

“Call of Duty” as a Call to Action? Antitrust Concerns in the Gaming Industry

Since the 1970s, there has been a push by conservative activists to diminish antitrust enforcement in the United States.¹ This effort has largely been successful. The types of conduct courts consider anticompetitive has decreased significantly, and the evidentiary bar for establishing anticompetitive harm has increased.² With the rise of Big Tech, however, the narrative regarding antitrust regulation has shifted. Policymakers, including the Chair of the Federal Trade Commission (FTC), Lina Kahn, have voiced concerns over the ability of big tech companies to compile huge amounts of consumer data and use it to further their business interests.³ Most recently, concerns about the gaming industry have come to the forefront of the antitrust debate through the FTC’s case against Microsoft. This article aims to examine the arguments for and against heightening antitrust regulation in the gaming industry with a specific focus on the implications of the recent ruling in *Federal Trade Commission v. Microsoft*.⁴

In parallel to Big Tech, the gaming industry has grown significantly in recent years. The global video game market size was estimated at \$173.70 billion in 2021 and is expected to reach \$314.40 billion by 2027.⁵ With the growth of this market, public concerns about monopolistic practices have led to greater scrutiny by federal agencies. To illustrate, Nintendo, Microsoft, and Sony are the three largest game console creators in the world.⁶ One source of their revenue is publishing and distributing games exclusively on their respective consoles and marketplaces.⁷ Consumers may buy subscriptions to these marketplaces, such as the Xbox Game Pass, to receive access to every game that is part of the publisher’s package.⁸ In order to mitigate the costs and risks of creating new games, game publishers have turned to buying existing game developers. Game developers are companies who design and program new games for distribution.⁹ Activision (creator of Call of Duty), Bungie (creator of Destiny 2), and Zynga (creator of Farmville) are three prominent examples.¹⁰ By acquiring game developers, publishers gain ownership of successful gaming franchises and individual games to lure consumers towards their subscription packages. This practice has led to a staggering number of mergers and acquisitions within the gaming industry. In 2022 alone, notable acquisitions included Take-Two Interactive’s acquisition of Zynga for \$12.7 billion, Sony’s acquisition of Bungie for \$3.6 billion, and most recently, Microsoft’s proposed acquisition of Activision for \$68.7 billion.¹¹ With smaller game developers being quickly bought out by large game publishers, concerns that this consolidation will lead to monopolization have heightened.

These acquisitions highlight an important question: what is the appropriate approach to antitrust regulation within the gaming industry? Proponents of increased regulation of publishers like Microsoft,

¹ Thurman Arnold Project, *Modern Antitrust Enforcement*, YALE SCHOOL OF MANAGEMENT, <https://som.yale.edu/centers/thurman-arnold-project-at-yale/modern-antitrust-enforcement> (last visited Oct. 4, 2023).

² *Id.*

³ Elizabeth Forrey, *The Monopoly Game: How Consolidation Jeopardizes Content Independence in Gaming*, ARTS MANAGEMENT & TECHNOLOGY LABORATORY (Jul. 19, 2022), <https://amt-lab.org/blog/2022/7/the-monopoly-game-how-consolidation-jeopardizes-artistic-independence-in-gaming>.

⁴ *Federal Trade Commission v. Microsoft Corp.*, 2023 WL 4443412 (N.D. Cal. July 10, 2023).

⁵ Philip Chang, *A Short Examination of Antitrust in the Video Game Industry*, USC GOULD SCHOOL OF LAW (May 18, 2022), <https://lawforbusiness.usc.edu/a-short-examination-of-antitrust-in-the-video-game-industry/>.

⁶ *Microsoft Corp.*, 2023 WL 4443412, at *2.

⁷ *See Id.* at *3.

⁸ *Id.* at *5–6.

⁹ *See Id.* at *3.

¹⁰ Forrey, *supra* note 3.

¹¹ *Id.*

Sony, and Nintendo cite concerns with consumer harm associated with monopolies. Specifically, many in the gaming community feel that developers' creativity is being stifled by large multinational parent companies.¹² This has purportedly resulted in lower quality games.¹³ There is also concern that parent companies are compiling massive amounts of consumer data. When companies acquire developers or studios, they obtain all of the studios' recorded consumer data.¹⁴ This allows parent companies to use such data to market their products across various platforms, giving them a competitive edge against other smaller companies while increasing data security risks for consumers.¹⁵ Lastly, there are concerns that games will become more expensive if consolidation within the gaming industry continues.¹⁶ These arguments make up the case for why antitrust regulation for gaming companies should be a priority.

