

Class 25 slides

Unit 13: Microsoft/Activision

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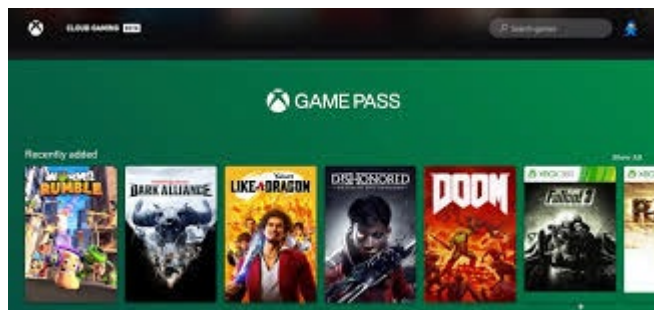
The parties

■ Microsoft Corporation

□ Products and services

- *Consoles*: Produces and sells Xbox consoles (Series S|X) and operates the Xbox ecosystem, including the digital store
- *Subscription services*: Offers the Game Pass multigame subscription service on the Xbox console and the PC, with a growing catalog of first- and third-party titles
- *Cloud gaming*: Operates Xbox Cloud Gaming, which lets users stream games from Microsoft's servers across devices (consoles, PCs, tablets, and mobile phones)
- *Game publishing*: Publishes first-party games through Xbox Game Studios and ZeniMax/Bethesda; notably made ZeniMax titles (e.g., Starfield, Redfall) exclusive to Xbox/PC postacquisition

- *Mobile weakness*: Lacks significant presence in mobile gaming, despite mobile being the industry's largest and fastest-growing revenue segment



The parties

■ Activision Blizzard, Inc.

□ Overview

- One of the "Big 4" independent video game publishers
- Portfolio that includes Call of Duty, World of Warcraft, Diablo, Overwatch, and King's mobile titles (Candy Crush)

□ Call of Duty

- An annual, top-selling "AAA" first-person shooter franchise with a massive, persistent online player base
- Notably, half of its monthly active players play on mobile

□ Console strategy

- Historically releases Call of Duty across multiple consoles and PC, often with Sony marketing arrangements and limited PlayStation-exclusive content
- At the time of the transaction, did not license Call of Duty to multigame subscription services or cloud gaming providers

□ Subscription/cloud view

- Maintained a "philosophical aversion" to licensing titles to multigame subscription services or cloud providers, viewing them as value-destructive to its "buy-to-play" model



The transaction

■ Overview

- ❑ Announced January 2022
- ❑ Microsoft agreed to acquire Activision Blizzard in an all-cash transaction valued at approximately \$68.7 billion (largest in tech history)
- ❑ *Vertical merger*: Combines an upstream content creator (Activision) with a downstream console/platform owner (Microsoft)
- ❑ *Termination date*: July 18, 2023
 - Reverse antitrust termination fee of \$3 billion

■ Structure

- ❑ Activision Blizzard would become a wholly-owned Microsoft subsidiary
- ❑ Activision's studios and titles would be folded into Microsoft's gaming division

■ Key assets to be acquired:

- ❑ Console and PC franchises (including Call of Duty, Diablo, Overwatch)
- ❑ King's mobile portfolio (Candy Crush and related titles)
- ❑ Massive base of active users across console, PC, and mobile

Strategic rationale

- Accelerate growth of Microsoft's gaming business
 - Shift Xbox from a console-centric offering to a multi-platform ecosystem (console, PC, mobile, cloud)
 - Increase scale toward top-tier global gaming revenue and user reach
- Strengthen first-party content and IP
 - Acquire leading franchises (Call of Duty, World of Warcraft, Diablo, Overwatch, Candy Crush)
 - Use premium content to enhance engagement and differentiation on Xbox and Windows
- Make Game Pass the central subscription platform
 - Add Activision Blizzard titles to expand Game Pass breadth and value
 - Increase recurring subscription revenue and reduce reliance on one-time game sales
- Build a real presence in mobile gaming
 - Leverage King (Candy Crush and related franchises) to obtain immediate scale in the mobile segment
 - Enable cross-promotion across console, PC, and mobile to deepen user engagement
- Advance cloud and future platforms
 - Use Activision Blizzard content to support xCloud and Microsoft's "play anywhere" strategy
 - Position the company for emerging immersive platforms (including metaverse-style environments) and strengthen competition with Sony, Tencent, and other global platforms

