

# Recent US Antitrust M&A Developments - February 2023

## **Publications**

February 2023

Aggressive merger enforcement continued through the end of 2022, with the agencies having mixed results in the courts. With several high-profile investigations still pending, the expectation is for aggressive enforcement to continue. Below are notable developments in three merger enforcement actions.

### **Court Blocks Merger of Two Large Publishing Houses**

In November 2021, the U.S. Department of Justice (“DOJ”) filed a complaint in federal court seeking to block the merger of Penguin Random House and Simon & Schuster, claiming the acquisition would substantially lessen competition in the market to acquire rights to “anticipated top-selling books” in violation of Section 7 of the Clayton Act. The court held a twelve-day trial in August 2022, and in October it issued an order blocking the merger. In its decision, the court found that the combined company would wield increased leverage in negotiations for book rights, resulting in competitive harm in the form of lower advances paid to authors. The DOJ’s win will likely embolden it to pursue additional monopsony cases, where alleged anticompetitive harm occurs in upstream “input” markets, including markets for labor.

### **DOJ Loses in its Attempt to Block Booz Allen Acquisition of Everwatch**

In June 2022, DOJ filed a complaint seeking to block defense contractor Booz Allen’s acquisition of EverWatch, a technology company and the only rival to Booz Allen in an ongoing bid for a contract with the U.S. National Security Agency. The complaint alleged the acquisition violated both the Sherman and Clayton Acts—Sherman because the agreement immediately reduced the incentive for each company to submit competitive bids, and Clayton because if the acquisition were consummated, future competition between the rivals would be eliminated. DOJ moved for a preliminary injunction on the Sherman Act claim alone, which the court denied, finding that the companies remained incentivized to submit competitive bids notwithstanding the pending acquisition. Following the loss, DOJ stipulated to a dismissal of the case without prejudice, promising to reopen it only if either Booz Allen or EverWatch withdraws its bid for the NSA contract.

### **FTC Sues to Block Microsoft’s Acquisition of Video Game Company Activision**

In January 2022, Microsoft agreed to purchase Activision Blizzard for \$68.7 billion. A major player in the video game industry, Activision develops and publishes high-quality “AAA” games including Diablo and Call of Duty for use on numerous devices. In December 2022, the FTC challenged the proposed transaction, filing a complaint in its in-house administrative court (because the European Commission is still reviewing the transaction, it cannot close, and the FTC therefore does not currently need to seek an injunction in U.S. federal district court). The Commission alleges the combined firm would have the incentive to disadvantage Sony, its primary video game competitor, by making Activision games exclusive to Microsoft’s Xbox, or by increasing the cost of PS5-compatible versions, thereby harming video game consumers. With the FTC currently revising the vertical merger guidelines, this administrative challenge could be a bellwether for future vertical merger enforcement.

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