

ANTITRUST — VERTICAL MERGERS — NORTHERN DISTRICT OF CALIFORNIA REITERATES STANDARD FOR SUBSTANTIALLY LESSENE COMPETITION. — *FTC v. Microsoft Corp.*, No. 23-cv-02880, 2023 WL 4443412 (N.D. Cal. July 10, 2023).

Despite the dramatic uptick in merger volume over the last forty years,¹ antitrust enforcement has been in decline.² In 2018, the Department of Justice (DOJ) challenged a vertical merger between AT&T and Time Warner Cable and lost.³ In 2020, the Federal Trade Commission (FTC) and DOJ issued new vertical merger guidelines,⁴ potentially indicating a stronger stance on vertical merger enforcement, but the FTC withdrew them in 2021 due to discrepancies between the guidelines and “market realities.”⁵ The FTC’s new assertiveness continued when it challenged the largest merger in tech history, between Microsoft and Activision Blizzard, Inc., a video game publishing company.⁶ Recently, in *FTC v. Microsoft Corp.*,⁷ the U.S. District Court for the Northern District of California rejected the FTC’s request to enjoin the merger and observed severe deficiencies in the FTC’s allegations.⁸ These deficiencies raise concerns about the FTC’s translation of information about markets it intends to regulate into robust legal claims.

In January of 2022, Microsoft announced its intent to acquire Activision for \$68.7 billion.⁹ Activision produces games including *Call of Duty*, *Candy Crush*, *Overwatch*, and *World of Warcraft*.¹⁰ It is especially known for producing “AAA” games (such as *Call of Duty*), which are “high-budget, high-profile games that are typically produced

¹ *Number of Merger and Acquisition (M&A) Transactions Worldwide from 1985 to April 2023*, STATISTA (June 6, 2023), <https://www.statista.com/statistics/267368/number-of-mergers-and-acquisitions-worldwide-since-2005> [<https://perma.cc/RE3U-LQ6K>].

² Filippo Lancieri et al., *The Political Economy of the Decline of Antitrust Enforcement in the United States* 9 (Nat’l Bureau of Econ. Rsch., Working Paper No. 30326, 2022).

³ *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 253 (D.D.C. 2018), *aff’d*, 916 F.3d 1029 (D.C. Cir. 2019).

⁴ U.S. DOJ & FTC, VERTICAL MERGER GUIDELINES (2020) [hereinafter VERTICAL MERGER GUIDELINES], https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf [<https://perma.cc/RB6Q-FE7M>].

⁵ Press Release, FTC, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sept. 15, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary> [<https://perma.cc/5V2B-K2WM>].

⁶ Ari Levy, *Microsoft Sets Record for Biggest Tech Deal Ever, Topping Dell-EMC Merger in 2016*, CNBC (Jan. 18, 2022, 8:35 PM), <https://www.cnbc.com/2022/01/18/biggest-tech-deal-ever-microsoft-activision-set-69-billion-record.html> [<https://perma.cc/ST5M-ZVRS>].

⁷ No. 23-cv-02880, 2023 WL 4443412 (N.D. Cal. July 10, 2023).

⁸ *Id.* at *1.

⁹ Press Release, Microsoft, Microsoft to Acquire Activision Blizzard to Bring the Joy and Community of Gaming to Everyone, Across Every Device (Jan. 18, 2022), <https://news.microsoft.com/2022/01/18/microsoft-to-acquire-activision-blizzard-to-bring-the-joy-and-community-of-gaming-to-everyone-across-every-device> [<https://perma.cc/ZE6F-EZ3D>].

¹⁰ *Id.*

and distributed by large, well-known publishers” and “rank as ‘blockbusters’ due to their extreme popularity.”¹¹

The FTC immediately began investigating the merger¹² and filed an administrative complaint to block it in December of 2022.¹³ In June of 2023, the FTC filed a complaint in the Northern District of California seeking a temporary restraining order and a preliminary injunction pending the administrative trial scheduled just before the deal was to close.¹⁴ The complaint alleged that the merger violated section 7 of the Clayton Act¹⁵ and section 5 of the FTC Act¹⁶ because Microsoft would prevent Activision’s content from being played on rival devices and services, hurting consumers and markets.¹⁷ The court granted the temporary restraining order pending its preliminary injunction hearing.¹⁸

