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The “Tech Antitrust Cases” – A Survey of Current Cases against “Big Tech”

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Media and academia often refer to the “tech antitrust cases,”² a term that encompasses the recent government and private litigation against large United States-headquartered technology firms including the so-called “GAFAM” companies—Google (now Alphabet), Apple, Facebook (now Meta), Amazon, and Microsoft. The tech antitrust cases do not have much in common beyond being tech and antitrust; there are no unifying antitrust legal threads or technological similarities. How, then, should business persons and lawyers wrap their heads around the tech cases?

The best way to understand the tech antitrust cases is to split them up into four groups: traditional merger cases; consummated merger cases; unilateral (single-firm) conduct cases; and cases involving “platform competition.” This paper does so, explaining each case briefly and making observations on each case’s lessons and importance.

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² See, e.g., Riitta Katila and Sruthi Thatchenkery, “The Surprising Consequences of Antitrust Actions Against Big Tech,” Harvard Business Review Online (Feb. 24, 2023), <https://hbr.org/2023/02/the-surprising-consequences-of-antitrust-actions-against-big-tech>.

Merger Injunction Cases

FTC v. Meta Platforms, Inc. / Within Unlimited, Inc.

Meta Platforms, Inc. (“Meta”) is the parent company of Facebook and other apps including Instagram, Messenger, and WhatsApp. Among its many strategic focal points, Meta seeks to become the leading company in virtual reality (“VR”). VR refers to any immersive computer-generated simulation of a three-dimensional image or environment, with which a user interacts (meaning, the environment responds to the user—it is not merely a passive viewing experience) in a seemingly real or physical way through use of special electronic equipment, such as a helmet with a screen inside or gloves fitted with sensors. Meta’s focus on VR dates from at least 2014, when it acquired Oculus VR, Inc., a VR headset manufacturer, and began selling the Oculus headset. Meta maintains an app store, the Quest Store, for compatible company-published and third-party VR apps.

In 2022, Meta proposed to acquire Within Unlimited, Inc., a maker of VR fitness apps including Supernatural, a leading VR app. Supernatural offers over 800 fully immersive VR workouts, each set to music and located in a virtual setting such as the Galapagos Islands or the Great Wall of China. Through deals with major music studios, Supernatural includes songs from A-list artists such as Katy Perry, Imagine Dragons, Lady Gaga, and Coldplay. Supernatural’s workouts are fitness classes that customers can access by paying a subscription fee.

The Federal Trade Commission (“FTC”) objected to Meta’s acquisition.³ The FTC had two theories: current competition, on the basis that Meta offers a game, Beat Saber, that provides some exercise (or at least might do so, if the user is especially vigorous when pretending to swing a virtual sword associated with music); and “potential competition,” on the basis that Meta by virtue of its size and focus on VR was the company most likely to develop apps more fully competitive to Supernatural in the future.⁴ The FTC alleged a “Virtual Reality Dedicated Fitness App market” in which Meta and Supernatural were two of the largest suppliers, making the transaction “presumptively illegal” because it would make a highly concentrated market even more so. The FTC sued to block the transaction, filing an administrative complaint within the FTC’s own administrative adjudication process.⁵ When the parties declined to stay their deal voluntarily during that administrative process, the FTC also sued in the Northern District of California for a temporary restraining order and preliminary injunction.⁶

³ See generally, *In re Meta/Within*, FTC Docket, <https://www.ftc.gov/legal-library/browse/cases-proceedings/221-0040-metazuckerbergwithin-matter>.

⁴ *FTC v. Meta Platforms*, Complaint for a Temporary Restraining Order and Preliminary Injunction, https://www.ftc.gov/system/files/ftc_gov/pdf/221%200040%20Meta%20Within%20TRO%20Complaint.pdf.

⁵ *In re Meta/Within*, Administrative Complaint, https://www.ftc.gov/system/files/ftc_gov/pdf/D09411MetaWithinComplaint Public.pdf.

⁶ See FTC Case Page, <https://www.ftc.gov/legal-library/browse/cases-proceedings/221-0040-meta-platforms-incmark-zuckerbergwithin-unlimited-ftc-v>.

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