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## **Forging A Gaming Empire: Microsoft's Activision Acquisition and India's Competition Scenario**

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### **INTRODUCTION**

#### **MICROSOFT'S LANDMARK ACQUISITION OF ACTIVISION**

On January 18th, 2022, Microsoft, one of the world's largest companies, announced that they would acquire Activision Blizzard in a monumental deal worth \$68.7 billion, equivalent to \$95.00 per share. This news surprised everyone, as there had been minimal indications of such a significant acquisition. The market pundits believed that Microsoft, as a company, was gradually moving away from the gaming industry, focusing on its other thriving sectors. For the longest time, Microsoft was the second-largest player in the gaming industry, trailing behind Sony. However, in recent years, Microsoft has been surpassed by new competitors like Tencent and outpaced by established rivals like Nintendo. In a last-ditch effort to regain its status as a major player, Microsoft strategically pursued the acquisition of Activision Blizzard. Activision Blizzard is one of the industry's powerhouses, boasting an estimated market cap of \$70.39 billion as of July 14, 2023, and exerting a strong influence over the market. Through this acquisition, Microsoft aimed to position itself above its competitors firmly. By acquiring Activision Blizzard, Microsoft sought to establish its dominance once again. The gaming industry's landscape was shifting, and Microsoft's move was a calculated attempt to reclaim its position and assert its presence.

#### **OPPOSITION TO THE HISTORIC ACQUISITION**

When an acquisition of this magnitude takes place, it is natural for competitors in the industry to raise objections, as it can impact their economic value in the market. Among the most vocal opponents of this acquisition is Sony, who have alleged that they will be significantly affected by this transaction, even though there is no prima facie evidence that such an acquisition would directly prohibit other companies from dealing with Activision. One of the arguments put forth by Sony in support of their objections is that Microsoft's acquisition of Activision would grant them exclusive ownership of several popular video game IPs, potentially preventing Sony from

publishing these games in their store. On the other hand, Microsoft has countered this argument by asserting that even after this massive acquisition, it would still be significantly behind Sony in revenue generation. Despite their initial confidence that the buy-out would proceed smoothly, Microsoft unexpectedly faced legal proceedings in both the United Kingdom and the United States.<sup>1</sup>

In their respective legal battles in the UK and the United States, Microsoft had to face two major governing bodies: the Competition and Markets Authority (CMA) in the UK and the Federal Trade Commission (FTC) in the U.S. Before delving into the legal proceedings with these authorities, it is crucial to provide a brief overview of their roles, operations, and jurisdiction, as well as determining if their Indian counterpart holds similar powers.

### **ACQUISITION IN THE CROSSHAIRS: LEGAL BATTLES AGAINST ACTIVISION-MICROSOFT ACQUISITION IN THE UK AND US**

The Competition and Markets Authority (CMA) serves as the primary authority in the U.K. and is responsible for competition and consumer protection matters. The CMA's main objective is to enforce competition and market regulations. It accomplishes this by investigating cases, issuing rulings, imposing penalties, and supporting the government and other market regulators. The CMA's overarching goal is to ensure that markets function effectively, offering advice on legislation and supporting other regulatory bodies. Its jurisdiction covers four legislative areas: competition law, consumer rights, the U.K. internal market, and subsidy control. The latter two were added after the U.K. departed from the EU.<sup>2</sup> It is essential to note that the CMA is a non-ministerial department, which is done to remove any political annotation concerning this department. The CMA is accountable to Parliament through its annual reports and accounts. The CMA has the power to regulate and investigate the situations that may affect the competition laws,

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<sup>1</sup> Microsoft / Activision Blizzard merger inquiry, GOV.UK (2022), <https://www.gov.uk/cma-cases/microsoft-slash-activision-blizzard-merger-inquiry> (accessed Jul 22, 2023).

<sup>2</sup> Thomas Pope & Dan Goss, *Competition and Markets Authority*, Institute for Government (2022), <https://www.instituteforgovernment.org.uk/explainer/competition-and-markets-authority> (accessed, 2023).

and this also includes looking into any practices in the corporate world that may prove discriminatory or anti-competitive.

