

# Anticipated acquisition by Microsoft Corporation of Activision Blizzard (excluding Activision Blizzard's non-EEA cloud streaming rights)

## Decision on relevant merger situation and substantial lessening of competition

ME/7068/2

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 22 September 2023. Full text of the decision published on 22 September 2023.

Please note that [X] indicates figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

### SUMMARY

1. Microsoft Corporation (**Microsoft**) has agreed to acquire Activision Blizzard, Inc (**Activision**) (the **Parties**), excluding Activision's cloud streaming rights outside of the European Economic Area (**EEA**) (the **Merger**). Immediately prior to the Merger, Activision's global cloud streaming rights (excluding the EEA) for all current and future Activision PC and console games released during the next 15 years (the **Activision Streaming Rights**) will be sold to Ubisoft Entertainment SA (**Ubisoft**).
2. The sale of the Activision Streaming Rights to Ubisoft will take place immediately before completion of the Merger as part of an agreement between Activision<sup>1</sup> and Ubisoft (the **Ubisoft Divestment Agreement**).<sup>2</sup> The terms of that transaction will

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<sup>1</sup> As part of the Merger, Microsoft will acquire Activision and be able to cause it to perform its obligations under the Ubisoft Divestment Agreement. Accordingly, this decision refers to Microsoft's obligations to Ubisoft under the Ubisoft Divestment Agreement, regardless of whether these are incurred by Microsoft or Activision.

<sup>2</sup> Ubisoft will also receive a non-exclusive licence to sell, distribute, and sublicense entitlements to play cloud streaming versions of Activision's games in the EEA. At the same time, Microsoft will receive a non-exclusive licence from Ubisoft for cloud streaming rights to the extent necessary for Microsoft to fulfil its obligations under its commitments to the European Commission and certain existing third-party cloud streaming agreements.

allow Ubisoft to commercialise these rights to other cloud gaming services providers (including to Microsoft itself). Ubisoft will compensate Microsoft for the cloud streaming rights to Activision's games through a one-off payment and through a market-based wholesale pricing mechanism, including an option that supports pricing based on usage.

3. The CMA has recently investigated the anticipated acquisition by Microsoft of the whole of Activision (the **First Proposed Merger**). In its Final Report,<sup>3</sup> the CMA found that cloud gaming is a developing market that could be transformative for the gaming industry. The CMA found that Microsoft is already a strong cloud gaming service provider with a multi-product ecosystem that gives it considerable advantages in this market. The CMA found that Activision creates some of the most popular gaming content, which will be important for the competitive offering of cloud gaming services as the market develops. Given Microsoft's already strong position, the CMA found that, if the First Proposed Merger were to proceed, Microsoft would find it commercially beneficial to withhold Activision's games from rival cloud gaming service providers, which may be expected to substantially reduce competition in this developing market, to the detriment of consumers. On 22 August 2023, the CMA imposed a Final Order that prohibits Microsoft from acquiring an interest in Activision unless it obtains prior written consent to do so from the CMA.
4. The Parties have submitted that the Merger represents a new transaction that will prevent the concerns identified in the Final Report from arising. According to the Parties, the divestment of the Activision Streaming Rights comprehensively removes Microsoft's ability to withhold Activision's games from rival cloud gaming providers.
5. The CMA considers that the Merger is different to the First Proposed Merger on the basis that Microsoft will not acquire the Activision Streaming Rights. In this case, for the Merger to proceed, the Parties are also required to seek consent under the Final Order (which, as noted above, prohibits Microsoft from acquiring any interest in Activision without the prior written consent of the CMA). The Parties have requested consent under the Final Order, and the CMA is considering that request in parallel.
6. In light of the substantial overlap between the matters considered in the Final Report, the recent final decision on possible material change of circumstances or special reasons published on 25 August 2023,<sup>4</sup> and the matters at issue in this investigation, the CMA has relied on and referred to the evidence and analysis

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<sup>3</sup> [Final Report on Anticipated acquisition by Microsoft of Activision Blizzard, Inc](#), 26 April 2023 (the **Final Report**).

<sup>4</sup> [Final Decision on possible material change of circumstances or special reasons for deciding differently under section 41\(3\) of the Enterprise Act 2002](#), 25 August 2023 (the **Final Decision on MCC/SR**).

undertaken for the purposes of those decisions as appropriate. The CMA has also conducted additional evidence gathering and analysis during this investigation and incorporated it into its assessment of the Merger.

7. The CMA found that, compared to the First Proposed Merger, the Merger would significantly change the way in which Activision's PC and console games are commercialised and distributed to cloud gaming services. Unlike the First Proposed Merger, Microsoft would not be in a position to unilaterally make Activision's games available only on its own cloud gaming service, or to withhold those games from rivals. Instead, the Merger aims to establish Ubisoft as a key supplier of content to cloud gaming services, to replicate the role that Activision would have played in the market absent the Merger. Ubisoft would have the right to license out the Activision Streaming Rights on a worldwide basis under any business model of its choosing, including buy-to-play, multi-game subscription services, or any other model that may arise. The key parameters of the sale of the Activision Streaming Rights to Ubisoft would be set up-front, and Ubisoft's ongoing interactions with Microsoft would be limited to the implementation of the transaction, rather than requiring ongoing negotiations to take place.
8. Some third parties raised concerns about Microsoft's ongoing relationship with Ubisoft post-Merger. These third parties submitted that Microsoft could, for example, seek an exclusive arrangement with Ubisoft to supply Activision's games only to Microsoft's own cloud gaming service, or otherwise give Microsoft preferential treatment. Microsoft could also set a wholesale price for Activision's games at a level that is unaffordable for Ubisoft or other cloud gaming providers seeking to license Activision's games from Ubisoft. Microsoft could also refuse to develop games for non-Windows operating systems, degrade the quality of the games or delay their release date to Ubisoft, or refuse technical support to Ubisoft and its sublicensees.
9. The divestiture of the Activision Streaming Rights to Ubisoft is intended to prevent such concerns from arising, and it includes certain provisions aimed at preventing Microsoft from engaging in strategies that could foreclose cloud gaming rivals. For example, the Ubisoft Divestiture Agreement provides that Ubisoft may not grant Microsoft an exclusive licence to Activision's games or offer Microsoft preferential terms. It also imposes limitations on the wholesale price that Microsoft can charge Ubisoft for Activision's games (ie, a price no higher than the PC or console wholesale price, whichever is lower), and allows Ubisoft, for a fee, to require Microsoft to adapt Activision's titles to operating systems other than Windows, such as Linux, or perform technical modifications to ensure that Activision's games support emulators like Proton. Parity clauses are also included in terms of quality

and date of release between the streaming and non-streaming versions of Activision's games, as well as technical support obligations for Ubisoft and its sublicensees.

10. Notwithstanding the largely self-standing nature of the assets being transferred to Ubisoft and the arrangements outlined above, the CMA has limited residual concerns that competition could be substantially lessened as a result of Microsoft's ongoing relationship with Ubisoft. The CMA recognises that the divestiture of the Activision Streaming Rights to Ubisoft aims to prevent Microsoft from having any ability to foreclose rival cloud gaming providers by placing these rights in the hands of an independent third party. However, there remains the possibility for certain provisions within the Ubisoft Divestment Agreement to be circumvented, terminated, or not enforced.<sup>5</sup> Consequently, the CMA has limited residual concerns that Microsoft could still engage in the strategies set out above (either in isolation or in combination) in order to foreclose rival cloud gaming service providers.
11. The CMA therefore believes that the Merger may be expected to give rise to a realistic prospect of a substantial lessening of competition (**SLC**) in cloud gaming services in the UK and is considering whether to accept undertakings under section 73 of the Enterprise Act 2002 (the **Act**). The Parties have until **29 September 2023** to offer an undertaking to the CMA that might be accepted by the CMA. If no such undertaking is offered, then the CMA will refer the Merger pursuant to sections 33(1) and 34ZA(2) of the Act.