International antitrust scrutiny

- The transaction triggered intensive merger review in multiple jurisdictions, including—
 - United States (FTC)
 - December 8, 2022: Filed an administrative complaint seeking to block the transaction in its entirety
 - July 10, 2023: The U.S. District Court denied the FTC's motion for a preliminary injunction
 - European Union (European Commission)
 - September 30, 2022: Notification to the European Commission
 - November 8, 2022: EC opens an in-depth Phase II review
 - May 15, 2023: EC Clears transaction subject to 10-year licensing commitments for Activision Blizzard PC and console games to rival cloud-gaming services and EEA consumers
 - United Kingdom (Competition and Markets Authority)
 - July 6, 2022: Initial notification/Phase 1 launch
 - April 26, 2023: Entered a prohibition decision blocking the transaction in its entirety
 - August 22, 2023: Notification of a revised transaction under which Microsoft would transfer non-EEA cloud-streaming rights for Activision Blizzard PC and console games to Ubisoft under a long-term license (covering the United States, the United Kingdom, Canada, Japan, and all other non-EEA jurisdictions).
 - October 13, 2023: CMA cleared the merger on the basis of this restructured transaction and the divestiture of non-EEA cloud-streaming rights to Ubisoft

FTC procedural posture

■ HSR review

- The transaction was reported to the DOJ and FTC on February 1, 2022
- Merging parties initially agreed not to close before November 21, 2022
- Later extending timing agreement to December 12, 2022
- The merger agreement original termination date was July 18, 2023

■ FTC administrative complaint

- On December 8, 2022, the FTC issued an administrative complaint alleging that the acquisition violated Section 7 of the Clayton Act and Section 5 of the FTC Act
 - Fact discovery closed on April 7, 2023, followed by expert discovery

■ Section 13(b) complaint

- The FTC initially did not seek a preliminary injunction, because the transaction could not close while review was ongoing before the European Commission and the UK CMA
 - Microsoft want the FTC to commence the Section 13(b) proceeding immediately
- On June 12, 2023, when foreign mandatory review periods began to expire, the FTC filed a complaint in federal district court under Section 13(b) seeking a preliminary injunction to prevent closing pending completion of the administrative trial
 - Microsoft would not stipulate to a TRO unless the FTC filed in the DDC rather than ND Calif.
 - FTC filed in ND Calif as a related case and court entered TRO
- The court held a five-day evidentiary hearing in June 2023 and denied the requested injunction on July 10, 2023 (a week before the merger agreement's termination date)

FTC's foreclosure theories

■ Three vertical foreclosure theories

- *Console gaming*: Withhold Call of Duty from Sony PlayStation
 - Not from Nintendo, which the FTC treated as outside the competitive set for this theory
- *Multigame subscription services*: Deny access to Call of Duty to rival subscription platforms (e.g., PlayStation Plus, Nvidia GeForce Now)
- *Cloud gaming*: Withhold Call of Duty from rival cloud-gaming providers in a nascent market

■ FTC's competitive concern

- Call of Duty is a "must-have" game
- Microsoft would have the ability and incentive to foreclose rivals by denying access to Call of Duty
- Foreclosure would substantially lessen competition

■ Microsoft's response

- 10-year Call of Duty licensing deals with Nintendo, Nvidia, and multiple cloud-gaming rivals
 - Sony signed a similar 10-year agreement only after the FTC's case appeared likely to fail
- Argued that making Call of Duty exclusive would be unprofitable and inconsistent with its revenue model

Behavioral remedies/Private commitments

- Attempted settlement of the FTC's investigation
 - During the investigation, Microsoft offered a formal consent decree with ten-year commitments to keep *Call of Duty* and other key titles available on rival consoles and services on parity terms
 - The FTC declined, citing concerns about enforceability, monitoring, and long-term conduct remedies in dynamic tech markets
- Private commitments
 - Microsoft entered into a series of private ten-year agreements to license *Call of Duty* and other Activision content:
 - Agreement with Nintendo to bring *Call of Duty* to Nintendo platforms on parity terms
 - Agreements with multiple cloud-gaming providers (e.g., Nvidia, Boosteroid, Ubitus, EE)
 - Public offer to Sony of the same ten-year licensing terms, which Sony initially declined and later accepted after the district court denied the preliminary injunction
 - Microsoft relied on these contracts to argue that it lacked an incentive to foreclose rivals and that the likely future world includes broad distribution of Activision content
- The court
 - Judge Corley treated these agreements not as remedies, but as probative evidence of Microsoft's incentives and the likely competitive behavior with the merger

