

# ANTICIPATED ACQUISITION BY MICROSOFT CORPORATION OF ACTIVISION BLIZZARD, INC.

## Issues statement

14 October 2022

### The reference

1. On 15 September 2022, the Competition and Markets Authority (**CMA**), in exercise of its duty under [Section 33\(1\)](#) of the Enterprise Act 2002 (**the Act**), referred the anticipated acquisition by Microsoft Corporation (**Microsoft**) of Activision Blizzard Inc. (**Activision**) (the **Merger**) for further investigation and report by a group of CMA panel members (the **Inquiry Group**). Microsoft and Activision are together referred to as the **Parties** and, for statements referring to the future, the **Merged Entity**.
2. In exercise of its duty under [section 36\(1\)](#) of the Act, the CMA must decide:
  - (a) whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
  - (b) if so, whether the creation of that relevant merger situation may be expected to result in a substantial lessening of competition (**SLC**) within any market or markets in the United Kingdom (**UK**) for goods or services.

### Purpose of this issues statement

3. In this Issues Statement, we set out the main issues that we are likely to consider in reaching a decision on the SLC question (paragraph 2(b) above), having had regard to the evidence available to us to date.
4. The CMA's phase 1 decision (the **Phase 1 Decision**)<sup>1</sup> contains much of the detailed background to this issues statement. We intend to use the evidence obtained during the phase 1 investigation, but we will also be gathering and considering further evidence. We are publishing this statement to assist parties submitting evidence to our phase 2 investigation.
5. We currently intend to focus our investigation in the areas in which the CMA found in the Phase 1 Decision that the Merger gives rise to a realistic prospect of an

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<sup>1</sup> [Phase 1 Decision, 1 September 2022.](#)

SLC. This does not preclude the consideration of any other issues which may be identified during this investigation, and we invite the Parties and third parties to notify us if there are any additional relevant issues which they believe we should consider.

## Background

### *The Parties*

6. 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 2021 was close to £125 billion.<sup>2</sup>
7. Microsoft is organised into three operating segments: (i) Productivity and Business; (ii) Intelligent Cloud; and (iii) More Personalised Computing. Microsoft offers a wide range of products and services including:<sup>3</sup>
  - (a) Windows OS. Microsoft Windows is a computer operating system (**OS**) that can be installed on a PC or server to provide a graphics-based interface between the user and the computer's hardware and software. Microsoft offers two types of licences for Windows – Windows for desktop PCs (**Windows Client**) and Windows for servers (**Windows Server**).
  - (b) Azure. Azure is Microsoft's public cloud platform and associated services. Azure offers a range of cloud-based solutions, such as computing, storage, networking, databases, operating systems, developer tools, and runtimes, to help enterprises build and run their systems, analytics, and applications in the cloud. Customers pay consumption-based fees for the services they use.
  - (c) Xbox Cloud Gaming. Microsoft currently offers cloud-based game streaming through Xbox Cloud Gaming, which is composed of dedicated Xbox consoles located in Microsoft data centres.
  - (d) Xbox. Xbox is Microsoft's gaming console. It connects to a television or other display and allows users to play games specifically developed for Xbox. Xbox first launched in 2001 and has since remained one of the three main gaming consoles in the market (along with Sony's and Nintendo's consoles).
  - (e) Xbox Game Studios. Microsoft is active as a developer, publisher, and distributor of games. Microsoft publishes games for PCs, consoles and mobile devices developed by Xbox Game Studios, a collection of 24 first party development studios, including the recently acquired ZeniMax studios.

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<sup>2</sup> Phase 1 Decision, paragraph 36.

<sup>3</sup> Phase 1 Decision, paragraph 37.

Examples include games in the *Minecraft*, *Forza*, *Elder Scrolls* and *Halo* game titles.

