

Kluwer Competition Law Blog

The Microsoft/Activision Blizzard merger: the \$69 billion deal in the light of Call of Duty foreclosure

Alba Ribera Martínez (Deputy Editor) (University Carlos III of Madrid, Spain) · Monday, September 5th, 2022

On 18 January 2022, Microsoft [announced](#) its future acquisition of Activision Blizzard, which will be the largest tech merger in the history of the United States. The press release voiced concern on a range of competition authorities around the World. Microsoft is one of the three contenders in the market of console-making and by acquiring Activision Blizzard it will take control of the largest independent creative studios in the World. However, the video gaming industry has rarely merited attention from competition authorities, if at all.

On 1 September, the CMA [pre-emptively found](#), amid phase I, that the merger would substantially reduce competition. It provided the parties until 8 September to submit proposals to address their concerns. Worst-case scenario, phase II proceedings will trigger an in-depth probe into the merger, despite the fact that many competition authorities have expressed their interest in reviewing the operation.

A brief definition of the industry and its strong network effects

Although the video gaming sector has been constantly overlooked in terms of enforcement by competition authorities, it is the largest revenue-generating form of entertainment worldwide. For twenty years now, at the upstream console-making level, Microsoft (Xbox), Sony (PlayStation), and Nintendo (Wii and Switch) are the only significant suppliers present in the market. Within this background, they have battled the ‘[console wars](#)’, i.e., through the launching of consoles they gained more or less of a competitive advantage in the market.

In the same vein as digital markets, the sector is characterised by especially strong network effects. In their purchasing behaviour, gamers are not only attracted to the functionalities of a particular console but also influenced by the library of games they can access through a given ecosystem as well as their ability to play the video games they have already purchased (backward compatibility). This is why the creative design of video games is such an important feature of the sector: it is the cornerstone of a great user experience. Activision Blizzard is the largest firm in this market segment through its several franchises, including Call of Duty, World of Warcraft, and Candy Crush video games. These three top franchises have collectively accounted for [82% of its net revenue](#) and are the most popular games in the video game arena. Up until this point, Activision

Blizzard's library of games was available for both Xbox and PlayStation.

The transaction, valued at \$68.7 billion, has attracted the interest of over a dozen of national competition authorities (including those from [New Zealand](#), [Japan](#), [Brazil](#), [Australia](#), [China](#), [South Korea](#), and [Saudi Arabia](#)) as well as the [Federal Trade Commission](#) and the [European Commission](#), which have already voiced out their own interest to analyse the merger's prospective consequences.

The transitional phase of the industry and the related anticompetitive concerns of the CMA

On its first public decision on the anticipated acquisition by Microsoft of Activision Blizzard, the CMA identified two main sources of concern where input foreclosure could be easily triggered due to the substantial lessening of competition caused by the merger in the first place: multi-game subscription and cloud-gaming services.

Much to the likes of the broader entertainment industry, video games are not exclusively purchased by gamers following the buy-to-play model anymore (i.e., each game is bought and paid in full and then accessed from a console or a PC). Instead, multi-game subscription services are becoming increasingly popular amongst gamers. Users can access a wide range of games through subscription for a fixed monthly fee. Microsoft started to cater for its own subscription service, Xbox Game Pass, in 2017 and it has become one of the leading competitors in the field, amassing an outstanding [user base of 25 million subscribers](#). Still, Microsoft is quite far from its nearest competitor on subscription services, PlayStation Plus, which accounts for [47.3 million subscribers](#).

The CMA believes that the merger raises serious input foreclosure concerns within this framework. Microsoft's attempt to foreclose access to its library of games, even if it only manifested in the Call of Duty franchise, could cause a 'material difference to the success of rivals' gaming platforms'. There is precedent showing that Microsoft already [foreclosed access](#) to a wide range of games through its subscription service as a consequence of its [acquisition of creative studio Bethesda in 2021](#).

On top of that, the CMA pre-emptively assessed that Microsoft would be incentivised, in economic terms, to foreclose Activision Blizzard's content: the immediate losses in terms of licensing revenues on other ecosystems with regards to Activision Blizzard's library of games would not outweigh the strategic benefits to Microsoft of engaging in foreclosure through its subscription services.

The acquirer [has already confirmed](#) that it has no intention of making Activision Blizzard's titles exclusive to Xbox and that it will honour the existing agreements it has concluded with Sony. Until now, nothing has been noted on whether Microsoft plans to release the titles in advance on its own platform and release them later than those of its competitors. This nuanced input foreclosure strategy would not be an immediate and outright manifestation of cutting off Activision Blizzard's catalogue of games to competitors altogether, but it could cause the largest base of users was driven away into playing the game solely on Xbox before it is even available on the rest of platforms.

