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CTFN View from Brussels: Forthcoming Activision/Microsoft commitments likely outside remit of new EU big-tech law

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by Michael Bow

As Microsoft prepares to submit remedies designed to secure clearance for its Activision buy to the European Commission, new laws policing tech firms' relationship with third parties are unlikely to sway how regulators see the looming concessions, a competition academic and two lawyers with relevant experience told *CTFN*.

The EC's new rules, known as the Digital Markets Act (DMA), establish a list of "dos and don'ts" for tech gatekeepers like Microsoft, including the obligation to allow third parties to interoperate with gatekeepers' own services.

Despite similarities with the Activision case and Sony's pleading to ensure the target's AAA-tier game franchise Call of Duty remains available on Playstation, the DMA is unlikely to have much impact on Microsoft's remedy discussions with the EC, said the academic and the two lawyers.

This is important because the EC previously treated overarching industry regulations as a source of comfort when considering whether to accept behavioral remedies. The agency cited the EU's financial-services regulation as a factor in accepting the London Stock Exchange Group's commitment to open access to TradeWeb during the Refinitiv review, for example.

Notwithstanding the differences between finance and tech, the EC is unlikely to see the DMA as a proxy enforcement tool to give it comfort in accepting Microsoft's pledge. The company indicated it will grant third parties like Nintendo, Sony and Steam access to Call of Duty for 10 years.

"The DMA is framed in a structured way where you get gatekeepers and core platform services, and then people who want to plug into that core platform service," said Dirk Auer, director of competition at the International Center for Law & Economics.

“The difficulty here is that it’s not that people are asking to interoperate with Microsoft as a third party. It’s that a newly acquired Activision Blizzard may no longer be on another platform, and I’m not sure the DMA has much to say about that.

“The DMA is trying to open up access to more core platform services, not make sure that gatekeepers are offering their ecosystem services on another platform,” Auer said.

Auer also said it was unclear whether Xbox would be considered a core platform service, the term used for the eight sectors the DMA will cover. Core platform services include online intermediation services, operating systems and cloud services.

Microsoft president Brad Smith has also insisted that gaming will be excluded from the forthcoming legislation for “good reason”, saying consoles are sold at a loss to establish an ecosystem for developers.

Timescales and specific industry characteristics of the gaming sector also make the DMA inapplicable for the case, said a competition lawyer who has separately advised clients on the DMA and tech merger reviews

Obligations to make core platform services interoperable with third parties will not kick in until 2024, long after the Activision case has been decided.

Unlike other big-tech reviews which had stronger interoperability theories of harm, such as Fitbit/Google, Microsoft has less control over an ecosystem, notwithstanding its dominance of the market for personal computers. Its Xbox console is one of a few gaming platforms and does not have the same dominance of its market as platforms like Android or iOS, they said.

A Brussels-based lawyer who advises clients on the DMA also said the EC is likely to pay scant regard to the DMA regulations when considering possible behavioral remedies in future tech cases.

“The DMA will not mean the end of behavioral remedies in tech cases. The DMA obligations are static, and merger control is something dynamic,” this lawyer said. “If you prove there are competition concerns and a remedy is needed, that is dynamic and much more subtle than the prescriptive elements of the DMA.”

A Microsoft spokesperson said the company is working with the EC to address any valid marketplace concerns.