- (f) Digital distribution. Microsoft distributes games in digital form. Microsoft operates the Microsoft Store on Windows, an app store on Windows PCs, through which it distributes its own first-party games and third-party games for PC, as well as an Xbox-branded storefront (through which it also distributes first-party and third-party games), which can be accessed via an Xbox console, web-browser, or the Xbox App for Windows.
- (g) Gaming Subscription Services. Microsoft offers multi-game subscription services that include access to first- and third-party games (eg Xbox Live Gold and Xbox Game Pass), online multiplayer capabilities (eg Xbox Live and Xbox Live Gold) and cloud gaming functionality (Xbox Cloud Gaming, which is available as part of the Xbox Game Pass top-tier subscription and on a free-to-play basis with *Fortnite*).

8. 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 2021 was over £6 billion, of which approximately £716 million was generated in the UK.<sup>4</sup> Activision is active in the following areas:<sup>5</sup>

- (a) Game development and publishing. Activision develops games for PCs, consoles, and mobile devices, and publishes them in most countries around the world through three business units: (i) Activision Publishing, (ii) Blizzard Entertainment, and (iii) King Digital Entertainment.
- (b) Digital distribution. In Europe, Activision provides warehousing, logistics, and sales distribution services to third-party publishers of interactive entertainment software and interactive entertainment hardware (as well as its own publishing operations). Activision also has an online gaming digital storefront for PC games, Battle.net, which facilitates digital distribution of Blizzard and select Activision content.
- (c) Display advertising. Activision operates digital display advertising within some of its game content, particularly within mobile games offered by King.

## **The Merger**

9. On 18 January 2022, Microsoft entered into an agreement with Activision, via its direct wholly owned subsidiary Anchorage Merger Sub Inc., to acquire sole control of Activision (as defined above, the **Merger**). Under the terms of this agreement,

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<sup>4</sup> Phase 1 Decision, paragraph 38.

<sup>5</sup> Phase 1 Decision, paragraph 39.

Microsoft agreed to pay USD 95 per share, representing a purchase price of approximately USD 68.7 billion.<sup>6</sup>

10. The Parties told the CMA that Microsoft's rationale for the Merger is to:<sup>7</sup>
- (a) provide Microsoft with gaming content (including popular Activision franchises like *Call of Duty (CoD)*, *World of Warcraft*, and *Candy Crush Saga*) which will help Microsoft to execute a cross-platform strategy (allowing gamers to play games on multiple devices);
  - (b) improve Microsoft's presence in the mobile segment, where Activision holds an established position (particularly through King);
  - (c) support Microsoft's investments in its multi-game subscription service, Xbox Game Pass (**Game Pass**), and improve user engagement/adoption amongst Xbox and PC users;
  - (d) improve Microsoft's ability to create a 'Universal Store' (extending the Xbox digital storefront across non-Xbox platforms and devices); and
  - (e) increase the attractiveness of Microsoft's advertising business.

## Our inquiry

11. Below we set out some specific areas that we intend to assess in order to help parties who wish to make representations to us.

## Jurisdiction

12. We shall consider the question of jurisdiction in our inquiry. A relevant merger situation exists where the following conditions are satisfied:
- (a) Two or more enterprises have ceased to be distinct; and
  - (b) Either:
    - (i) the value of the target enterprise's UK turnover exceeded £70 million in its last fiscal year (the turnover test); or
    - (ii) the enterprises ceasing to be distinct have a share of supply in the UK, or in a substantial part of the UK, of 25% or more in relation to goods or services of any description (the share of supply test).<sup>8</sup>

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<sup>6</sup> Phase 1 Decision, paragraph 40.

<sup>7</sup> Phase 1 Decision, paragraph 43.

<sup>8</sup> Section 23 of the Act.