The court then denied the FTC’s motion for a preliminary injunction, dissolved the restraining order, and dismissed the case.¹⁹ The court “(1) determine[d] the likelihood that the Commission [would] ultimately succeed on the merits and 2) balance[d] the equities”²⁰ to decide whether to grant the preliminary injunction. The court ultimately did not need to reach the question of equities for its decision but found the equities favored denying the injunction.²¹

The court first defined the relevant market. It agreed with the FTC that high-performance consoles — namely Microsoft’s Xbox and Sony’s PlayStation consoles — were a relevant product market²² because of those consoles’ comparable prices, hardware, and ability to run AAA games.²³ The FTC also argued that multigame content libraries (which include Microsoft’s Game Pass) and cloud gaming services were relevant product markets because of the acquisition’s potential to affect subscription prices and availability of games.²⁴ The court assumed without deciding that library subscription services and cloud gaming markets were

¹¹ *What Are AAA Games?*, ARM, <https://www.arm.com/glossary/aaa-games> [<https://perma.cc/67WT-49HX>].

¹² David McLaughlin, *Microsoft Deal for Activision to Be Reviewed by FTC in U.S.*, BLOOMBERG (Feb. 1, 2022, 10:52 AM), <https://www.bloomberg.com/news/articles/2022-02-01/microsoft-deal-for-activision-to-be-reviewed-by-ftc-in-u-s> [<https://perma.cc/24FV-6M37>].

¹³ Microsoft Corp., F.T.C. No. 9412 (Dec. 8, 2022) (complaint).

¹⁴ Complaint for a Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the FTC Act §§ 17–18, *Microsoft*, No. 23-cv-02880 [hereinafter Complaint].

¹⁵ 15 U.S.C. § 18.

¹⁶ *Id.* § 45.

¹⁷ Complaint, *supra* note 14, ¶ 1.

¹⁸ Order re: Temporary Restraining Order and Preliminary Injunction, *Microsoft*, No. 23-cv-02880.

¹⁹ *Microsoft*, 2023 WL 4443412, at *22.

²⁰ *Id.* at *8 (citing *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984)).

²¹ *Id.* at *21–22.

²² Relevant product markets in relation to section 7 of the Clayton Act are used to assess the area of effective competition in the product market and geographic market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

²³ *Microsoft*, 2023 WL 4443412, at *10–11.

²⁴ *Id.* at *11.

each their own product market.²⁵ As to the relevant geographic market, the court agreed that it was limited to the United States.²⁶

Next, the court assessed the merger's effect on competition. The FTC emphasized that Activision is a leader in publishing AAA games, which are especially difficult to develop but also important inputs²⁷ for consoles and gaming subscription services.²⁸ It argued that the merger would deprive Sony of a fair opportunity to compete by foreclosing *Call of Duty* games from Sony²⁹ and that these anticompetitive effects could be demonstrated through (1) a showing that the merged Microsoft-Activision would be incentivized to foreclose³⁰ *Call of Duty* games from rivals or (2) the factors from *Brown Shoe Co. v. United States*.³¹ As for Microsoft's incentive to foreclose, the FTC argued that since Microsoft owns its own console, the Xbox, it would stand to gain by making *Call of Duty* unavailable on rival consoles like Sony's PlayStation — thereby inducing gamers to switch to the Xbox.³² The complaint also alleged that Microsoft would likely withhold Activision content from rivals because Microsoft had promised not to withhold content made by ZeniMax (a video game holding company) when it acquired the latter in 2021 but reneged on its promise after the acquisition was complete.³³

The court agreed that the merged firm would have the *ability* to foreclose *Call of Duty* games because it would own the series, but it did not find that the firm would have the *incentive* to foreclose.³⁴ The court reached this conclusion by examining Microsoft's commitments to its

²⁵ *Id.*

²⁶ *Id.*

²⁷ A linear supply chain consists of an essential input and a downstream market that can be harmed through the discriminatory supply of the input. See Ramsi A. Woodcock, How Antitrust Really Works: A Theory of Input Control and Discriminatory Supply 27, 32 (Mar. 1, 2021) (unpublished manuscript), <https://ssrn.com/abstract=3794816> [<https://perma.cc/R9NY-97D7>].

²⁸ Complaint, *supra* note 14, ¶¶ 111–112.

²⁹ *Id.* ¶ 128.

³⁰ *Id.* ¶¶ 116–117. Under this theory, the upstream division of the merged firm would deny inputs or degrade input quality to rivals and hurt consumers. Steven C. Salop & Daniel P. Culley, *Revising the US Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners*, 4 J. ANTITRUST ENF'T 1, 17–18 (2016).

