Linklaters

Linklaters LLP response to European Commission consultation on competition in virtual worlds and generative AI

1 Introduction

(1) We welcome the opportunity to respond to the European Commission's call for contributions with respect to competition in virtual worlds[1] and generative AI systems[2]. We support the EC's stated goals to "engage in a forward-looking analysis of technology and market trends" and to identify "potential competition issues that may arise in these fields".[3]

(2) This paper responds to questions 9 and 10 of the EC's virtual worlds questionnaire and questions 11 and 12 of the EC's generative AI questionnaire, addressing how the EU's digital regulatory framework and, in particular, competition law, applies to virtual worlds and generative AI.

(3) The evolution of any new technology inevitably gives rise to a range of legal and regulatory issues and virtual worlds / generative AI are no different. Many of these issues are cross-cutting, raising potential issues under multiple strands of regulation. For example, the impact of generative AI on the holders of intellectual property rights gives rise to issues under copyright law but may also, should markets become concentrated, raise competition issues. As these technologies develop, the EC has a critical role to play, in collaboration with regulators in Member States, not only to protect EU citizens and businesses from harm, but also to ensure they benefit from technological advancements.

(4) There is a broad and recently expanded EU regulatory toolkit that has been specifically designed to address the digital world. In addition, EU competition law is flexible and adaptable. Therefore, we recommend that the EC:

- applies a case-by-case and principle-based approach to addressing any potential competition issues relating to virtual worlds and generative AI. The EU's antitrust and merger control rules already provide considerable versatility in this respect.
- observes the impact of recent and upcoming non-competition law specific EU rules affecting virtual worlds and generative AI, before considering adapting EU competition law concepts or investigation tools and practices.
- continues to engage with stakeholders by conducting public consultations, workshops, and by organizing cross-border conversations among regulators and innovators, for example in the form of regulatory sandboxes, if needed.

2 Making use of the EU's existing regulatory framework for digital markets

(5) The Consultation asks whether the EU's existing regulatory framework is sufficiently flexible to regulate emerging virtual worlds (or "metaverse") and generative AI appropriately.[4] The EU has – in recent years

[1] In this position paper we use the EC's definition: "*Virtual worlds are persistent, immersive environments, based on technologies including 3D and extended reality (XR), which make it possible to blend physical and digital worlds in real-time, for a variety of purposes such as designing, making simulations, collaborating, learning, socialising, carrying out transactions or providing entertainment.*" See: EC, press release 9 January 2024, IP/24/85, 'EC launches calls for contributions on competition in virtual worlds and generative AI'.

[2] In this position paper we use the EC's definition: "*Generative AI systems are AI systems that generate, in response to a user prompt, synthetic audio, image, video or text content, for a wide range of possible uses, and which can be applied to many different tasks in various fields.*" See: EC, press release 9 January 2024, IP/24/85, 'EC launches calls for contributions on competition in virtual worlds and generative AI'.

[3] Competition in Virtual Worlds and Generative AI Calls for contributions, p. 2.

[4] Council of the European Union Analysis and Research Team *Metaverse: Virtual world, real challenges* (9 March 2022). Metaverse is best described as "*an immersive and constant virtual 3D world where people interact through an avatar to enjoy entertainment, make purchases and carry out transactions with crypto-assets, or work without leaving their seat.*"

– significantly bolstered its regulatory framework for digital services with the introduction of new rules, notably the Digital Markets Act,[5] the Digital Services Act,[6] the Data Act,[7] and the General Data Protection Regulation[8] not to mention various other legal instruments affecting the operation of digital markets.[9] The proposed AI Act is also in the final stages of the legislative process.[10]

(6) These rules safeguard the rights of consumers and small businesses, prevent unfair terms and conditions, lay down provisions for switching, data portability, and interoperability, and generally promote fair competition in the field of virtual realms and generative AI. They also offer a robust foundation for addressing emergent challenges. Given the nascent stage and innovative potential of virtual worlds and generative AI, we suggest that the EC first observes the impact of these new laws before considering new competition law policy actions.

