



US & EU Antitrust Investigations into Major Digital Corporations Antitrust Activities

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Director

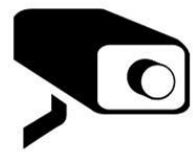
HelpUsTrade

GATEKEEPERS & DUAL PURPOSE ROLE





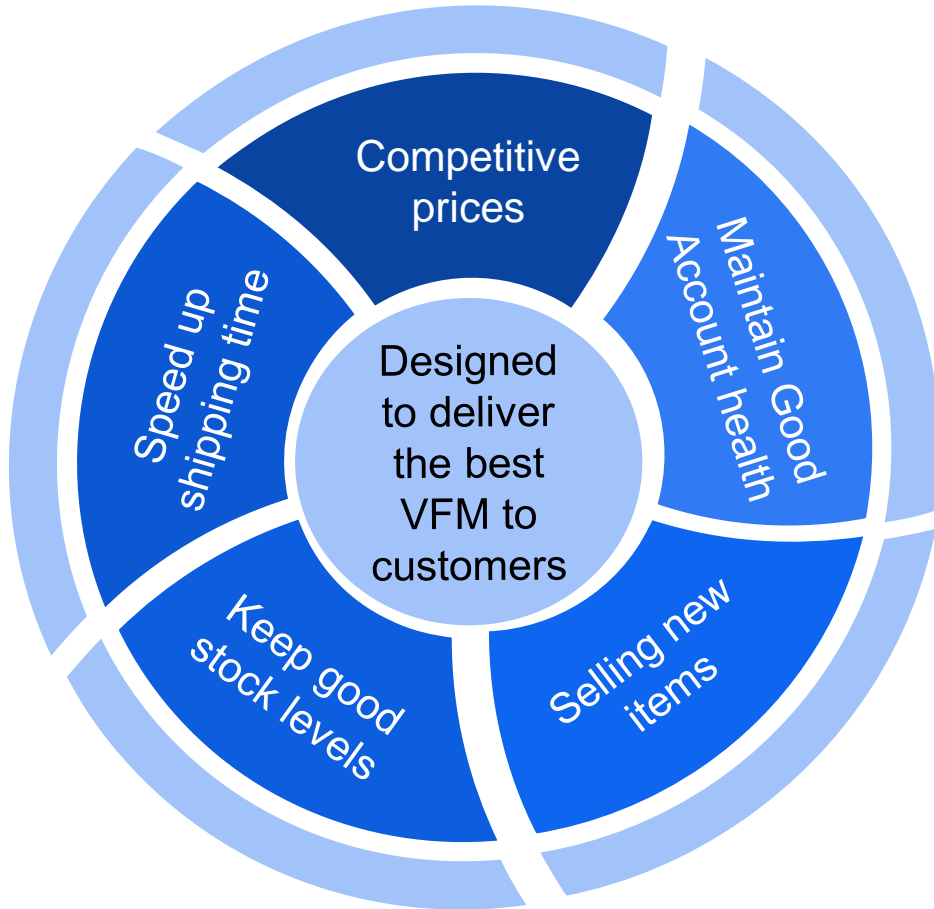
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prime video

Dual Purpose Role of Online Platforms under investigation



The Amazon Buy-Box

How does the Buy-Box work?

We DON'T know – there are no Amazon buy box algorithm hacks...BUT what we SEE is that AMAZON's own brands or sponsored choices get high visibility in Amazon searches

You can pay to be in the Buy Box!!!

Dual Purpose Role of Online Platforms under investigation

Step 1

1. Information you give Amazon
2. Information from other sources, e.g., delivery data from carriers
3. Data it collects automatically, e.g., Kindle e-reader will collect data such as what you read, when, how fast you read

Step 2

- Amazon can work out such as:
1. Where you work
 2. Where you live
 3. How you spend your leisure time
 4. Who your family & friends are
 5. Revealing your thoughts, feelings, preferences & beliefs

Step 3

Using the collected data to benefit Amazon rather than YOU the consumer!!!

2021: Amazon hit with \$886m fine for alleged EU data law breach.

Dual Purpose Role of Online Platforms under Investigation

The Amazon Buy-Box – the antitrust threat...

Amazon collects consumer data, to find out what are the most popular products consumers like, and then it produces its own version of those popular products and puts them in the “buy box” for consumers to buy...