Relevant markets

- High-performance console market
 - FTC alleged a two-firm market: Microsoft (Xbox) and Sony (PlayStation)
 - Excluded Nintendo Switch
 - Highly concentrated market with significant barriers to entry
- Multigame subscription services market
 - Services offering access to a catalog of games for a recurring fee
 - Examples: Microsoft's Xbox Game Pass, Sony's PlayStation Plus (and similar services)
 - Rapidly growing segment of game distribution
- Cloud gaming market
 - Nascent market for streaming games over the cloud without local downloads
 - Various providers, including Microsoft (xCloud) and Nvidia GeForce Now
 - Future scope and competitive dynamics uncertain
- Market definition in the litigation
 - Microsoft disputed aspects of these markets, but Judge Corley analyzed the case assuming the FTC's proposed markets and focused on whether foreclosure in those markets was likely

The ability and incentive test

■ Legal standard

- FTC must show Microsoft would have both ability *and* incentive to foreclose
 - Court rejected FTC's position that ability *or* incentive alone sufficient

- The test:

[T]o establish a likelihood of success on its ability and incentive foreclosure theory, the FTC must show the combined firm (1) has the ability to withhold Call of Duty, (2) has the incentive to withhold Call of Duty from its rivals, and (3) competition would probably be substantially lessened as a result of the withholding.

- *Brown Shoe* factors

- Not clear, but appears to reject as an independent test of vertical harm
- Instead, treats them as circumstantial evidence bearing on ability, incentive, and likely competitive effects

The ability and incentive test

■ Ability to foreclose

- Microsoft would control Call of Duty post-acquisition
- Microsoft could make the game exclusive to Xbox (or degrade quality/terms) on rival platforms
- Microsoft's technical and contractual ability to foreclose/RRC was not seriously disputed

■ Incentive to foreclose

- *Key question:*

Would withholding Call of Duty from rivals be profitable for Microsoft?

- Depends on whether the loss of Call of Duty sales and in-game revenue on rival platforms is outweighed by additional Xbox console, subscription, and ecosystem profits
- Economic modeling crucial to analysis

Consoles

- The FTC's core concern
 - Microsoft could make Call of Duty exclusive to Xbox, or degrade quality, timing, or features on PlayStation to shift users away from Sony
- What the FTC needed to prove
 - *Ability*: Microsoft did not seriously dispute
 - *Incentive*: That such foreclosure would be profitable
- Methods of proof
 - Economic evidence:
 - Expert modeling of whether foreclosure would yield higher profits than continued multiplatform distribution of Call of Duty.
 - Noneconomic evidence:
 - Sony testimony
 - Microsoft internal documents, public statements, and prior conduct (e.g., Zenimax/Bethesda)

Consoles: The FTC's economic evidence

- Dr. Lee's foreclosure model
 - Modeled a scenario in which Microsoft removes Call of Duty from PlayStation (complete foreclosure)
 - Compared profits under foreclosure with profits from continued multiplatform distribution, including:
 - Lost Call of Duty and in-game revenues on PlayStation
 - Gained Xbox profits from additional console sales, game sales, and Game Pass subscriptions
- Critical switching rate
 - *Critical switching rate*: The minimum share of affected PlayStation Call of Duty players who must switch to Xbox for foreclosure to be profitable
 - If actual switching exceeds the critical switching rate → foreclosure becomes profit-maximizing
 - Lee used an actual switching rate of roughly 20%

