

# NSR Tech Policy: MSFT-ATVI: The Judge

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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. Our [second note](#) examined the **global landscape**, focusing on international regulators’ review of the merger.

Today, we 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 look at the **company**: how will MSFT respond? Finally, our fifth note will provide our assessment of the most likely **outcome** of the review case.

## Bottom line:

- The FTC’s administrative court is typically viewed as a favorable forum for the FTC. The administrative law judge (ALJ) who will hear the case sits within the FTC, and any appeal of his decision will be heard first by the full Commission.
- Using this process also enables the Commission to publish its own opinion in the case: if the losing party were to appeal the decision by the ALJ, the Commission would hear the appeal, and write its own opinion.
- If MSFT loses before the Commission, it can appeal the case to a federal court of appeals. But the ALJ process gives the FTC an advantage at that stage as well: the FTC would shape the review by the court of appeals, since the court of appeals would review the opinion and factual record established in the administrative proceeding, rather than reviewing the opinion and factual record of a federal district court judge. That does not mean the FTC will win; indeed, we think current antitrust jurisprudence suggests the FTC will have an uphill battle at the court of appeals. But the ALJ process increases the odds of an FTC

victory.

- The FTC’s decision to use the administrative process also has downsides. The administrative route is lengthy, and in some cases, a deal might be able to close before the administrative process is resolved. To avoid that result, the FTC would typically need to go to federal court to get an injunction to halt the deal during the administrative proceedings.
- But going to federal court isn’t necessary here, at least not yet. MSFT will not close the deal while it is still under review by the European Commission and the United Kingdom.
- In sum, pursuing the case via the administrative process gives the FTC a favorable venue and a better posture on appeal. It also gives Chair Khan the opportunity to write a public opinion on the deal, which is compelling for someone who made her reputation as a “thought leader” in antitrust. It is conceivable, of course, that the European Commission and United Kingdom will reach decisions on the deal that shape the result in the United States before the administrative hearing begins in August.

### What is the FTC’s administrative court?

- The FTC has the authority to pursue competition and consumer protection cases using its own in-house administrative court. An Administrative Law Judge (ALJ) hears the case, conducts the initial fact-finding process, and issues a decision. Administrative litigation at the FTC is also known as the “Part 3” process, named after the section of the Code of Federal Regulations that outlines the rules governing the proceedings. The FTC is not the only federal agency to use ALJs to adjudicate cases; they are widely used throughout the federal government.
- The losing party may appeal the case to the full Commission, which has wide latitude to decide the case and “exercise all the powers which it could have exercised if it had made the initial decision.” The Commission reviews the case de novo – meaning that it can make its own determinations of fact, and is not bound by the ALJ’s findings – and issues a decision.
- After the Commission rules, the losing party may appeal the decision to a federal appeals court. But the appeals court would review the factual record established in the administrative proceeding.
- The FTC has pursued several prominent recent cases through the ALJ process, including Illumina’s

acquisition of GRAIL. In that case, the ALJ dismissed the challenge in September 2022, and the case was argued before the FTC in December 2022.

### How is the ALJ process different from a case in federal court?

- Alternatively, the FTC could have first sought either a preliminary or a permanent injunction in federal court. Historically, the FTC has more commonly pursued preliminary relief, which would halt the deal until the administrative case has concluded.
- When it uses the administrative process, the FTC can obtain a cease and desist order, rather than a permanent injunction. The cease and desist order may come after the deal closes. If it does, then it requires the deal to be unwound.
- Even though the ALJ is the FTC's in-house court, the FTC does not win every case it brings to the ALJ. Recently, the ALJ ruled against the complaint brought by the FTC challenging Illumina's acquisition of GRAIL.

### Why did the FTC choose this route for this case?

- First, the ALJ may provide a favorable venue for the FTC. While the FTC does lose cases, trying a case in its own in-house court improves the odds of the FTC winning. It also enables the FTC to ensure that the fact-finding phase of the case is conducted within the FTC, rather than by an independent federal district court judge.
- Second, in this case, the FTC may not have needed the remedies available in federal court. The FTC does not need to go to federal court to prevent MSFT from closing the deal before the Part 3 process resolves, since the EU and UK reviews of the deal are ongoing, and MSFT will not close the deal before those reviews conclude.
- Third, the Commission has the opportunity to hear appeals of the ALJ's decision. This means the FTC can essentially serve as the judge in its own case. It also gives the Chair an opportunity to publish an opinion

outlining her views on this case and on these types of mergers more generally. Her hope might be that this type of an opinion could serve as a model for federal judges.

- Fourth, if MSFT were to appeal the Commission's decision to a federal appeals court, the court would review that decision and the facts established in the administrative proceeding, rather than the decision and factual record established by an independent district court judge. That will advantage the Commission if the case is appealed to a court of appeals.

### **MSFT criticizes the Part 3 process...but then drops it**

- The Part 3 process has been criticized extensively, including by past commissioners. The legality of the process is now being litigated in the Supreme Court, which heard arguments this term in two cases challenging the ALJ process.
- MSFT initially included similar constitutional challenges to the FTC's authority in its response to the FTC complaint, but then dropped those arguments a few weeks later.
- MSFT lawyers may have calculated that raising these arguments would disadvantage the company in its attempt to settle the case before it goes to trial. If the FTC perceived MSFT to be seeking to undermine its authority, it might be less willing to find common ground.

### **What happens next?**

- The administrative hearing is scheduled to begin on August 2.
- That date is roughly 4 weeks after MSFT's original target date for closing the deal. In the wake of the FTC's suit, MSFT indicated that the regulatory review process might delay the closing.
- It is conceivable, of course, that the European Commission and United Kingdom will reach decisions on the deal that shape the result in the United States before the administrative hearing begins in August. Those decisions are expected April 25 and 26, respectively. We detail the international regulatory review process in our second note.
- If the deal does not close by July 2023, MSFT may be obligated to pay a breakup fee that could be as high

as \$3 billion.

**Stay tuned...**

- **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.



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