



JULY 2023

## ANTI-TRUST GONE WILD

Activision Blizzard has been the largest single position in our equity portfolio for some time. As such, we wanted to provide you with an update, given the flurry of headlines and countless twists and turns in recent weeks. Spoiler alert: the saga has continued to play out as expected, and we believe the deal's conclusion is imminent.

Bottom Line: On Tuesday, July 11th, District Judge Jacqueline Corley denied the Federal Trade Commission's request for a preliminary injunction (PI) to block the Microsoft / Activision merger. Within hours, the UK's Competition and Market Authority (CMA) agreed to stay Microsoft's appeal of the agency's prior decision, clearing the remaining major obstacles in the way of the deal closing. In the remainder of this letter, we'll do our best to summarize the recent events that got us here and outline our perspective on the path forward.<sup>1</sup>

## BACKGROUND: TRUST BUSTERS IN CAHOOTS

In December 2021, long before Microsoft (MSFT) announced its bid to acquire Activision (ATVI), members of the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) traveled to London for the Competition Enforcers Summit. There the parties agreed to work together to prevent anti-competitive mergers, particularly in the technology sector. They issued this statement following the event<sup>2</sup>:

"We share common goals and are dedicated to close and regular engagement both on the agency head and staff level, as priorities and resources allow. Deeper recognition of our common cause of tackling anticompetitive conduct and mergers opens up possibilities for us to implement robust cross-border enforcement regimes and achieve success in ways that would elude individual agencies working alone."

A few days later, the FTC met with the European Commission and issued a similar statement suggesting that the entities would also cooperate with each other.<sup>3</sup> So going into the deal, we knew all too well that we were facing an uphill battle.

## PHASE I: THE REGULATORY PROBES BEGIN

A month after announcing Microsoft's all-cash acquisition of Activision Blizzard, the FTC revealed it would be reviewing the deal as opposed to the Justice Department. The FTC's role in presiding over the case is important, as the agency has vowed to take an aggressive stance towards technology mergers by testing new theories of harm and drawing out cases as long as possible - a tactic we call Death by Delay.<sup>4</sup>

---

<sup>1</sup> A more detailed timeline of the FTC's actions in the case is available via the agency's legal library, [here](#).

<sup>2</sup> [Joint Statement from FTC, DOJ Antitrust Division, and UK Competition and Markets Authority Leadership Following the G7 Competition Enforcers Summit.](#)

<sup>3</sup> [Joint Statement from FTC, DOJ Antitrust Division, and European Commission Leadership on Launch of EU-US Joint Technology Competition Policy Dialogue](#)

<sup>4</sup> [U.S. FTC's Lina Khan Vows Return to Agency's Trustbusting Roots](#)

Not to mention that should the acquiring party seek to appeal the FTC's decision, that appeal is heard by the FTC's own administrative court. Effectively making the FTC judge, jury, and executioner. More on this in a moment, as it is a critical component of the MSFT <> ATVI merger.

Predictably, the FTC sued to block the deal on December 8th, 2022, bringing the case before its Administrative Law Judge (ALJ). The FTC's stance towards the deal was all but clear: they intended to block the merger. The FTC's decision was followed by the CMA, who announced its decision to block the deal on April 26th, 2023.

While the move by the CMA surprised the market and prompted a sharp sell-off in shares of ATVI, we did not believe either case held water. Given the weight of the evidence, we expected Microsoft to appeal the CMA's decision.

## SIDEBAR: IS IT CONSTITUTIONAL?

As previously noted, we believe that the FTC's current structure facilitates its strategy of Death by Delay. By investigating, prosecuting, judging, and appealing cases levied against it, the agency has the power to draw out merger deals until either the deal ends up in district court or the parties to the merger walk away. The FTC claims its own Administrative Law Judges are impartial and independently appointed, but evidence suggests the contrary. In fact, the FTC's administrative proceeding boasts a 25-year win streak. It's tough to lose when you are the one calling the game.

