

NSR Tech Policy: MSFT-ATVI: The Global Landscape

By [Matt Perault](#) | March 1, 2023

New Street Research's Internet Policy Team is publishing a 5-part series of notes on the FTC's suit challenging the Microsoft-Activision merger.

In our first note, 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 ([LINK](#)).

Today, we examine the **global landscape**, analyzing how international regulators are reviewing the merger. We detail the status of the case in the 12 jurisdictions that have reviewed it or that are conducting ongoing reviews.

We will hold a call on Friday, March 3rd, at 10 AM ET to discuss our first two notes in the series: the case and the global landscape. Please register [here](#).

In our third note, we will look 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. Our fourth note will focus on the **company**: how will Microsoft respond to regulators' concerns? The final note will provide our assessment of the most likely **outcome** of the case.

Bottom line

- While MSFT is pursuing approval from more than a dozen countries, the approval from the US, EU, and UK pose the greatest risk to the deal. Denial by any of those three may scuttle the acquisition.
- While each jurisdiction follows its own formal process, regulators are heavily influenced by their international counterparts.

- The FTC may be particularly influenced by how the EU and UK approach the deal.

The Context: international regulatory review of mergers

There is no single international competition or antitrust authority; each country or jurisdiction reviews major mergers independently. Even though both MSFT and ATVI are US companies, a foreign regulator who decides to block the deal could effectively stop the merger.

In some jurisdictions, a regulator must formally approve the deal. In others, such as the US, the regulator does not need to approve a merger; a deal is permitted to close so long as the regulator does not block the deal.

After announcing its acquisition of ATVI, MSFT President Brad Smith stated that MSFT would “start the process of seeking regulatory approval in capitals around the world.” Some press reports claimed that Smith said MSFT would pursue approval in 17 jurisdictions. *The New York Times* reported that 16 jurisdictions are reviewing the acquisition. We identified 12 proceedings that have completed review or are actively reviewing the deal (listed below).

Status of international regulator review

Four countries have approved the deal: Serbia, Saudi Arabia, Brazil, and Chile.

- Serbia: Serbia’s Commission for Protection of Competition approved the deal on August 12, 2022.
- Saudi Arabia: Saudi Arabia’s General Authority for Competition, issued a “No Objection Certificate” on August 22. Saudi Arabia’s Public Investment Fund owns a large amount of ATVI stock and will benefit significantly if the acquisition goes through.
- Brazil: Brazil’s Administrative Council for Economic Defense (CADE) approved the deal with no restrictions on October 5. The agency noted that even if MSFT does make games like *Call of Duty* exclusive to Xbox, that exclusivity does not “represent, in itself, a risk to competition in the console market as a whole.”
- Chile: On December 29, the Fiscalía Nacional Económica in Chile approved the deal, reporting that their analysis found the “merger would not raise either horizontal nor [sic] vertical concerns in Chile.” In addition

to finding that other developers “exert competitive discipline on” ATVI, “Call of Duty was not found to be as relevant for the Latin American region, as it would be for the rest of the global regions.”

At least four jurisdictions have signaled some concern with the deal: China, the UK, the EU, and the US.

- China: China’s State Administration for Market Regulation (SAMR) decided to initiate an in-depth review of the deal, rather than a simplified review.
- United Kingdom: The UK’s Competition Markets Authority (CMA) is currently conducting a phase 2 investigation of the deal.
 - On September 1, the CMA announced that the phase 1 investigation indicated the merger gave rise “to a realistic prospect of a substantial lessening of competition (SLC) in gaming consoles, multi-game subscription services, and cloud gaming services.”
 - After MSFT and ATVI declined to submit an “undertaking” addressing CMA concerns, the CMA referred the deal for a phase 2 investigation, a decision MSFT opposed.
 - In mid-October, the CMA released an “Issues Statement” defining the scope of the phase 2 inquiry. Sony and an unnamed “Market Participant A” also submitted formal responses opposing the deal, and MSFT submitted its own response.
 - The CMA also solicited and collated responses from the public concerning its Issues Statement, noting that 75% of public comments were in favor of the deal.
 - On February 8, 2023, the CMA released a Provisional Findings Report that suggested the merger could result in a “substantial lessening of competition.” On the same day, it released a Notice of Possible Remedies, detailing three options to remedy the SLC: prohibiting the merger, divestiture of part of ATVI, or “behavioral commitments.”
 - MSFT and ATVI can submit responses to the Provisional Findings Report. The CMA is expected to release its final report and determination on April 26.
 - Either company can appeal the CMA’s decision, however, the appeal does not consider the merits of the case. The appeal considers only whether the decision was marred by illegality, irrationality or

procedural unfairness.