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<sup>5</sup> See [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 7.15.

# ASSESSMENT

## PARTIES

### Microsoft

12. Microsoft is a global technology company, founded in 1975 and headquartered in Redmond, Washington, US. Microsoft is publicly listed on Nasdaq. Microsoft's global turnover in the financial year 2022 was close to £184 billion, of which over [X] was generated in the UK.<sup>6</sup>
13. Microsoft offers a wide range of products and services that are important to gaming:<sup>7</sup>
  - (a) Xbox: one of the three main gaming consoles in the market, along with Sony Interactive Entertainment's (**SIE**) and Nintendo's consoles.
  - (b) Windows: the leading PC operating system (**OS**). Many people play games on a PC rather than a console, and most of them use Windows OS. Because of its popularity, game developers generally make PC games that are designed and optimised for Windows OS.
  - (c) Azure: a leading public cloud platform (ie a network of data centres and cloud computing infrastructure), offering a wide range of services across several industries, including gaming.
  - (d) Xbox Cloud Gaming: Microsoft's current cloud gaming service, powered by custom Xbox Series X hardware, and is distinct from Azure.
  - (e) Xbox Game Studios: a collection of 24 first-party development studios, several of which it acquired in recent years. These studios make games such as *Minecraft*, *Forza*, *Elder Scrolls* and *Halo*. Many of Microsoft's first-party titles are available exclusively on Xbox and PC, and some are licensed to rival console providers.

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<sup>6</sup> FMN, paragraph 6.1. Microsoft's turnover data is provided for fiscal year 2022 (1 July 2021-30 June 2022). Average foreign exchange rate for Microsoft's FY2022 is USD 1 = GBP 0.7520 as per the Bank of England average spot exchange rates for that period.

<sup>7</sup> Further information regarding Microsoft's activities can be found at paragraphs 2.2 -2.10 of the Final Report.

## Activision

14. Activision is a game developer and publisher founded in 2008 and headquartered in Santa Monica, California, US. Activision is publicly listed on Nasdaq. Activision's global turnover in the financial year 2022 was over £6 billion, of which approximately £716 million was generated in the UK.<sup>8</sup>
15. Activision develops gaming content for consoles, PC, and mobile. Activision's three most popular franchises—*Call of Duty (CoD)*, *World of Warcraft* and *Candy Crush*—account for most of its revenue. It publishes these games through three separate business divisions: Activision Publishing, Inc, Blizzard Entertainment, Inc, and King Digital Entertainment, respectively.
16. CoD, in particular, is widely regarded as one of the most successful gaming franchises of all time. For more than a decade, its releases have ranked in the top games available on console and PC. The latest game in the franchise, *CoD Modern Warfare II*, was released in November 2022 to what Activision described as the #1 top-selling opening weekend ever in the franchise.<sup>9</sup>

## BACKGROUND

17. On 18 January 2022, Microsoft entered into an agreement to acquire the whole of Activision (the **First Proposed Merger**).
18. The First Proposed Merger was subject to an in-depth phase 2 investigation by the CMA, with the CMA's Final Report published on 26 April 2023. In relation to cloud gaming services, the Final Report found that:<sup>10</sup>
  - (a) Cloud gaming has started to emerge as an alternative to gaming consoles and PCs, and could be transformative for the gaming industry, widening the pool of potential customers and introducing new ways to compete that could facilitate new entry.

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<sup>8</sup> FMN, paragraph 6.1. Activision's turnover data is provided for fiscal year 2022 (1 January 2022 – 31 December 2022). Average foreign exchange rate for Activision's FY2022 is USD 1 = GBP 0.8120 as per the Bank of England average spot exchange rates for that period.

<sup>9</sup> Further information regarding Activision's activities can be found at paragraphs 2.11 - 2.16 of the Final Report.

<sup>10</sup> Final Report, paragraphs 4.32 - 4.38; 8.96 - 8.280.

- (b) Microsoft has a strong multi-product ecosystem, giving it important advantages in running a cloud gaming service. It is the leading cloud gaming services provider and is already much stronger than its rivals.
  - (c) Activision creates some of the most popular gaming content, which will be important for the competitive offering of cloud gaming services as the market continues to grow and develop.
  - (d) Given Microsoft's already strong position, even a moderate increment to Microsoft's strength may be expected to substantially reduce competition in this developing market, to the detriment of current and future cloud gaming users.
19. The Final Report found that, following the First Proposed Merger, Microsoft would have the ability and incentive to use Activision's content to foreclose current and future rival cloud gaming service platforms and, as a result, the First Proposed Merger may be expected to result in an SLC in cloud gaming services in the UK. The Final Report found that prohibition of the First Proposed Merger was the only effective and proportionate remedy to this SLC and any adverse effects which may be expected to result from the SLC.
20. On 22 August 2023, the CMA issued its Final Order prohibiting the First Proposed Merger.<sup>11</sup>

## THE MERGER

21. On 21 August 2023, Microsoft announced that it proposed acquiring Activision excluding Activision's non-EEA cloud streaming rights. Immediately prior to the Merger, and pursuant to the Ubisoft Divestment Agreement, the Activision Streaming Rights will be divested to Ubisoft.
22. Considering the substantial overlap between the matters considered in the recent Final Report of 26 April 2023, the recent Final Decision on MCC/SR, and the matters at issue in this investigation, the CMA has taken the evidence and analysis undertaken for the purposes of those decisions as the starting point in this investigation. The CMA has referred to that analysis and evidence in this decision

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<sup>11</sup> [The Microsoft and Activision Merger Inquiry Order 2023](#). At the same time, the CMA announced its rejection of Microsoft's submissions that there had been a material change of circumstances since the publication of the CMA's Final Report or that there were otherwise special reasons for reaching a different decision in relation to the remedy for the First Proposed Merger (see the Final Decision on MCC/SR).

where appropriate.<sup>12</sup> The CMA has also conducted additional evidence gathering and analysis during this investigation and incorporated it into its assessment of the Merger.

## PROCEDURE

23. The CMA commenced its phase 1 investigation on 22 August 2023.
24. On 21 August 2023, each of the Parties informed the CMA that they accepted that the test for a reference of the Merger under section 33 of the Act is met on the basis that it is or may be the case that (i) the Merger, if carried into effect, will result in the creation of a relevant merger situation; and (ii) the creation of that situation may be expected to result in an SLC in the supply of cloud gaming services in the UK, and requested that the case be fast tracked to the consideration of UILs. As part of the request, the Parties agreed to waive certain procedural rights, including their right to an issues meeting.
25. As set out in the CMA's guidance,<sup>13</sup> merger parties can waive their rights in relation to certain procedural steps within a merger investigation as well as their right to challenge the SLC decision at phase 1 in order to enable a binding outcome to be arrived at more quickly. In agreeing to fast-track the case to the consideration of UILs, the CMA has, in keeping with the process set out in its guidance, had regard to the efficient conduct of the investigation and decided that it was appropriate to proceed with an accelerated Phase 1 timetable.

## JURISDICTION

26. The CMA believes that the Merger gives rise to arrangements in progress or contemplation for the purposes of the Act.<sup>14</sup>
27. Each of Microsoft and Activision (excluding the Activision Streaming Rights) is an enterprise. As a result of the Merger, Microsoft and Activision (excluding the Activision Streaming Rights) will cease to be distinct.

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<sup>12</sup> While this decision cross-refers to specific paragraphs of the Final Report and Final Decision on MCC/SR where appropriate, that is not to the exclusion of the evidence and analysis contained in the Final Report and the Final Decision on MCC/SR more broadly.

