

COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST AND INTERNATIONAL LAW ON THE CONSULTATION ON VIRTUAL WORLDS MARKETS

March 6, 2024

The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The American Bar Association Sections of Antitrust and International Law (the Sections) welcome the opportunity to submit these comments to the European Commission (the Commission) on its consultation on virtual worlds markets, commonly referred to as the “metaverse,” published for public consultation on January 9, 2024. These comments reflect the expertise and experience of the Sections’ members with competition law and economics.

The Antitrust Law Section is the world’s largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 9,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors and law students. The Antitrust Law Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the Antitrust Law Section have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Antitrust Law Section has provided input to enforcement agencies around the world conducting consultations on topics within the section’s scope of expertise.

The International Law Section (the ILS) focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing, and practical assistance related to cross-border activity. Its members total approximately more than 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The ILS’s over fifty substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the ILS has provided input to debates relating to international legal policy. With respect to competition law and policy specifically, the ILS has provided input for decades to authorities around the world.

DISCUSSION

Vigorous enforcement of antitrust and unfair competition laws plays a critical role in keeping all markets innovative and competitive. The Sections have long supported the evolution of antitrust and consumer protection laws to keep pace with evolving circumstances, technological innovation, new forms of competition, economic theory, and empirical evidence. In that spirit, the Sections commend the European Commission for taking the initiative to gather

information and closely monitor developments in virtual worlds. The Sections support the European Commission’s vigilance in scrutinizing virtual worlds for competitive concerns and, where appropriately supported by the evidence and applicable legal and economic principles, pursuing enforcement actions.

Governments around the world are studying competitive effects in emerging technology markets. In the October 30, 2023 Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, President Biden called upon federal agencies (taking into account the views of industry, academia, and other stakeholders) to promote a “fair, open, and competitive ecosystem and marketplace for AI and related technologies so that small developers and entrepreneurs can continue to drive innovation.”¹ On November 8, 2023, competition law leaders and policymakers attended the G7 Hiroshima Summit on digital competition. At the conclusion of the Summit, the G7 competition authorities pledged to “take action by enforcing competition laws, improving the existing regulatory toolboxes, and developing new regulatory frameworks to the extent necessary.”² Nonetheless, the Sections respectfully submit that it is important also to consider the potential unintended consequences that may result from implementing a prescriptive regulation at this stage of development of these technologies, as well as both under-enforcement and over-enforcement of existing laws in the area of virtual worlds.

The Sections note that the term virtual worlds markets can be confusing, in that the term can refer to two very different categories of market. The first category includes the market or markets for products and services relating to the creation and making available of virtual worlds. The second involves markets for products and services within virtual worlds.

Products and services for making virtual worlds available. With respect to the markets for products and services for the creation and making available of virtual worlds, such as software as a service, the Sections see no reason at this time to expect that the relevant antitrust markets will differ significantly from other markets with which the Commission is familiar, such as markets for social media services, videogame software and hosting services.

More specifically, there is no reason to think that these virtual worlds markets will be characterized by competitive drivers or barriers to entry or growth that are materially different than those applicable to other digital markets.

Markets for goods and services within virtual worlds. The nature of markets within virtual worlds is less clear, from several perspectives. When a consumer joins a virtual world, his or her rights are based in contract, normally a license from the creator or operator of the virtual world. The same is true when the consumer acquires virtual assets from the platform operator.

The nature of the rights and obligations applicable to actions of these participants and interactions between them, by contrast, may be unclear. For example, a virtual world participant may create a virtual artwork that can be transferred by the creator to other virtual world participants for tokens acquired from the platform operator. Two or more virtual artists active in the online world could presumably agree between themselves on the token prices they will charge other participants for their virtual artworks. Instead of intellectual (or other)

¹ Pres. Joseph R. Biden, Jr., Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence at 2-3 (Oct. 30, 2023) at <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence>.

² Statement of the G7 Competition Authorities and Policymakers on the 2023 Hiroshima Summit, “Digital Competition Communiqué” at 2 (Nov. 8, 2023) at https://www.jftc.go.jp/en/pressreleases/yearly-2023/November/231108G7_result1EN.pdf.

property rights, however, the virtual artists' rights and obligations vis-à-vis virtual purchasers are again presumably governed by their contracts with the platform operator. These interactions may raise questions in numerous domains, including consumer protection, tort, criminal and intellectual property laws and financial services laws and regulations, as well as antitrust.

Without prejudice to the Commission's efforts to monitor developments in virtual worlds markets from an antitrust perspective, the Sections respectfully recommend that the Commission consider the relationship between antitrust issues in virtual worlds markets and other legal frameworks. While some antitrust rules, such as the prohibition against price fixing, may seem easy to apply to interactions between participants in virtual worlds, this transferability may raise unexpected issues. For example, it may not be clear whether private antitrust damage claims could be brought before courts, or how antitrust damages could be determined if they were. These questions may in turn depend on the virtual world's rules governing convertibility of virtual world tokens into legal tender. The Sections submit that future antitrust enforcement (private and public) would benefit from greater legal clarity regarding the rights of virtual world participants under antitrust and other applicable legal regimes.

The Sections take no position on the current state of competition or the proper level of antitrust enforcement in virtual worlds. Products and services in the virtual worlds space remain at an early stage of development, and advancements in this area have the potential to increase innovation, promote efficiency and economic growth, and enhance competition to the benefit of consumers and other industry participants. That counsels for care but does not, however, preclude the possibility of competitive concerns or diminish the importance of vigilance and robust antitrust enforcement in this area. The Sections respectfully submit that virtual worlds involve complex, nuanced issues, which require competition authorities to analyze carefully both potential procompetitive benefits and anticompetitive effects. The Sections also note certain specific issues in virtual worlds may warrant particularly close attention by the European Commission going forward, including network or platform effects, economies of scale, barriers to entry, and access to the large, high-quality datasets needed to develop and hone virtual worlds products.

CONCLUSION

The Sections appreciate the opportunity provided to comment on the virtual world consultation. We would be pleased to respond to any questions the Commission may have regarding these comments, or to provide additional comments or information that may be of assistance to the Commission.