³¹ 370 U.S. 294 (1962); see *Microsoft*, 2023 WL 4443412, at *12 (citing *Brown Shoe*, 370 U.S. at 328–34). The *Brown Shoe* factors include: “[I]ndustry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.” 370 U.S. at 325.

³² See Complaint, *supra* note 14, ¶¶ 7, 64–65, 116–118. But Sony has historically made many more games exclusive (with twelve major PlayStation 5-exclusive titles compared to Xbox’s three) and “paid Activision for exclusive marketing rights that allowed Sony to market *Call of Duty* on PlayStation, but restricted Xbox’s ability to do the same.” *Microsoft*, 2023 WL 4443412, at *15; see also Marshall Honorof, *PS5 Exclusives vs. Xbox Exclusives — Which Games Are Better?*, TOM’S GUIDE (Oct. 4, 2022), <https://www.tomsguide.com/face-off/ps5-vs-xbox-series-x-exclusives> [<https://perma.cc/5QMF-NXDT>].

³³ Complaint, *supra* note 14, ¶¶ 12, 127–128.

³⁴ *Microsoft*, 2023 WL 4443412, at *13. The court did not engage the question of whether competition would be harmed as a result.

board of directors,³⁵ and competitors,³⁶ and its internal communications,³⁷ all of which indicated no intention of making *Call of Duty* exclusive to the Xbox.³⁸ The court also considered how *Call of Duty*'s success depends on cross-platform play,³⁹ Microsoft's risk of reputational harm from foreclosing the series, and the FTC's failure to identify an instance where a game like *Call of Duty* was made exclusive after a merger.⁴⁰ As to the merits of the *Brown Shoe* theory, the court found that the FTC did not make any additional arguments and extended its analysis of the foreclosure theory.⁴¹

The court then rejected the FTC's expert testimony that Microsoft would find it profitable to withhold *Call of Duty*.⁴² The court took issue with the expert's failure to account for Microsoft's offer to keep *Call of Duty* available on Sony products for the next ten years, as well as Microsoft's economic interest in avoiding the reputational harm it would suffer if it withheld *Call of Duty* from rival consoles.⁴³ The court also rejected the FTC's argument that Microsoft's foreclosure of two games after acquiring ZeniMax demonstrated an incentive for making *Call of Duty* exclusive, explaining that the ZeniMax games were distinct from *Call of Duty*.⁴⁴ The court therefore did not find enough evidence for the FTC's assertions that the merger would decrease innovation or cause a partial foreclosure by making *Call of Duty* a worse game on non-Xbox consoles or delaying future *Call of Duty* releases for rival consoles.⁴⁵

Turning to the library subscription services and cloud streaming markets, the court did not find that the proposed merger was likely to substantially lessen competition.⁴⁶ The court agreed that the merged firm would be incentivized to include *Call of Duty* on Microsoft's own Game Pass without expanding to other libraries; however, the court was not convinced that such exclusivity would substantially lessen competition in light of the procompetitive effect of lowering the cost of playing *Call of Duty*.⁴⁷ The court then applied a similar line of reasoning to cloud streaming, citing Microsoft's agreements with five cloud streaming

³⁵ *Id.* at *14.

³⁶ *Id.* at *13–14.

³⁷ *Id.* at *14.

³⁸ *Id.* at *13–15.

³⁹ “Cross-platform” gaming or “cross-play” refers to multiplayer games that allow players using different devices to play concurrently. *Id.* at *2.

⁴⁰ *Id.* at *14–15. To the contrary, after acquiring the studio that developed *Minecraft* (Microsoft's largest game by revenue), Microsoft did not make *Minecraft* games exclusive. *Id.* at *15.

⁴¹ *Id.* at *21.

⁴² *Id.* at *16.

⁴³ *Id.* at *16–17.

⁴⁴ *Id.* at *17. One of the games in question was not yet released (*Starfield*) while the other (*Redfall*) was only released in May of 2023.

⁴⁵ *Id.* at *18.

⁴⁶ *Id.* at *20.