<sup>13</sup> Guidance on the CMA's jurisdiction and procedure (**CMA2**), paragraphs 7.8-7.13.

<sup>14</sup> Section 33(1)(a) of the Act.



28. The UK turnover of Activision in FY 2022 exceeds £70 million, so the turnover test in section 23(1)(b) of the Act is satisfied.<sup>15</sup>
29. A small number of third parties suggested that the Merger could not be the subject of a CMA phase 1 decision unless it can be characterised as a ‘new’ relevant merger situation for the purposes of the Act when compared with the First Proposed Merger (ie on the basis that the Merger is materially different from the First Proposed Merger already reviewed by the CMA).<sup>16</sup>
30. In this case, the following provisions are relevant to the framework through which the CMA should review the Merger in light of the outcome previously reached in relation to the First Proposed Merger:
  - (a) Section 33(1) requires the CMA to consider whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
  - (b) Section 33(3) of the Act lists certain circumstances in which the CMA may not make a reference under section 33 of the Act.<sup>17</sup> None of these circumstances relates or refers to the CMA’s prior review of a similar anticipated merger or imposes a requirement that a relevant merger situation must be ‘new’ or ‘different’ to a previously reviewed anticipated merger for the CMA to be able to make a reference.<sup>18</sup>
  - (c) In the current circumstances where a Final Order is in place in respect of the First Proposed Merger,<sup>19</sup> and the reference relating to the First Proposed Merger has thus been finally determined pursuant to sections 79(1)(e) and 79(2)(e) of the Act, the Parties are able to approach the CMA to request

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<sup>15</sup> Activision currently generates no turnover from the supply of its games to cloud gaming services in the UK, and thus these turnover figures are not affected by the divestment of Activision Streaming Rights to Ubisoft.

<sup>16</sup> Third party responses to the CMA’s information request and invitation to comment, September 2023.

<sup>17</sup> Section 33(3) of the Act states that ‘No reference shall be made under this section if— (za) the period within which the CMA is required by section 34ZA to decide whether the duty to make the reference applies has expired without such a decision having been made; (a) the making of the reference is prevented by section . . . 74(1) ... or paragraph 4 of Schedule 7; (b) the CMA is considering whether to accept undertakings under section 73 instead of making such a reference; (c) the arrangements concerned are being, or have been, dealt with in connection with a reference made under section 22; (d) a notice under section 42(2) is in force in relation to the matter or the matter to which such a notice relates has been finally determined under Chapter 2 otherwise than in circumstances in which a notice is then given to the CMA under section 56(1)’.

<sup>18</sup> For instance, in Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust / Poole Hospital NHS Foundation Trust, the CMA reviewed at phase 1 substantially the same merger that had previously been prohibited by the Competition Commission. The CMA carried out both a phase 1 review of the merger and contemporaneously considered whether consent should be granted under the undertakings that had previously been given to the Competition Commission. See also Tarmac Trading Ltd / Breedon Group plc.

<sup>19</sup> See [Final Order \(publishing.service.gov.uk\)](https://publishing.service.gov.uk).

consent to take certain actions that would otherwise be prohibited by the Final Order. The Final Order explicitly states at Articles 12 and 13 that the prohibition relating to the First Proposed Merger applies 'except with the prior written consent of the CMA'.<sup>20</sup> A request for consent has been made by the Parties,<sup>21</sup> and the CMA will in this case separately consider whether consent under the Final Order should be granted.

31. In practice, the CMA considers that, if the Merger were materially the same as the First Proposed Merger, then, unless there had been significant developments since the determination of the First Proposed Merger (eg, market developments),<sup>22</sup> the outcome of the CMA's investigation of the Merger would likely be the same or very similar to the outcome set out in the Final Report. In this case, however, the CMA notes that there are significant differences between the Merger and the First Proposed Merger, on the basis that, under the Merger, Microsoft will not acquire the Activision Streaming Rights. These rights, which the CMA considers to be important to the ability of suppliers to compete in the UK cloud gaming market (for the reasons set out in the Final Report), will be divested prior to completion of the Merger.
32. The CMA therefore considers it appropriate to give further consideration to the Merger pursuant to section 33(1) of the Act. For the reasons set out above, the CMA believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
33. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 23 August 2023 and the statutory 40 working day deadline for a decision is therefore 18 October 2023.

## COUNTERFACTUAL

34. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie, the counterfactual).<sup>23</sup> The counterfactual may consist of the pre-Merger conditions of competition, or conditions of competition that involve

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<sup>20</sup> See also paragraph 16 of the [Final order explanatory note \(publishing.service.gov.uk\)](https://publishing.service.gov.uk).

<sup>21</sup> Application for consent for Microsoft to acquire Activision Blizzard under the Microsoft and Activision Merger Inquiry Order 2023, 23 August 2023.

<sup>22</sup> See, for instance, Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust / Poole Hospital NHS Foundation Trust.

<sup>23</sup> See [Merger Assessment Guidelines \(CMA129\)](#), March 2021, from paragraph 3.1.

stronger or weaker competition between the merging parties than the pre-merger conditions of competition.<sup>24</sup>

35. In its phase 2 investigation of the First Proposed Merger, the CMA concluded that the relevant counterfactual against which to assess the transaction was the prevailing conditions of competition.<sup>25</sup> As part of the prevailing conditions the CMA recognised that the market for cloud gaming services would continue to grow, and that at least some cloud gaming providers—especially those with a buy-to-play (**B2P**) or bring-your-own-game (**BYOG**) offering—would have Activision’s most valuable games available on their platforms on the date of their release in the foreseeable future. The CMA did not exclude that cloud gaming services with different business models would arise absent the First Proposed Merger, noting that it is difficult to predict with any certainty how an emerging and dynamic market will continue to evolve.<sup>26</sup>
36. The Parties submitted that the relevant counterfactual against which to assess the Merger is similarly the prevailing conditions of competition but disagreed that this would include Activision making its games available on cloud gaming services.<sup>27</sup> According to the Parties, Activision’s games are not currently available via cloud gaming services and Activision has no plans to make them so available in the foreseeable future.<sup>28</sup>
37. In a phase 1 investigation, the CMA will choose the counterfactual in which the merger firms exert the strongest competitive constraint on each other, and where third parties exert the weakest competitive constraints on the merger firm, provided that counterfactual is a realistic prospect.<sup>29</sup> In any case, the CMA has not received material new evidence from the Parties or third parties to support departing from its findings in the Final Report. The CMA will therefore assess the Merger against prevailing conditions, which includes that Activision would have made its games available on cloud gaming services on the date of their release in the foreseeable future.

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<sup>24</sup> See [Merger Assessment Guidelines \(CMA129\)](#), March 2021, from paragraph 3.2.

<sup>25</sup> Final Report, paragraph 45 and 6.13.

<sup>26</sup> Final Report, paragraph 11.93.

<sup>27</sup> FMN, paragraphs 11.1-11.3.

<sup>28</sup> The Parties referred to material submitted as part of Microsoft’s appeal of the CMA’s phase 2 decision to the Competition Appeal Tribunal, namely, Mr. Kotick’s sworn testimony. However, the CMA does not consider that this evidence, when considered with the full body of available evidence, supports departing from the findings in the Final Report. The CMA carefully considered submissions of a similar nature from Activision during the course of its phase 2 investigation of the First Proposed Merger (see, for example, paragraphs 8.226-8.280 of the Final Report).

<sup>29</sup> [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 3.12.