DMA

(7) The DMA applies to core platform services ("**CPS**") offered by designated gatekeepers.[11] Virtual worlds and generative AI are not specifically listed as CPS in article 2(2) of the DMA. However, there are adjacencies, as virtual world / generative AI technology is likely to be used in the provision of existing CPS. For example, an online intermediation service may involve elements of virtual worlds, and virtual assistants / online search engines are already using elements of generative AI, while cloud computing services underpin it.[12] The regulatory framework of the DMA is therefore well equipped to manage concerns around the fairness, transparency and contestability of markets as these emerging technologies reach broader use. The DMA also mandates interoperability in various contexts, ranging from operating systems to virtual assistants, and their respective connected products and services.[13]

DSA, GDPR

(8) The DSA creates a new framework for the regulation of online harms in the EU, imposing new and wide-ranging obligations on online intermediaries. These obligations would apply to some virtual worlds, i.e. those with certain types of user to user interaction. The DSA would also apply to generative AI used by users of the platform. The DSA protects fundamental rights of users, including freedom of expression and consumer protection rights.[14]

(9) The GDPR imposes obligations on companies collecting data about individuals. There is concern among generative AI providers about whether it is lawful to train an AI model on public data. Under the GDPR

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5 Regulation (EU) 2022/1925.

6 Regulation (EU) 2022/2065.

7 Regulation (EU) 2023/2854.

8 Regulation (EU) 2016/679.

9 E.g., the Data Governance Act, DORA, NIS2 and the proposed Health Data Spaces, Cyber Resilience Act, Platform Workers Directive, Media Freedom Act, CSAM Regulation, eIDAs 2.0.

10 EC Press release, 9 December 2023, IP/23/6473, 'Commission welcomes political agreement on Artificial Intelligence Act'.

11 Article 2(2) Digital Markets Act. CPS include online search engines, social networking services, app stores, certain messaging services, virtual assistants, web browsers, operating systems, and online intermediation services.

12 The metaverse was considered and discussed by the EC when the DMA was negotiated, but ultimately reference to the metaverse was left out (see Council of the European Union Analysis and Research Team *Metaverse: Virtual world, real challenges* (9 March 2022). The EC has not since raised concerns that the DMA would not apply to the metaverse. Instead, Margrethe Vestager commented that the raft of legislation adopted in the last five years to regulate Big Tech – including the DMA – would apply to the metaverse (see Reuters *Metaverse has set off no alarms or need for controls yet, EU antitrust chief says* (7 July 2023), linked here). On this same basis, we would therefore expect the DMA to be flexible enough to include generative AI and virtual worlds more broadly.

13 See in particular Articles 6(7) and 7 of the DMA.

14 DG COMP Understanding the metaverse – a competition perspective, linked here. *"When it comes to wider societal challenges, the Digital Services Act provides tools aiming to ensure a safe metaverse environment where the fundamental rights of its users, such as freedom of expression, are adequately protected."*

you need to have a lawful basis (Article 6) and likely a processing condition for special category personal data (Article 9). It is still unclear if such a condition exists.

3 EU competition law applied to virtual worlds and generative AI

(10) Competition law has repeatedly shown – over many decades – a remarkable capacity to evolve with market developments, due to its open textured nature. We agree with DG Comp officials who have said that *"antitrust and merger control rules are technology-neutral and versatile."*[15] The adaptation of EU competition law concepts or investigation tools and practices for virtual worlds and generative AI is therefore unnecessary at best, and the risks are counter-productive, given the uncertainty around how these technologies will progress. At a later stage, when markets are sufficiently mature, it can be assessed whether sectoral regulation is necessary. In the meantime, we suggest that the EC works on a case-by-case basis and takes advantage of the versatility of current antitrust and merger control rules.

Competition concerns in relation to virtual worlds and generative AI

(11) The development of virtual worlds and generative AI tends to benefit from economies of scale, due to reliance on large datasets, cloud infrastructure, and hardware. Furthermore, as with earlier digital innovations, virtual worlds and generative AI introduce challenges that include assessing multi-sided markets, understanding network and ecosystem effects, considering the implications of switching costs, and recognizing the potential for market tipping. Concerns have been raised that dominance in virtual worlds could "*perpetuate current anticompetitive practices, such as self-preferencing and dark patterns.*"[16]

(12) Despite these concerns, we believe that competition law is well equipped to deal with any issues that arise.

Market definition

(13) The new market definition notice provides significant guidance on how to deal with innovative, zero price, and ecosystem markets.[17] This will help regulators and companies to navigate the competition risks in markets related to virtual worlds and generative AI.

Merger control

(14) Any transaction involving a virtual world or generative AI meeting the relevant jurisdictional thresholds can be reviewed in the same way as other transactions. Any below-threshold acquisitions can either be reviewed through (i) the Article 22 EUMR[18] referral mechanism or (ii) Article 102 TFEU.[19] In addition, under the DMA, gatekeepers are obliged to inform the EC of all acquisitions, removing the possibility that the largest tech companies could close deals "under the radar".[20] The EC has a strong track-record of reviewing and where it has considered it necessary, intervening, in mergers in digital (and other innovation-heavy) markets. The EUMR is well-adapted to the specific challenges of innovative markets, in both its analytical framework and its approach to remedies.