Anti-competitive Mergers or acquisitions also fall within the jurisdiction of the CMA as these may harm the competition. Still, even though these fields come within the jurisdiction of the CMA, the companies don't require the permission of the CMA for the merger or the acquisition to follow through. Still, the authority is well within its rights to provide remedies to the buyer, impose orders on them, or block the transaction as a whole, which is pertinent in the present situation as the Competition. The Markets Authority has objected to the acquisition of Activision because it is anti-competitive; as of right now, there have not been any substantial developments regarding this acquisition as it is still on hold. While Microsoft has successfully approved the transaction in the EU, the Competition Appeal Tribunal in the U.K. has provided more time for Microsoft to explain why this acquisition is legal and should be allowed.<sup>3</sup>

### **ANTITRUST STORM BREWS: FEDERAL TRADE COMMISSION CHALLENGES MICROSOFT'S ACQUISITION OF ACTIVISION**

The Federal Trade Commission (FTC) is an independent federal agency in the United States, similar to the UK Competition and Markets Authority (CMA). However, there is a significant difference between them: the FTC is not a non-ministerial organization, as the President nominates its members and must be confirmed by the Senate. Moreover, up to three members of the FTC can be affiliated with the same political party. This aspect introduces potential political undertones into the decision-making process of the FTC, which is absent in the CMA.

One of the primary objectives of the FTC is to enforce a range of antitrust and consumer protection laws that apply to virtually every sector of commerce, with some exceptions, such as banks, insurance companies, non-profits, transportation and communications common carriers, air carriers, and certain other entities.<sup>4</sup> The agency optimizes its resources by focusing its enforcement

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<sup>3</sup> Kelvin Chan, *The UK is giving Microsoft more time to explain why its historic \$69 billion acquisition of Activision Blizzard should be legal*, *Fortune* (2023), <https://fortune.com/2023/07/17/microsoft-activision-blizzard-merger-uk-competition-markets-authority-call-duty/> (accessed, 2023).

<sup>4</sup> Federal Trade Commission, *What the FTC Does*, Federal Trade

efforts on practices that inflict the most significant harm on consumers. Regarding mergers and acquisitions, the Bureau of Competition of the Federal Trade Commission has the authority and the power to prevent mergers and acquisitions that are likely to reduce competition and lead to higher prices, lower quality goods or services, or less innovation.

In December of 2022, the acquisition of Activision caught the attention of the FTC, leading it to file a legal challenge against Microsoft's proposed acquisition. The grounds for the challenge were rooted in concerns about the anti-competitive nature of the acquisition and its potential negative impact on competitors in the video game industry. Alongside this challenge, the FTC also sought a temporary restraining order and injunction from a US federal district court regarding the same subject matter. In its arguments, the FTC alleged that the acquisition could harm competition by withholding some of Activision's games from competitors or by raising prices and degrading content to make it less efficient on rival platforms. However, the most recent development in the case indicates a divide in opinions between lawmakers and the FTC. A California court ruled in Microsoft's favor, dismissing the FTC request for an injunction.

Nevertheless, this ruling does not guarantee that the transaction will go through, as the FTC has filed an appeal against the court's decision. The outcome is yet to be determined. The acquisition of Activision and its ongoing legal proceedings have been highly intriguing, as there is no clear-cut answer regarding the legality of such a merger. All parties involved have presented their arguments for and against the acquisition. However, several decisions from different countries have favored Microsoft in recent months.<sup>5</sup>

One of the critical factors contributing to Microsoft's success in these rulings is its efforts to prevent exclusive ownership of the most popular intellectual properties (IPs) under Activision's banner. Microsoft has achieved this by entering into various long-term agreements with competitors in the market, such as Nintendo and Sony. These agreements ensure that these

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Commission (2018), <https://www.ftc.gov/news-events/media-resources/what-ftc-does> (accessed Jul 22, 2023).

