

COMPETITION & REGULATORY NEWSLETTER

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European Commission clears Microsoft/Activision Blizzard subject to conditions

Introduction

On 15 May 2023, the European Commission [approved](#) the proposed acquisition of Activision Blizzard by Microsoft, subject to conditions. Following an in-depth review of the deal, the Commission concluded that the licensing commitments offered by Microsoft would fully address its competition concerns. The decision comes just a few weeks after the UK Competition and Markets Authority (CMA) rejected Microsoft's proposed remedies and blocked the transaction.

Background

Microsoft and Activision are both developers and publishers of games for PCs, game consoles and mobile devices as well as distributors of games for PCs. Microsoft also distributes games for consoles and offers the Xbox gaming console as well as other products and services, including the cloud computing service Azure and the PC operating system Windows.

In January 2022, Microsoft announced that it had agreed to acquire Activision for a value of \$68.7 billion. The transaction was notified to the Commission on 30 September 2022.

The Commission began a preliminary investigation into the deal under the EU Merger Regulation. This resulted in the Commission's decision, on 8 November 2022, to [launch](#) a phase 2 investigation on the basis that it wanted to examine its main concerns that the acquisition could potentially reduce competition in the markets for:

- the distribution of console and PC video games, including multi-game subscription services and/or cloud game streaming services; and
- the supply of PC operating systems.

The Commission's findings

Following its in-depth review of the transaction, the Commission dismissed several of its preliminary concerns. In particular, the Commission found that:

- Microsoft would have no incentive to refuse to distribute Activision's games to Sony, which is the leading distributor of console games worldwide, including in the EEA where "there are four Sony PlayStation consoles for every Microsoft Xbox console bought by gamers". On the contrary, Microsoft would have "strong incentives" to continue to distribute Activision's games to Sony.
- Even if Microsoft did decide to withdraw Activision's games from the PlayStation, this would not significantly harm competition in the consoles market.

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- In the absence of the transaction, Activision would not have made its games available for multi-game subscription services so the proposed acquisition would not change the position of third-party providers of multi-game subscription services compared to their position if the acquisition did not go ahead.

However, the Commission maintained two main concerns following its in-depth investigation. According to the Commission:

- The deal could harm competition in the distribution of PC and console games via cloud game streaming services. Although cloud streaming service for video games is a relatively small means of distributing games currently, the Commission was concerned that it was a market which had the potential to expand very quickly and that, if post-acquisition Microsoft decided to offer Activision games that could be cloud-streamed, this could accelerate the growth of cloud gaming. The Commission was also concerned that Microsoft might be able to foreclose other downstream game distributors from cloud game streaming if it chose to make its Activision games exclusive to its own cloud game streaming service, Game Pass Ultimate.
- Microsoft could strengthen the position of Windows in the market for PC operating systems if it chose to make Activision's games exclusive to its own cloud game streaming service, and deliberately degraded the streaming of Activision's games on PCs that use operating systems other than Windows.

Remedies

In response to the Commission's concerns, Microsoft proposed the following remedies:

- Licence to consumers: for a period of 10 years, Microsoft would grant a free licence to consumers in the EEA that would allow them to stream, via any cloud game streaming services of their choice, all current and future Activision Blizzard PC and console games for which they have a licence.
- Licence to cloud game streaming service providers: for the same duration, Microsoft would grant a corresponding free licence to cloud game streaming service providers to allow EEA-based gamers to stream any Activision PC and console games.

The Commission concluded that the proposed commitments would fully address its competition concerns. It considered that the remedies would represent "*a significant improvement for cloud game streaming compared to the current situation*": the licences would increase competition by bringing Activision's games to new platforms, including smaller EU players, and to more devices than before. The Commission also noted that the availability of Activision's popular games for streaming via all cloud game streaming services will "*boost the development of this dynamic technology in the EEA*".

Next steps

The Microsoft/Activision case is the latest example of the Commission and the CMA diverging on a high-profile merger review post-Brexit. While the Commission was satisfied based on "*hard evidence*" that Microsoft's commitments were fundamentally pro-competitive and would "*unlock significant benefits for competition and consumers*", the CMA's view was that the proposed licensing remedies, being behavioural in nature, were insufficient to address its concerns. The CMA's decision to block the deal shows that, unlike the Commission, it is reluctant to accept behavioural remedies other than in very limited circumstances. We explained the CMA's decision in more detail in a [previous edition](#) of this newsletter.

The proceedings are not over in the UK: on 24 May 2023, Microsoft lodged its appeal against the CMA's decision at the Competition Appeal Tribunal (CAT). It remains to be seen whether the CAT will affirm the CMA's current opposition to the deal, or if it will indirectly endorse the pattern of approval seen in the EU, China (receiving unconditional approval on 19 May 2023) and other jurisdictions where the proposed acquisition has been cleared. A final decision has not been reached in the US, where an evidentiary hearing is scheduled for 2 August 2023.

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OTHER DEVELOPMENTS

MERGER CONTROL

General Court clarifies concept of “single concentration” in EVH v Commission

On 17 May 2023, the General Court (GC) [dismissed](#) the action brought by German electricity producer EVH GmbH against the Commission’s approval of the acquisition of E.ON’s generation assets by RWE AG and in doing so, clarified the concept of “single concentration” in the context of asset swaps.

In March 2018, RWE and E.ON announced a complex asset swap by means of three “concentration operations”. The operations were as follows: (1) RWE would acquire control over certain generation assets of E.ON; (2) E.ON would acquire control over the distribution and retail energy business, as well as some production assets of RWE’s subsidiary, Innogy SE; and (3) RWE would acquire 16.67% of E.ON’s shares. The first and second concentration operations were reviewed by the Commission, while the third concentration operation was reviewed by the German national competition authority.

