AMERICAN ECONOMIC LIBERTIES PROJECT

Quick Take: Why the Judge Was Wrong in FTC vs. Microsoft-Activision

By Lee Hepner

In December 2022, the Federal Trade Commission sued to block Microsoft's $68.7 billion acquisition of Activision-Blizzard, a merger that would combine two of the largest game developers in the world. Activision — thanks to a merger with Blizzard in 2008 — publishes some of the world's most popular AAA game titles. Already, Microsoft is the third largest game developer globally, owning around 30 gaming studios and the Xbox gaming platform.

Today, Judge Jacqueline Scott Corley of the Northern District Court of California denied the Federal Trade Commission's request for a preliminary injunction, which would have halted the deal until the FTC could review it in full later this year. **Here's why the judge's opinion is flawed, and why the FTC was right to block this merger and should continue its administrative case against Microsoft's ambitions to monopolize the future of gaming.**

Shortly after coming into office, President Biden issued an Executive Order on Promoting Competition in the American Economy. Over the last several decades, 75% of domestic industries have consolidated and competition has weakened, denying Americans the benefits of an open economy.

In noting the federal government's failure to address these problems, President Biden called for the rigorous enforcement of antitrust laws to *"meet the challenges posed by new industries and technologies, including the rise of the dominant Internet platforms, especially as they stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects."*

Microsoft's proposed $68.7 billion acquisition of game studio Activision-Blizzard would be the largest merger in the history of Big Tech. In emails presented by the FTC as evidence, Microsoft executives spoke to their desire to build a "moat" around Xbox, and that they are in a "unique position to spend Sony out of existence.

Judge Corley ignores this salient evidence and makes the following errors:

1) Judge Corley deviates from the text of the Clayton Act and decades of controlling precedent prohibiting mergers that "*may*" substantially lessen competition" – instead adopting a "*will probably* substantially lessen competition" standard that is a higher bar than the statute allows.
2) Judge Corley dismisses extensive evidence proffered by the FTC that, even absent exclusivity, Microsoft has a clear incentive to "partially foreclose" access on competing consoles, including by degrading game functionality.
3) Judge Corley dismisses ample evidence that Microsoft has acquired game developers in the past only to quickly convert their games to exclusive Xbox content.
4) The FTC introduced bombshell evidence including emails from top Microsoft executives explicitly detailing their monopoly ambitions and intent to "spend Sony out of existence" – and Judge Corley completely ignores it.
5) Judge Corley misunderstands the nature of vertical mergers on content platforms, refusing to engage with ample evidence and academic research that differentiated content is not replaceable – and that anticompetitive effects are more pronounced.
6) Judge Corley improperly places the burden on the FTC of demonstrating the adequacy of Microsoft's behavioral remedies (e.g., side agreements with other consoles) in its initial *prima facie* case.
7) Judge Corley finds that it does not make financial sense for Microsoft to pull Call of Duty from competing consoles, ignoring that Microsoft can afford to take short-term positions that advance their longer-term monopoly ambitions.
8) Judge Corley improperly narrows the FTC's complaint to concerns about Call of Duty, even though the FTC's complaint includes other Activision-Blizzard AAA games like Diablo and Overwatch. In doing so, she also rubber stamps Microsoft's side agreements with other consoles as to Call of Duty only, with no analysis of the anticompetitive harm posed by foreclosure to Activision-Blizzard's many other offerings.

Judge Corley's Opinion is laced with inexplicable disdain for the FTC, including when she swipes at the FTC for filing its challenge "less than six weeks" prior to the merger agreement's termination date. The FTC is short-staffed and already rushing against its own statutory clock for intervening in anticompetitive mergers. By comparison, merger agreements can be amended and routinely are. This fact should not have weighed against the FTC, but nevertheless speaks to Corley's bias against the agency.