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Turkish Competition Board clears Microsoft's acquisition of Activision Blizzard by finding global commitments sufficient for market

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Introduction

On 18 January 2024, the Turkish Competition Authority published the Turkish Competition Board's reasoned decision⁽¹⁾ concerning the acquisition of sole control over Activision Blizzard Inc (Activision Blizzard) by Microsoft Corporation. The transaction concerns a reverse triangular merger⁽²⁾ in which Anchorage Merger Sub Inc (Merger Sub), a solely controlled subsidiary of Microsoft established exclusively for the purpose of realising the transaction, will be merged with Activision Blizzard under Activision Blizzard, after which Merger Sub will cease to exist and Activision Blizzard will be the surviving company. As a result of the transaction, Activision Blizzard will become a 100% subsidiary of Microsoft and will be under its sole control.

The Board concluded that the commitments submitted by Microsoft to the European Commission within the scope of the transaction eliminated the concerns surrounding market foreclosure, and accordingly granted clearance to the transaction on the grounds that the commitments are also valid for Türkiye and will be valid for the undertakings that will enter the Turkish market in the future.

This article aims to provide an overview of the Decision and offer insight into the Authority's approach towards applicability of global commitments within the scope of mergers and acquisitions in Türkiye.

Overview of transaction

Parties' activities and relevant markets

Microsoft's activities globally and in Türkiye are substantially similar. While its core areas of activity are productivity and business processes, intelligent cloud and more personal computing, Microsoft has activities in:

- game development and publishing;
- game distribution;
- sale of licensed products related to games;
- online display advertising; and
- game console hardware markets with respect to the gaming sector.

As a global game development, publishing and distribution company, Activision Blizzard's activities in the gaming industry consist of:

- game development and publishing;
- game distribution;
- game-related licensed product sales; and
- online display advertising markets.

Activision Blizzard does not have any subsidiaries in Türkiye but publishes games in Türkiye through its business units:

- Activision Publishing, Inc;
- Blizzard Entertainment, Inc; and
- King Digital Entertainment.⁽³⁾

In the video game industry, from the moment a game is designed to the moment it is played by end users, two main activities come into play, namely:

- game development and publishing; and
- game distribution and marketing.

Once a game is developed, it is licensed, marketed, and released by publishers in different regions. While games were traditionally played by pre-purchasing them at a certain price with a "buy-to-play" model, over time publishers have started to offer their games with the "free-to-play" model. With this model, games are offered for free and then monetised through in-game purchases or in-game advertisements.

Based on this, in the decision, the Board grounded its analysis of potential relevant product markets on five main groups, namely:

- game development and publishing;
- game distribution;
- game playing tools (hardware gaming and cloud gaming);
- licensed product sales; and
- online display advertising markets.

The Board refrained from defining the relevant product market for these five activity groups by assessing that the transaction does not give rise to competitive concerns and the existence of a precise definition would not affect the conclusion of the file under paragraph 20 of the Guidelines on the Definition of Relevant Market. However, it was assessed that the game development and publishing market could be divided into two as:

- computer and console games; and
- mobile games; and
- hardware gaming within the scope of the game playing tools market could be divided into three;
 - computers;
 - consoles; and
 - mobile devices (mainly phones and tablets) depending on the gaming hardware.

It was then evaluated that the hypothetical console gaming and cloud gaming markets, in which the parties operate, and which are affected by the transaction, should be taken into account in consideration within the game playing tools market.

In terms of the relevant geographic market, the Board firstly stated that the main factor determining the geographical boundaries of the markets for Microsoft, Sony Interactive Entertainment Europe Ltd (Sony) and other parties operating in the video game industry is the geographical area where the activities are carried out, like traditional markets. Accordingly, the Board considered that it is possible for consumers to benefit from online video gaming services regardless of the country or location in which they reside or are located. In parallel, the parties had explained in the filing that, for the purposes of the transaction, the relevant geographic market could be defined as worldwide, taking into account the fact that access to sources of supply, marketing, sales and pricing conditions are homogenous across regions.

However, the Board also specified that user preferences are of great importance for the gaming sector, and it was observed that gaming services shaped by user preferences give rise to regional differences despite the fact that they are offered on a global scale. Taking into consideration that the cases where the geographic market is defined globally are quite limited both in the context of precedents in Türkiye and the decisions of foreign competition authorities in relation to the transaction, the Board defined the relevant geographic market as "Türkiye" since the distribution, marketing, sale, and pricing of the products concerned are generally similar throughout Türkiye.

Assessments of global competition authorities and sector players

The transaction was unconditionally cleared by the competition authorities of Brazil, Chile, South Korea, Japan, Saudi Arabia, Serbia, South Africa, and Ukraine, whereas the Competition and Markets Authority (CMA) did not authorise the transaction. In the Decision, the Board took into consideration the assessments of other competition authorities⁽⁴⁾ as well as the opinions of the undertakings operating in the sector regarding the transaction.