Consoles: The FTC's economic evidence

- Actual switching rate (~20%)
 - Lee posited approximately 20% of PlayStation Call of Duty users would switch to Xbox if access or quality were withdrawn or degraded
 - This switching-rate assumption was central to showing foreclosure could be profitable under the model
- The basis for Lee's actual switching estimate
 - Lee used two sources to support his actual switching estimate—
 1. A 2019 internal Microsoft “must-have title” memo, used to help calibrate how strongly Call of Duty could drive console switching
 2. An econometric “share model” based on Gen-8 U.S. console data, estimating how many defecting PlayStation users would become Xbox users

Consoles: The FTC's economic evidence

1. The 2019 “must-have title” memo

- ❑ The 2019 “must-have title” memo
 - The opinion and available court filings provide only a very limited description of the memo
 - The memo appears to have been prepared to evaluate how securing exclusivity for certain high-value third-party titles could increase Xbox console share
 - The memo included rough estimates indicating exclusivity could shift console share by 1-3 percentage points worldwide
 - ❑ The memo's estimate concerned aggregate Xbox console-share changes, while Lee's 20% figure measured behavioral switching within a subset of PlayStation Call of Duty users → The two metrics measured different phenomena and are not directly comparable
 - ❑ However, there are indications in the court's opinion that Lee's 20% affected user switching rate implies 5.5% share shift to Xbox
- ❑ The Court's evaluation
 - Methodological concerns
 - ❑ The memo did not explain how the estimated console-share shifts were derived or described the attributes of the titles being studied
 - ❑ It was unclear whether, or how, the memo's analysis applied to Call of Duty
 - Magnitude inconsistent with Lee's switching inference
 - ❑ Lee testified that a 2% share shift would not be sufficient to make COD exclusivity profitable
 - ❑ In any event, the memo did not support the 5.5% share shift Lee apparently required for profitability

Court's conclusion: The memo did not provide reliable empirical support for the 20% actual switching rate

Consoles: The FTC's economic evidence

2. Lee's "share model"

□ The model

- The second source of support for Lee's 20% actual switching rate estimate is his "share model"
- The opinion and available court filings provide almost no technical detail, other than that it is an econometric model of consumer demand for video-game consoles and titles that relates the relative monthly sales shares of Microsoft Xbox and Sony PlayStation consoles to the availability and attractiveness of exclusive content on each console
- Lee testified that, under Call of Duty exclusivity, the model predicted an 8.6-percentage-point increase in Xbox's console share, much greater than the 5.5-percentage-point share gain he testified would be sufficient to make foreclosure profitable

□ The Court's evaluation

- Model based on Gen-8 PlayStation-to-Xbox substitution data and assumed all lost PlayStation users would migrate to Xbox and ignored PC, mobile, and cloud gaming as destinations
- Gave little role to players choosing based on nonexclusive games or ecosystem preferences
- Microsoft expert Carlton testified that more realistic assumptions materially reduced the implied switching rate — dropping it below the threshold needed to make foreclosure profitable

- Lee did not rebut Carlton, and the FTC did not challenge Carlton's analysis on cross-examination

Court's conclusion: The share model did not reliably support either the 20% actual switching rate or the claim that Call of Duty foreclosure would be profit-maximizing for Microsoft.

Consoles: The FTC's non-economic evidence

■ Sony testimony

- FTC's evidence: Sony executives testified that—
 - Call of Duty is critical to PlayStation
 - Losing access or parity would harm Sony and shift users to Xbox, and
 - They feared Microsoft would have both the ability and incentive to foreclose
- Court's evaluation
 - Treated this as self-interested prediction, not proof of Microsoft's likely conduct
 - Testimony showed CoD's importance to Sony, but did not establish that Microsoft would sacrifice substantial CoD revenues and network effects by withdrawing or degrading the game on PlayStation

■ Internal Microsoft documents & statements

- FTC's evidence
 - Pointed to internal strategy materials and emails discussing the value of exclusive content and more aggressive content-acquisition strategies, and to some statements that could be read as contemplating exclusivity
- Court's evaluation
 - Found the documents ambiguous and not specifically tied to a plan to remove CoD from PlayStation
 - Gave more weight to Microsoft's contemporaneous public commitments and ten-year contracts to keep CoD on rival platforms on parity terms