While many advocate for a crackdown on anticompetitive tendencies in the gaming industry, Microsoft's proposed acquisition of Activision Blizzard provides a recent case study for why heightened antitrust regulation for game developers is not necessary. On January 18, 2022, Microsoft announced their plan to acquire Activision for \$68.7 billion, making it the most expensive gaming acquisition in history.¹⁷ This potential deal caught the attention of the FTC and prompted them to issue a press release on how the US needs to strengthen enforcement against illegal mergers.¹⁸ Several months later, the FTC filed a complaint in the United States District Court for the Northern District of California requesting a preliminary injunction and a temporary restraining order against the acquisition.¹⁹ On July 10, 2023, the parties appeared before Judge Jacqueline Corley for a hearing to decide on the grant of injunctive relief.²⁰ The FTC argued that the acquisition would enable Microsoft to illegally reduce competition by reserving Activision's popular games, such as Call of Duty, exclusively for their platforms.²¹ This would, they claimed, force consumers to buy an Xbox and box out their competitors' consoles, such as the PlayStation.²² The court held that injunctive relief would not be appropriate because the FTC had not shown that Microsoft had the ability or incentive to foreclose Activision's games to the Xbox, nor shown that competition would be "substantially lessened" as a result of the alleged withholding.²³ It was particularly relevant that Microsoft had vowed publicly and under oath to keep Call of Duty available on their competitor Sony's platforms for the next ten years.²⁴ They also announced they would be bringing the Call of Duty franchise to the Nintendo Switch, another major console competitor.²⁵ Additionally, the valuation of the merger was based on Call of Duty's sales on other platforms.²⁶ This dilutes Microsoft's

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See generally Stacy Mitchell & Susan R. Holmberg, *America's Monopoly Problem: Why it Matters and What We Can Do About It*, INSTITUTE FOR LOCAL SELF-RELIANCE (July 2020), <https://ilsr.org/fighting-monopoly-power/americas-monopoly-problem-and-why-it-matters/>.

¹⁷ *Id.*

¹⁸ Press Release, Federal Trade Commission, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>.

¹⁹ *Microsoft Corp.*, 2023 WL 4443412.

²⁰ *Id.* at *1.

²¹ *Id.* at *12.

²² See *Id.*

²³ *Id.* at *13–14.

²⁴ *Id.* at *13.

²⁵ *Id.*

²⁶ *Id.*

incentive to make the game exclusive to the Xbox as it would decrease its total value. All of these facts convinced the court that Microsoft had no incentive to foreclose access to Activision's games and competition would likely not be lessened as a result of the acquisition.

This case demonstrates why heightened antitrust regulation in the gaming industry is not yet necessary. First, there is still sufficient competition among game developers. If Microsoft's acquisition of Activision goes through, Microsoft will still only be the third largest company in the gaming industry by revenue.²⁷ Despite its significance, this acquisition is not bringing Microsoft to a point where Sony, Nintendo, and other competitors cannot compete. Arguably, it is leveling the playing field among large game developers. Additionally, while companies profit from publishing their games on exclusive marketplaces, there are also profits to be made from allowing games to be sold on competitors' platforms. For instance, a player with a Sony PlayStation can play Call of Duty with players on a Microsoft Xbox through a cross-play feature.²⁸ This increases the overall value of a given game and increases the total gaming consumer market.²⁹ This argument is exemplified by the fact that Activision's value in the acquisition was based on the value of Call of Duty's availability on Sony's platforms.³⁰ Another reason why antitrust concerns are overstated is because of established industry practices. The Activision acquisition is not the first large acquisition to pass through the gaming industry. In 2014, Microsoft acquired Mojang, the developer responsible for the hugely popular Minecraft franchise.³¹ At the time of the acquisition, Minecraft was available on Xbox, PlayStation, and PC.³² Microsoft had the ability to limit its availability to Xbox, but it did not due to an understanding that the game's value and popularity comes from its availability across platforms.³³ Microsoft even made subsequent versions of the game available for the Nintendo Switch.³⁴ This shows how game publishers behave in these kinds of situations. Lastly, monopolistic tendencies are mitigated by a company's desire to maintain its reputation. If Microsoft or another publisher were to acquire a game franchise as popular as Call of Duty, then restrict access from millions of players on other platforms, they would suffer a huge hit to their reputation.³⁵ Those consumers would either have to begrudgingly buy a new console or accept that they can no longer play one of their favorite games because of Microsoft. The likely negative, overwhelming response would affect their consumer base across all other revenue sources, not just their gaming profitability.

The realities of the proposed Microsoft acquisition suggest that significantly increasing restrictions on acquisitions in the gaming industry are not necessary – at least not yet. Antitrust regulations remain an integral part of the US economy. In order to protect consumers, there must be safeguards against monopolies. However, it is also important to limit aggressive regulation to ensure innovation and production are not being stifled by burdensome restrictions. In the case of Microsoft's proposed Activision acquisition, the concerns regarding anticompetitive motivations do not hold enough merit to risk the negative effects of regulatory control. That being said, it will be essential for the FTC and other agencies to monitor the gaming industry in the near future. With the gaming market's immense

²⁷ Forrey, *supra* note 3.

²⁸ See *Microsoft Corp.*, 2023 WL 4443412, at *14.

²⁹ See *id.*

³⁰ *Id.* at *13.

³¹ *Id.* at *14–15.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at *14.

growth and proximity to Big Tech, monopolistic tendencies among game publishers could yet prove to be dangerous.