## FRAME OF REFERENCE

38. Market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger, as it is recognised that there can be constraints on merging parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others. The CMA will take these factors into account in its competitive assessment.<sup>30</sup>
39. The starting point for the CMA's assessment is the relevant services provided by the Parties in:
- (a) the supply of game publishing services (where both Activision and Microsoft are currently active); and
  - (b) the supply of cloud gaming services (where Microsoft is currently active).
40. Although Microsoft is also active in the supply of console gaming services, the CMA will not assess the impact of the Merger in that market. In the Final Report, the CMA found on the basis of considerable evidence and analysis that Microsoft would not have the incentive to foreclose PlayStation in the market for console gaming services in the UK.<sup>31</sup> Having considered this evidence and analysis in detail, and in light of no new evidence raising concerns in this market being provided to the CMA in the course of this investigation, the CMA considers that the Merger does not give rise to a realistic prospect of an SLC in the supply of console gaming services in the UK.<sup>32</sup>

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<sup>30</sup> [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 9.4.

<sup>31</sup> Final Report, paragraph 7.402.

<sup>32</sup> In addition, the CMA noted in its phase 1 investigation of the First Proposed Merger that it did not have to conclude whether that merger gave rise to competition concerns arising from horizontal unilateral effects in game publishing split by genre because any such concerns would be captured by the concerns found in the remaining theories of harm set out in the decision (Phase 1 Decision, footnote 112). In the Final Report, the CMA also concluded that the available evidence did not support third-party concerns in relation to foreclosure of rival PC operating systems (Final Report, Appendix F, paragraph 3). Accordingly, the CMA has not considered further either of these theories of harm in this decision.

## Supply of game publishing services

### *Product scope*

41. In the Final Report, the CMA found that it was appropriate to segment the market for game publishing services by device type (ie, between PC, console, and mobile) but not by game genre.<sup>33</sup>
42. The Parties submitted that the CMA's prior findings may be adopted for the purposes of assessing the Merger,<sup>34</sup> and the CMA has not received evidence to support departing from its prior findings.

### *Geographic scope*

43. In the Final Report, the CMA considered it appropriate to assess the effects of the First Proposed Merger on the supply of console game publishing and PC game publishing services on a global basis.<sup>35</sup>
44. The Parties submitted that they agree with the CMA's prior findings that the relevant geographic frame of reference is global,<sup>36</sup> and the CMA has not received evidence to support departing from its prior findings.

## Supply of cloud gaming services

### *Product scope*

45. In the Final Report, the CMA found that cloud gaming services should be considered as a distinct market to consoles and gaming PCs, even if consoles and gaming PCs may exert some competitive constraint on cloud gaming services.<sup>37</sup> The CMA also found it appropriate to assess the impact of the First Proposed Merger within a product market for cloud gaming services that includes all business models (including B2P, BYOG, and multi-game subscription services), whilst taking into account relevant differences in the competitive assessment.<sup>38</sup>
46. In line with their submissions in relation to the First Proposed Merger, the Parties submitted that they do not agree that cloud gaming is a separate market to consoles

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<sup>33</sup> Final Report, paragraph 5.124-5.139.

<sup>34</sup> FMN, paragraph 13.2.

<sup>35</sup> The CMA noted that any regional or UK-specific differences where relevant were taken into account in the competitive assessment (Final Report, paragraph 5.145)

<sup>36</sup> FMN, paragraph 13.3.

<sup>37</sup> Final Report, paragraphs 5.82-5.97.

<sup>38</sup> Final Report, paragraphs 5.98-5.102.

and gaming PCs. According to the Parties, cloud gaming should be considered as part of the same relevant market(s) for the digital distribution of games with no distinction based on the form of access.<sup>39</sup>

47. The CMA has not received material new evidence from the Parties or third parties to support departing from its prior findings. As such, the CMA considers that it is appropriate to assess the impact of the Merger in a separate product frame of reference for cloud gaming services that includes all business models, while taking into account the constraint from consoles and gaming PCs within its competitive assessment as appropriate.

### ***Geographic scope***

48. In the Final Report, the CMA found that it is appropriate to assess the impact of the Merger in the market for cloud gaming services in the UK (but taking account of the multi-national aspects of competition where relevant in the competitive assessment).<sup>40</sup>
49. The Parties submitted that they consider the relevant market(s) for digital distribution of games are worldwide.<sup>41</sup>
50. The CMA has not received material new evidence from the Parties or third parties to support departing from its prior findings. As such, the CMA considers that it is appropriate to assess the impact of the Merger in cloud gaming services on a UK-wide basis, taking into account any multi-national features of cloud gaming services in the competitive assessment as appropriate.

### **Conclusion on frame of reference**

51. For the reasons set out above, the CMA has considered the impact of the Merger in the following frames of reference:
- (a) the supply of game publishing services globally; and
  - (b) the supply of cloud gaming services in the UK.

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<sup>39</sup> FMN, paragraph 13.14. The Parties submitted that their view is supported by the European Commission. The CMA notes that, while the European Commission defined an overall market for PC and console video game distribution, it nonetheless assessed in the competitive assessment the impact of the First Proposed Merger in relation to cloud streaming services within that overall market and considered cloud streaming services to be an important and growing part of that overall market (Case M.10646 – Microsoft/Activision Blizzard, European Commission decision of 15 May 2023, paragraphs 456-571).

<sup>40</sup> Final Report, paragraph 5.108.

<sup>41</sup> FMN, paragraph 13.16.

## COMPETITIVE ASSESSMENT

### Vertical effects

52. Vertical effects may arise when a merger involves firms at different levels of the supply chain, for example a merger between an upstream supplier and a downstream customer.
53. Vertical theories of harm involve the merged entity harming the ability of its rivals to compete post-Merger, for example through input foreclosure; raising effective prices or worsening non-price aspects, such as quality, of an input to its rivals (partial input foreclosure); or refusing to supply them completely (total input foreclosure). Such actions may harm the ability of the merged entity's rivals to provide a competitive constraint on the merged entity, and thereby lead to higher prices, worse quality or less choice for consumers.
54. Vertical mergers may be competitively benign or even efficiency-enhancing, but in certain circumstances can weaken rivalry, for example when they result in foreclosure of the merged firm's competitors. The CMA only regards such foreclosure to be anticompetitive where it results in an SLC in the foreclosed market(s), not merely where it disadvantages one or more competitors.
55. The CMA has followed the framework set out in the Merger Assessment Guidelines for assessing input foreclosure theories of harm.<sup>42</sup> In applying this framework, the CMA considers whether three cumulative conditions are satisfied:<sup>43</sup>
- (a) Would the merged entity have the ability to use its control of content to harm the competitiveness of rival cloud gaming services?
  - (b) Would it have the incentive to actually do so, ie would it be profitable?
  - (c) Would the foreclosure of rival cloud gaming services substantially lessen overall competition between cloud gaming services?
56. In the Final Report, the CMA found vertical effects in cloud gaming services as a result of the First Proposed Merger, following this same framework. The CMA found that, as a result of the First Proposed Merger, Microsoft would have the ability and incentive to foreclose rival cloud gaming service providers by withholding

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<sup>42</sup> [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraphs 7.9-7.22.

<sup>43</sup> [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 7.9.

Activision's games from them. The CMA found that this may be expected to result in an SLC in the market for cloud gaming services in the UK.

57. The Parties have structured the Merger in a way that aims to prevent the concerns that the CMA found in the Final Report from arising. Immediately prior to completion of the Merger, the Activision Streaming Rights will be divested to Ubisoft. Ubisoft will also receive a non-exclusive licence to sell, distribute, and sublicense entitlements to play cloud streaming versions of Activision's games in the EEA. At the same time, Microsoft will receive a non-exclusive licence from Ubisoft for cloud streaming rights to the extent necessary for Microsoft to fulfil its obligations under its commitments to the European Commission and the Existing Agreements.<sup>44</sup>
58. The CMA has therefore considered whether, taking into account this divestment of the Activision Streaming Rights, the Merger would give rise to a realistic prospect of competition concerns.