Consoles: The FTC's non-economic evidence

- Prior conduct: ZeniMax/Bethesda
 - FTC's evidence
 - After acquiring ZeniMax, Microsoft made several Bethesda titles exclusive to Xbox/PC, despite earlier indications that they might remain multiplatform
 - FTC argued this showed a pattern of promising broad access and later choosing exclusivity
 - Court's evaluation
 - Distinguished ZeniMax, noting that the Bethesda games were not comparable to Call of Duty in scale, multiplayer network effects, or platform dependence
 - Concluded that Microsoft's past decisions about those titles did not show it was likely to foreclose CoD on PlayStation

Overall, the court held that the noneconomic evidence did not demonstrate a likely profit-maximizing plan by Microsoft to withdraw or degrade Call of Duty on PlayStation

Consoles: The merging parties' evidence

1. Microsoft's core argument: Foreclosure would be unprofitable

- ❑ PlayStation revenue dependence
 - Call of Duty generates substantial revenue on PlayStation from game sales and in-game purchases
 - Removing the title from PlayStation would require Microsoft to forgo billions of dollars in near-term revenue
- ❑ Network-effects and franchise value
 - The value of Call of Duty is tied to a large, cross-platform multiplayer base
 - Exclusivity risks diminishing user engagement and reducing long-term franchise value
- ❑ Internal financial planning consistent with multi-platform strategy
 - Microsoft's post-merger models assumed continued PlayStation distribution
 - Court treated these projections as credible forward-looking evidence of actual incentives

The Court's evaluation: The defense evidence reinforced the Court's determination that the FTC had not shown a likelihood of profitable anticompetitive foreclosure

Consoles: The merging parties' evidence

2. Past behavior viewed as probative of likely future conduct

- ❑ Minecraft acquisition as comparator
 - After acquiring Mojang, Microsoft continued broad, multiplatform support for Minecraft
 - Court accepted the analogy as relevant to predicting postmerger conduct for large cross-platform franchises
- ❑ Xbox's broader platform strategy
 - Microsoft business filings and executive testimony identified growth through content accessibility, including PC, mobile, and cloud
 - Suggested the firm benefits more from a broad distribution model than a closed Xbox ecosystem
- ❑ Sony's testimony partially discounted
 - Court noted Sony both competes with and negotiates with Microsoft, affecting its incentives in litigation
 - Viewed Sony's predictions as advocacy rather than neutral market evidence

The Court's evaluation: The defense evidence reinforced the Court's determination that the FTC had not shown that Microsoft was likely to withdraw or materially degrade Call of Duty on PlayStation

Consoles: The merging parties' evidence

3. Access agreements demonstrate commitment to nondiscriminatory access

- Behavioral and contractual commitments
 - Microsoft entered multiple 10-year licensing agreements (Nintendo, Nvidia, cloud-gaming firms, etc.) to maintain *Call of Duty* on rival platforms on parity terms
 - Public offer to Sony based on the same terms (later accepted after PI loss)
- Structural modification to address cloud concerns
 - Microsoft restructured the transaction by divesting non-EEA cloud-streaming rights for *Activision Blizzard* PC and console games to Ubisoft under a long-term license
 - Transferred cloud-streaming access decisions to Ubisoft and out of Microsoft
- How the court treated these commitments
 - Judge Corley did not treat these as “remedies,” but as probative evidence of Microsoft’s planned competitive behavior in the merits assessment
 - The commitments further demonstrated Microsoft’s economic incentives against foreclosure and undercut the FTC’s ability to show likely foreclosure harm

The Court’s evaluation: The access agreements restructuring reinforced the Court’s determination that Microsoft was unlikely to foreclose rivals’ access to Activision content.

Consoles: Conclusion

■ The Court: Not proven

- On this record, the court concludes that the FTC did not show that Microsoft likely has both the ability and the profit-maximizing incentive to foreclose or substantially disadvantage Sony through Call of Duty
- Microsoft would forgo substantial profits from Call of Duty sales and in-game purchases on PlayStation if it removed or degraded the title there
- The value of Call of Duty depends heavily on a large, cross-platform player base (multiplayer network effects), making full or partial foreclosure costly

Multigame subscription services

■ Background

- ❑ Premerger, Activision did not license Call of Duty to any multigame subscription service (including Game Pass or PlayStation Plus)
- ❑ Activision's leadership was publicly and internally skeptical of day-and-date subscription distribution for its flagship console titles, concerned about cannibalizing full-price retail and digital sales
- ❑ Any limited subscription participation focused on older or narrower titles, not on current-generation, frontline franchises like Call of Duty