⁴⁷ *Id.*

providers to conclude that the merger will be procompetitive for this market.⁴⁸

The FTC moved for an injunction pending appeal on July 13, 2023.⁴⁹ The following day, the Ninth Circuit denied the motion.⁵⁰ On July 16, Microsoft and Sony signed a ten-year deal to keep *Call of Duty* on PlayStation consoles.⁵¹ The FTC withdrew its administrative challenge on July 20⁵² but returned the matter to adjudication on September 26.⁵³

In ruling that the FTC failed to make a showing of the merger's anticompetitive effects, the court revealed the FTC's defective translation of facts into legal liability. The facts of the case dictated its failure under the foreclosure theory, but key relationships between console manufacturers and game developers could have composed a different, stronger case. *Microsoft* therefore raises concerns for how the FTC can identify anticompetitive behavior and use such facts to bring the most effective actions in the future — especially in light of its new proposed merger guidelines, which reflect the kinds of behavior that the government deems anticompetitive.

It is tempting to look at Microsoft's acquisition of Activision as simply an acquisition of *Call of Duty* — one of the most commercially successful game series ever.⁵⁴ This interpretation naturally lends itself to a foreclosure theory. In the heyday of merger enforcement, courts considered foreclosure to be an anticompetitive effect under section 7 of the Clayton Act,⁵⁵ which is a compelling motivation for the FTC to bring its case under this theory. But *Call of Duty* was notably understated in Microsoft's press release announcing the acquisition. Instead, the press release focused on mobile gaming and Microsoft Game Pass,⁵⁶ which is consistent with the growth of mobile games⁵⁷ and Activision's

⁴⁸ *Id.*

⁴⁹ Motion for an Injunction Pending Appeal of the FTC at 1, *FTC v. Microsoft Corp.*, No. 23-15992 (9th Cir. July 14, 2023).

⁵⁰ *Microsoft*, 2023 U.S. App. LEXIS 17985, at *1.

⁵¹ Rohan Goswami & Jordan Novet, *Microsoft and Sony Sign Deal to Keep Activision's Call of Duty on PlayStation*, CNBC (July 16, 2023, 1:14 PM), <https://www.cnbc.com/2023/07/16/microsoft-and-sony-sign-deal-to-keep-activisions-call-of-duty-on-playstation.html> [<https://perma.cc/N776-LLRZ>].

⁵² Order Withdrawing Matter from Adjudication Pursuant to Rule 3.26(c) of the Commission Rules of Practice, *Microsoft Corp.*, No. 9412 (F.T.C. July 20, 2023).

⁵³ Order Returning Matter to Adjudication, *Microsoft Corp.*, No. 9412 (F.T.C. Sept. 26, 2023).

⁵⁴ Tom Bowen, *The 10 Best-Selling Video Game Franchises of All Time, Ranked*, GAME RANT (Aug. 10, 2023), <https://gamerant.com/biggest-best-selling-video-game-franchises-most-popular/#call-of-duty-425-million> [<https://perma.cc/PM72-5HRN>].

⁵⁵ See PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 1000a (4th & 5th ed. Supp. 2018–2023).

⁵⁶ Press Release, Microsoft, *supra* note 9.

⁵⁷ *Microsoft*, 2023 WL 4443412, at *2.

footprint in this market.⁵⁸ The court accordingly recognized that Microsoft’s “keen interest in Activision’s mobile content suggests the combined firm is not incentivized to withhold *Call of Duty*.”⁵⁹

The FTC’s foreclosure theory also ignored trends in the gaming market. One of the FTC’s key points was that when Microsoft acquired ZeniMax in 2021, it withheld certain ZeniMax titles despite its promise to refrain from such behavior.⁶⁰ Putting aside the evidence that Microsoft made no such promise,⁶¹ this piecemeal analogy revealed more deficiencies in the FTC’s case. The court itself distinguished the withheld games from *Call of Duty* due to their fundamental differences,⁶² and *Fallout* and *Elder Scrolls* — ZeniMax’s AAA titles similar to *Call of Duty* in popularity and longevity⁶³ — remain available on other consoles.⁶⁴ Instead of recognizing the status of AAA games, the FTC zeroed in on *Call of Duty*’s success and constructed an entirely speculative case premised on Microsoft’s potential to make the title exclusive.⁶⁵

Looking beyond foreclosure, an alternative theory the FTC could have explored was contemplated in its withdrawn *Vertical Merger Guidelines* of 2020.⁶⁶ The guidelines’ discussion of unilateral effects⁶⁷ contained a short paragraph describing a vertical merger’s ability to “give the combined firm access to and control of sensitive business information about its upstream or downstream rivals that was unavailable to it before the merger.”⁶⁸ This proposition is particularly relevant to Microsoft’s acquisition of Activision because programming, testing, and

⁵⁸ As of November 2022, *Candy Crush* had been the top-grossing game franchise in U.S. app stores for nearly six years. See King, *Candy Crush Saga Celebrates 10 Iconic Years of Making the World Playful*, PR NEWSWIRE (Nov. 14, 2022, 12:01 AM), <https://www.prnewswire.com/news-releases/candy-crush-saga-celebrates-10-iconic-years-of-making-the-world-playful-301676337.html> [<https://perma.cc/NQR3-VJ69>].