What is the Competition problem?: Amazon, the gatekeeper of the selling platform is also simultaneously a market participant, pushing its own products in front of consumers to the detriment of other independent sellers' products OR products of others who are “sponsored” (fee paid).

....Amazon's access to consumer data is aggravating the Buy-Box antitrust problem.



EU Buy Box investigation settled (2022)....

...Amazon agreed to share its analysis of consumers preferences with other sellers on its platform.

But does solve the Competition problem???

...seems a curious result because Amazon still controls the buy-box...while ALSO remaining a market participant itself.

Amazon – Other eyes are also on Amazon...



House Judiciary Ctee



Other eyes are also on Amazon...

2022: The *UK Competition and Markets Authority (CMA)* opened its own investigation into Amazon's "Buy Box" use of consumers' data

2020: The US shares similar concerns, highlighted by the *US House Judiciary Committee's 2020 Antitrust Subcommittee Report*

"[i]ndustry experts estimate that about 80% of Amazon sales go through the Buy Box [...]",

AND the existence of other anti-competitive concerns surrounding Amazon's "significant and durable market power in the US online retail market" (i.e., probable "dominant position"); and "Amazon's asymmetric access to and use of third-party seller data".

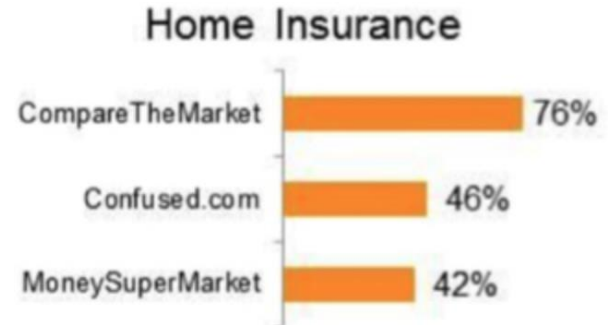
Developments in the United Kingdom

ComparetheMarket.com (2020, CMA)

CMA finds Comparethemarket.com holds over 70% of the household insurance market

2020: the CMA condemned price-fixing and other anti-competitive practices engaged in by the CTM.com platform, imposing a £17.9 million fine (USD\$ 24.8m) on platform owner BGL for breach of *the UK Competition Act 1998*.

The CMA found that the platform imposed unduly **wide ‘most-favored nation’ (“MFN”) clauses** on home insurance companies, *preventing them* from placing their insurance products on either their own website or other competitors’ price-comparison websites, *at more competitive prices*.



UK Comparethemarket.com compares interestingly with the German *Booking.com BV v Bundeskartellamt* (FCO) 2019

The Court held that Booking.com's imposition of **narrow 'most-favored nation' ("MFN") clauses** on hotels prevented them from placing their hotel rooms on their own websites *at more competitive prices....*

...BUT also held that use of such narrow MFN clauses was acceptable because they do not seek to prevent the hotels using Booking.com *from offering lower prices to consumers via other price comparison websites.*



Developments in China...



....the equivalent of Amazon



....the equivalent of Uber Eat



....the equivalent of Meta
(Facebook)

Alibaba and the ‘choose one from two’ conundrum (China’s version of wide MFN clauses)



‘*Choose one from two*’ sounds simple enough!!!....but not when it means you must lose access to one companies’ services in order to maintain access to the dominant company’s services...

Alibaba’s online platform (50%+ market share) allowed companies sell products to consumers, BUT those sellers COULD NOT offer their products on competing platforms = abuse of dominant position by refusing to supply access to China’s dominant online marketplace UNLESS the seller removed their products from other competing online marketplaces.

So, the ‘choose one from two’ requirement constitutes an abuse of dominance

April 2021: SAMR fined Alibaba an equivalent to **USD\$2.8 billion**.