The Commission concluded that the transaction would not result in a change within third-party multi-game subscription services as Microsoft would not have the incentive not to distribute Activision Blizzard's games on Sony consoles, which sell four times more than Microsoft consoles in the European market, and the withdrawal of games from Sony consoles would not raise serious anti-competitive concerns since Activision Blizzard's games are less popular in Europe than in the global market; whereas found that the exclusivity of Activision Blizzard games to Microsoft would restrict competition in the market for game distribution via the cloud. In this framework, Microsoft committed to provide free licenses for Activision Blizzard games to consumers and cloud service providers for a period of 10 years to address the Commission's anti-competitive concerns. In response, the Commission rendered these commitments sufficient, and the transaction was authorised on the condition of full compliance with Microsoft's commitments.

The CMA considered that competition in the UK market for the supply of cloud gaming services would ultimately be substantially hindered post-transaction for a number of reasons, including Microsoft having a cost and content advantage in cloud gaming with its assets and services owned prior to the transaction (eg, Xbox and Windows), its unique multi-product ecosystem which allows it to be the market leader and domination of market entry by large players who are able to overcome existing barriers to entry, such as the need to scale and network effects, resulting in unsuccessful entry and growth attempts of smaller players in the market. As such, the CMA held that Microsoft's commitments regarding cloud gaming services could not be adapted to potential changes in the market, the anti-competitive concerns surrounding the transaction were structural and therefore the 10-year commitment period would not be sufficient, and the concerns could only be addressed by dismissing the transaction.⁽⁵⁾

Opinions expressed by sector players were mixed. While some undertakings specified, inter alia, that Microsoft will be the only company in the world with the server infrastructure power to support computer, mobile and console platforms in cloud gaming services, and the transaction would give Microsoft unprecedented power and incentive for foreclosure of video game space to, which would harm competition in game distribution, especially in light of Microsoft's history of market foreclosure strategy, others pointed out the continued existence of alternative game distribution channels and indicated, among other things, that Microsoft has no tendency to make the games for which it has acquired the rights exclusive to its own game consoles and Turkish players will not be affected in the short term as a result of the transaction since the majority of Turkish players play free games available on mobile and computers.

Board's assessment and decision

Assessment on horizontal overlaps

Within the scope of its assessment of the competitive effects of the transaction, the Board concluded that there is horizontal overlap between the parties':

- game publishing;
- game distribution;
- game-related licensed product sales; and
- online display advertising activities.

However, it stated that each of these markets contains many competitors with high market shares, such as Electronic Arts Inc and Valve Corporation, both in Türkiye and globally, and that there will be many strong competitors after the transaction. Overall, as a result of horizontal overlaps analysis, the Board assessed that the transaction will not result in a significant impediment of competition in terms of both unilateral effects and coordination-inducing effects.

Assessment on vertical overlaps and Microsoft's commitments

As regards the vertically affected markets, the Board evaluated that there is vertical overlap between the upstream market for the development and publishing of games and the parties' activities in the downstream markets for:

- digital distribution of console and computer games;⁽⁶⁾
- console hardware; and
- cloud gaming services.⁽⁷⁾

Within the scope of the unilateral effects assessment with respect to the markets for console hardware and digital distribution of console games,⁽⁸⁾ the Board determined that it would not make economic sense for Microsoft impose input foreclosure considering the market shares in the console hardware market, Sony's leading position in the market, the significance of Call of Duty (CoD) on Xbox, and the importance of the cross-play feature. Microsoft has also made numerous public statements committing to keeping CoD and Activision Blizzard's other content available on their current channels and even expanding them to other channels. Moreover, a letter of intent was signed between Microsoft and Nintendo Co, Ltd on 7 December 2022, including a 10-year commitment to provide CoD for Nintendo consoles. Subsequently, on 10 February 2023, Microsoft and Nintendo signed a final agreement to publish CoD games on Nintendo after the transaction. In this context, the Board concluded that Microsoft's negotiations with Sony and Nintendo for the provision of Activision Blizzard's games post-transaction indicates that Microsoft intends to provide these games to competing consoles for 10 years, even though the negotiations with Sony had not resulted in an agreement. Additionally, it was assessed that Microsoft needs third-party games to continue its console hardware activities, and therefore, will not have any customer foreclosure incentive.

Similarly, for the market for the digital distribution of computer games, the Board concluded that the combined undertaking would not have the opportunity or incentive to prevent competitors operating in the market from accessing Activision Blizzard's games or restrict customers due to factors such as Microsoft's low market share, the presence of a large number of players in the market and the existence of strong competitors.