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[15] DG COMP Understanding the metaverse – a competition perspective, linked here.

[16] European Parliament Briefing *Metaverse: Opportunities, risks and policy implications* (June 2022), available here.

[17] There is no generally accepted market definition of virtual worlds and generative AI. Commission notice on the definition of the relevant market for the purposes of Community competition law, C/2024/1645, see in particular section 4.

[18] In July 2022, the EU General Court ruled in *Illumina/Grail* (T-227/21) that national competition authorities can rely on Article 22 of the EUMR to refer a transaction for merger control review where the transaction does not meet either the EU or Member State thresholds.

[19] The CJEU's *Towercast* judgment (C-499/21 – Towercast 16 March 2023) confirmed that acquisitions by dominant companies falling below EU and national filing thresholds, and that are not subject to an Article 22 referral, may be reviewable under abuse of dominance rules both before and after closing.

[20] DMA at Article 14.

Article 101 TFEU

(15) The EC's Guidelines on Horizontal Cooperation ("**Horizontal Guidelines**") contain several provisions which apply to platforms. These include joint distribution through platforms to compete with larger operators, and what information might be lawfully exchanged through a platform or facilitated by an algorithm.[21] The guidelines also contain provisions detailing when aggregated data and raw data can be exchanged, and what type of data can be used to feed algorithmic software (i.e. publicly available vs. commercially sensitive information). This guidance will assist market participants who are active in virtual worlds and generative AI, to ensure that they stay on the right side of the line when it comes to operating their services and sharing information.

Article 102 TFEU

(16) As with other forms of technology, there are a range of theoretical abuses of dominance that could arise involving virtual world / generative AI technology. For example, just as an internet platform with a dominant position might abuse its market power by favouring the selling of its own products over a third-party sellers' products on the platform, generative AI models could be combined with "plugins" (apps) that can be developed both by the original AI model provider, or by third-party providers. This may lead to concerns that an AI model provider engages in self-preferencing and creates a closed eco-system around its AI model. However, self-preferencing concerns are not new, and EU competition law is already capable of addressing such concerns should they arise.[22]

(17) Existing competition law is also capable of addressing other dominance related concerns which could arise in respect of virtual worlds or generative AI, such as refusal of access or tied-selling. For example, if a virtual world platform were to block the entry or access of other companies to its platform, or if a generative AI model refused to give access to other plugins, then the essential facility doctrine could apply. Or, if a dominant company conditioned its access to its virtual world platform through its own virtual reality devices, this could be scrutinised under the usual prohibitions on anti-competitive tying and bundling.

4 Conclusion

(18) The EC holds a broad toolkit to address any challenges posed by emerging digital technologies, including virtual worlds and generative AI. These tools are new and are either not yet or only recently implemented. Each instrument imposes a significant compliance burden and associated cost on affected firms, as well as significant engineering time to re-design and ensure compliance. Many businesses have made significant changes to their business models to comply.

(19) The EC will play an important role in monitoring compliance and observing how the EU digital package reshapes digital markets over the coming years. In addition, the "catch-all" of competition law is well placed to address any regulatory gaps. We would urge the EC to "let the dust settle" on existing legislation before taking on new legislative initiatives: there is no reason to believe that virtual worlds or generative AI raise specific new issues not considered through the current EU legal framework affecting digital markets.

(20) Should a legislative solution ultimately be considered necessary, we would advocate for a refinement of the existing legislative framework, rather than introducing new legislation. Amending these acts allows for the evolution of current laws to adapt to the dynamic digital landscape, ensuring that the legislation

[21] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, OJ C 259 (2023).

[22] For example, in the *Google Shopping (C*-612/17 – *Google and Alphabet v EC* 10 November 2021) decision, the General Court confirmed that certain dominant (online) companies bear an equal treatment obligation and cannot discriminate in favour of their own services. Similarly, a virtual world provider might favour its own sellers or plugins, to the detriment of third-party sellers or plugins.

remains relevant and effective. This approach prevents the proliferation of overlapping or even conflicting laws, which can create uncertainty for businesses and consumers alike. Furthermore, allowing existing regulations to mature promotes the development of case law, which consequently provides guidance on specific issues. This helps to create a more coherent legal environment which promotes innovation, while safeguarding user rights and fostering competition.

(21) As technologies evolve, it is part and parcel of the dynamic competitive process that some providers may choose a range of business models – open and closed – as they experiment with, and innovate new technologies. This has already been seen with generative AI, where both open and closed LLMs have been released. The existing framework can address this in a flexible way and competition law is well placed to intervene when particular models, or business practices, are problematic. Regulation targeting only one model risks having a counterproductive effect on innovation and competition, ultimately disadvantages EU citizens.

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