■ FTC theory

- ❑ Argued that adding Call of Duty to Game Pass while it remained unavailable on PlayStation Plus would give Microsoft a pivotal advantage in the emerging market for multigame subscription services
- ❑ Contended that subscription services are a distinct competitive arena in which early, high-value content exclusivity could drive user migration and entrench Game Pass as the leading platform

Multigame subscription services

■ The Court

1. Merger has the procompetitive effect of expanding access to Call of Duty

■ Premerger

- ❑ Players could only access new COD titles through full-price purchase
- ❑ Activision did not license COD to any multigame subscription service

■ Postmerger

- ❑ Adding COD to Game Pass gives consumers a new, lower-cost, day-and-date way to play COD while preserving the traditional purchase option
- ❑ Court credited Carlton's testimony that—
 - Adding Activision content to Game Pass would lower effective costs for many consumers and harm none
 - A larger Game Pass base would increase Microsoft's incentives to invest in game development (both Activision and non-Activision titles)
- ❑ Adding COD to Game Pass gives consumers a new, lower-cost, day-and-date way to play COD while preserving the traditional purchase option

- *Court's conclusion*: Court treats these effects as output-enhancing efficiencies and competition on the merits, not evidence of foreclosure in a distinct subscription market

Multigame subscription services

2. FTC failed to substantiate competitive harm in multigame subscriptions
- ❑ Lee acknowledged that exclusivity can have both pro- and anticompetitive effects,
 - ❑ BUT Lee performed no quantitative analysis of whether adding COD to Game Pass (and not to rival services) would actually injure competition
 - No estimate of how many users would subscribe to Game Pass because of COD
 - No analysis of how that switching would affect competition with rival subscription services (Amazon, EA, Ubisoft, Sony)
 - ❑ Lee testified that multigame subscription and cloud services are “relatively nascent and new” and that the lack of reliable data made it very difficult to perform a quantitative analysis he would consider reliable
 - ❑ Carlton likewise emphasized the absence of credible quantitative evidence linking COD-on-Game-Pass exclusivity to a likely substantial lessening of competition in a defined subscription market
 - ❑ *Court’s conclusion:* Without reliable quantitative evidence on how many users would switch to Game Pass for COD or how that would affect competition with rival services, the court found that the claimed competitive harm in multigame subscriptions was speculative rather than proven

Multigame subscription services

3. FTC's but-for story about Activision licensing to subscriptions lacked evidentiary support

- ❑ FTC's theory
 - Going forward without the merger, Activision would contract to put Call of Duty and other content on multigame subscription services
- ❑ Record evidence pointed the other way
 - Activision's CEO (Bobby Kotick) testified that Activision believes day-and-date subscription distribution is not in its financial interest because it would cannibalize individual game sales
 - Kotick "could not imagine" a subscription service agreeing to the financial terms Activision would require for such a deal
- ❑ Past conduct was consistent with this stance
 - In 2020, Xbox attempted to negotiate placing certain Activision titles on Game Pass; Activision refused
 - Activision had no plans to put its content on a game-library subscription service going forward
- ❑ *Court's conclusion:* FTC offered no explanation or evidence as to why it would suddenly become financially in Activision's interest to reverse its long-held position on subscription services in the but-for world

Overall conclusion: FTC failed to make out a prima facie case in the multigame subscription services market

Cloud Gaming

■ Background

□ Premerger

- Activision content—including Call of Duty—was not available on any cloud-streaming platform
- Activision previously pulled Call of Duty from GeForce NOW after beta testing and did not later license it to any cloud service
- Activision executives testified that placing frontline titles on cloud services was not financially attractive under its existing business model

□ FTC theory

- Argued that postmerger Microsoft would have the ability and incentive to foreclose rival cloud-streaming platforms by denying access to Activision content
- Claimed cloud streaming represents an emerging competitive battleground where early exclusivity could shape user adoption and entrench Microsoft's xCloud service
- Post-complaint agreements should be ignored as mere “proposed remedies”