As for unilateral effects in the cloud gaming services market, the Board evaluated that even if Microsoft begins to offer cloud gaming services in Türkiye, input foreclosure would not be economically feasible for Microsoft in light of its global share and the presence of many large and powerful players in the cloud gaming services market, while the parties' limited share in the market for game development and publishing and the fact that Microsoft generates revenue largely through the games of third-party developers would result in the inability of customer foreclosure.

Subsequently, the Board assessed the commitments submitted by Microsoft to the Commission regarding the cloud gaming market and their validity in Türkiye. In this context, in line with the information provided by Microsoft to the Authority, it was confirmed that the first of the open licenses providing streaming rights for Activision Blizzard games within the scope of the commitments, the Streaming Provider License, will be valid globally and for 10 years, both for the undertakings already active in the market and for the undertakings that may enter the market within this period, while the second of the open licenses, the Consumer License, will be valid for a period of 10 years for all existing and potential consumers globally. Accordingly, the Board concluded that essentially the relevant commitments will also be valid for Türkiye for 10 years.

Considering that Microsoft has also entered into agreements with Nvidia Corp ("Nvidia"), Boosteroid Games SRL and Ubitus KK, which are other cloud game streaming providers in the market, and that these agreements have been declared by these undertakings to address their concerns regarding the Transaction, the opinions of Lifecell Digital Ltd (Lifecell), which is the only undertaking that officially offers cloud gaming services in Türkiye and provides Nvidia's Geforce NOW (GFN) cloud gaming services in the Turkish market exclusively through the sub-brand Game+ established for this activity, have been obtained. Based on Lifecell's statements, it is understood that no competitive concerns will arise for Lifecell; on the contrary, consumers will have access to a wider game library due to Nvidia's agreement with Microsoft, Xbox games will become accessible with GFN, Activision Blizzard games will also be within the scope of this agreement if the Transaction is cleared, and this agreement will not be regional but will also be valid for Türkiye. Eventually, the Board concluded that the transaction would not raise anti-competitive concerns in terms of unilateral effects in the cloud gaming services market.

Finally, in terms of the coordination-inducing effects of the transaction, the Board determined that the presence of a large number of players operating in the market will make it difficult to establish coordination among undertakings and to discipline non-compliant undertakings as a result of a possible coordination and held that the Transaction will not significantly impede competition and may be cleared.

Comment

The decision provides further insight into the Board's approach towards the adequacy and validity of global commitments in merger control filings in Türkiye. Although it can be observed from the Board's precedents that there is a tendency to accept global commitments in mergers and acquisitions in Türkiye, the Board's conclusion that the global commitments submitted by Microsoft are sufficient for the Turkish market in such an acquisition involving two major global companies in the gaming industry, which has also been examined by various competition authorities for long periods, reaffirms the Board's approach to the matter for digital markets.

Endnotes

- (1) The Board's decision dated 13 July 2023 and numbered 23-31/592-202.
- (2) According to the decisional practice of the Board, a reverse triangular merger constitutes an acquisition, rather than a merger (recent case law include *US Ecology/Republic Services* (24 March 2022; 22-14/216-93), *Take-Two/Zynga* (24 March 2022; 22-14/215-92), *American Securities/Ferro* (24 February 2022; 22-10/144-59)).
- (3) Activision Blizzard's most notable games are Call of Duty developed by Activision, World of Warcraft developed by Blizzard, and Candy Crush developed by King.
- (4) The assessments of the Commission, CMA and Administrative Council for Economic Defense (CADE) were specifically taken into consideration.
- (5) On 22 August 2023, Microsoft submitted a second filing to the CMA, this time for an acquisition by which Microsoft will acquire Activision, excluding Activision's cloud streaming rights outside of the European Economic Area. This filing was assessed as a separate merger investigation by the CMA, and the transaction was cleared on 13 October 2023.
- (6) Since the parties do not have activities in the physical distribution channel and in the field of game distribution for mobile devices, the market for digital distribution of console and computer games was taken as a basis.
- (7) Although it was assessed that there may be vertical overlap between Microsoft's cloud gaming services and Activision Blizzard's game development and publishing, it was determined that these activities of the parties do not overlap vertically in Türkiye since the cloud feature that Microsoft offers as part of its subscription-based gaming services is not currently available in Türkiye and Activision Blizzard does not currently distribute games in multi-game subscription services or cloud broadcasting. Therefore, the Board addressed this vertical relationship within the framework of the possibility that Microsoft begins offering cloud gaming services in Türkiye and Activision Blizzard games (CoD in particular) are only offered by Microsoft.
- (8) As it is not possible to purchase or access console games in digital form outside of the digital storefront associated with the console in question, it is not possible to evaluate the console hardware market separately from the market for the digital distribution of console games. Therefore, the assessments with respect to these two markets were made together. In addition, although Microsoft operates in the console hardware market, Activision Blizzard does not have any activities in console hardware or gaming hardware.