

NSR Tech Policy: MSFT-ATVI: The CMA's Final Decision

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What's new?

Today, the UK's competition regulator blocked Microsoft's proposed merger of ATVI, citing concerns about the harm to competition in cloud gaming. This decision significantly increases the likelihood that the deal will not close: it is difficult to overturn the UK decision on appeal, other key regulators are now more likely to challenge the deal rather than to agree to a settlement, and the parties may decide to scuttle the deal since they face a protracted legal process ahead.

What we got wrong, what we got right:

In a 5-part series (linked to below), our view was that regulators would permit the deal to close, with MSFT offering concessions to address regulators' concerns. In an expert call on Monday, a former Justice Department antitrust lawyer echoed this view ([LINK](#)).

Yet while we believed a final settlement was likely, we anticipated that commitments related to cloud integration might be the most difficult for MSFT to agree to. We noted that "MSFT will aim to avoid these types of restrictions, but may be willing to consider them if necessary to reach a settlement" ([LINK](#)). We also noted that "negotiations may hit a snag" if they focus on concessions that "could impede MSFT's other core businesses, such as its cloud operation" ([LINK](#)). According to the UK's decision, the concessions MSFT offered to address potential harms in the cloud gaming market were not "effective."

Understanding the CMA decision:

In its [decision](#), the UK's Competition Markets Authority (CMA) states that the merger would result in the "most powerful operator in the fast-development market for cloud gaming, with a current market share of 60-70%,

acquiring a portfolio of world-leading games with the incentive to withhold those games from competitors and substantially weaken competition in this important growing market.” It found that “harm is likely to endure” and that it would “expect the harm to grow over time” due to increased demand for cloud gaming.

The CMA concluded that blocking the deal is the “only effective and proportionate way forward.” It preferred this path to a remedy that “imposes global regulatory oversight” for a 10-year period.

The CMA asserts that the MSFT’s proposed remedies would not ameliorate the loss to competition in the cloud gaming sector. Specifically, the CMA asserts that the proposed remedies are “too limited in scope,” are “not sufficiently open to providers who might wish to offer versions of games on PC operating systems other than Windows” and would “standardise the terms and conditions on which games are available” rather than being set through the “dynamism and creativity of competition in the market.”

Context:

While cloud gaming currently represents a fraction of the gaming industry, many see it as a key area for future growth. Streaming games, rather than playing them on one’s own consoles, could mean gamers could play the newest releases without having to buy expensive devices. Given MSFT’s existing cloud infrastructure, Azure and Xcloud, many have suggested that one of MSFT’s main goals in the acquisition was to bolster its streaming and subscription services, and ultimately become the “Netflix of gaming.”

Last month, the CMA had filed an addendum to their provisional findings, stating that, having reconsidered available evidence they have “provisionally concluded that the Merger may not be expected to result in a substantial lessening of competition in the market for the supply of console gaming services in the UK.” However, they continued to assert that the deal likely would result in a “substantial lessening of competition” in the “cloud gaming services in the UK.”

What happens next:

- **Deal in doubt:** This decision significantly increases the likelihood that the deal will not close:
 - It is difficult to overturn the UK decision on appeal,

- Other key regulators are now more likely to challenge the deal rather than to agree to a settlement, and
- As our expert speaker noted in our call on Monday ([LINK](#)), the parties may decide to scuttle the deal since they face a protracted legal process ahead. MSFT faces a \$3 billion breakup fee if the deal does not close by July 18.
- **A UK appeal:** Microsoft president Brad Smith has said in a statement that MSFT will appeal the decision. Under UK law, parties are permitted to appeal the CMA’s final decision to the Competition Appeal Tribunal. However, the Tribunal’s power to review the original decision is limited: it considers only the “lawfulness of a decision or action” and not the correctness of the decision itself. Assuming the CMA followed proper process, it will be difficult for MSFT to prevail on appeal.
- **Europe up next:** The European Commission’s antitrust regulator, DG-COMP, is now expected to announce their decision on May 22. A decision had been expected yesterday, but the regulator delayed a decision after MSFT submitted additional remedies for its consideration.
- **The United States:** The FTC filed a lawsuit challenging the merger in its own in-house administrative court. The administrative trial is scheduled to begin on August 2.
- **A shift in the antitrust spotlight?** As Big Tech has become a focal point for global antitrust enforcement, MSFT has largely avoided the spotlight. In our quarterly reviews of regulatory risk in the tech sector, we referred to MSFT as the “big friendly giant” ([LINK](#)). Today’s news – coupled with MSFT’s agreement to change Teams integration as a result of the Slack investigation in Europe and with increasing regulator attention on the cloud services market ([LINK](#)) – suggests that perception may be shifting.

Going Deeper:

Over the last several months, New Street Research has extensively covered the proposed MSFT-ATVI merger. In a recent five-note series, we provide a broad overview of the case:

- In our first note ([LINK](#)), we examined the **case**: regulators' main concerns, MSFT's responses, the legal standards in key jurisdictions, and the role that "litigating the fix" might play in the outcome.
- Our second note examined the **global landscape**, focusing on international regulators' review of the merger ([LINK](#)).
- The third note looked at the **judge**: the FTC's decision to pursue the case in front of an administrative law judge in its own in-house administrative court, rather than in federal court. ([LINK](#)).
- The fourth note examined the **company**: how will MSFT respond to the steps regulators are taking to potentially block the deal? ([LINK](#)).
- In our final note ([LINK](#)), we provided our assessment of the most likely **outcome** of the case.

In addition, in a piece published Monday, we looked at some proceedings in the US and UK that suggested a greater interest by antitrust authorities in examining the current competitive dynamics in the cloud services market ([LINK](#)).

Full 12-month historical recommendation changes are available on request

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