

The “Tech Antitrust Cases” — A Survey of Current Cases against “Big Tech”

Presented by Hill Wellford

May 26, 2023

1

What are the “Tech Antitrust Cases?”

FTC v. Meta/Within

UK CMA v. Amazon Shopping

UK CMA Cloud Services
(Amazon & Microsoft)

Two themes:

- **“Potential competition”** – when is a big company presumed to be capable of “building,” so it shouldn’t be permitted to “buy?”
- **Product design and platform sponsorship** – when can a competition authority second-guess a fundamental way that a tech platform operates?

DOJ v. Google Advertising

FTC v. Microsoft/Activision

FTC v. Meta/Instagram/Whatsapp

2

Tech Antitrust Cases - Sorted

- **Merger Injunction Cases**
 - FTC v. Microsoft Corp. / Activision Blizzard King
 - FTC v. Meta Platforms, Inc. / Within Unlimited, Inc.
- **Consummated Merger Cases**
 - FTC v. Meta / Instagram / Whatsapp
 - DOJ v. Google Advertising
- **Unilateral Conduct Cases** (with elements of platform competition)
 - UK CMA v. Amazon Shopping
 - UK CMA Cloud Services Investigations (Amazon & Microsoft)
 - DOJ v. Google Search
- **Platform Competition** (purely)
 - App Store Practices Litigation (Apple App Store & Google Play)

3

The Biden Administration's Antitrust Enforcers

- **Federal Trade Commission**
 - Lina Khan, Chair
 - 2017 Yale Law School graduate currently on leave from her position as an Associate Professor at Columbia Law School; took office at 32 years old
 - Renowned among progressive antitrust proponents for her concern about business concentration in general and her hostility to Big Tech in particular
 - FTC currently consists of 3 Democrats and 2 vacancies
 - Republicans resigned, criticizing Khan as not attempting to be bipartisan
- **DOJ Antitrust Division**
 - Jonathan Kanter, Assistant Attorney General of the Department of Justice's Antitrust Division
 - Started out as an FTC staff attorney in 1998 before moving to a firm
 - Has extensive experience defending antitrust investigations and also has represented complainants against Big Tech companies



4

FTC v. Microsoft Corp. / Activision Blizzard King

- January 2022 deal announcement, \$70 billion
 - Microsoft is the largest OS publisher / desktop gaming platform; its Xbox is the second-largest console
 - ABK is the largest independent game developer
- In December 2022, FTC sued in Part III (administrative court) to block the deal, alleging:
 - “Vertical foreclosure” – ability to deny games to rival platforms
 - Three “markets”: consoles; multi-game subscription services; cloud gaming
 - Alleges Microsoft has a history of disavowing exclusivity in games (and other software), then going exclusive anyway (broken promises)
- What to watch:
 - Vertical foreclosure theories don’t break new ground
 - But applying them in the fast-moving world of games may prove challenging
 - Are the lines between these “markets” clear?
 - Does it matter that Xbox is #2, while Sony PlayStation is #1?

5

FTC v. Meta Platforms, Inc. / Within Unlimited, Inc.

- In October 2021, Meta announced plans to buy Within
 - Meta, the parent of Facebook, is aggressively moving into “Virtual Reality”
 - Within is a maker of VR fitness apps
 - Within’s Supernatural app offers 800+ fully immersive VR workouts
- In July 2022, the FTC voted 3-2 to sue in federal District Court (N.D.Cal.)
 - Democrat Commissioners overruled an FTC staff recommendation to close the investigation
 - The two Republican commissioners dissented
- Key allegation is “potential competition” – Meta doesn’t offer VR fitness apps, but could
 - FTC seemingly adopted the position that companies with sufficient financial and technical resources should build instead of buy their way into a new market; to do otherwise violates Section 7?
- In January 2023, court denied the FTC’s request for a PI; FTC later dismissed its admin case
- Lessons:
 - Potential competition isn’t a new theory
 - But it can’t be mere speculation – there was no evidence that Meta planned to make VR fitness apps

6

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Recent Antitrust Tech Cases and Update on Non-Competes

Also available as part of the eCourse

[2023 Technology Law eConference](#)

First appeared as part of the conference materials for the
36th Annual Technology Law Conference session

"Recent Antitrust Tech Cases and Update on Non-Competes"