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TECHNOLOGY MARATHON

Competition in the Virtual World

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Agenda



Metaverse Overview



Antitrust and Competition Considerations in the Metaverse



Developing Antitrust Regulations in the US, UK, and EU

What is the Metaverse?



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The Landscape



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What is the Metaverse?



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What is the Metaverse?



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The Landscape

Today there are multiple emerging metaverses (e.g., Sandbox, Decentraland, and Horizon World by Meta), but many are in the pipeline

- Users recently acquired virtual plots of land in The Sandbox
- Users bid on artwork from a Sotheby's auction in Decentraland
- Users viewed, tried on, and purchased digital Gucci items

Ultimately, there could be a single metaverse, operated by one entity, or multiple metaverses existing alongside one another

Users currently interact with the metaverse through VR headset, a web browser, and a PC, but as technology and the metaverses evolve, access points are expected to diversify and grow

There are many unknowns from regulatory perspective, particularly antitrust, but regulators and lawmakers are beginning to speak about potential concerns in this space

Scope and Reach of Metaverse

- Metaverse is in a nascent stage with a lot of hype, but analysts expect the global metaverse revenue opportunity is ~\$800B in 2024 vs. ~\$500B in 2020.
[Source: Bloomberg]
- Studies estimate that 25% of people will spend at least one hour per day in the metaverse by 2026.
[Source: Gartner]
- The AR/VR sector is expected to grow to ~\$250B by 2028, up from ~\$28B in 2021.
[Source: Insight Partners]
 - In 2021, nearly 10M AR/VR units shipped worldwide, with forecasts suggesting ~19M units will ship in 2023. [Source: Statista]
 - But today, only ~25% of Americans have ever used an AR/VR headset and just 28% say they're excited by the technology. [Source: July Morning Brew-Harris poll]

Antitrust and Competition Law Considerations



The exact contours of the types of antitrust issues that may emerge in the metaverse depend on what the metaverse will eventually look like – a single metaverse, multiple adjacent metaverses, etc. and, for example, how each metaverse is accessed

The potential antitrust claims may also vary by jurisdiction given differing standards to establish certain types of claims in the US compared to EU / UK (i.e., monopoly, abuse of dominance, monopoly leveraging, refusals to deal, etc.).



Interoperability

- Practically, interoperability here means being able to move from one metaverse to another and in moving, bring your "data" (e.g., NFTs) with you from one metaverse to another
- Where there is interoperability, expect to see lower barriers to entry, and a high likelihood of network effects
- Policies relating to interoperability can raise antitrust concerns. Competitors agreeing on standards and exchanging information to implement such standards across platforms raises antitrust risk.
- Limitations and restrictions on competitor access to a metaverse, features or services within the metaverse, user data, or technology needed to access a metaverse could impose barriers to entry, lead to market consolidation, and raise antitrust concerns

Interoperability – Potential Antitrust Claims

Anticompetitive Agreements

Depending on the circumstances in each case, the following types of agreement may potentially give rise to competition law concerns:

- Exchange of competitively sensitive information
- Market sharing and customer allocation
- Price fixing
- Agreements between purchasers (e.g., collective boycotts)
- Exclusivity requirements
- Tying claims (e.g., required use of certain proprietary devices)
- Limitations on interoperability and access to a metaverse by a competitor

Dominance and Monopolization

- Building metaverses requires significant investment and resources, which will require monetization to pay for such costs
- If a single gateway is created, the single metaverse will have unique access to user data and resources that automatically makes entry or expansion of competitors difficult/impossible

Monopolization / Dominance - Potential Antitrust Claims

Monopolization / Abuse of Dominance

Depending on the circumstances, the following types of conduct by a dominant firm may potentially give rise to an abuse:

- Industry consolidation

Acquirer	Target company	Value	Date
Microsoft	Activision Blizzard	69 billion	January 2022
Match Group	Hyperconnect	2 billion	February 2021
Unity Technologies	Weta Digital	2 billion	November 2021
Far Peak Acquisition	Bullish GI	900 million	July 2021
Byte Dance	Pico Interactive	771 million	August 2021
Take-Two Interactive	Zynga	700 million	January 2022

Source: Global Data

Monopolization / Dominance - Potential Antitrust Claims

Monopolization / Abuse of Dominance

Depending on the circumstances, the following types of conduct by a dominant firm may potentially give rise to an abuse:

- Industry consolidation
- Refusal to supply/exclusivity
- Tying and bundling
- Predatory pricing
- Loyalty discounts
- Excessive and unfair pricing
- Margin squeeze

Regulatory Focus on Digital Sectors and Technology

Globally, regulators are focused on antitrust and competition concerns in digital sectors

Focus to date has been on "Big Tech" and finding ways to limit or curtail large platforms from harming competition by, e.g., self-preferencing and "killer acquisitions"

Regulators and lawmakers in the US, EU, and UK are considering legislation and regulatory guidelines focused on increasing competition in the digital space

While the metaverse is clearly a hot topic in the tech and gaming space, regulators are only now beginning to think about how competition can be impacted through the metaverse.