Importantly, on April 14th, 2023, the US Supreme Court recently voted unanimously against the FTC in a suit brought by Axon Enterprise. The taser and bodycam maker alleged that the FTC's administrative process combined "investigative, prosecutorial, adjudicative, and appellate functions" together in violation of the Fifth Amendment's prescribed right to due process.<sup>5</sup>

While we were thrilled to learn that this blatantly conflicting structure was not upheld, we do wonder how it came to be in the first place. Unfortunately, it didn't seem that any changes to the current structure were likely to occur in time to assist Microsoft. Consequently, what happened next was like an early visit from Santa Clause, or specifically, Christmas in July!!

## PHASE II: ANTS IN THEIR PANTS

On June 12th, 2023, the FTC filed a request for a Preliminary Injunction (PI) from the US district court. The FTC claimed that circulating press reports suggested that Microsoft was contemplating closing the acquisition despite pending administrative litigation.<sup>6</sup> We suspect it was just as likely that the CMA nudged their new friends at the FTC to "do something" after nearly 40 other countries had already approved the deal. Whatever the reason, circumstances forced the FTC's hand. And as a result, the deal was redirected from the FTC's own administrative judge to the district court, where we believed it had a much higher chance of success.

The district judge promptly granted the FTC a Temporary Restraining Order (TRO), a two-week stay to allow time for a decision on the preliminary injunction. On June 28th, representatives of Microsoft, Activision, and the FTC arrived in San Francisco for Judge Jacqueline Corley to hear the case. The hearing lasted 5 days, and her decision was published on July 11<sup>th</sup>.

---

<sup>5</sup> [Axon v. Federal Trade Commission Media & Investor Briefing Page](#)

<sup>6</sup> [Complaint for a Temporary Restraining Order and Preliminary Injunction](#)

## PHASE III: VICTORY (ALMOST) AT LAST

"After considering the parties' voluminous pre-and-post hearing writing submissions, and having held a five-day evidentiary hearing, the Court DENIES the motion for a preliminary injunction."

Following Corley's rejection of the PI, the CMA requested to pause their appeal, paving the way for the deal to close.<sup>7</sup> The FTC attempted to appeal Corley's decision and was quickly shot down. FTC Chair Lina Khan was later grilled by Congress in a five-hour oversight hearing<sup>8</sup>. You're going to want popcorn before pressing play.

As the last man standing, the CMA has now shown it is open to renegotiating the deal, though doing so would require restarting a lengthy investigation. We believe the most strategic option for all parties is if the CMA allows Microsoft to close while the CMA continues its investigation. This way, the CMA appears reasonable without backing down, and Microsoft avoids a \$3B breakup fee. That said, if the deal were delayed beyond Tuesday, we'd be happy to collect that fee as a premium.

As always, please feel free to reach out at any time with questions. We enjoy hearing from you.

Sincerely,

The logo for Broyhill Asset Management features the name "Broyhill" in a large, elegant, cursive script. Below it, the words "ASSET MANAGEMENT" are written in a smaller, clean, sans-serif, all-caps font.

---

<sup>7</sup> [Preliminary Injunction Denial](#)

<sup>8</sup> [LIVE: FTC Chair Lina Khan testifies during oversight hearing by House Judiciary Committee — 7/13/23](#)

# ABOUT BROYHILL

Broyhill Asset Management is a boutique investment firm, initially established as a family office in 1980 and guided by a disciplined value orientation. Founded in the foothills of North Carolina's Blue Ridge Mountains, we operate outside of the fray and invest with a rational, objective, long-term perspective.

FIND THIS INTERESTING?

Stay curious. [Click here](#) to subscribe.

FOR MORE INFORMATION:

[ir@broyhillasset.com](mailto:ir@broyhillasset.com) | 828.610.5360

## DISCLOSURES

Broyhill Asset Management LLC (“Broyhill”) is an investment adviser in North Carolina. Broyhill is registered with the Securities and Exchange Commission (SEC). Registration of an investment adviser does not imply any specific level of skill or training and does not constitute an endorsement of the firm by the Commission. Broyhill only transacts business in states in which it is properly registered or exempted from registration. A copy of Broyhill’s current written disclosure brochure filed with the SEC which discusses, among other things, Broyhill’s business practices, services and fees is available through the SEC’s website at [www.adviserinfo.sec.gov](http://www.adviserinfo.sec.gov).