In its [decision](#) of 26 February 2019, the Commission cleared the first concentration operation. EVH subsequently brought an action seeking annulment of this decision on the basis that the Commission failed to (i) review the third concentration operation; and (ii) consider the three operations as components of a single concentration. As to the first limb of EVH’s plea, the GC found that the third operation did not qualify as a concentration for the purposes of Article 3 of the EU Merger Regulation. As to the second limb, the GC found that, in order to regard multiple operations as components of a “single concentration”, two cumulative conditions must be met:

- the operations must be interdependent in such a way that none of them could be carried out without the others; and
- the operations must result in one or more undertakings acquiring direct or indirect economic control over the activities of one or more other undertakings.

The GC found that the concept of “single concentration” cannot apply where interdependent undertakings gain control of different targets, as is the case in an asset swap. Applying this test to the facts, the GC found that while the interdependence condition was met, the condition regarding the result of the operations was not as there was no functional link between the three concentration operations and, in particular, the three components of the parties’ proposed asset swap did not constitute several intermediate transactions carried out in order to confer control over one or several undertakings by the same undertaking(s).

Although the GC supported the Commission bifurcating its review of the first and second concentration operations resulting in separate decisions, the GC added that the Commission was entitled to take into account the effects of the operations on one another. To the extent that there was a link between the concentration operations enabling the Commission to gain an understanding of the probable effects on the market of each concentration, it is for the Commission to take it into account in its overall analysis of the effects of the operation on the internal market. The GC’s press release on this case can be found [here](#).

ANTITRUST

Hong Kong Competition Commission commences second set of proceedings in air conditioning cartel investigation

On 23 May 2023, the Hong Kong Competition Commission (HKCC) [began proceedings](#) against ATAL Building Services Engineering (ABS); Johnson Controls Hong Kong, York International and Johnson Controls International (Johnson Controls); and Jimmy Lee Yui Ming, a former employee at Johnson Controls.

The HKCC alleges that ABS and Johnson Controls, who are competitors in the provision of air conditioning works, fixed prices, shared markets and/or rigged bids during a three-year period from December 2015 to June 2018, in

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breach of the First Conduct Rule of Hong Kong's Competition Ordinance. The HKCC's investigation indicated that the alleged anti-competitive conduct between these two companies directly or indirectly impacted the sales of air conditioning works in Hong Kong worth over HK\$3 billion (approximately £310 million).

This case is related to an earlier set of proceedings brought by the HKCC before the Tribunal almost a year ago, in June 2022 (and previously [reported](#) in this newsletter). ABS has already entered into a cooperation agreement with the HKCC, whereby it has agreed to admit liability in both cases and pay a penalty of HK\$150 million (approximately £15.52 million), in addition to the HKCC's investigation and legal costs. Under the cooperation agreement, ABS has also agreed to implement a compliance programme to prevent future instances of anti-competitive conduct. To date, it does not appear that any of the other parties have agreed to cooperate.

Procedurally, there are several points of interest. First, some tenders alleged to have been affected appear to be common to both proceedings, so it is curious that the Commission has chosen to bring these proceedings separately, and with a gap of almost a year. It will be interesting to see whether the Commission consolidates the actions, or whether the trials with the non-cooperating parties will be kept separate. Second, the Commission has applied for confidential treatment in these proceedings but did not do so for its most recent case relating to the government subsidy scheme filed in March 2023, which also involved similar conduct i.e. bid rigging, price-fixing and information exchange. Therefore, it appears that the Commission's practice with respect to confidential treatment is not yet settled.

REGULATORY

CMA publishes annual report on use of concurrent competition powers in regulated sectors

On 10 May 2023, the CMA published its [annual report](#) (the Report) on how it has worked closely with sector regulators such as Ofcom, Ofgem and Ofwat within the concurrency regime which took effect in April 2014.

Key themes: The overall theme of the Report (which covers the period April 2022 to March 2023) is the ongoing cost of living crisis as a key focus for sector regulators, given that the goods and services supplied in the regulated sectors constitute an increasingly large part of household budgets. Maintaining open and competitive markets is therefore especially important in these sectors to help keep prices down in order to alleviate the significant pressures on household budgets. Other key themes for the CMA and the sector regulators in the reporting period were: (i) to further develop the UK's approach to promoting competition in digital services and technologies, including supporting innovation, as well as (ii) environmental sustainability and the transition to a net zero economy.

Highlights of the CMA and regulators' collective work: The Report draws attention to several material developments during the reporting period. These include *inter alia*: (i) in December 2022, Ofcom issuing an antitrust decision in relation to the supply of communication equipment to the emergency services; (ii) the launch of five new antitrust investigations where jurisdiction was shared between the CMA and one or more sector regulator; and (iii) in the financial services sector, a new investigation was launched by the Financial Conduct Authority (FCA) into a suspected infringement of the Chapter II prohibition, whilst the CMA launched three new antitrust investigations in relation to digital markets.

The use of the markets regime: The Report also noted the growing use of market studies and/or market investigations to address problems in regulated sectors. In particular, this reporting period saw the FCA and Ofcom each exercise their concurrent powers to conduct market studies under the Enterprise Act 2002 for the first time. In October 2022, Ofcom launched a market study into the supply of cloud services (see a [previous edition](#) of the newsletter for details), and concluded in its interim report that there were reasonable grounds to suspect that certain features in the public cloud infrastructure may have an adverse effect on competition in the UK. In March 2023, the FCA launched a market study into (among other things) the market for the distribution of

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wholesale data, which is relied upon in financial markets to make investment decisions and meet regulatory obligations.

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