

NSR Tech Policy: FTC Challenge to Meta/Within Comes to Court

By [Blair Levin](#) | December 7, 2022

What's New: The most significant effort to date by the current antitrust agencies to expand antitrust powers in the digital economy is the FTC's effort to obtain a Temporary Restraining Order to block the Meta/Within transaction. Starting this morning and continuing into next week, the court will hold a hearing, scheduled over four days, on the matter.

Background: The FTC is challenging Meta's purchase of Within. It is a relatively small transaction (\$400 million) in the developing virtual reality industry.^[1]

Biggest test of new theories, a test both sides welcome. In a sense, this is litigation that both the progressive forces pushing for more aggressive antitrust enforcement and the forces seeking to stop such enforcement have been hoping for.

- The progressive forces wanted a case that would utilize novel theories of antitrust harm – novel in the sense of trying to apply antitrust law to potential competition in the digital economy – to prevent established companies from buying up potential competitors in “[nascent markets](#).”
- The targets for such efforts have wanted a case that would enable a court to shoot down the theories and send a clear signal to antitrust agencies that traditional antitrust jurisprudence is sufficient to prevent anticompetitive behavior in digital markets.

Court hearing. The Judge, located in the Northern District of California, has scheduled a hearing on the case, which will occur over four days (all times PST):

- Thursday, December 8th, 10:30 am.
- Friday, December 9th, 9:00 am.

- Tuesday, December 13th, 9:00 am.
- Wednesday, December 14, 9:00 am.

Potential impact of decision. The decision could both affect the specific deal and many other transactions.

- *If Meta wins*, the FTC may abandon its challenge, and we think the companies may move to close the deal. It could appeal but would risk having an appellate court lock in a decision that makes it harder to win such cases.
- *If the FTC wins*, Meta may walk away from the merger, and other tech companies will think much harder about whether to proceed with deals they might have liked.^[2]
- **Further, the decision could affect many other deals** being considered, one way or another, including the Microsoft/Activision and Amazon/One Medical deals. Microsoft and other commentators have framed the acquisition as an effort to secure a stronger position in metaverse gaming.

Will a loss cause Congress to act? One theory for why the FTC is pursuing the case was articulated by the FTC Chair, Lina Khan, in a New York Times story yesterday. The article reported that “In April, Ms. Khan said at a conference that if ‘there’s a law violation’ and agencies ‘think that current law might make it difficult to reach, there’s huge benefit to still trying.’ She added that any courtroom losses would signal to Congress that lawmakers needed to update antitrust laws to better suit the modern economy.”

Putting aside the policy merits, we are skeptical on the politics.

- We don’t think the Meta case involves a fact pattern that will cause a political backlash if Congress does not act. The transaction is too small, involving a product that is too limited in market reach, to cause consumer outrage if the Court allows the deal to proceed. Further, Meta’s stock losses (down 66% YTD) suggest the market sees Meta as subject to new competitive forces and does not see the metaverse as an attractive market for Meta.
- Congress’ inaction on antitrust in the current session, despite bipartisan support for reining in the power of

Big Tech, suggests underlying problems in enacting new powers into law. There are multiple problems in passing antitrust legislation including that Republicans appear supportive only if the legislation adopts the conservative preference for limited content moderation, which is at odds with Democratic concerns about the proliferation of the type of online content conservatives seek. So far, nothing has emerged to untie that Gordian knot. We don't think the FTC losing the Within case will do so.

- In a new Congress that is divided -- with Republicans controlling the House and Democrats controlling the Senate – a deal on antitrust reform that responds to Chair Khan's concerns seems unlikely.

Further analysis forthcoming. We will provide further analysis when the four proceedings are over or, if there is a decisive moment, a more immediate update.

[1] We are not sure what the product market is, which is one of the interesting issues in the antitrust case. The complaint says the transaction “poses a reasonable likelihood of substantially lessening competition in the market for VR dedicated fitness apps,” but we have our doubts about whether the FTC can demonstrate that “VR dedicated fitness apps” constitutes a relevant product market. Notably, the FTC already dropped its claims related to the broader VR market, as we described in a previous note ([LINK](#)).

[2] Ironically, if Wall Street does not like a deal — and Wall Street is clearly skeptical of Meta's metaverse ambitions — the stock could rise if a deal were rejected. Here, however, a rejection would signal that all Big Tech companies may have problems in growth strategies premised on acquisitions. Alternatively, Meta winning might signal that the climate remains open to such transactions.

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