Meituan and the 'choose one from two' conundrum (China's version of wide MFN clauses)



Meituan and the ‘choose one from two’ conundrum (China’s version of wide MFN clauses)

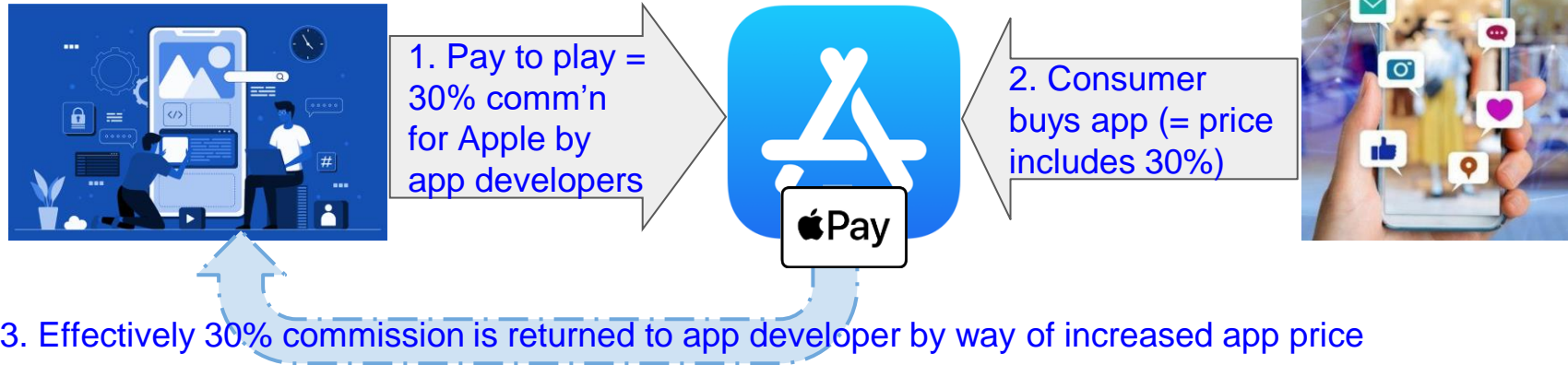
Meituan (like Uber Eat) is the dominant takeaway food delivery platform in China (60%+ market share).

Meituan required restaurants seeking to use its food delivery platform to stop using competitor platform “E Le Ma?” (“Are you Feeling Hungry”).

This ‘choose one from two’ strategy constituted an abuse of dominance ... SAMR fined Meituan **USD \$530 million (2021)**.

So interestingly, China’s antitrust regulator is becoming very active against major online platforms abuse of dominant position.

Apple – *In re Apple iPhone Antitrust Litig.* (2013) 11-cv-06714-YGR (N.D. Cal.) (“Apple v Pepper”)



2013: Apple charges a 30% commission to app developers every time a consumer purchases a developer’s app. Consumers buy the apps from Apple’s App Store.

4 US consumers took a class action in California alleging overcharging by Apple arguing that the app developers’ commission fee was in effect being loaded onto them when the app purchase price was set by the app developer.

... “*Apple v Pepper*” (*In re Apple iPhone Antitrust Litig.*
(2013) 11-cv-06714-YGR (N.D.Cal.)



Apple argued it bore **no** responsibility if app developers chose to recover some of Apple’s 30% developers’ commission fees from consumers.

The Court: Although the District Court (Nth. Dist. Calif.) held the 30% arrangement constituted price fixing between Apple and the app developers (contrary to the Sherman Act 1890, even though the app developers had little choice in the matter), **HOWEVER**, the Court also held that plaintiffs had no standing to sue Apple because it regarded them as “indirect purchasers” (because they were purchasing the apps from Apple, not from the party who set the app price (the app developers), and indirect purchasers cannot sue for antitrust damages according to *Illinois Brick* US Sup Ct (1977))