### ***Parties' submissions***

59. The Parties submit that the Microsoft will have no ability or incentive to foreclose rival cloud gaming services.
60. First, Microsoft will not acquire the Activision Streaming Rights, which will be divested to Ubisoft. In particular, Microsoft will not acquire the Activision Streaming Rights in respect of (i) past and current Activision Games (including a back catalogue of popular games published over 20 years) and (ii) future Activision Games published over the next 15 years. According to the Parties, by removing Microsoft's ability to make Activision Games exclusive to Microsoft's own cloud gaming service (rather, Microsoft must itself license the rights to stream Activision Games from Ubisoft on a non-exclusive basis), the divestment of the Activision Streaming Rights removes any foreclosure concern that could result from the Merger.

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<sup>44</sup> The CMA notes that the Existing Agreements do not prevent Ubisoft from entering into separate agreements with the cloud gaming service providers that are a party to the Existing Agreements with Microsoft (ie, NVIDIA, Boosteroid, Ubitus, Nware, and SIE). This means that if the Existing Agreements are limited in scope or not complied with, those cloud gaming service providers may seek a licence for the Activision Streaming Rights from Ubisoft. To the extent that the Merger is effective in preventing any of the concerns identified in the Final Report from arising, therefore, the Existing Agreements do not detract from its effectiveness. Moreover, to the extent that the Merger is not effective in preventing the concerns identified in the Final Report from arising, we do not consider the Existing Agreements would alter that conclusion, for the reasons discussed in the Final Report (see in particular paragraphs 8.329-8.337, 8.375-8.383, 8.434-8.441, 9.72-9.83, and 11.173-11.189) and the Final Decision on MCC/SR (see in particular paragraphs 35-83).



61. Second, the Parties submitted that Ubisoft will be fully able to commercialise the Activision Streaming Rights. The Parties submitted that the Activision Streaming Rights assigned to Ubisoft are perpetual and exclusive and relate to all current Activision Games, as well as games released between now and 2038. This means that Ubisoft has the rights to commercialise the Activision Games in perpetuity and ownership of the Activision Streaming Rights is effectively assigned to Ubisoft. Ubisoft will also be able to sublicense these rights worldwide without limitation using any business model.
62. Third, the Parties consider that Ubisoft will have appropriate incentives to license the Activision Games to cloud gaming service providers, ensuring at least as competitive an outcome as would have occurred in the counterfactual. The Parties submitted that the terms under which Ubisoft will acquire the Activision Streaming Rights aim to replicate Activision's incentives in the counterfactual and provide Ubisoft with the freedom and incentive to develop innovative new business models for cloud gaming, while at the same time ensuring that Microsoft continues to have the incentive to invest in the development of the Activision Games.

### ***Third party views***

63. The CMA published an invitation to comment on its case page and contacted customers and competitors of the Parties inviting them to comment on the potential impact on competition arising from the new transaction structure. The CMA received several responses, both from market participants and members of the public.<sup>45</sup>
64. Some market participants that made submissions to the CMA were in favour of the Merger.<sup>46</sup> For example, one cloud gaming provider submitted that the Merger would have a positive impact on competition in cloud gaming and the whole video games industry. According to this third party, the Merger will make it impossible for Microsoft to lock Activision content into its own cloud gaming ecosystem and will instead make it available to every market participant. Another third party submitted that it welcomed and supported this new proposal for Activision's cloud streaming

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<sup>45</sup> The CMA received emails from individual members of the public, expressing a mix of positive and negative opinions about the Merger. The CMA took these views into account where appropriate. However, many of them were not directly related to the matters at issue in the CMA's investigation of the Merger. Moreover, for the reasons set out in the Final Report (paragraph 5.17), which also applied to the CMA's consideration of the Merger, the CMA considered it appropriate to apply caution when interpreting these submissions.

<sup>46</sup> As set out in the CMA's [Merger Assessment Guidelines \(CMA129\)](#), March 2021 (paragraph 2.29(a)), the CMA recognises that third parties may have an interest in the outcome of the CMA's investigation. In this case, some cloud gaming service providers were offered contractual agreements by Microsoft, while others have been opposed to the Merger for reasons that may go beyond the concerns identified by the CMA in the Final Report. The CMA has taken this into account when deciding on the weight to give submissions from third parties in this investigation.

rights being made available via Ubisoft and looked forward to potentially engaging with Ubisoft to secure these rights.

65. A few market participants expressed concerns. These concerns related to Microsoft's ability and incentive to engage in total or partial foreclosure strategies post-Merger, notwithstanding the divestment of the Activision Streaming Rights. These concerns are considered in further detail below within the CMA's competitive assessment.<sup>47</sup>

### ***Microsoft's ability to foreclose***

66. The CMA considered whether the Merger would be effective in preventing Microsoft from having the ability to foreclose cloud gaming rivals.
67. Some third parties raised concerns that Microsoft would be in a position to withhold Activision's games altogether from cloud gaming rivals. These concerns were as follows:
- (a) Ubisoft may enter into an exclusive arrangement with Microsoft to license Activision's games only to Microsoft's own cloud gaming service. This outcome would be similar to Microsoft owning Activision's games and refusing to license them to cloud gaming rivals.
  - (b) Microsoft could set the wholesale price of Activision's games for cloud gaming services at a level that makes it unaffordable for Ubisoft or any other rival (except for Microsoft) to offer Activision's games on cloud gaming services.
  - (c) Microsoft could stop supplying Activision's games to Ubisoft and rival cloud gaming providers after the 15-year deal with Ubisoft comes to an end.
68. Some third parties also raised concerns that Microsoft would be able to foreclose rivals by degrading access to Activision's games in a number of ways. These concerns were as follows:

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<sup>47</sup> A few third parties raised the concern that Ubisoft may decide not to offer Activision's games to other cloud gaming providers. To the extent that Ubisoft's conduct could potentially be influenced by its ongoing relationship with Microsoft (and Microsoft's own commercial incentives), that is addressed in this decision. However, this decision does not address more generally the separate and prior acquisition by Ubisoft of the Activision Streaming Rights. The CMA has not decided as part of this decision whether Ubisoft's acquisition of the Activision Streaming Rights would meet its jurisdictional threshold for UK merger control or give rise to competition concerns. The CMA considers, however, that Ubisoft's acquisition of the Activision Streaming Rights is unlikely to give rise to concerns given that Ubisoft is independent from Microsoft and does not have Microsoft's advantages in the cloud gaming market as identified in the Final Report (ie, its ownership of Windows, its cloud infrastructure, and its ownership of Xbox and its catalogue of first party titles).

- (a) Microsoft will control Activision's catalogue of games and will therefore control the design, look, and feel of those games. Microsoft will be able to engage in partial foreclosure strategies by optimising games to work better with its cloud gaming service than with rivals. It could do this in a number of ways, such as by ensuring that Activision's games on Microsoft's own service result in higher frames per second, better performance on three-dimensional graphics, better image sharpness, and better button feel for controllers.
- (b) Microsoft may not make Activision's games available to Ubisoft on a day and date basis, or at least as soon as they are available on Game Pass.
- (c) Microsoft may not offer technical support to Ubisoft or its sublicensees to ensure that Activision's games can operate on their respective cloud gaming services.
- (d) Ubisoft may adopt preferential treatment towards Microsoft. This could include licensing Activision's games to Microsoft on preferential terms or with preferential features.
- (e) Microsoft may not port Activision's games to non-Windows operating systems in a way that preserves the quality of the game, or in a reasonable amount of time.
- (f) The terms of the Ubisoft Divestment Agreement may not allow for the emergence of cloud gaming services with different business models, such as cloud-based multi-game subscription models.

