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## With Microsoft Victory, Courts Go On Epic Killstreak Against FTC Antitrust Agenda

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In order for a player to be victorious at the end of a video game, he or she typically must defeat the imposing "final boss." It seems Microsoft's acquisition of video game giant Activision brought with it a real-life version of a final duel with the Federal Trade Commission (FTC).

The FTC's actions to halt a proposed Microsoft-Activision merger deal certainly risked ending the transaction in the same way a defeat can end a game for players. After going through many challenges and gaining approval from other competition regulators around the world, [a California judge sided](#) with the American consumer by rejecting the FTC's argument and clearing a path to closing the deal.

The real winner in the FTC's defeat, however, is the consumers.

In attempting to prevent the merger, the FTC had argued that the deal would harm competition in the video game industry. This aggressive attempt to stop the merger continued even after Microsoft had assured regulators Activision's popular *Call of Duty* would continue its presence on competitors' consoles, such as Sony's PlayStation.

The court found the FTC did not meet the burden of proof required to justify a preliminary injunction that could pause the acquisition, which needed to close by July 18. Far from seeing the behavior that regulators alleged could lead to consumer harm, the court acknowledged that Microsoft "[even took steps to expand \*Call of Duty\* to non-Microsoft platforms.](#)"

This decision echoes foreign regulators, including the stringent European Union, which has already approved the acquisition. Even the U.K.'s Competition and Markets Authority, which had previously challenged the acquisition, has [agreed to pause its case and negotiate](#) with Microsoft to resolve its concerns about the deal.

The gaming market remains competitive with a wide variety of options available to them. Many factors, including the availability of games, go into a consumer's decision about their gaming consumption. In addition to multiple console options, the gaming ecosystem also includes P.C. games and an increasingly popular mobile gaming market. The Microsoft-Activision deal allows

Microsoft to acquire popular franchises including *Call of Duty* and *Candy Crush*, but it will still face significant competition from Sony and Nintendo.

While this case may be the final boss that this deal needs to defeat, it is only the latest in a string of defeats for the FTC's aggressive antitrust actions against America's leading tech companies—actions that do not appear to be slowing down.

Based on "the possibility Meta's entry would influence competition" in the virtual reality fitness space, another court, an attempt to block Meta's acquisition of V.R. company Within Unlimited, rejected the agency's theory of anticompetitive behavior. In 2021, the FTC unsuccessfully attempted to unwind the previously approved acquisitions of Instagram and WhatsApp by Meta (the agency was later allowed to proceed with a case following an amended complaint).

Despite this growing losing record for such cases, like a video game player finding extra lives and excuses for poor performance, supporters of the agency's cases like to claim that these losses are actually "wins."

While the FTC loses in court, some members of Congress have been pursuing legislation that, in antitrust cases, would change the rules of the game for the agency in ways that would no longer benefit consumers and instead would favor less successful competitors.

In fact, Senator Amy Klobuchar recently reintroduced the American Innovation and Choice Online Act (AICOA), a bill that would target successful tech companies without the objective economic standards at the heart of the current consumer welfare approach. Instead of seeing antitrust laws as a way to ensure consumers benefit from free-market competition, the theories from the FTC and proposals from Congress would allow the government to intervene much more, dictate the outcome they believe is best, and use antitrust against companies or industries for political purposes.

The FTC's losses have been consumers' wins. The good news is that courts appear to remain committed to the objective analysis at the heart of the consumer welfare standard rather than more creative and potentially harmful theories put forward by the FTC. While this may be the final boss for the Microsoft-Activision deal, the consumer welfare standard still has many more levels to fight.

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