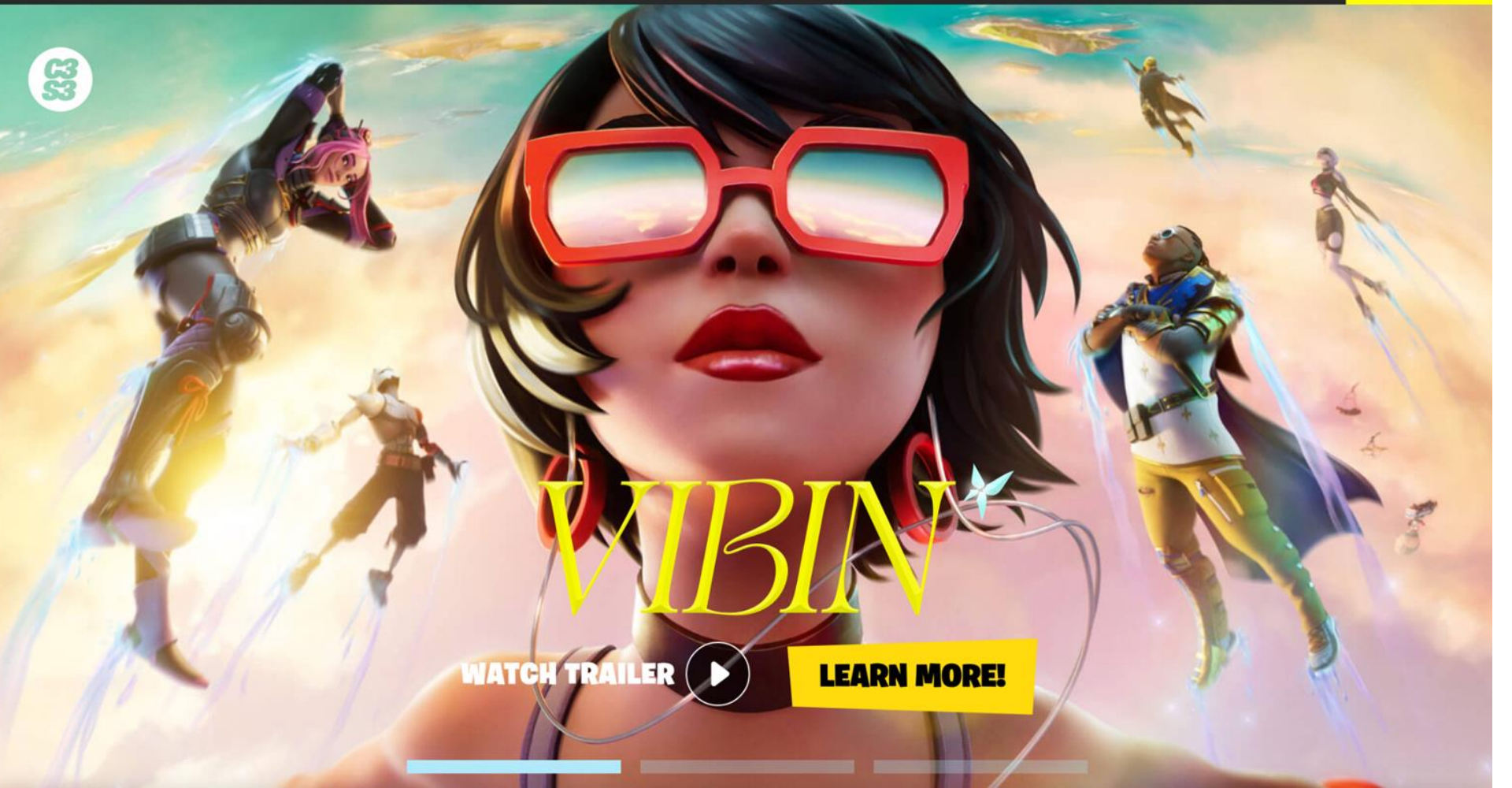
Apple v Pepper Appeal to 9th Circuit...& Supreme Court



May 2019: The US Supreme Court upheld the Ninth Circuit's decision (reversing the Dist. Ct) holding that the complainants *were direct purchasers from Apple's App Store:*

- ❖ they can sue Apple pursuant to the Clayton Act for damages for antitrust harm “*caused by the purchase of goods at higher than competitive prices from an allegedly monopolistic retailer*” ...
- ❖ “immediate buyers from an alleged antitrust violator may maintain suit against the violator” because “*the absence of an intermediary in the distribution chain between Apple and consumers is dispositive.*”

[Normally, in the US, *indirect purchasers* cannot sue at Federal level (*Illinois Brick 1977*) because they have no contractual relations with the party involved in the illegal price fixing arrangements. However, in *Apple v Pepper*, the Supreme Ct decided that consumers who purchase apps *from an online platform's app store are direct purchasers, rather than indirect purchasers just because consumers have no contract with the party who set the app price (app developer), does not make them *indirect purchasers* BECAUSE the iPhone owners purchased the apps from Apple, a party directly involved in the alleged price-fixing: THIS is what makes them direct purchasers from Apple, and so they can sue Apple].*



VIBIN

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Epic Games, Inc. v. Apple Inc. (2020)
No.4:20-cv-05640-YGR (N.Dt.Cal.)