69. The CMA has assessed whether Microsoft would be able to foreclose rivals as a result of engaging in these strategies either individually or in combination.<sup>48</sup>

#### *CMA assessment of Microsoft's ability to foreclose*

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<sup>48</sup> The CMA notes that some of the concerns it received from third parties would typically be considered total foreclosure strategies (ie, withholding Activision's games altogether), and some would typically be considered partial foreclosure strategies (ie, degrading access to Activision's content). As noted in the Final Report, the CMA considers that partial foreclosure strategies can be incremental and, depending on their type and severity, can have a similar impact to a total foreclosure strategy (Final Report, paragraph 7.306). The CMA's published guidance also notes that the CMA's focus when considering the mechanisms through which the merged entity could potentially harm its rivals when supplying inputs will be on understanding if collectively these would allow the merged entity to foreclose its rivals, not on predicting the precise actions it would take ([Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 7.13). The CMA considers that the strategies described in this section could amount to total foreclosure, depending on their severity, and on whether they are deployed individually or in combination. For the purposes of this Phase 1 decision, therefore, the CMA considers that it is unnecessary to arrive at a firm distinction between total and partial foreclosure strategies.

70. As set out above, the starting point for the CMA's analysis in this case is the Final Report, which found that Microsoft would have the ability to foreclose cloud gaming rivals following the First Proposed Merger.
71. The Merger now proposed is structured in a way that is intended to prevent Microsoft from acquiring any ability to foreclose. In particular:
- (a) Unlike the First Proposed Merger, Microsoft would not be in a position to unilaterally make Activision's games available only on its own cloud gaming service, or to withhold those games from particular rivals. Instead, this input would be controlled, for the foreseeable future, by Ubisoft.
  - (b) The assets being transferred are readily identifiable and hold significant commercial value. In the hands of Ubisoft, which already possesses significant capabilities as a content provider,<sup>49</sup> these assets put Ubisoft in a position to establish itself as a key supplier of content to cloud gaming services providers, replicating the role played in the market by Activision pre-Merger. Subject to certain minor exceptions (relating to pre-existing regulatory or contractual commitments), Ubisoft has the commercial freedom to deploy the assets being transferred as it wishes, supporting whichever business models emerge as the market develops.
  - (c) The key commercial parameters of the transaction (including, in particular, the scope of assets being transferred and transaction consideration) have been set up-front, with ongoing interactions between Microsoft and Ubisoft being limited to the implementation of the transaction, rather than requiring ongoing commercial negotiations to take place. While the transaction has some atypical features (which largely reflect the nature of the transaction as an intended solution to competition concerns), it is, in large part, based on arrangements that are customary within the gaming industry.
  - (d) Although the market for cloud gaming services is already sizeable, it is a dynamic market that remains in the early stages of development. The Ubisoft Divestment Agreement aims to maintain the competitive structure of the market for cloud gaming services as it develops over the coming years. In particular, Ubisoft will control this input during the period in which it is expected

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<sup>49</sup> See FMN, paragraph 19.9(c).

that current and future potential rivals will get a foothold in the market and become well established as viable competitors to Microsoft.<sup>50</sup>

72. The CMA considers, however, that competition concerns could nevertheless arise if, notwithstanding the divestment of the Activision Streaming Rights, Microsoft would retain the ability to foreclose rivals in the supply of cloud gaming (such as through the mechanisms set out above).
73. The arrangements that the Parties have entered into as part of the divestiture of the Activision Streaming Rights to Ubisoft are intended to preclude such foreclosure mechanisms from arising. The terms include the following:<sup>51</sup>
- (a) Ubisoft may not grant Microsoft an exclusive licence to the Activision Games, and any such purported licence would be null and void.
  - (b) Ubisoft may not offer Microsoft preferential pricing nor material preferential treatment with respect to Cloud Streaming Rights not made available to third parties.
  - (c) Microsoft must offer the Activision Games to Ubisoft at a price that is no higher than the wholesale price for digital download and retail sales of PC and console versions of the same content (whichever is lower); [X]
  - (d) Microsoft must provide Ubisoft with the Activision Games in a standard executable format sufficiently in advance to allow Ubisoft to release them on the same date as they are released on console and PC.
  - (e) Microsoft will ensure that the quality, content, features and performance of any Activision Game delivered to Ubisoft will be materially similar to the non-streaming version of that Activision Game. Microsoft will not design PC versions of Activision Games, or any other versions which are or are planned

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<sup>50</sup> As set out in the Final Report (see paragraphs 19-22, 60-62 and 8.57-8.60), the CMA found that cloud gaming is expected to grow significantly and become profitable in the next five years. Market reports forecast that global cloud gaming revenue will increase to \$6.1–11.4 billion by 2025, and \$11.9–13.5 billion by 2026. While providers have currently had mixed results and continue to explore different avenues to monetise their service and gaming content, the evidence suggested that costs will continue to fall as demand grows and providers are able to scale their offering. These expectations were backed up by considerable amounts of investment into this market by a range of market participants.

<sup>51</sup> As part of the Merger, Microsoft will acquire Activision and be in a position to cause it to perform its obligations under the Ubisoft Divestment Agreement. Accordingly, this section refers to Microsoft's obligations to Ubisoft under the Ubisoft Divestment Agreement, regardless of whether these are incurred by Microsoft or Activision.

to be available on multiple cloud streaming services, to be solely optimised for its own cloud streaming service.

- (f) Microsoft must port Activision Games to non-Windows OS following a request from Ubisoft. Ubisoft may also request that Microsoft perform technical modifications, including to ensure that the Activision Games support emulators like Proton. Microsoft must carry out this work at its regular pace and at a quality and standard which is customary in the gaming industry. Microsoft can only charge Ubisoft for the reasonable costs incurred for this work. Microsoft is also required to provide Ubisoft with development and porting plans for the Activision Games reasonably in advance.
- (g) Ubisoft will compensate Microsoft for the Activision Streaming Rights through a one-off payment and through a market-based wholesale pricing mechanism, including an option that supports pricing based on usage. This will allow Ubisoft to license out the Activision Streaming Rights under any business model of its choosing, including buy-to-play, multi-game subscription services, or any other model that may arise.
- (h) Microsoft will offer technical support to Ubisoft for Activision Games [§<]. It will also offer reasonable technical support for Ubisoft's sublicensees, provided these cover Microsoft's reasonable costs.

74. The CMA received some representations in relation to the duration of the Ubisoft Divestment Agreement. One third party expressed concerns that the Ubisoft Divestment Agreement is not perpetual. Another third party, who was in favour of the Merger, noted that the duration of the Ubisoft Divestment Agreement is 'even longer' than the duration of the Existing Agreements, and submitted that it would prevent Microsoft from using Activision's games to substantially lessen competition in cloud gaming.

75. The CMA notes that the transfer of the Activision Streaming Rights to Ubisoft will be perpetual and irrevocable. This means that, even after the expiry of the 15-year time period, Ubisoft will continue to have full ownership and licensing rights of the cloud streaming rights for the relevant Activision Games released during that 15-year time period.

76. Moreover, the CMA considers that, within the specific context of the supply of cloud gaming services in the UK (at this stage of development of the market), the divestment of the Activision Streaming Rights results in a materially different market structure, with different implications for overall competition over the short- and long-

term in the downstream market, as compared to the position under the First Proposed Merger.

