



ELB Blogpost 32/2024, 28 June 2024

Tags: Metaverse, Statehood, Digital Services Act, Fundamental Rights, Platform Regulation, Web 4.0

Topics: Administrative Law, Artificial Intelligence, Data Protection and Digital Governance, EU Constitutional Law

Regulating the Virtual World as a new State

By Annelieke A. M. Mooij & Jip Tushuizen

The European Commission has recently published an initiative that aims to regulate virtual worlds and Web 4.0 which is structured around the objectives of the Digital Decade policy programme. Virtual reality (VR) is a relatively old concept that was introduced primarily through gaming environments but given a new meaning through the introduction of the “Metaverse”. The Metaverse allows users to enter an immersive virtual reality that offers relaxation, education or an office environment. The wide variety of virtual realities that are part of the Metaverse brings expected use to new levels. It is estimated that, by 2026, [25% of the global population will spend at least one hour a day in the Metaverse for the purposes of either work](#), shopping, education or entertainment. Unlike current online stores or movie platforms, the Metaverse will provide a 3D immersive environment where users can interact with other users. Companies like Apple, Google, Roblox and Microsoft have made significant investments, with the total market size expected to [hit 800 billion US dollars by 2030](#), potentially contributing [2.8% to global GDP in the tenth year](#) after its creation.

The interaction with other users has been proven to produce positive, but also very negative virtual experiences, sometimes even amounting to virtual rape. [Victims have stated that whilst this act was virtual, the emotional damage was physical](#). VR technology has improved since 1993 when the first virtual rape occurred. Its current state can be so realistic as to confuse the human body with reality, impacting both our conscious and subconscious [emotional state](#). Immersive environments further have a significant impact on users’ vision of the world. For example, gamers who are continuously confronted with

oversexualized female avatars in games are more likely to tolerate sexual harassment and to [support the rape myth](#).

Regulating the Metaverse hence does not seem an unnecessary luxury. This post will argue that the current regulatory approach under the [Digital Services Act](#) is insufficient. Whilst new regulation is highly desirable, it should not extend to provide *de facto* statehood to Metaverse providers.

Regulatory choices in the EU

The European Commission is currently working on a new [legislative proposal to regulate virtual realities](#). While the initiative is still in its infancy, it concretely puts forward four pillars. The most important from a regulatory perspective is the third pillar: government. The Commission is not clear in how it intends to regulate the virtual worlds, but it refers to the applicability of the [Digital Services Act \(DSA\)](#). The DSA's approach is primarily focused on the transparency of the terms & conditions and complaint procedures, but it does not regulate content. It determines applicability of fundamental rights (see e.g. Art. 1(1)) but fails to provide concrete elaboration. It further considers that content flagged as 'illegal' should be appropriately taken care of, but only refers to Union law and national law of Member States for the exact definition of what exactly constitutes 'illegal content' (see e.g. Arts. 16 and Art. 3(h)). Harmful content is furthermore excluded from this regime.

The counter-model to the DSA's regulatory approach, so far not considered by the Commission in its Initiative, would be an emphasis on content regulation, whereby providers have to allow all speech without discrimination. Speech could only be limited when it is prohibited by law. This type of approach severely limits the freedom to conduct a business (Art. 16 CFREU) as all virtual realities are *de facto* regulated as public spaces. Nevertheless, this approach is considered to [contribute to a safe digital environment](#). It would, however, entail assigning legal duties and limits on private legal persons that closely resemble those of a State. A legal person would have to monitor and effectively enforce the fundamental rights of its users. In this monitoring, the provider arguably becomes an extension of the State's police. Similarly, virtual worlds can install their own [dispute resolution proceedings](#). [Increasing regulatory responsibilities for the Metaverse providers could reach a point where they are *de facto* mini-States. Whilst this approach may increase digital safety it raises the question of whether we could and should](#) think of virtual realities as the new State?