⁵⁹ *Microsoft*, 2023 WL 4443412, at *14.

⁶⁰ See Complaint, *supra* note 14, ¶¶ 12, 127–128.

⁶¹ Joshua Fineman, *European Regulator Approved ZeniMax Deal Without Any Microsoft Commitments*, SEEKING ALPHA (Dec. 9, 2022, 2:46 PM), <https://seekingalpha.com/news/3915833-european-regulator-approved-zenimax-deal-without-any-microsoft-commitments> [<https://perma.cc/C9FX-LJZA>].

⁶² See *supra* note 44.

⁶³ See Vedran Radić, *The Highest-Selling Games Developed by Bethesda Ranked (& How Much They Sold)*, GAME RANT (Sept. 18, 2023), <https://gamerant.com/bethesda-games-best-selling-ranked> [<https://perma.cc/8C5M-4XYN>].

⁶⁴ Alex Santa Maria, *Every Console Skyrim Has Released On*, SCREEN RANT (Oct. 4, 2022), <https://screenrant.com/skyrim-release-how-many-consoles-times-what-when> [<https://perma.cc/N4UQ-N4WA>].

⁶⁵ See Complaint, *supra* note 14, ¶¶ 67, 128.

⁶⁶ VERTICAL MERGER GUIDELINES, *supra* note 4, at 10.

⁶⁷ Unilateral effects refer to “a situation where the post-merger firm but not necessarily others in the market is able to increase its price as a consequence of the merger.” AREEDA & HOVENKAMP, *supra* note 55, ¶ 901b1.

⁶⁸ VERTICAL MERGER GUIDELINES, *supra* note 4, at 10.

software development kits⁶⁹ play large roles in game development.⁷⁰ As a result, console makers like Sony must provide game developers like Activision with unreleased technology that corresponds to their business and product lineup years into the future. However, this would endow Microsoft with the competitive advantage of responding to Sony's maneuvers. Indeed, Sony Interactive Entertainment CEO Jim Ryan stated that Sony could no longer share information about in-development consoles with Activision if it were acquired by Microsoft,⁷¹ which is consistent with Sony's attitude toward Microsoft-owned studios.⁷²

Under this alternative theory, Sony could withhold its technology, but game developers would be severely restricted in their ability to optimize their software's performance, as this requires detailed knowledge of hardware specifications. The development process of AAA games can total over \$300 million,⁷³ and yet these games are still subject to hardware-based limitations. For example, *Cyberpunk 2077* cost over \$300 million to develop, and though it performed well on the newest generation of computing hardware, it struggled to run at all on Xbox and PlayStation consoles.⁷⁴ Microsoft Gaming CEO Phil Spencer explained that "Xbox Game Studios and ZeniMax[] understand that the games they're going to build will be shipping on Xbox and PC," and other platforms would be decided later.⁷⁵ Thus, it is even more critical for console makers to share their technology with developers when their consoles are not among the first to be built around, as Sony's will be after Activision is acquired. Sony must share its technology with Activision, but this will result in significant costs after the merger.

It is possible that the FTC recognized but misattributed this nuance. In the hearing on June 28, 2023, the FTC correctly indicated that games can provide different experiences across devices, and Activision's studios would prioritize Microsoft devices for future development.⁷⁶

⁶⁹ Software development kits are sets of tools for developers provided by manufacturers of hardware platforms that allow developers to create software for that specific platform. See *What Is an SDK?*, RED HAT (June 10, 2020), <https://www.redhat.com/en/topics/cloud-native-apps/what-is-sdk> [<https://perma.cc/9KYZ-V4JL>].