- Given these changes are focused on technology and concepts like interoperability, self-preferencing, etc., legislation will certainly have implications for the metaverse

US Antitrust Law - Sherman Act

- The Sherman Act
 - Section 1: prohibits combinations or conspiracies in restraint of trade
 - Section 2: makes it unlawful for any person to "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"
- Consequences of antitrust violations in the US:
 - Companies face fines, damages (3x actual losses), legal fees, business disruption
 - Individuals face fines, job loss, and potential jail time

US: Evolving Antitrust Laws and Regulations



Congress released a report on its "Investigation of Competition in Digital Markets" in 2020.



U.S. Congress is considering antitrust reform bills:

- American Innovation and Choice Online Act
- Ending Platform Monopolies Act
- Platform Competition and Opportunity Act
- Augmenting Compatibility and Competition By Enabling Service Switching Act (ACCESS Act)
- Open App Markets Act
- Competition and Antitrust Law Enforcement Reform Act



Federal antitrust regulators are modernizing merger guidelines to address the House's 2020 Investigation of Competition in Digital Markets

European Commission

European Commission's Executive Vice President, Margrethe Vestager:

"We're trying to figure out how to ask the right questions [...] The Metaverse will present new markets and a range of different businesses. There will be a marketplace where someone may have a dominant position [...] Things are happening that we need to be able to follow."

(January 2022)

Commissioner for Internal Market of the European Union, Thierry Breton:

"[T]he Commission has no intention to launch a specific study into the functioning of the metaverse, but such a study is not excluded at a later stage."

The Commission has also no immediate intention to propose specific policy or regulatory measures concerning the metaverse, in particular since the existing regulatory framework also applies to metaverse. For example, the Digital Markets Act and the Digital Services Act on which the political agreement was recently reached provide the appropriate framework and the necessary tools to tackle issues concerning metaverse."

The Digital Markets Act will provide tools to foster contestability in the metaverse, either because the relevant services are within its scope or through the provisions that ensure future proofing of the Digital Markets Act."

(1 June, 2022)

Anti-competitive Agreements (1/2)

European Union

- Article 101 of the Treaty on the Functioning of the European Union (TFEU):
 - Prohibits agreements or concerted practices that have the object or effect of preventing, restricting or distorting competition
 - Horizontal arrangements between competitors and vertical agreements

United Kingdom

- Competition Act 1998 (CA98):
 - Chapter I: replicates the Article 101 prohibition on anticompetitive agreements
- Enterprise Act 2002
 - Part 6: sets out the criminal cartel offence and the CMA's related investigatory powers
 - Part 7: provides for the CMA to seek competition disqualification orders and competition disqualification undertakings

Anti-competitive Agreements (2/2)

By Object Analysis

- Horizontal Agreements: applies only to "hard core" cartels: price fixing, market or customer sharing, output/supply limitation, bid rigging
- Vertical Agreements: resale price maintenance, or certain territorial and customer restrictions
- It is irrelevant to show effects; the mere existence of an agreement or concerted practice is sufficient to find an infringement

By Effect Analysis

- Applies to agreements which may involve restrictions of competition e.g. joint selling, R&D collaboration, standard-setting
- More nuanced analysis. Balances negative and positive effects: an agreement will only be found illegal if its anticompetitive effects outweigh its pro-competitive benefits
- Some practices may be covered by the safe harbour of a Block Exemption under EU law, others require individual self-assessment

Abuse of Dominant Position

European Union

Article 102 TFEU: prohibits abusive conduct by dominant firms

United Kingdom

Chapter II CA98: replicates the Article 102 prohibition on abuse of dominance

- Using market power unilaterally to restrict competition
- Dominance: in broad terms, a business may be considered to have market dominance if it has a market share of around 40% or more in a relevant market.
- Definition of the relevant market is critical issue for determining dominance

Penalties for Infringement of EU and UK Competition Law



Fines: up to 10% of worldwide group turnover of a company

Contractual restrictions are void and unenforceable, and the whole agreement may be void

Damages actions

Class actions on behalf of consumers

Criminal liability in certain jurisdictions e.g., in the UK, if a company participates in a "hard core" criminal cartel, criminal liability for individuals:

- Director disqualification orders for a period of up to 15 years
- Five-year prison sentence, unlimited fine, or both

EU Digital Markets Act (DMA)

The DMA was agreed on 24 March 2022 and is expected to be adopted by the end of 2022, with most of its provisions coming into force 6 months after its entry into force



"Gatekeepers will now have to comply with a well-defined set of obligations and prohibitions. This regulation, together with strong competition law enforcement, will bring fairer conditions to consumers and businesses for many digital services across the EU."