Cloud Gaming

■ The Court

- Microsoft entered binding licensing agreements with five cloud-gaming providers, giving them access to Activision content for the first time
- FTC's counterargument that non-U.S.-based services should be disregarded was unsupported
 - To the contrary, evidence showed U.S. server locations for several signatory providers
- FTC offered no quantitative evidence that an independent Activision would license content to cloud services absent the merger
 - Lee did not model the cloud-streaming market
- *Court's conclusion:* Because the merger expands—not restricts—access to Activision content in cloud streaming, the FTC did not show likely foreclosure or competitive harm in this segment

Overall conclusion: FTC failed to make out a prima facie case in the cloud gaming market subscription services market

Brown Shoe as an alternative foreclosure theory

■ FTC's *Brown Shoe* theory

- Invoked the *Brown Shoe* “functional factors” as an alternative basis for liability
- Argued that the merger’s “very nature and purpose” was to convert an independent, platform-agnostic publisher (Activision) into a captive internal supplier for Microsoft
- Pointed to a supposed “trend toward concentration” and rising entry barriers in the videogame industry, and to Microsoft’s past conduct (e.g., ZeniMax) as evidence of likely anticompetitive effects

Brown Shoe as an alternative foreclosure theory

■ The Court's evaluation

- Noted that this theory was not developed in the FTC's opening, closing, or Dr. Lee's expert report
 - Found that the *Brown Shoe* arguments added nothing new beyond the foreclosure theories already rejected in the console, multigame subscription, and cloud-streaming markets
 - Observed that converting an independent supplier into a "captive" one is a feature of any vertical merger and, without more, does not show an anticompetitive purpose
 - Held that generalized references to concentration trends and past transactions were unsupported and incomplete (e.g., they ignored counterexamples such as Mojang/Minecraft and the record of increased content investment)
 - *Court's conclusion*: Judge Corley appears to reject the *Brown Shoe* factors as an independent test of vertical anticompetitive harm and instead treats them, at most, as circumstantial evidence relevant to Microsoft's ability and incentive to foreclose and to any resulting competitive effects—issues on which the FTC had already failed to carry its burden.

District Court: Outcome

■ Failure of the FTC's prima facie case

□ Consoles

- Microsoft lacked credible incentive to withdraw or degrade CoD given cross-platform economics, revenue losses, and brand harm
- Microsoft's existing contractual commitments (and history with Minecraft) undermined the prediction of exclusivity

□ Multigame subscriptions

- Adding Call of Duty to Game Pass expanded access and lowered effective prices
- Any harm to Sony reflected product improvement, not foreclosure, and was not quantified
- FTC failed to show subscriptions were a distinct antitrust market where harm would occur in the near term

□ Cloud streaming

- Activision has not licensed, pulled content from cloud (GeForce NOW), and does not plan to license cloud absent the merger
- Microsoft's contracts with multiple cloud providers increased access to Activision content

■ Disposition

- Court denied the FTC's motion for a preliminary injunction under Section 13(b)
- Without a federal-court injunction, the parties were free to proceed toward closing once remaining foreign regulatory conditions were satisfied

Ninth Circuit Affirmance

■ Standard of review

- ❑ Abuse of discretion standard for preliminary injunction denial
- ❑ District court's factual findings reviewed for clear error
- ❑ Legal conclusions reviewed de novo

■ Ninth Circuit holding

- ❑ FTC failed to carry burden of showing likelihood of success
- ❑ Affirmed district court's denial of preliminary injunction (July 14, 2023)

■ Court's reasoning

- ❑ District court properly evaluated economic evidence
- ❑ Dr. Lee's model had significant methodological limitations
- ❑ Microsoft's behavioral commitments were relevant consideration
- ❑ FTC's foreclosure theories not sufficiently supported by evidence

Microsoft/Activision: Bottom line

■ Practical outcome

- ❑ Microsoft completed \$69 billion acquisition July 13, 2023
- ❑ FTC withdrew administrative complaint
- ❑ Call of Duty remains available on PlayStation pursuant to 10-year agreement

■ Significance for vertical merger enforcement

- ❑ Standard: ability and incentive required, not ability or incentive
- ❑ Court's reliance on behavioral commitments notable
- ❑ Economic modeling challenges highlighted importance of reliable foreclosure evidence