⁷⁰ See COMPETITION & MKTS. AUTH., ANTICIPATED ACQUISITION BY MICROSOFT OF ACTIVISION BLIZZARD, INC.: FINAL REPORT 74, 77 (2023), https://assets.publishing.service.gov.uk/media/644939aa529eda000c3b0525/Microsoft_Activision_Final_Report_.pdf [<https://perma.cc/LW2H-4G2J>].

⁷¹ Non-Party Sony's Exhibit 2 at 4, *Microsoft*, No. 23-cv-02880, ECF No. 134-2 (citing Deposition of Jim Ryan at 34:08–34:18, *Microsoft*, No. 23-cv-02880).

⁷² See Excerpts of Record of the FTC Index Volume at 139, *FTC v. Microsoft Corp.*, No. 23-15992 (9th Cir. Aug. 9, 2023), ECF No. 35-3 [hereinafter Excerpts].

⁷³ COMPETITION & MKTS. AUTH., *supra* note 70, at 309.

⁷⁴ See Keza MacDonald, *Cyberpunk 2077: How 2020's Biggest Video Game Launch Turned into a Shambles*, THE GUARDIAN (Dec. 18, 2020, 4:50 PM), <https://www.theguardian.com/games/2020/dec/18/cyberpunk-2077-how-2020s-biggest-video-game-launch-turned-into-a-shambles> [<https://perma.cc/E3RS-LG88>].

⁷⁵ See Excerpts, *supra* note 72, at 80.

⁷⁶ See *id.* at 25.

However, the FTC's attorney asked Activision CEO Bobby Kotick if he was aware of developers *intentionally* developing a subpar game for one platform versus another, to which the answer was no.⁷⁷ This question was relevant to the court in rejecting the FTC's partial foreclosure theory.⁷⁸ But it could have been employed more effectively had the FTC focused instead on the long history of games degrading across devices *irrespective* of developer intentions and the imperfect remedy of sharing sensitive technology with a direct competitor.

Despite the abundant evidence of hardware limitations in consoles,⁷⁹ Microsoft's difficulties porting⁸⁰ its games to *any* console,⁸¹ and the performance issues of console-to-personal-computer ports,⁸² the FTC neglected to tell the story of *nonexclusive* Activision games performing suboptimally if console makers refuse to share sensitive information. After the merger is consummated, console makers will be forced to choose between (1) sharing their sensitive technology with Microsoft, thereby allowing it to respond to their competitive maneuvers, and (2) risking losing players to Xbox consoles due to the poor performance of Activision games on their consoles. Consumers will shoulder these costs.

Microsoft is not the first time that a federal agency has lost a vertical enforcement action due to its misaligned facts and allegations.⁸³ It will also not be the last unless the FTC improves its translation of market information into theories of antitrust liability. This is not to say that the outcome of *Microsoft* would have changed under a different theory, especially since Activision has a history of working with more experienced parties to launch games on new platforms.⁸⁴ However, if the FTC intends to tighten its reins, as the new draft merger guidelines indicate,⁸⁵ the agency will first need to precisely identify anticompetitive behavior and convert relevant facts into legal liability. The draft guidelines' expanded discussion of how a combined firm's access to competitively sensitive information can be anticompetitive⁸⁶ is a promising indication. But the agency has yet to show that it can effectively bring this theory, along with the other newly identified mechanisms, to bloom.

⁷⁷ *Id.*

⁷⁸ See *Microsoft*, 2023 WL 4443412, at *18.

⁷⁹ COMPETITION & MKTS. AUTH., *supra* note 70, at 77.

⁸⁰ Porting is the process through which games are transferred to more platforms. *The Importance of Content Optimisation in Game Porting*, STARLOOP STUDIOS, <https://starloopstudios.com/the-importance-of-content-optimization-in-game-porting> [<https://perma.cc/YX8T-SK5Y>].

⁸¹ COMPETITION & MKTS. AUTH., *supra* note 70, at 59.

⁸² See Hemanth Kumarr Kumanan, *9 Great Games that Received Bad PC Ports*, GAME RANT (May 16, 2023), <https://gamerant.com/games-bad-pc-ports> [<https://perma.cc/KY23-M722>].

⁸³ See *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 198–99 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

⁸⁴ Excerpts, *supra* note 72, at 43–44.

⁸⁵ See U.S. DOJ & FTC, MERGER GUIDELINES 3–4 (2023), https://www.justice.gov/dg/2023-07/2023-draft-merger-guidelines_o.pdf [<https://perma.cc/T28J-THRM>].

⁸⁶ *Id.* at 16.