The performance of the Broyhill Equity Portfolio illustrated here is representative of the fully invested strategies available through various TAMPs (Turnkey Asset Management Platforms). The majority of Broyhill’s SMAs include a significant cash allocation, which has averaged 30% - 40% in recent years, and also utilize options to complement individual position sizing and to hedge the portfolio as appropriate for individual clients. As a result, we believe that the historical performance of our flagship strategy (which includes both options and a significant cash drag) is not representative of a pure equity allocation. As such, this data may be useful for an advisor evaluating Broyhill, although individual results may differ based on each account’s investment objectives, the date of initial funding, the opportunity set available at the time, specific investment vehicles available to the accounts, and individual fee schedules. These historical performance figures are for our equity-only strategy.

Performance is calculated using time-weighted rates of returns, net of fees. Since these platforms report returns to Broyhill gross of fees, in order to report net returns, a 1.5% annual management fee has been subtracted from gross reported returns. This methodology has also been applied to the extracted attribution returns. Average position size is calculated from average capital invested divided by average portfolio capital in fully invested accounts.

The investment return and principal value of an investment will fluctuate. Therefore, an investor’s account, when liquidated or redeemed, will almost always have a different value than that shown herein. Current performance may be lower or higher than return data quoted herein.

Past performance is not indicative of future returns. This information should not be used as a general guide to investing or as a source of any specific investment recommendations and makes no implied or expressed recommendations concerning the manner in which an account should or would be handled, as appropriate investment strategies depend upon specific investment guidelines and objectives.

Information presented herein is subject to change without notice and should not be considered as a solicitation to buy or sell any security. This document contains general information that is not suitable for everyone. The information contained herein should not be construed as personalized investment advice.

There is no guarantee that the views and opinions expressed in this document will come to pass. Investing in the stock market involves gains and losses and may not be suitable for all investors. No representations, expressed or implied, are made as to the accuracy or completeness of such statements, estimates or projections, or with respect to any other materials herein.

Under no circumstances does the information contained within represent a recommendation to buy, hold or sell any security, and it should not be assumed that the securities transactions or holdings discussed were or will prove to be profitable. There are risks associated with purchasing and selling securities and options thereon, including the risk that you could lose money.

Certain information contained herein constitutes “forward-looking statements,” which can be identified by the use of forward-looking terminology such as “may,” “will,” “should,” “expect,” “anticipate,” “project,” “estimate,” “intend,” “continue,” or “believe,” or the negatives thereof or other variations thereon or comparable terminology. Due to various risks and uncertainties, actual events, results or actual performance may differ materially from those reflected or contemplated in such forward-looking statements. Nothing contained herein may be relied upon as a guarantee, promise, assurance or a representation of the future.

Market value information (including, without limitation, prices, exchange rates, accrued income and bond ratings furnished herein) has been obtained from sources that Broyhill believes to be reliable and is for the exclusive use of the client. Market prices are obtained from standard market pricing services or, in the case of less liquid securities, from brokers and market makers. Broyhill makes no representations, warranty or guarantee, express or implied, that any quoted value necessarily reflects the proceeds that may be received on the sale of a security. Changes in rates of exchange may have an adverse effect on the value of investments.

Indices represent unmanaged, broad-based baskets of assets. They are typically used as proxies for overall market's performances. Index returns typically assume that dividends are reinvested and do not include the effect of management fees or expenses. You cannot invest directly in an index. Without prior written permission of index owner, this information and any other index-related intellectual property may only be used for your internal use, may not be reproduced, or redistributed in any form and may not be used to create any financial instruments or products or any indices. This information is provided on an "as is" basis, and the user of this information assumes the entire risk of any use made of this information. Neither the index owner nor any third party involved in or related to the computing or compiling of the data makes any express or implied warranties, representations or guarantees concerning the index-related data, and in no event will index owner or any third party have any liability for any direct, indirect, special, punitive, consequential or any other damages (including lost profits) relating to any use of this information.

For additional information about other indices or strategies mentioned here, you may contact us at [ir@broyhillasset.com](mailto:ir@broyhillasset.com).

No part of this material may be copied, photocopied, or duplicated in any form, by any means, or redistributed without Broyhill's prior written consent.