Human rights and the Metaverse

Earlier generations of the internet were expected to produce substantial societal benefits by facilitating more efficient communication infrastructures. However, the destructive force of the internet has arguably turned out greater than initially anticipated with its ability to foster strong polarization, [spread misinformation](#) and reinforce pre-existing [patterns of oppression](#). An example of the latter can be found on Facebook, with the platform notoriously punishing black women's comments [speaking out against racism and sexism](#). In fact, Facebook's algorithms have targeted hate speech directed at white persons disproportionately compared to hate speech directed at any [other societal group](#). Platform policies seeking to protect marginalized communities hence actually reinforce marginalization. Algorithms further generally consider the white male as the default, which resurfaced when Amazon had to discontinue using an AI hiring tool which rendered resumes containing variations of the [word "women's" as less desirable](#).

With further development of newer generations of the internet facilitating the development of entirely virtual spaces, the foregoing issues will aggravate exponentially if left regulated insufficiently or incorrectly. In fact, it has already been established that users of existing virtual spaces struggle with reporting mechanisms. Users describe that it is often difficult to identify the speaker, that usernames are not easily traceable and that it is relatively difficult for a new user to figure out [how to report harassment](#). The definition of "online harassment" is further highly subjective. Harassment within a virtual space is experienced much more intensely by some identities than others and besides, full embodiment and presence within a virtual space facilitate [a far more intense experience](#). It logically follows that users choose to customize their avatar in a way that reflects an identity that is subjected to the least amount of harassment, rather than have their avatar reflect their own physical identity. As a person of colour has pointed out: "[Since I can choose to get treated like a black person or not get treated like a black person—I'm probably going to choose not to get treated like a black person](#)".

Where one identity is deemed more "favourable" than the other, it logically follows that Metaverse spaces risk being overrepresented by identities rendered more "favourable" compared to others. Not only does this inherently communicate a narrative of desirability, it also projects a remarkably one-sided view of the world. Such a one-sided projection of reality unarguably runs the risk of seriously enhancing existing patterns of oppression towards minority groups both virtually and physically.

Human rights obligations of States vs companies

The modern conceptualization of Statehood is defined by the Westphalian system, identifying State sovereignty and the principle of territorial integrity as the foundations for the international legal system since 1648. Consequently, international human rights law is traditionally premised on the assumption that the sovereign State as the quintessential bearer of international obligations is responsible for the protection of fundamental rights within its territory. This logic firstly insinuates a hierarchy between the “oppressive” sovereign on the one hand and the citizen requiring protection from this oppression on the other. Secondly, this Westphalian logic is premised on the notion that the sovereign State is the exclusive actor within a legal system that is capable of [wielding oppressive power against an individual](#).

Crucially, corporations are not, or at least not directly, subjected to international human rights obligations as it is the State that is burdened with this responsibility. [Currently, companies merely face the moral responsibility to conduct a process of assessing, preventing and mitigating existing and potential adverse human rights impacts of operations across their supply chain](#). However, this process of human rights due diligence is derived from a soft law mechanism which does not produce legally binding obligations. [Whilst the EU legislator has recently adopted a legally binding framework](#), emphasis remains on the avoidance of contribution to human rights violations rather than a responsibility to actively [safeguard human rights protection across business operations](#).

The oppressive corporation

The traditional idea of the State monopoly on power and coercion has been proven to hold less relevance for today’s realities, with surveillance tasks increasingly becoming fragmented across various public and private actors. In fact, the idea of assigning State-like regulatory duties to private companies is far from modern, with former colonial companies like the Dutch and English East and West India companies being granted sovereign powers ranging from the right to form [colonies to the right to use force](#). Interpreting the concept of ‘power’ in a broader sense, namely the ability to create or [destroy wealth within a system](#), it follows that this trend undeniably mirrors today’s realities, with corporations representing 69 out of the top [100 largest economic entities globally in 2015](#).