In 2020: Epic Games sued Apple alleging abuse of dominant position

- a. in the app purchasing market (i.e., App Store) by forcing app developers to create Apple platform-compatible apps for Apple users wishing to play Epic Games on their Apple devices; and because
- b. the App Store in-app payment requirement demands that app users process their app payments exclusively through Apple's in-app payment processing system (this ensures that Apple can deduct the 30% commission fee automatically every time a consumer buys an app);
- c. Dist. Ct. (CAL.) did not hold for Epic Games. EPIC (supported by the DoJ and 35 US State AG's) has appealed the ruling (9th Circuit) and the appeal outcome is awaited.

EU Commission investigations into Apple's Gatekeeper roles (20/21)



EU Commission investigations into Apple's Gatekeeper roles (20/21)



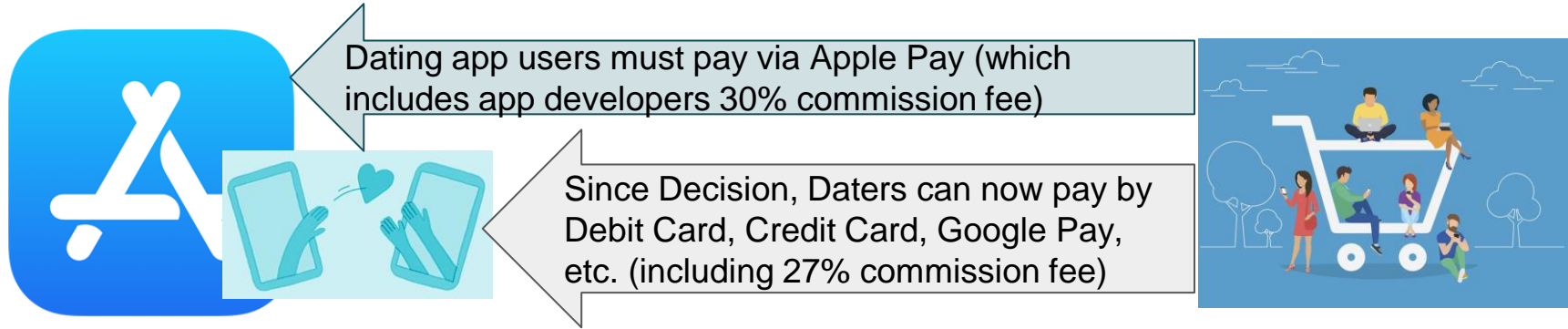
The EU Commission opened antitrust investigations investigating Apple's "gatekeeper" role in the distribution of apps /charging app developers 30% commission.

2021: Commission preliminary findings: Apple has abused its dominant position: "Apple's devices & software form a "closed ecosystem" in which Apple controls every aspect of the user experience for iPhones & iPads" because no one else can enter the app-selling market for Apple devices AND consumers can only pay through *Apple Pay*.

Apple has responded and a final decision is awaited – possible outcomes:

- a. Apple allows consumers pay through other methods other than Apple Pay?; or
- b. Commission imposes massive fine? (up to 10% of worldwide annual turnover); or
- c. Commission Decision suspended while Apple lodges appeal to Commission Decision to EU General Court in Luxembourg)

Straws in the Wind for Apple from The Netherlands dating scene....



2022: The Netherlands Authority for Consumers and Markets (ACM) **successfully** required Apple to revise their payment conditions for dating apps, bringing them into line with the Dutch Competition Act, by:

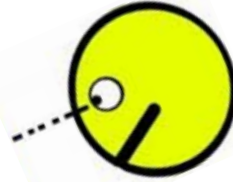
- 1) permitting *different payment methods* to be used for the dating apps, other than Apple Pay; *and*
- 2) Getting apple to reduce app comm'n fees to 27% (from 30%)

Google – being investigated on both sides of the Pond ...

US Justice Department
(2020)



EU Commission (2022)



36 US States AG's &
District of Columbia
(2021)



UK CMA (2022)



Google – being investigated both sides of the pond ...



December 2020: US Justice Department (and more than 30 US States) jointly filed a complaint alleging that Google's dominance in the global search engine market has led to practices harming consumers & advertisers by use of unfair restrictive & exclusionary search practices...

July 2021: 36 States AG's & District of Columbia brought a new suit against Google over its anti-competitive tactics to extract a 30% commission via Play Store for Android users...