Moreover, cloud gaming technology has disrupted the market entirely. Video games can be played on highly-priced PCs and state-of-the-art consoles produced by the main console makers, but cloud

gaming has enabled games can be accessed and streamed directly through a range of devices, such as mobile phones or tablets. Users do not need to heavily invest in hardware anymore, and there have been recent entrants into the gaming industry in this aspect, including Amazon Luna and Google Stadia. Microsoft owns Azure, a leading cloud platform offering a wide range of services, as well as Windows, the leading PC operating system. With regards to gaming, Windows Operating System (Windows OS) is the **most popular among gamers** and most game developers tend to create, design, and optimise their games for this operating system.

Given the strength of Activision Blizzard's catalogue, the CMA points out that the acquirer could leverage its own power in game development towards its broader ecosystem, namely cloud gaming services. Microsoft already owns a well-distributed cloud infrastructure to host its library of games based on preferential terms. In addition, the acquirer possesses an installed base of users to whom it can promote its revamped cloud gaming services.

In appearance, the CMA's theory of harm on cloud gaming services seems less straightforward than that of multi-game subscription services, but any one of them can do to pave the way for the competition authority to produce a prohibition decision over the merger. In terms of its likeliness, irrespective of the thorough economic analysis that will have to be involved, the input foreclosure strategy seems to be the economic outcome attributable to the concentration. In any case, if the CMA does not accept the parties' proposals on 8 September, it will have to hold its promise to follow through on these theories of harm within Phase II.

What way is right?

The most daring challenge for the CMA (and those competition authorities which have and will intervene with regards to the merger) is that of capturing the market's intricacies and bringing them forward into market definition[1]. Only if the background of the merger is well identified, the corresponding theory of harm will follow through based on a substantial lessening of competition.

At the EU level, market definition of the video gaming industry has been skewed and inconsistent throughout the three major operations that have been analysed[2]. Although the theories of harm presented by the CMA are quite traditional in essence, they will have to bear with the market's economic characteristics as applied to demand and supply-side substitution, namely backward compatibility, cross-platform availability[3] and interoperability between platforms.

On top of that, the fact that up to 9 different competition authorities will analyse the same merger poses major jurisdictional challenges, namely a myriad of commitments, conditions and decisions will apply to the same set of facts. As of early September, only the Saudi Arabian competition authority has cleared the merger entirely with no commitments, although the proceedings at most of the national competition authorities are following their own course.

In the table below, the main lines of action are addressed:

Last action	Competition authority	Status	Timeframe
01/09/2022	Competition & Markets Authority	Phase I	8 September: receives proposals

23/08/2022	General Authority for Competition (Saudi Arabia)	Clearance	N/A
09/08/2022	Conselho Administrativo de Defesa Econômica (Brazil)	Seeks information and comments	N/A
22/07/2022	European Commission	Seeks information and comments	N/A
18/07/2022	Federal Trade Commission	Seeks data from undertakings	30-day to review
20/06/2022	Australian Competition & Consumer Commission	Informal review (seeks information and comments)	15 September: findings on final decision/statement of issues
16/06/2022	Commerce Commission New Zealand	Open (Phase I)	9 September 2022: decision due clearance or proceed
16/06/2022	Japan Fair Trade Commission	Seeks information and comments	N/A
14/04/2022	Korean Fair Trade Commission	Open (Phase I)	N/A

Against this background, the Microsoft/Activision Blizzard merger is called to be one of the landmarks in terms of merger control for 2022 that will expand the knowledge and understanding of the video gaming industry. Broader and narrower market definitions will converge and define the same operation around the World, creating divergence not only in result -some authorities will clear the merger, others will be offered commitments and one or two of them may even block the merger- but also concerning the applicable methodology when it comes to video games.

[1] Following Fabian Ziermann in '*Microsoft/Activision – market definition and theories of harm under EU competition law*' and Eli Pales in '*Microsoft and Activision-Blizzard: Examining the Largest Tech Acquisition of All Time*'.

[2] Cases No COMP/M.5008 *Vivendi/Activision*, COMP/M.7866 *Activision Blizzard/King* and COMP/M.10001 *Microsoft/ZeniMax*.

[3] Cross-platform availability is an attribute enabling the user to play the same game across different platforms, even those from different brands and ecosystems.

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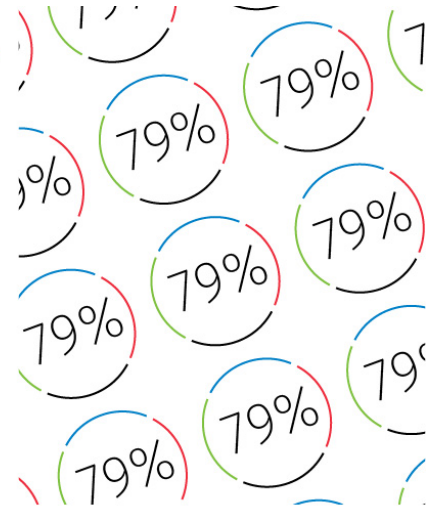
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