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The Ninth Circuit Properly Calls to Duty Precedents in Rejecting FTC Claim against Microsoft

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In *FTC v. Microsoft Corp. and Activision Blizzard, Inc.*,[1] the U.S. Court of Appeals for the Ninth Circuit laid out an easy-to-follow, textbook analysis of whether Microsoft Corporation's acquisition of Activision Blizzard, Inc., would substantially lessen competition in violation of Section 7 of the Clayton Act.[2] As is typical in vertical transactions, the Federal Trade Commission's ("FTC") primary argument in opposing the transaction was that Microsoft would be able to foreclose its competitors' access to a key input/product, the video game *Call of Duty*, and therefore harm competition in three key relevant product markets.

In affirming the district court's denial of the FTC's motion for a preliminary injunction, the court confirmed that the FTC's burden to obtain a preliminary injunction[3] in federal district court based on a Section 7 challenge "is whether the FTC's evidentiary showing raised sufficiently serious and substantial questions as to a 'reasonable probability that the merger will substantially lessen competition' in any relevant market."[4] The court expressly rejected the FTC's "proposed construe-everything-my-way standard" and reminded the FTC that "a preliminary injunction remains 'an extraordinary and drastic remedy' that must be affirmatively justified by the FTC."[5]

Through that lens, the court thoughtfully analyzed whether the FTC showed a sufficient likelihood of success on the merits with respect to any of the three product markets at issue, and, in affirming the district court's denial of a preliminary injunction, held that the FTC had failed to do so. First, the court reasoned that the "mere fact that, after a vertical merger, a company might make some of its newly acquired intellectual property exclusive to its platforms does not, without more, show a substantial lessening of competition." The court further reasoned that, for an injunction to issue, it was necessary to show that Microsoft had ***both*** the *ability* and the *incentive* to foreclose rivals. Here, in analyzing the first market (console devices), the court found that the FTC had failed to demonstrate that Microsoft had the incentive to exercise its exclusive rights in a manner that would substantially lessen competition. Second, in analyzing the other two markets (subscription services and cloud-streaming services), the court determined that the FTC failed to show that exclusive control over content would lead to a lessening of competition because there was

[1] 136 F.4th 954 (9th Cir. 2025).

[2] Section 7 of the Clayton Act, 15 U.S.C. § 18, prohibits transactions where the effect "may be substantially to lessen competition" or "tend to create a monopoly."

[3] Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC to seek in federal district court preliminary and permanent injunctions to remedy "any provision of law enforced by the Federal Trade Commission."

[4] *Id.* at 965.

[5] *Id.* at 967.

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no evidence that such content was available to these markets before the transaction—thus there would be no substantial post-merger effects.

The Ninth Circuit's opinion offers a thoughtful analysis of the two primary aspects that parties should consider when contemplating a vertical merger: market foreclosure and whether acquiring exclusive input may substantially lessen competition. This is the government's most recent failed challenge to a high-profile vertical merger.[6]

The Transaction

In January 2022, Microsoft—the creator of the Xbox video game console—announced its intention to acquire video game developer Activision for $68.7 billion. Microsoft and its competitors create exclusive content to "differentiate themselves in the console market," including by entering agreements with video game developers for games exclusive to their platform. Activision develops and publishes video games but does not manufacture game consoles. Instead, companies like Activision generally sell their games for particular platforms, splitting royalty revenues with the platform owners, such as Microsoft and its competitors Sony and Nintendo. Activision's *Call of Duty* is one of the most popular video game franchises in the world and the primary game at issue in this case. In fact, *Call of Duty* users represent a substantial portion of Sony's revenue.

The FTC Seeks to Block the Transaction

The FTC immediately began investigating the transaction and sought to block it by filing its administrative complaint in December 2022 alleging that the merger violated Section 7 of the Clayton Act.[7] The FTC alleged that, by making Activision's content exclusive to Microsoft, the transaction was reasonably likely to substantially lessen competition in three markets: video game consoles, subscription video game services, and cloud gaming. Microsoft addressed those concerns by entering into agreements with Nintendo and Sony, promising access to *Call of Duty* for a period of ten years. Despite those assurances, the FTC moved for preliminary injunction under Section 13(b) of the FTC Act.[8]

Section 7 of the Clayton Act prohibits mergers and acquisitions of "any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Under *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, the FTC is required to show only a "reasonable probability that the merger will substantially lessen competition" because a merger's effects cannot be predicted with any certainty. Further, Section 13(b) of the FTC Act "places a lighter burden on the Commission than that imposed on private litigants by the traditional equity standard," meaning that the FTC is not required to show irreparable harm to obtain preliminary injunction.[9]

The district court denied the FTC's motion for a preliminary injunction, finding that the FTC failed to raise "serious questions regarding whether the proposed merger is likely to substantially

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[6] *See, e.g., FTC v. Tempur Sealy Int'l, Inc. and Mattress Firm Group Inc.*, 768 F. Supp.3d 787 (S.D. Tex. 2025) (denying FTC's motion for preliminary injunction where FTC failed to establish (1) a relevant product market; and (2) that Mattress Firm had incentive to foreclose); *Illumina, Inc. v. FTC,* No. 23:60167, 2023 WL 8664628 (5th Cir. Dec. 15, 2023) (vacating FTC's administrative appellate win where proposed remedy addressed alleged harm); *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118 (D.D.C. 2022) (rejecting DOJ's challenge in light of intended divestiture); *United States v. AT&T*, 310 F. Supp. 3d 161 (D.D.C. 2018), *aff'd* 916 F.3d 1029 (D.C. Cir. 2019) (rejecting DOJ's challenge where proposed remedy addressed alleged harm).

[7] 15 U.S.C. § 18.

[8] 15 U.S.C. § 53(b).

