

NSR Tech Policy: MSFT-ATVI: A Resolution is Near

By Matt Perault and Blair Levin | June 16, 2023

What's new?

Earlier this week, the FTC sought a temporary restraining order and preliminary injunction in court to prevent Microsoft (MSFT) from closing its acquisition of Activision (ATVI). A judge agreed to prevent the parties from concluding the deal until after it rules in the case. A hearing is scheduled for next week.

What does this development mean for the future of the MSFT-ATVI deal?

Takeaways:

- **The judge's decision will likely determine the fate of the deal:** The judge's decision on the preliminary injunction (PI) will likely decide whether MSFT and ATVI close the deal or abandon it.
 - Although a PI decision is procedural, and the parties could continue the case on the merits in theory, the PI decision typically forecasts the final result accurately enough that it will cause the loser to abandon its case.
 - If the FTC loses, it will likely withdraw its pending suit in administrative court (that trial is scheduled to begin on August 2). If MSFT loses, it will likely abandon the deal. Neither party will want to devote additional time and resources to a losing effort.
 - A recent example of a similar case is the FTC's suit to block Meta's acquisition of Within. The FTC filed the case in its administrative court, but then sought a PI in federal court. The federal court held a hearing, and then sided with Meta. The FTC withdrew its administrative case, and Meta closed the deal.
 - Based on the timing of the Meta-Within case, we would expect the court to rule shortly after the

hearing. That case was heard in mid-December, and a decision was issued in early February. If this case followed a similar timeline, it would be resolved by early August.

- The case is being heard in the Northern District of California by Judge Jacqueline Scott Corley, a Biden nominee who was confirmed in March 2022. In March 2023, Judge Corley dismissed an antitrust suit brought by gamers seeking to block the deal.
- **But what about the UK's block of the deal?** Earlier this year, the UK's Competition Markets Authority blocked the deal. MSFT appealed that decision, but the bar for overturning the CMA's decision is high. If the CMA's decision is upheld, as we expect it to be, then the question is whether MSFT could close the deal in other markets, but offer separate MSFT and ATVI products in the UK. Some commentators now believe that is possible, and may enable MSFT to consummate the acquisition globally. If they do, it is possible that MSFT could offer a unified product in the UK in the future if the CMA's concerns ease over time.
- **Our prediction:** We continue to believe that the deal is likely to close. As we detailed in our 5-part series on the deal (see links below), our view has been that regulators would permit the deal to close, with MSFT offering concessions to address regulators' concerns. We continue to believe that the FTC faces a difficult task in demonstrating that the deal is substantially likely to lessen competition. This task is even harder for the FTC because the parties will "litigate the fix" (a concept we discussed in detail in our first note in the series) ([LINK](#)). Litigating the fix means that the judge will evaluate the deal in light of the concessions that MSFT has offered, rather than the terms of the deal when it was initially announced. MSFT's concessions were successful in securing approval for the deal in the European Union, which suggests a similar result in a U.S. court.

Going Deeper

Over the last several months, New Street Research has covered the proposed MSFT-ATVI merger extensively. In a five-note series, we provided 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, we held an expert call on the deal ([LINK](#)), and wrote an analysis of the UK's decision in the case ([LINK](#)). We also 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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