

NSR Tech Policy: Despite likely FTC challenge to Microsoft Activision deal, we are sticking to our guns

By [Matt Perault](#) | December 1, 2022

What's new: Despite [reports](#) last week that the FTC is likely to challenge Microsoft's acquisition of Activision Blizzard, our view remains largely unchanged ([LINK](#)). The deal is likely to proceed, with Microsoft agreeing to conditions.

What Happened?

- Last week, news outlets reported that the FTC is likely to file an antitrust lawsuit to block Microsoft's \$69BN acquisition of Activision-Blizzard. The [story](#) cited three anonymous sources with "knowledge of the matter."

Will the FTC challenge the deal?

- We see three distinct paths for the FTC:
 - The FTC does not challenge the deal. The FTC is satisfied with concessions offered by Microsoft. The deal goes through with conditions.
 - The FTC sues to block the deal but uses the suit to gain leverage in settlement discussions. The parties agree on conditions, and the FTC drops the case before it goes to trial.
 - The FTC sues to block the deal and litigates the case.
- Our view is that the first two are most likely. If the press reports of an imminent suit are accurate, they may be consistent with the second scenario.
- The third path is least likely because the FTC has a weak case and does not want to devote significant

enforcement resources to litigating it. Both parties benefit from a settlement: meaningful concessions from Microsoft would enable the FTC to declare a victory, set initial ground rules for the metaverse, and Microsoft would get the acquisition it wants.

News of a challenge doesn't mean a challenge is imminent:

- **The FTC's scrutiny of this deal is not surprising.** FTC chair Lina Khan has emphasized her intent to closely scrutinize mergers in the tech sector, and rose to prominence in part based on her criticism of other mergers. Scrutiny here is appropriate: if successful, the deal will be the largest video game acquisition in history and unites a leading console maker with a leading game developer. In addition, her decision to challenge the far-smaller Meta-Within deal increases the importance of signaling that the FTC is conducting a robust review of Microsoft's Activision acquisition. Both cases involve device makers acquiring game developers to support future gaming development.
- **A threatened challenge may provide the FTC with leverage to extract larger concessions from Microsoft.** While antitrust authorities generally dislike behavioral conditions, we think here the combination of the uncertainty of success in the courts and the ability to create what could become the ground rules for gaming and the metaverse might convince the FTC that 100% certainty of establishing conditions next year may be better than a low probability of winning in court years from now.
- **But the FTC is unlikely to litigate.** As we have noted (LINK), the FTC faces an uphill battle in court if it decides to litigate the deal. Together, the two companies will have approximately a 15% market share. Given the competitiveness of the sector, it is unlikely that the deal would grant the combined company pricing power or result in vertical foreclosures.

International scrutiny increases pressure on the FTC and Microsoft:

- **The EU, UK, and China have each already signaled they will closely review the deal.** The European Commission announced early in November it was initiating a 90-day Phase II investigation. The UK's Competition and Markets Authority (CMA) also began a Phase II investigation after it failed to approve the deal in a preliminary review. China has rejected a "simplified" review for the deal.

- **Even if the acquisition is ultimately successful, extended scrutiny of the deal signals the FTC's seriousness to international counterparts.** The FTC wants to retain its institutional leadership among the different competition agencies around the world, and such scrutiny demonstrates that the FTC is both concerned about emerging markets, and it is not giving a "home field advantage" to an iconic American company.
- **Heightened scrutiny by the FTC and international counterparts signal that, at a minimum, regulators expect significant concessions from Microsoft to advance the deal.** A content licensing agreement is, however, unlikely to satisfy the UK's CMA, which has expressed concerns regarding how the deal bolsters Microsoft's position in the emerging game streaming and subscription markets.
- **Microsoft is already responding to this pressure by floating potential concessions.** On Monday, Reuters reported that Microsoft is preparing to offer the EU concessions to prevent a formal objection to the deal. Concessions will likely include a 10-year licensing deal to Sony for Activision-Blizzard games — an offer Microsoft had previously made to Sony.

What Happens Next?

- **The UK and EU will conclude their investigations by March 1st and March 23rd** However, negotiations between Microsoft and international regulators will continue over the next several months.
- **For now, the deal remains on track.** The parties have stated that the deal will close by June 2023.
- **The likelihood of a formal FTC challenge may be influenced by the FTC's other technology-related antitrust cases,** such as the ongoing Meta-Within case (a federal court hearing starts next week, and the parties may close the deal by the end of the year if the district court judge hasn't ruled in the FTC's favor by then) and possible cases against Amazon. The FTC has finite resources and may choose not to pursue an uncertain case against Microsoft in favor of safer bets.
- **The likelihood of an FTC suit may also be impacted by legislative developments, such as antitrust reform.** Despite some bipartisan support for new antitrust legislation, the possibility of passage through a divided Lame Duck congress remains low.

- **Microsoft’s competitors will continue to advocate for regulators to challenge the deal.** Sony, for instance, has publicly denounced the deal.

Going Further:

- **Although the “third-largest gaming company by revenue,” Microsoft already leads both the nascent streaming and subscription gaming markets with 57% and 41% market shares, respectively.** Streaming and subscription gaming currently account for a tiny fraction of gaming revenue, it is likely a growth area. In their decision to initiate a Phase II investigation, the UK’s CMA asserted that streaming and subscription models are pulling the industry into a “transition phase,” that “is opening a window of opportunity for new entrants.” Microsoft’s ability to succeed in this transition may be bolstered by its ability to utilize and integrate its Azure cloud platform.
- **The FTC is led by three Democrats and one Republican** following the confirmation of Alvaro Bedoya in March 2022 and the resignation of Noah Phillips, effective in October 2022.

Full 12-month historical recommendation changes are available on request

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