77. Notwithstanding the largely self-standing nature of the assets being transferred to Ubisoft and the arrangements outlined above, the CMA has limited residual concerns that competition could be substantially lessened as a result of Microsoft's ongoing relationship with Ubisoft. The CMA recognises that the divestiture of the Activision Streaming Rights to Ubisoft aims to prevent Microsoft from having any ability to foreclose rival cloud gaming providers by placing the Activision Streaming Rights in the hands of an independent third party. However, there remains the possibility for certain provisions within the Ubisoft Divestment Agreement to be circumvented, terminated, or not enforced.<sup>52</sup> Consequently, the CMA has limited residual concerns that Microsoft could still engage in the strategies set out above (either in isolation or in combination) in order to foreclose rival cloud gaming service providers.
78. As set out above, the Parties have also submitted to the CMA that the test for reference is met in relation to cloud gaming services in the UK and requested that the case be fast-tracked to consideration of UILs. This means that the Parties have not, for the purpose of these proceedings, sought to contest the CMA's initial finding that the residual concerns set out above could result in Microsoft having the ability to foreclose rival suppliers of cloud gaming services as a result of the Merger.
79. On this basis, the CMA considers that, post-Merger, Microsoft may have the ability to foreclose cloud gaming services rivals.

### ***Microsoft's incentive to foreclose***

80. In the Final Report, the CMA found that Microsoft would have the incentive to withhold Activision's games to foreclose cloud gaming rivals following the First Proposed Merger.<sup>53</sup> The Merger is designed to prevent Microsoft from having the ability to foreclose rivals by divesting the Activision Streaming Rights immediately prior to Microsoft's acquisition of Activision. If the Merger fails to do that completely, however, the CMA's starting point—consistent with its findings in the Final Report—is that Microsoft would have the incentive to foreclose cloud gaming rivals.
81. As set out above, the Parties submitted to the CMA that the test for reference is met in relation to cloud gaming services in the UK and requested that the case be fast-tracked to consideration of UILs. This means that the Parties have not, for the

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<sup>52</sup> See [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 7.15.

<sup>53</sup> Final Report, at paragraph 8.390.

purpose of this investigation, sought to contest the CMA's initial finding that Microsoft would continue to have the incentive to foreclose rival suppliers of cloud gaming services as a result of the Merger.

82. On this basis, the CMA considers that, post-Merger, Microsoft may have an incentive to foreclose cloud gaming services rivals.

### ***Effect on competition***

83. In the Final Report, the CMA found that cloud gaming appears to be a relatively concentrated market in the UK, with Microsoft enjoying a strong position and several advantages over its rivals.<sup>54</sup> The CMA found that there appear to be significant barriers to entry in the market, such as the cost of cloud infrastructure, the cost of acquiring content, the need to grow sufficiently to benefit from economies of scale, and material direct and indirect network effects.<sup>55</sup> The CMA found that the First Proposed Merger would likely harm Microsoft's main rivals and raise barriers to entry for smaller players and potential new entrants.<sup>56</sup> The CMA concluded that Microsoft using Activision's content to foreclose rivals in cloud gaming services would distort the development of the cloud gaming market and result in substantial harm to overall competition in this market.<sup>57</sup>
84. As set out above, the CMA has residual concerns that the Merger will not completely remove Microsoft's ability to foreclose rival cloud gaming service providers. The CMA has also received no evidence in this investigation to depart from its conclusion in the Final Report that foreclosing rival cloud gaming services would distort the development of the cloud gaming market and result in a substantial harm to overall competition. Moreover, as set out above, the Parties submitted to the CMA that the test for reference is met in relation to cloud gaming services in the UK. Accordingly, the CMA considers that the Merger may have the effect of distorting the development of the cloud gaming market and result in substantial harm to overall competition in this market.

### ***Conclusion on vertical effects***

85. For the reasons set out above, and in particular the CMA's concerns that Microsoft's ability to foreclose rival cloud gaming services will not be completely removed by the divestment of Activision's Streaming Rights prior to the Merger, the CMA believes that Microsoft may have the ability and incentive to foreclose cloud gaming rivals as

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<sup>54</sup> Final Report, at paragraph 8.422.

<sup>55</sup> Final Report, at paragraph 8.437.

<sup>56</sup> Final Report, at paragraph 8.439.

<sup>57</sup> Final Report, at paragraph 8.441.



a result of the Merger, and that this could substantially harm overall competition in the supply of cloud gaming services in the UK.

## COUNTERVAILING FACTORS

### *Barriers to entry and expansion*

86. Entry, or expansion of existing firms, can mitigate the initial effect of a merger on competition, and in some cases may mean that there is no SLC. In assessing whether entry or expansion might prevent an SLC, the CMA considers whether such entry or expansion would be timely, likely and sufficient.<sup>58</sup>
87. In the Final Report, the CMA found that there are significant barriers to entry or expansion for developing successful AAA games such as CoD (or other Activision games).<sup>59</sup> The CMA also found that it is not likely that entry or expansion of sufficient scale would occur in a timely manner in order to prevent or reduce the impact of the SLC in cloud gaming services in the UK from arising as a result of the transaction.<sup>60</sup>
88. The CMA has not received any further evidence in this investigation to lead it to consider that such entry or expansion is likely to occur here. Accordingly, the CMA does not have evidence to support a finding that entry or expansion would be timely, likely and sufficient to prevent a realistic prospect of an SLC as a result of the Merger.

### *Efficiencies*

89. Efficiencies arising from a merger may enhance rivalry, with the result that the merger does not give rise to an SLC where an SLC may otherwise arise. The CMA must receive compelling evidence to be satisfied that efficiencies will enhance rivalry so that a merger does not result in an SLC. More specifically, the CMA must be satisfied that the efficiencies will: (a) enhance rivalry in the supply of those products where an SLC may otherwise arise; (b) be timely, likely and sufficient to prevent an SLC from arising; (c) be merger-specific; and (d) benefit customers in the UK.<sup>61</sup> Efficiencies may also be considered within the framework of relevant

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<sup>58</sup> [Merger Assessment Guidelines \(CMA129\)](#), March 2021, from paragraph 8.40.

<sup>59</sup> Final Report, paragraph 9.44-9.46.

<sup>60</sup> Final Report, paragraph 9.60.

<sup>61</sup> [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraphs 8.2-8.27.

customer benefits (which are discussed in the 'Exceptions to the duty to refer' section below).

90. The Parties submitted that the Merger would give rise to the following efficiencies:<sup>62</sup>
- (a) The Merger allows Microsoft to make Activision content available for native gaming in Game Pass 'day and date', which will enhance rivalry in console and PC gaming, increase customer choice and lower the cost of access.
  - (b) The availability of Activision's content on the cloud gaming services of NVIDIA, Boosteroid, Ubitus and Nware under the cloud gaming licensing agreements entered into by Microsoft, together with the divestment of the Activision Streaming Rights to Ubisoft, as well as any licensees of Ubisoft, will enhance competition in cloud gaming and result in a greater choice of goods and services.
91. In relation to the first claimed efficiency, the CMA notes that it relates to different markets (ie, the markets for console and PC gaming).<sup>63</sup> As such, it is not an efficiency capable of preventing an SLC in the market for cloud gaming by offsetting any anticompetitive effects.<sup>64</sup>
92. In relation to the second claimed efficiency, the Parties put forward a similar submission in relation to the First Proposed Merger regarding Microsoft's agreements with NVIDIA, Boosteroid, and Ubitus. In the Final Report, the CMA rejected the purported efficiencies arising from these agreements *inter alia* because they would not be merger-specific, given that, absent the First Proposed Merger, the CMA considered that Activision would likely have made its games available for cloud gaming services in the next five years. This finding was not limited to any one specific cloud gaming service.<sup>65</sup> The CMA has not received any evidence to depart from this conclusion. Further, to the extent that the Merger, together with the Ubisoft Divestment Agreement, succeeds in restoring the pre-Merger conditions of competition by placing Ubisoft in a position that replicates the role played in the market by Activision pre-Merger, this does not amount to an efficiency in the market.
93. As both claimed efficiencies fail at least one of the conditions for accepting efficiencies, and given that the conditions are cumulative, the CMA does not

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<sup>62</sup> FMN, paragraphs 24.1-24.4.

