NSR Tech Policy Quick Hit: FTC sues to block Meta's acquisition of Within

By Matt Perault | July 27, 2022

What happened: The FTC sued Meta in federal court in Northern California to block the company's acquisition of Within Unlimited, a virtual reality game maker. Within makes Supernatural, a virtual reality fitness app. The suit claims that Meta is a potential entrant in the virtual reality dedicated fitness app market, and that acquiring Within would have the effect of "dampening innovation and competitive rivalry." The FTC vote to authorize the suit was 3-2. Christine Wilson announced that she was one of the dissenters.

The deal was first announced in October 2021 for an undisclosed sum, though the price is rumored to have been $400 million.

What it means:

- This is Lina Khan's first significant action against a Big Tech company, and is consistent with the new approach to mergers that she announced earlier this year. In that announcement, she highlighted that merger analysis should involve more rigorous review of potential competition, and this suit is an example of moving in that direction. It alleges that the deal "poses a reasonable probability of eliminating both present and future competition."

- The suit alleges that Meta has a "virtual reality empire," despite how small the virtual reality market still is and even as other large tech companies signal their intent to compete aggressively with Meta in this market. The FTC then defines the relevant market as an even narrower category of "VR dedicated fitness apps." Determining the relevant market and Meta's current and potential position in it will now be questions for a federal district court judge to resolve.

- Meta's response to the suit indicates some of the arguments it will likely use in court to defend the acquisition. It claimed that the suit was "based on ideology and speculation, not evidence." It also claimed that the virtual reality market is a "dynamic space."

- The FTC filed the suit on the same day that Meta announced disappointing Q2 earnings. In prior notes (LINK), we have argued that when a company's business prospects become more fragile, its policy risk is likely to diminish. But for at least three members of the FTC, Meta's slumping business prospects and the relatively small size of the acquisition did not assuage their concerns about the company's power.

- The suit indicates that the FTC may adopt a more aggressive posture now that Democrats have a majority on the Commission. Alvaro Bedoya was sworn in as the third Democrat on the Commission on May 16. The 3-2 vote to bring this suit reflects how important his vote is.

- The FTC's action in this case signals that Microsoft's acquisition of Activision could face a challenge as well, given the significantly larger size of the deal ($68.7 billion). Microsoft will likely aim to distinguish its acquisition from Meta's, emphasizing that it has committed to continue offering its most popular games on rival platforms.

- It is also possible that the FTC's action in this case indicates that it is likely to challenge Amazon's acquisitions of MGM and One Medical too. The MGM deal has already closed, but when it did, the FTC made clear that it could challenge it in the future. Amazon announced the One Medical deal last week, and critics have already raised concerns about it (we discuss the deal HERE).

- But if Meta files a motion to dismiss the case and a judge upholds it – as it did with the FTC's December 2020 Complaint against Facebook – the loss could have a deterrent effect on these types of merger challenges by the agency.

- It is notable that one of the year's most significant regulatory actions against Meta seemed to have an immaterial impact on the company's stock price, as it continued to rise in the hours after the suit was announced. Investors may view a challenge to the deal as relatively insignificant and as a preferable alternative to other options the FTC might have for using its enforcement resources against the company.

Full 12-month historical recommendation changes are available on request

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