at the time).

The lawsuit against Microsoft was a long time coming, as the FTC and the DOJ had investigated Microsoft on multiple occasions starting in 1991, culminating in a consent decree in 1995 prohibiting the pricing and bundling tactics used by Microsoft.

The antitrust lawsuit was, unsurprisingly, protracted and contentious. The DOJ was quick to win an initial ruling by the District Court in November 1999 with a proposed remedy of breaking up Microsoft. The company appealed and won major concessions from the Appeals Court in June 2001, that concluded with a settlement in November 2002. Microsoft was found liable for only its monopoly in the operating systems market for PCs and not for bundling Internet Explorer with Windows or attempting to monopolize the web browser market.

In a win for Microsoft, the company avoided a catastrophic breakup of its operating system and applications. On the other hand, though, Microsoft was banned from a slew of restrictive and retaliatory practices. In retrospect, Microsoft Corp. v. United States ushered in an era of web browser innovation but showcased the arduous task of proving antitrust allegations against tech companies. Since Microsoft, antitrust lawsuits against Big Tech have been few and far between. The recent allegations of antitrust violations among today’s tech elite, though, may bring the end of the little-to-no scrutiny that Silicon Valley has experienced in recent years.

Big Tech Under Scrutiny for Antitrust Violations

Silicon Valley ushered in a wave of technological innovations, and, on their path to stardom, many companies became dominant players in their respective industries. Like Microsoft in 1998, Amazon, Google, Facebook and Apple are facing a reckoning. These companies have become juggernauts, and, in many cases, they are the only real player in their industry. It’s important to keep in mind that being a monopoly is not illegal in and of itself, but the act of preserving or enhancing it is. Below is an overview of the antitrust investigations against the Big Tech companies:

Google: On September 9, 2019, Attorneys General for 50 U.S. states and territories announced an antitrust investigation of Google. The investigation will focus on Google's advertising business and search engine. Particularly, the Attorneys General will see if Google has used its monopoly position in internet ads and its search engine to stifle competition, ultimately harming consumers through price increases and lack of choices.

Facebook: Facebook has endured many missteps in the past few years, as the company has come under scrutiny for lapses in corporate governance. On September 6, 2019, the Attorney General for New York, along with seven other state Attorneys General, opened an antitrust investigation of Facebook. This investigation will primarily focus on "[Facebook's](#) dominance in the industry and the potential anti-competitive conduct stemming from that dominance." Facebook has acquired competitors, like WhatsApp and Instagram, that arguably posed a real threat to Facebook's dominance in social media. By acquiring competitors, Facebook may be in violation of the Clayton Act, as the acquisitions may have substantially reduced competition.

Amazon: Amazon has become a retail giant and a one-stop shop for many consumers. Recently, the company has been criticized for favoring its own products over third-party sellers and mining seller data to create competing products. An investigation will focus on how Amazon has exerted control over its marketplace and if its control has amounted to anti-competitive behavior that has preserved or enhanced its monopoly.

Apple: Apple has built an entire marketplace surrounding the iPhone called the Apple App Store. Apple, which has been known for its high-quality hardware, is now being investigated for its high App Store standards. The App Store has strict requirements and oftentimes has penalized third party apps over Apple apps. Investigators will examine if the control the company has on the App Store has hurt competitors, either through excluding apps on its store or favoring its own apps over third-party apps.

Implications of Adverse Rulings on Big Tech

Any adverse rulings against these companies would likely have a major impact on the broader tech ecosystem, as they did in the days of the Microsoft lawsuit. Proponents of antitrust actions against Big Tech will argue that innovation will increase as Big Tech companies pare back anti-competitive practices. Arguments will be made that if Big Tech is forced to break up, then a slew of existing companies and startups will be able to take advantage of a more even playing field. Additionally, any rulings that reduce a company's control of its marketplace could arguably lead to lower prices for consumers if competition truly needs to be restored.

Second, given the investigation into Facebook's M&A practices, we expect more tech companies to second guess any acquisition opportunities in order to avoid the regulatory scrutiny. Lastly, these antitrust investigations all surround one key issue: data privacy. These investigations may uncover more cases of improper consumer data use by Big Tech. As a result, legislation may be enacted to counteract the use and sale of consumer data, affecting many startups and other companies that have come to rely on the vast stores of data gathered by Big Tech.