- European Commission: The European Commission is conducting an in-depth investigation of the merger.
 - On November 8, Europe’s antitrust authority, the Directorate-General for Competition (DG COMP), announced it was opening an in-depth investigation into the deal.
 - The regulator noted that a preliminary investigation found that MSFT “may have the ability, as well as a potential economic incentive, to engage in foreclosure strategies” that would “reduce competition in the markets for the distribution of console and PC video games, leading to higher prices, lower quality and less innovation for console game distributors, which may in turn be passed on to consumers.”
 - Politico has reported that DG COMP issued a formal antitrust warning over the deal, sharing a “statement of objections” with MSFT. The Statement of Objections has not yet been publicly released.
 - MSFT and ATVI are able to submit responses to the Statement of Objections and suggest potential remedies to DG COMP’s complaints. DG COMP initially planned to complete its review and issue its final decision by April 11, but recent reports indicate that it will now release its decision on April 25.
 - After the decision, MSFT and ATVI will have two months to appeal DG COMP’s decision to the EU General Court and ultimately to the Court of Justice.
- Finally, on December 8, 2022, the FTC challenged the merger, filing the case in its in-house administrative court. We will discuss this decision in more detail in our third note.
 - The FTC filed the Complaint on December 8.
 - On December 22, both MSFT and ATVI filed responses to the FTC’s Complaint. In early January, they both petitioned to amend their submissions, removing six bullets that asserted the unconstitutionality of both the FTC’s case and the FTC itself.
 - The hearing is scheduled to begin August 2, 2023

The deal remains under review in at least four other jurisdictions: Japan, South Korea, Australia, and New Zealand.

- Japan: The Japan Fair Trade Commission has not yet ruled on the deal. However, there have been rumors

that it will approve the deal, largely fueled by a tweet by an Arabic language Xbox news site.

- South Korea: The South Korea Fair Trade Commission has been reviewing the deal since at least April 2022, but has yet to release or schedule a decision.
- Australia: The Australian Competition & Consumer Commission review is ongoing. It solicited public comments in June. In September, it delayed a ruling on the merger, and has not yet announced when it will release a decision. In February 2023, it stated that it is “engaging with international regulators.”
- New Zealand: The New Zealand Commerce Commission has thrice delayed releasing its decision but is expected to release its decision on April 28th.

What happens next?

International review may determine the fate of the agreement. If one prominent jurisdiction blocks the deal, other regulators may follow. With ongoing reviews in at least 8 jurisdictions, and several of those antitrust agencies possessing significant global clout, a large amount of uncertainty remains.

It remains unclear how Microsoft would respond to a split decision across jurisdictions. The company could theoretically decide to pull its products from smaller jurisdictions that block the deal, but a negative ruling from a major jurisdiction, such as the UK or EU, is likely to cause the parties to abandon the merger.

Even so, the threat of a foreign regulator blocking the deal may end up serving primarily as a mechanism to advance negotiations. The outcome of litigation is uncertain in the US, and so the FTC’s lawsuit might not be sufficient on its own to extract the most meaningful concessions from MSFT. The threat of an adverse decision from the European Commission or the CMA might be more likely to push the deal toward a settlement.

Several key dates loom. Decisions in both Europe and the United Kingdom are expected in April.

Stay tuned...

- **Note 3: The Judge.** Our third note will focus on the FTC’s decision to pursue the case in its in-house administrative court.

- **Note 4: The Company.** Our fourth note will look at how Microsoft might respond.
- **Note 5: The Outcome.** Our final note will provide our prediction for how the case will resolve.

Full 12-month historical recommendation changes are available on request

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