<sup>5</sup> Federal Trade Commission v. Microsoft Corp. et al., (2023), [https://www.cand.uscourts.gov/ftc-v-microsoft\\_corp\\_et\\_al/](https://www.cand.uscourts.gov/ftc-v-microsoft_corp_et_al/) (accessed Jul 22, 2023).

competitors can continue using the video game IPs as before, removing concerns about potential market impacts. The confidence instilled by these measures has resonated with lawmakers in various countries like China, Japan, and South Korea, leading to rulings in favor of Microsoft's acquisition. Despite this trend, the final resolution of the acquisition's legality remains uncertain, and the case continues to be closely monitored by stakeholders.

### **POTENTIAL REGULATORY STORM: ASSESSING THE HYPOTHETICAL IMPACT OF INDIA'S COMPETITION COMMISSION ON MICROSOFT'S ACQUISITION OF ACTIVISION**

The in-depth analysis of this ongoing story leads to whether similar circumstances can occur within India's jurisdiction and whether India has the tools to challenge an acquisition of this magnitude. In India, any anti-competitive merger or acquisition can be reviewed under the Competition Act 2002 by the Competition Commission of India. As per the Competition Act, the CCI has the powers to amend the merger/acquisition, accept or even reject it; therefore, maintaining the competitive nature of the market is something that most countries around the world pay importance to as it plays a vital role in ensuring a healthy economy.

Sections 5 and 6 of the Competition Act state that any anti-competitive agreement restricting other competitors in the market would be considered void and unenforceable. Similarly, any company abusing its dominant position in the market to gain an unfair advantage over other competitors is also deemed problematic.

The Competition Commission of India (CCI) has demonstrated its authority in modifying significant acquisitions and imposing regulations to ensure fair competition. Notably, in the Walmart-Flipkart acquisition, where Walmart acquired a 77% stake in Flipkart for \$16 billion, the CCI approved the transaction but imposed certain conditions to prevent potential anti-competitive practices in the future. Similar actions were taken in the cases of the Sun Pharma-Ranbaxy Deal and the Holcim-Lafarge Deal, where the CCI approved the transactions with specific conditions in place after the anti-trust review. While outright rejections of acquisitions or deals are rare, they do occur. An example of this was the Aditya Birla-Pantaloon deal, which the CCI rejected because it required a muster through the respective company's board of directors. This showcases that,

theoretically and practically, the CCI holds the power to cancel or refuse an acquisition if it deems it necessary to safeguard fair competition and protect the interests of consumers and competitors.<sup>6</sup>

## CONCLUSION

After analyzing one of the most significant acquisitions in the tech industry and the legal backlash surrounding it, it becomes crucial to address whether such an acquisition could take place within the jurisdiction of India or if it would face rejection similar to that in the UK and the US. When compared to the CCI, the distinction between the proceedings of authorities like the CMA and FTC lies in the enforcement of their actions. In the case of the FTC, while they possess the freedom to execute various measures to arrive at a decision, they must follow an extensive process. This process involves going through an investigation step followed by the enforcement step. To initiate an enforcement action, the authority must undergo an administrative or judicial process when it has "reason to believe" that the law is being or has been violated. On the other hand, the decisions made by the CCI have a more binding effect. Although their findings can be appealed before various authorities, such as the Competition Appellate Tribunal (COMPAT) and National Company Law Appellate Tribunal (NCLAT), the CCI's decision will remain in force if unchallenged.

Based on the facts and circumstances of the instant case, as well as the decisions of courts in foreign countries, one might presume that if the identical matter were brought before the CCI, the decision would likely favor Microsoft. However, it is essential to recognize that each case is unique and treated independently, making it difficult to predict the CCI's decision with certainty. Based on the considerations outlined under section 20(4) of the Competition Act and previous judgments, the chances of the transaction going through are plausible. However, certain conditions may be imposed on the final deal. The various agreements made by Microsoft with its competitors will also likely facilitate the CCI's decision-making process.

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<sup>6</sup> Walmart's Acquisition of Flipkart, 1 (2008), [https://cuts-ccier.org/pdf/Edition-10-Analysis\\_of\\_Competition\\_Cases\\_in\\_India.pdf](https://cuts-ccier.org/pdf/Edition-10-Analysis_of_Competition_Cases_in_India.pdf) (accessed Jul 22, 2023).