Proskauer

Microsoft Defeats FTC's Roadblock on Path to Activision Merger

Minding Your Business on **July 14, 2023**

In the latest of a string of losses for antitrust enforcers, the Northern District of California resoundingly denied the FTC's bid to enjoin the *Microsoft-Activision* merger, allowing the deal to proceed a week in advance of its upcoming merger termination date. In a case that tested the bounds of antitrust law in vertical integration deals, Presiding Judge Jacqueline Scott Corley found "the record evidence points to more consumer access," rather than showing signs of reduced competition. *Federal Trade Commission v. Microsoft Corporation, et al.*

Microsoft's acquisition of Activision was announced on January 18, 2022, spurring a whirlwind of regulatory approval hearings across the globe. With an impending merger termination deadline of July 18, and a fear that Microsoft would close its deal in advance of the upcoming FTC proceedings set to begin on August 2, the FTC attempted to jump-start its offensive by filing a TRO and preliminary injunction in the Northern District of California, asking the court to halt Microsoft's ability to close the deal. Judge Corley summarily granted the TRO, and parties quickly began preliminary injunction hearings on June 22.

In two tales of the same deal, Microsoft described Activision's video game content as an opportunity to expand Microsoft's mobile gaming portfolio. The FTC narrowed its focus to the vertical integration of Microsoft's Xbox gaming console paired with the unprecedented popularity of Activision's *Call of Duty* franchise. It hypothesized that control over the game would be enough for Microsoft to force gamers into the Xbox market and drive out competition. In doing so, the FTC argued for limitation of the relevant market to include only "Gen 9" consoles by Xbox and PlayStation, eliminating Nintendo's most recent launch, the portable Nintendo Switch, from the playing field.

Judge Corley's opinion was quick to highlight facts that suggest the FTC's focus on console gaming was overblown, having lost its prior predominance to now "represent a smaller share of video game revenue than either mobile or PC" gaming. Judge Corley also took note of Microsoft's argument that both Nintendo and PlayStation already had a "significantly higher number of exclusive games" than the Xbox.

In evaluating the parties' relevant market dispute, Judge Corley suggested that the console market would include Nintendo given that the distinct features of the Switch could increase its attractiveness and draw purchasers away from competing consoles. Nonetheless, Judge Corley allowed the analysis to proceed on that point, stating that the FTC had met its burden at the preliminary injunction stage to make a "tenable showing" of a Gen 9-only market.

But the FTC fell short in arguing a risk of anticompetitive effects. Specifically, the Court found that the combined firm would have the ability, but not the incentive, to foreclose the *Call of Duty* franchise from competitors. First, Microsoft had not shown any signs of an intent to make *Call of Duty* exclusive, instead reaching out to competing platforms such as Valve and Nintendo in efforts to continue and expand *Call of Duty*'s multi-platform success. Sony's own CEO Jim Ryan agreed in a widely-circulated email that Call of Duty will be on PlayStation "for many years to come." The Court also noted that the deal documents were consistent with Microsoft's testimony, reflecting a purchase price that relied on cross-platform sales and reflected Microsoft's major focus on instead increasing its mobile content. And exclusivity of the game would not create increased value for Microsoft – instead, it would lose valuable cross-platform play and face the wrath of angry gamers.

The Court found the FTC's contrary evidence lacking. Judge Corley noted that the FTC's key expert Dr. Robin Lee did not "dispute the evidence of Microsoft's lack of an economic incentive." When Microsoft's expert, Dr. Dennis Carlton, argued that the FTC's evidence rested on faulty assumptions as to the consumer choices made by gamers, the FTC responded with "nothing," and "chose not to challenge, or even address, Dr. Carlton's identification of material flaws" in the model. Judge Corley also discussed that the Microsoft merge would bring increased access to *Call of Duty*, and enhanced competition, via subscription services and cloud streaming.

Though the FTC has said it will appeal, the decision further clears the path for Microsoft to close its deal in advance of the July 18 deadline.

View original.

Related Professionals

- **Colin Kass**
  Partner
- **David A. Munkittrick**
  Partner