March 2022: EU Commission opens antitrust investigation into Google's use of consumers viewing / purchasing / location data in the online advertising market as it suspects abuse of dominance by Google charging advertisers at different prices for advertising practices without objective justification)...

June 2022: UK CMA opens investigation into Google obliging app developers to use Google's own payment system (Google Pay) for in-app purchases (similar to Apple Pay investigation)...

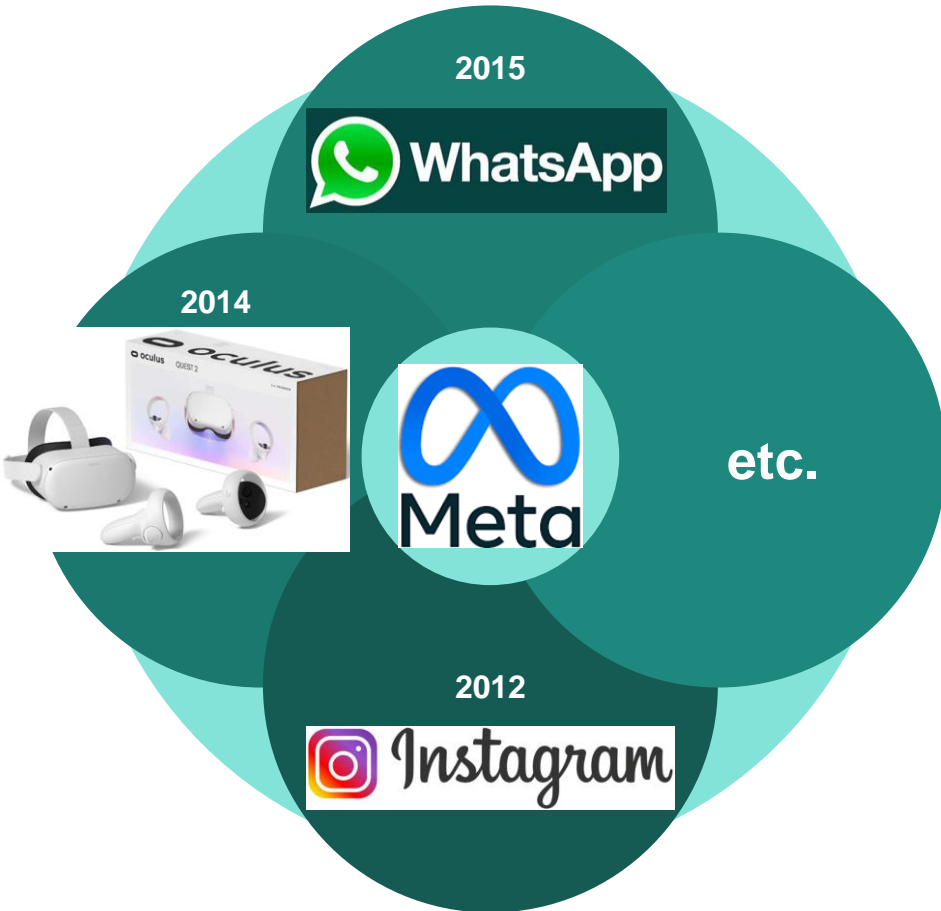
Competition Killing Acquisitions by US and China players...
massive market concentration ...

Regulators asleep at the wheel...



“Acquisitions are part of every industry, and just one way we innovate new technologies to deliver more value to people.”

Competition Killing Acquisitions by US player...



Target business	% of M&A (2009- 2020)
Social Media	14%
Messaging	10%
App Development	6%
Augmented Reality	6%
Publishing	5%
Data Science / Analytics	4%
Advertising	4%
Cyber Security	3%
Sound production	3%
Virtual Reality	3%
Others	43%
Total	79



Competition Killing Acquisitions by China player

Tencent 腾讯

A social enterprise powerhouse: under one roof, TENCENT (China's Facebook) has acquired China's equivalent of WhatsApp, Spotify, Kindle and Apple Pay, etc. under one roof...

Games

2021: Sumo Group (100%)

2013: Epic Games (40%)

Search Engine

2016: Sogou (100%)
(no.2 in the market)

Tencent

Found in 1998

Entertainment

2016: ChinaMusicCorp (100%)

2014: Cloudary Corp
(100%, Kindle equivalent)

etc.

For
mobile email
& instant message



The End

or

the end of the Beginning?