<sup>63</sup> Microsoft would not be able to unilaterally place Activision's games on the cloud gaming element of Game Pass following the Merger, as that would require a license from Ubisoft. Accordingly, this would also not amount to an efficiency capable of preventing an SLC in the market for cloud gaming.

<sup>64</sup> See [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraphs 8.3-8.4.

<sup>65</sup> Final Report, paragraphs 9.72-9.83.

consider it necessary to consider whether either of the claimed efficiencies would meet the other conditions.

94. The CMA therefore does not consider that there is sufficiently compelling evidence to indicate that the Merger would give rise to efficiencies that may prevent the SLC by offsetting its anti-competitive effects.

### **THIRD PARTY VIEWS**

95. The CMA issued an invitation to comment and contacted customers and competitors of the Parties. Third party comments have been taken into account where appropriate in the competitive assessment above.
96. The CMA also received several comments from members of the public in relation to the Merger. Although the CMA sought to take these comments into account in the competitive assessment where relevant (noting, for the reasons set out in paragraph 5.17 of the Final Report, that it is necessary to apply some caution when interpreting these submissions), some of these comments were unrelated to the matters at issue in this investigation. Some of the submissions that the CMA received from members of the public included the following:<sup>66</sup>
- (a) The Merger will allow Microsoft to expand the catalogue of games available on subscription services, including Game Pass.
  - (b) The Merger may lower the price and increase competition in console gaming subscription services.
  - (c) The Merger will not be anticompetitive because there are other strong console providers in the market for console gaming, such as PlayStation and Nintendo.
  - (d) Ubisoft is an adequate and suitable purchaser for the Activision Streaming Rights.
  - (e) The Merger represents an improvement on the remedies proposed by Microsoft in the First Proposed Merger and will prevent increased consolidation in the cloud gaming market.

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<sup>66</sup> The CMA received some submissions expressing the same concerns already addressed in the competitive assessment, and those submissions are not repeated here.

(f) Cloud gaming represents a small market compared to console, PC, and mobile gaming, and the CMA should not be concerned about the impact of the Merger on this market.

97. For the reasons set out above, this decision does not reconsider concerns relating to the console gaming, PC gaming, or mobile gaming market. To the extent that the CMA received relevant concerns in relation to the market for cloud gaming, these have been addressed in the competitive assessment section.

## CONCLUSION ON SUBSTANTIAL LESSENING OF COMPETITION

98. Based on the evidence set out above, the CMA believes that it is or may be the case that the Merger may be expected to result in an SLC as a result of vertical effects in cloud gaming services in the UK.

## EXCEPTIONS TO THE DUTY TO REFER

### *Relevant Customer Benefits*

99. Where the CMA's duty to refer is engaged, the CMA has the discretion to decide not to refer the merger under investigation for a Phase 2 investigation if it believes that any relevant customer benefits (**RCBs**) outweigh the adverse effect from the merger's impact on competition.<sup>67</sup> For the CMA to consider exercising its discretion, the claimed RCBs must be clear, and the evidence in support of them must be compelling. Merging parties must also be able to provide evidence that the claimed benefits will be (i) likely, (ii) timely, and (iii) merger-specific.<sup>68</sup>

100. The Parties submitted that the two claimed efficiencies discussed in the 'Countervailing factors' section above also constitute RCBs.<sup>69</sup> As set out above, these are that (i) the Merger will allow Microsoft to make Activision's content available in Game Pass on a 'day and date' basis, enhancing rivalry in console and PC gaming, and increasing customer choice and lower cost of access, and (ii) the availability of Activision's content on the cloud gaming services of NVIDIA, Boosteroid, Ubitus and Nware under the cloud gaming licensing agreements entered by Microsoft, together with the divestment of the Activision Streaming Rights to Ubisoft, as well as any licensees of Ubisoft, will enhance competition in cloud gaming and result in a greater choice of goods and services.

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<sup>67</sup> Section 33(2)(c) of the Act. See [Exceptions to the duty to refer](#) (CMA64), December 2018, paragraph 82.

<sup>68</sup> [Exceptions to the duty to refer](#) (CMA64), December 2018, paragraphs 70 and 77.

<sup>69</sup> FMN, paragraphs 21.1-21.4.

101. The CMA considered the first claimed efficiency—Microsoft making Activision content available in Game Pass ‘day and date’—as an RCB in its Final Report on the First Proposed Merger (the **Game Pass RCB**).<sup>70</sup> The CMA found that the Game Pass RCB would amount to an RCB under section 30 of the Act but that the scale of the benefit would be limited. Having Activision’s content on Game Pass would represent a different way to pay for the same content, which would not necessarily be cheaper for all consumers. The CMA also expected Microsoft to have the incentive to increase the price of Game Pass commensurate with the value enhancement of adding Activision’s valuable content to it, and that even a modest price increase would significantly reduce or eliminate any potential RCB. Ultimately the CMA found that the RCB would not outweigh the harm to competition arising from the First Proposed Merger.
102. The CMA has not received any evidence to support departing from this conclusion with respect to the Merger. The Parties submitted that Microsoft has recently increased the price of Game Pass subscriptions in the UK since the Final Report was published [X]. However, the CMA considers that the recent price rise does not preclude further price rises and, therefore, does not undermine the reasoning in the Final Report. The CMA also considers the recent Game Pass price increase can be expected to reduce the magnitude of the benefit to UK consumers of using Game Pass relative to purchasing Activision games.
103. Regarding the second claimed efficiency, the CMA does not consider that it would be merger-specific. The CMA found in the Final Report that Activision would have made its games available on cloud gaming services in the counterfactual.<sup>71</sup> To the extent that the Merger, together with the Ubisoft Divestment Agreement, succeeds in restoring the pre-Merger conditions of competition by placing Ubisoft in a position that replicates the role played in the market by Activision pre-Merger, this does not amount to an RCB.
104. The CMA, therefore, does not believe that there is compelling evidence of RCBs that will outweigh the competition concerns it has identified. Moreover, the Parties have accepted that the test for reference is met in relation to cloud gaming services in the UK. On this basis, the CMA believes that there are no grounds in this case to warrant exercising its discretion not to refer the Merger on the basis of RCBs.

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<sup>70</sup> Final Report, 11.227-11.265 and 11.295.

<sup>71</sup> Final Report, Chapters 6 and 8.

## DECISION

105. Consequently, the CMA believes that it is or may be the case that (i) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and (ii) the creation of that situation may be expected to result in an SLC within a market or markets in the United Kingdom.
106. The CMA therefore believes that it is under a duty to refer under section 33(1) of the Act. However, the duty to refer is not exercised whilst the CMA is considering whether to accept undertakings under section 73 of the Act instead of making such a reference.<sup>72</sup> The Parties have until **29 September 2023**<sup>73</sup> to offer an undertaking to the CMA.<sup>74</sup> The CMA will refer the Merger for a phase 2 investigation<sup>75</sup> if the Parties do not offer an undertaking by this date; if the Parties indicate before this date that they do not wish to offer an undertaking; or if the CMA decides<sup>76</sup> by **6 October 2023** that there are no reasonable grounds for believing that it might accept the undertaking offered by the Parties, or a modified version of it.

**Colin Raftery**  
**Senior Director**  
**Competition and Markets Authority**  
**22 September 2023**

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<sup>72</sup> Section 33(3)(b) of the Act.

<sup>73</sup> Section 73A(1) of the Act.

<sup>74</sup> Section 73(2) of the Act.

<sup>75</sup> Sections 33(1) and 34ZA(2) of the Act.

<sup>76</sup> Section 73A(2) of the Act.