

Managing antitrust and competition risk

In January 2022, the European Commissioner for Competition, Margrethe Vestager, whose responsibilities also include Digital Regulation, was quoted as stating that competition authorities “should start thinking about [the metaverse] now.” While almost all competition authorities and legislative bodies around the globe have made digital markets a priority area for enforcement, this call to action is one of the first times that the head of one of the major antitrust authorities has explicitly recognized the need to consider the future of competition enforcement in the metaverse. The emergence of the metaverse and the reinforcement of the ever-increasing pervasiveness of digitization will undoubtedly come under close scrutiny from competition regulators worldwide.

However, to date, there are more questions than answers on how this should be done. Indeed, Ms. Vestager’s comments note a concern that developments are occurring that need to be followed, but that the competition authorities are still trying to work out how to ask the right questions to understand potential competition concerns.

- As the world becomes increasingly interconnected, how will competition law enforcers adjust to this trend, and will the individual competition authorities be able to find a way to work together to address issues on a global, rather than a piecemeal, individualized basis?
- At what stage should regulators intervene? If they intervene too soon, innovation could be stifled, and if too late, the market could “tip,” causing substantial distortion of competition, risk of monopolization, and emergence of mega-corporations.
- Do regulators have a choice at all of balancing intervention, just in case they risk falling behind rapidly changing digital developments?
- Will the competition tools that have been or are currently being developed to address powerful digital platforms prove to be sufficient, or will they be outdated even before they are effectively applied?
- Will there be a way to provide legal certainty for companies doing business in the metaverse, and will there be guidance that companies can rely on when adapting their business models to the new age?
- What steps should be taken to safeguard consumers in the metaverse jungle?

Even at this early stage, it is possible to identify a number of issues competition authorities across the world will have to grapple with. The competition issues the metaverse is likely to create can be looked at from different perspectives, including

- i. the infrastructure needed in the metaverse,
- ii. operating a business in the metaverse, and
- iii. the roles of users in the metaverse.

Infrastructure needed in the metaverse


Access to the metaverse and gatekeepers – competition authorities will likely want to ensure that there is sufficient access to products or services deemed indispensable for effective competition in digital markets, in particular in the metaverse (for example, access to data, hosting/server capacities, critical technologies or solutions for metaverse-specific types of advertisement, augmented reality/display, etc.).

Standard setting and interoperability – In order for the metaverse to operate effectively, it appears likely that there will need to be agreement on technical standards. We expect regulators will want the metaverse and markets therein to remain open and accessible to market participants (in particular smaller players) on FRAND (fair, reasonable, and non-discriminatory) terms, balanced against the legitimate commercial interests of relevant suppliers to incentivize development and innovation. The tensions between intellectual property holders, licensors of standard essential intellectual property, and licensees that continue to be prevalent in a number of sectors can be expected to arise in the context of the metaverse.

- Merger control and *ex ante* regulation – Today, there is a consensus among competition authorities around the world that *ex ante* regulation (preventing harm to competition before it occurs) is far more effective, less invasive, and thus generally preferred to *ex post* regulation (retrospective enforcement activity), which

tends to entail lengthy administrative proceedings often followed by even lengthier court proceedings. *Ex post* intervention often fails to address the competition issues in the fast-changing digital world in a timely manner. Especially in the digital economy, many markets show a high degree of concentration, and the metaverse is unlikely to change this trend. Furthermore, takeovers and mergers can tip a market or create ecosystems that are almost unassailable for competitors. For this reason, regulators are likely to take merger control more seriously than ever in the context of the new digital era.

- Saving innovation from “killer acquisitions” – Innovating firms are often acquired by incumbents, typically in the early stages of product development and often for large amounts that do not appear to be justified by current revenues. Such acquisitions are referred to as “killer acquisitions” where there is a risk that the purchase of a new challenger by an incumbent will eliminate promising, yet likely competing, innovation. Such acquisitions seem all the more likely to occur in the metaverse, as large digital platforms jostle to position themselves to take advantage of the new technology. Competition authorities are developing tools to enhance pre-merger screenings to discourage these acquisitions when competition is negatively impacted, and the authorities can be expected to vigorously enforce these tools in the context of metaverse M&A.



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Doing business in the metaverse

- The overall challenge for regulators will be to keep markets open and free, and to allow companies to do business with consumers in the metaverse. This is always a challenge for competition authorities in times when new “markets” are developing or major developments or innovations occur with the potential to disrupt existing business models.
- Generally, we expect that the rules currently being developed to address market power identified among certain digital companies will continue to be relevant in the context of the metaverse. A number of the issues that have the potential to arise in the metaverse are already being considered in existing digital markets.
- The tendency for markets to “tip” due to the benefits to users and businesses of a critical mass of other users on the same platform can make it very difficult for new competitors to break into the market.
- Users will need some manner to interface with the metaverse. Where this occurs – particularly if there is only a single interface platform or a small number of interface platforms – those platforms have a benefit in being able to favor their own services in secondary markets within the metaverse over services offered by their competitors. Competition authorities consider this type of self-preferencing practice by digital platforms to be potentially harmful as likely distorting competition and increasing dependencies of third-party businesses from the platform’s services. This practice can therefore be expected to remain on the “blacklists.”
- Advertising markets in digital ecosystems have been the subject of a number of competition investigations in recent years. We expect that competition authorities will continue to take a keen interest in digital advertising in the metaverse, particularly if an advertising-funded business model becomes prevalent.



- The further integration of the digital world with consumers' day-to-day lives will generate huge amounts of data about individuals' routines, habits, and preferences. Access to this data can be vital in ensuring the popularity of services offered in the metaverse. The position of the platform provider can, therefore, impart a significant advantage over rivals, serving to reinforce the platform's market power or enable it to leverage the power to other service areas.

Users in the metaverse

Over recent years, users have become familiar and comfortable with platforms being provided for free at point of use. It seems likely that users will expect digital services in the metaverse to be available on the same basis. However, not being required to pay money does not mean the consumer is not paying anything. Consumers are generally paying for such "free" services with their data. Given the interconnectedness with so many aspects of their lives in the metaverse, this data will be hugely valuable to businesses. There will be a need for higher privacy standards, more transparency, and a simplification of the ways for consumers to agree to or reject the transfer of their data.

This personalized information can be used to create increasingly personalized product and service offerings, which may include setting personalized pricing for different consumers for the same product or service based on what the business knows about that consumer (the strength of their preference for the service, their income, other products they have bought, their location, etc.). Competition authorities have already been considering this issue in digital markets and debating whether exploiting customers' willingness to pay is fair and where the limits of any possible efficiencies will be reached.

In the metaverse, interoperability will set new standards – but not only from the perspective of enabling businesses to connect to the digital platforms. Interoperability will also likely become a standard requirement imposed by competition policy to require digital platforms to provide consumers with the ability to port their data when deciding to leave a platform. Digital platforms are more likely to gather market power if consumers are "locked in" due to the lack of interoperability and the consequence that data is lost when leaving. If consumers are allowed to migrate their data to competing systems (for example, using an application programming interface), lock-in effects would be diminished, which may promote competition between platforms.

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