



July 11, 2023

Court Rejects FTC Attempt to Block Microsoft - Activision Blizzard Acquisition

On July 10, 2023, a judge in the United States District Court for the Northern District of California denied a motion by the Federal Trade Commission ("FTC"), the U.S. antitrust (competition) regulator, for a preliminary injunction to block Microsoft, maker of the XBox video gaming platform, from completing its >\$70 billion acquisition of virtual reality ("VR") video game publisher Activision Blizzard, maker of the "Call of Duty" and "World of Warcraft" games, leading entries in the nearly \$200 billion gaming sector. The decision scuttles a scheduled August evidentiary hearing before an FTC administrative law judge and clears the merger to close everywhere but in the U.K., where the competition regulator blocked the merger, perhaps as early as this month, ahead of the July 18 expiration of Microsoft's bid and vesting of a \$3 billion termination fee to Activision. A copy of the 53-page decision by U.S. District Judge Jacqueline Scott Corley, redacted to protect trade secret information, can be found [Here](#).

We reported on the FTC's attempt to block the merger in December and U.K. blocking of the deal in April. The FTC alleged that the proposed merger violated s. 7 of the Clayton Act (18 U.S.C. s. 12, *et seq.*, s. 18), which prohibits mergers and acquisitions of either stock or assets whose effect "may be substantially to lessen competition, or tend to create a monopoly." Microsoft competes directly with Sony's Playstation and Nintendo's switch as the troika of leading makers of high-end video gaming consoles, with a sub-segment of the industry consisting only of Microsoft and Sony competing for the most technologically advanced gaming consoles.

The FTC also alleged that the proposed merger will create a combined firm with incentives to withhold or degrade Activision's games for use by competing console makers, leading to reduced consumer choice, higher prices, and lower quality products; reduce

innovation in optimizing Activision content for competing platforms; and reduce competition for high-end consoles and gaming subscription services in the United States.

Judge Corley's decision rejects the FTC's arguments and dissolves the preliminary injunction blocking the merger effective July 14 (to allow the FTC to appeal to the United States Court of Appeals for the Ninth Circuit). The decision is a major rebuff to FTC Chair Lina M. Khan and Department of Justice ("DoJ") Antitrust Division Chief Jonathan Kanter, who have attempted to institute a newly activist antitrust review policy and rein in big tech after decades of a relatively "laissez faire" treatment of proposed M&A activity. See, "FTC and DoJ Launch Effort to Restrict Anticompetitive Mergers," "FTC Restores Restrictive Prior Approval Merger Review Policy," and "FTC Sets Ambitious M&A Enforcement Agenda," further discussed in our "Mergers & Acquisitions VIII: Antitrust Merger Control and Clearance," all available at [Kurtin PLLC Mergers & Acquisitions](#). Although Judge Corley's decision describes itself as narrowly tailored to deciding the injunction motion before her, it remains to be seen whether it presages a larger judicial reaction to the FTC/DoJ activist merger review posture.

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