[9] *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1159 (9th Cir. 1984).

lessen competition" in any of the three relevant markets.

The Ninth Circuit Affirms the Denial of the Preliminary Injunction

On appeal, the Ninth Circuit considered (1) whether the district court abused its discretion when it concluded "that the FTC had failed to raise sufficiently serious and substantial questions on the merits of its Clayton Act § 7 claim to support preliminary injunctive relief," and (2) whether, under Section 13(b), "the FTC's evidentiary showing raised sufficiently serious and substantial questions as to a reasonable probability that the merger will substantially lessen competition."[10]

The Ninth Circuit rejected the FTC's argument that the district court erroneously required it to *prove* the underlying merits of its § 7 claim rather than requiring it to simply raise serious questions regarding reasonable likelihood of a substantial lessening of competition in a relevant market. The court noted that the district court adopted the FTC's relevant product and geographic market definitions and that the district court correctly applied Section 13(b) standard (*i.e.,* "sufficiently serious and substantial questions as to a "reasonable probability that the merger will substantially lessen competition' in any relevant market").

Next, the Ninth Circuit rejected the FTC's argument that the district court erred by resolving evidentiary conflicts on a preliminary record. The Ninth Circuit explained that the district court should make a "preliminary assessment," rather than a "final determination" whether the FTC has raised "serious questions" regarding the merits of a § 7 claim. But that preliminary assessment "may properly rest upon pertinent factual findings bearing upon whether that showing has been made."

Accepting the three relevant market definitions, the court next focused on whether the district court abused its discretion when it concluded that FTC failed to establish its Section 7 claim. First, considering the high-performance console market, the court concluded that the FTC failed to show a likelihood of success of its claim that "Microsoft might make *Call of Duty* exclusive to Xbox after the merger." The court found that Microsoft was unlikely to withdraw *Call of Duty* from PlayStation because, according to Activision CEO's testimony, its revenue from PlayStation was probably twice that of Xbox. Further, withdrawing access from millions of PlayStation users would result in serious reputational harm for Microsoft. Relatedly, the court explained the FTC failed to show that Microsoft was likely to withdraw access to a multiplayer, multi-platform game with cross-play (the ability for users on different console platforms to play each other), deeming Microsoft's acquisition of the game Minecraft's developer as an apt example. There, Microsoft continued to distribute Minecraft to the same platforms after acquisition, and so it was likely to do the same with respect to a popular multi-player cross-platform game. The court also emphasized that Microsoft's internal documents were consistent with its public representations that it would continue to make *Call of Duty* available on PlayStation. Ultimately, the court held, Microsoft's internal documents supported the district court's finding that Microsoft lacked incentive to remove *Call of Duty* from PlayStation.

Additionally, the court affirmed the district court's finding that the FTC failed to make a sufficient showing in support of its "partial foreclosure" theory, specifically, that Microsoft would release an inferior version of *Call of Duty* to PlayStation. In support of its finding, the district court relied on testimony from Sony's CEO who explained that game developers had incentive of providing an equal gaming experience across all platforms. Ultimately, the FTC "failed to raise serious questions as to whether there was a reasonable possibility that Microsoft would actually have an incentive to engage in [partial foreclosure] with respect to" *Call of Duty*.

[10] 136 F.4th at 965.

The court next rejected the FTC's argument that Microsoft would have incentive to make Activision's other titles exclusive to Xbox. The court further noted that even if Microsoft had such incentive, there was no showing of "a substantial lessening of competition." The Ninth Circuit emphasized that intellectual property rights inherently include exclusive control and warned against conflating this exclusivity with the relevant question at issue under Section 7: "whether there is a reasonable probability that, if Microsoft acquires such exclusivity rights with respect to the relevant intellectual property, Microsoft will exercise such rights in a manner that *substantially lessens competition* in the pertinent market, i.e., the console market." Specifically, "[i]n the context of a vertical merger … something more than merely showing that some of the rights acquired will be made exclusive" is required.

Finally, the FTC argued the district court failed to sufficiently consider the competitive impact of the merger under the *Brown Shoe* multifactor test. But the court notes that the factors "invoked" by the FTC "ultimately turn[ ], in the context of the record evidence in this case, on the FTC's central premise that Microsoft will engage in foreclosure," and the FTC "failed to meaningfully rely on evidentiary proof of any such "alternative" theory of a substantial lessening of competition in the proceedings below."

The Ninth Circuit next determined that the district court did not abuse its discretion when it determined that the merger would not substantially lessen competition in the library subscription services or cloud-streaming markets. Modern video games are often used through a subscription service, like Microsoft's Xbox Game Pass, where users have to access a catalog of Microsoft's video games, including first-party games (games created by Microsoft). And others have similar services.

Unlike the console market, the district court began with the presumption that Microsoft had "the ability and the incentive to exercise exclusivity rights with respect to *Call of Duty* and other Activision Blizzard content in the subscription market." But, importantly, the court noted that, before the merger, Activision itself had opposed putting its content onto subscriptions services. The FTC challenged this argument, pointing to evidence that it was not "an impossibility" that Activision Blizzard's content could be included on a subscription service and that some content had been on subscriptions services in the past. The district court concluded—and the Ninth Circuit agreed—that the record as a whole did not support FTC's assertion that Activision's content would *eventually* be available to Microsoft's competitors *but for* the merger.

Lastly, the Ninth Circuit concluded the district court did not abuse its discretion when it held the FTC failed to show that the transaction would lessen competition in the cloud-streaming market. The court concluded that the FTC failed to show that, absent the transaction, Activision Blizzard's content would be "otherwise open to competitors" in the streaming market. Thus, the FTC "failed to show a sufficient likelihood of success as to its foreclosure-based theory of a substantial lessening of competition."