Margrethe Vestager
Commission Executive Vice President



"This is a global movement, that is really good [...] We hope our take on [digital markets] will inspire all over the planet"

Margrethe Vestager
Commission Executive Vice President



"The agreement ushers in a new era of tech regulation worldwide"

Andreas Schwab
European Parliament's rapporteur on the DMA

DMA Applies to Designated "Gatekeepers"

- DMA regulates certain practices by large platforms acting as "gatekeepers"
- To qualify as a "gatekeeper" a company must:
 - First, either have had an annual EU turnover of at least €7.5 billion in the past three years or have a market valuation of at least €75 billion;
 - Second, have at least 45 million monthly end users and at least 10,000 business users established in the EU; and
 - Third, must control one or more core platform services in at least three member states
- "Core platform services" include marketplaces, app stores, search engines, social networks, cloud services, advertising services, voice assistants and web

What are the obligations on "gatekeepers"?

Gatekeepers must:

- Ensure that users have the right to unsubscribe from core platform services under similar conditions to subscription
- For the the most important software (e.g. web browsers), not require this software by default upon installation of the operating system
- Ensure the interoperability of their instant messaging services' basic functionalities
- Allow app developers fair access to the supplementary functionalities of smartphones (e.g. NFC chip)
- Give sellers access to their marketing or advertising performance data on the platform
- Inform the European Commission of their acquisitions and mergers

Gatekeepers can not:

- Rank their own products or services higher than those of others (self-preferencing)
- Reuse private data collected during a service for the purposes of another service
- Establish unfair conditions for business users
- Pre-install certain software applications
- Require app developers to use certain services (e.g. payment systems or identity providers) in order to be listed in app stores

Penalties



Fine of up to 10% of a gatekeeper's total worldwide turnover

For a repeat offence, a fine of up to 20% of its worldwide turnover

If a gatekeeper systematically fails to comply with the DMA, i.e. it violates the rules at least three times in eight years, the European Commission can open a market investigation and, potentially, impose behavioural or structural remedies

UK pro-competitive regime for digital markets

- A new dedicated **Digital Markets Unit** (DMU) established on 7 April 2021 in 'shadow' form to focus on operationalising and preparing for a new "pro-competitive" regime in the digital sector
- On 6 May 2022, UK Government published its response on 2021 consultation on the design and implementation of the new regime:
 - Apply to companies designated as having "**strategic market status**" (SMS): i.e. substantial and entrenched market power in a digital activity, providing the firm with a strategic position
 - Once firm has been designated with SMS, the DMU will set out how it is expected to behave in respect of the activities for which it is designated, by reference to specific conduct requirements
 - DMU will have the ability to issue "pro-competitive interventions", impose ownership separation remedies, and impose fines of up to 10% of a firm's global turnover
 - Directors of firms in breach of the new regime may face director disqualification orders
 - Enhanced merger control restrictions materially watered down from original proposals

Potential anticompetitive agreements

- Depending on the circumstances in each case, the following types of agreement may potentially give rise to competition law concerns from a UK / EU perspective:
 - Interoperability
 - Sharing of competitively sensitive information
 - Collaboration agreements
 - Market sharing and customer allocation
 - Price fixing
 - Agreements between purchasers e.g., collective boycotts
 - Vertical concerns
 - Other?

Potential types of abuse of dominance

- Depending on the circumstances, the following types of conduct by a dominant firm may potentially give rise to an abuse under EU/EU competition law:
 - "Unfair" prices:
 - Excessive and unfair pricing
 - Predatory pricing
 - Margin squeeze
 - Refusal to supply/exclusivity
 - Tying and bundling
 - Loyalty discounts
 - Other?

Biography



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Joanna focuses her practice on EU and UK competition law and antitrust, including competition law litigation in the European and English Courts. Joanna defends clients in cartel or abuse of dominance investigations, competition disputes, dawn raids, damages actions, director disqualification proceedings, merger control, restructuring and joint ventures, and advises clients on a range of competition law matters. She represents clients before the European Commission, the European Courts, the Competition and Markets Authority (CMA), the Financial Conduct Authority, the Competition Appeal Tribunal (CAT), the Court of Appeal, the Supreme Court, as well as antitrust authorities in other jurisdictions.

Biography



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Minna focuses on antitrust and complex litigation matters. She has worked on litigation, investigation, and counseling matters in many industries including pharmaceutical, technology, airline, oil and gas, and ride-sharing industries. Her experience includes multidistrict litigation, class action and direct action defense, litigation against the DOJ and multiple state attorneys general, and counseling on matters ranging from cartel and monopolization, breach of contract, fraud, and unfair competition matters.

Biography



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Rishi represents clients in a broad range of litigation matters in United States federal and state courts, with particular focus on antitrust litigation. His practice also includes Federal Trade Commission (FTC) and US Department of Justice (DOJ) investigations of mergers and related litigation matters. Rishi has worked with clients in a wide range of industries, including technology, retail, medical devices, and health care. He is an associate representative for the firm's Asian American/Asian Lawyer Network and is a Young Lawyer Representative for the ABA Antitrust Section's Media and Technology Committee.

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