With citizens increasingly practicing their daily needs and responsibilities in the Metaverse, the question to what extent this virtual world then factually still differs from life in a nation State is not far-fetched. Metaverse operators, predominantly represented by [white or Asian non-queer men](#), can decide who gets to enter their virtual space and what type of behavior is deemed desirable. While the DSA mentions the applicability of fundamental

rights to the regulation of online platforms, it is still questionable how this precisely plays out in practice. For example, the question arises whether operators can exclude certain identities from their virtual space without a valid cause. Upon entry, a user is obliged to accept the rules and guidelines of the platform. If the user disagrees, it is still uncertain to what extent these guidelines could effectively be challenged in a court. Users are left with the option of either agreeing and signing away their rights or disagreeing with [subsequent exclusion from the platform](#). Such corporate policies are therefore capable of imposing restrictions on the user's fundamental rights protection that undeniably resemble the intrusive character of regulatory decisions taken by the nation State.

Corporate sovereignty?

Accordingly, the corporate creator of the virtual space increasingly assumes the [factual position of a regulatory actor with consequences that reach considerably further than previously seen](#). It takes on an authoritative role that inherently insinuates a hierarchy towards its users which mirrors the hierarchical position of the State against its citizens. Mark Zuckerberg has already indicated that he considers Facebook as a government with the policies it is developing and the number of [users it has gathered](#). The company even announced the introduction of its own digital currency: the Libra.

Apart from a government, a recognized State under international law possesses a permanent population, a defined territory and the capacity to enter into [relations with other States](#). The population of a Metaverse consists of its users, with the distinct virtual space providing for a defined territory these users can inhabit. Some argue that the sovereignty of the company is based on data rather than territory, rendering the boundaries of this sovereignty rather fluid. Metaverse companies could further enter into agreements of interoperability with other companies which determine the conditions based on which users and their data could 'travel' from one virtual space to the other. Yet, the extent to which these criteria apply to companies remains highly debatable. Indeed, corporate actors are not authorized to exercise physical coercion against citizens or collect taxes. While the latter issue could reasonably be refuted by the argument that the collection of data largely equates to the collection of taxes due to their monetizable character, or by selling data storage plans based on the amount of virtual goods a user wishes to store, the argument remains that corporate sovereignty inherently takes on a different form than State sovereignty. This becomes more apparent when considering that States and companies inherently project different narratives onto their target audience, with the former employing a vocabulary of citizenry while the latter considers its subordinates as 'customers' with the [subsequent prioritization of commodification over human autonomy](#).

Nevertheless, the foregoing proves that Metaverse operators are factually exercising regulatory actions that mirror those of a State. Scholars draw an analogy with the financial principle of 'same activity, same regulation', prioritizing a logic of assigning regulatory duties based on an actor's [conduct rather than their status](#). In the context of a Metaverse, the overwhelming majority of power and factual control over the virtual space is likely assigned to one or a few dominant actors. Evidently, the extent to which the sovereign State can then still exercise factual control over this space that is entirely detached from State borders is severely limited. Subsequently, the ability of the regulatory approach taken under the DSA to effectively regulate such Metaverse spaces is highly questionable.

Conclusion

The development of Metaverse spaces undeniably creates promising societal benefits. Yet, as seen with the regulation of Web 2.0, the stakes for the Commission's web 4.0 initiative are exceptionally high. It is crucial to be ahead of the developments in order to prevent power balances between States and private corporations to shift drastically. If the issue of human rights protection remains to be overlooked by the initiative, the possibility of an all-powerful Metaverse operator arising, or possibly even a "[Virtual Wild West](#)", becomes increasingly realistic. While legislative efforts provide for promising frameworks, further elaboration on human rights duties of companies is crucial to facilitate a responsible transition into the virtual space. While it is largely undisputable that rendering Metaverse platforms as entirely sovereign States is rather undesirable and unrealistic, it is quintessential to assign responsibilities that mirror the factual position and regulatory actions of operators. Yet, the EU legislator will have no easy task in determining to what extent such duties should be assigned upon providers and what form these duties should have.