13. In its Phase 1 Decision, the CMA found it is or may be the case that the CMA had jurisdiction to review the Merger on the basis that each of Microsoft and Activision should be considered an enterprise, that these enterprises will cease to be distinct as a result of the Merger, and that the turnover test is met because Activision generated more than £70 million turnover in the UK in FY2021.<sup>9</sup>

## Counterfactual

14. We will compare the prospects for competition resulting from the Merger against the competitive situation without the Merger: the latter is called the 'counterfactual'. The counterfactual is not a statutory test but rather an analytical tool used in answering the question of whether a merger gives rise to an SLC.<sup>10</sup>
15. The counterfactual may consist of the prevailing conditions of competition, or conditions of competition that involve stronger or weaker competition between the merger firms than under the prevailing conditions of competition. In its Phase 1 Decision, the CMA found no evidence supporting a different counterfactual other than the prevailing conditions of competition.<sup>11</sup>
16. We currently intend to adopt the prevailing conditions of competition as the most likely counterfactual to the Merger, but welcome any evidence on this part of our assessment.

## Market definition

17. Where the CMA makes an SLC finding, this must be 'within any market or markets in the United Kingdom for goods or services'.<sup>12</sup> The CMA is therefore required to identify the market or markets within which an SLC may arise. An SLC can affect the whole or part of a market or markets. Within that context, the assessment of the relevant market is an analytical tool that forms part of the analysis of the competitive effects of a merger and should not be viewed as a separate exercise.<sup>13</sup>
18. The boundaries of a market do not determine the outcome of the analysis of the competitive effects of a 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. We will take these factors into account in our competitive assessment.<sup>14</sup> Furthermore, we may not find it necessary to conclude on the precise boundaries

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<sup>9</sup> Phase 1 Decision, paragraph 49.

<sup>10</sup> [Merger Assessment Guidelines \(CMA129\) \(MAGs\)](#), paragraph 3.1.

<sup>11</sup> Phase 1 Decision, paragraph 55.

<sup>12</sup> [Section 36\(1\)\(b\)](#), the Act.

<sup>13</sup> [MAGs](#), paragraph 9.1.

<sup>14</sup> [MAGs](#), paragraph 9.4.

of some relevant markets if they do not significantly impact the CMA's competitive assessment.

19. In practice, the analysis of market definition and the competitive effects will often overlap, with many factors affecting market definition being relevant to the assessment of competitive effects and vice versa.<sup>15</sup>
20. In the Phase 1 Decision, the CMA considered the impact of the merger in the supply of gaming consoles (and associated digital storefronts), multi-game subscription services, and cloud gaming services. Moreover, in assessing the impact of the merger on cloud gaming services, the CMA took into account products in Microsoft's broader ecosystem, including cloud platforms and computer operating systems.
21. In terms of geographic scope, the CMA assessed the impact of the Merger in these product frames of reference in the UK, taking into account the broader global context and evidence that is not specific to the UK in its competitive assessment where relevant.
22. We will use the frame of reference adopted in the Phase 1 Decision as a starting point for our analysis, and our view of market definition will be largely drawn from the same evidence that informs our competitive assessment. Where relevant, we will consider out-of-market constraints and/or any differences in the degree of competitive constraints on the Merged Entity from different suppliers. We will consider the Parties' and other submissions and evidence on market definition, but we do not expect it to be determinative in the outcome of our assessment.

## Theories of harm

23. The term 'theory of harm' describes the possible ways in which an SLC could arise as a result of a merger. Theories of harm provide the framework for our analysis of the competitive effects of a merger.<sup>16</sup> Identifying a theory of harm in this issues statement does not preclude an SLC from being identified on another basis following receipt of additional evidence or following further analysis. We welcome views on the theories of harm described below.
24. In its Phase 1 Decision, the CMA found that the Merger gave rise to a realistic prospect of an SLC as a result of vertical effects arising from:<sup>17</sup>

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<sup>15</sup> MAGs, paragraph 9.2.

<sup>16</sup> MAGs, paragraph 2.11.

<sup>17</sup> Phase 1 Decision, paragraph 22.

- (a) Microsoft withholding or degrading Activision's content—including popular games such as CoD—from other consoles or multi-game subscription services; and
  - (b) Microsoft leveraging its broader ecosystem together with Activision's game catalogue to strengthen network effects, raise barriers to entry and ultimately foreclose rivals in cloud gaming services.
25. We currently intend to focus our competitive assessment on these theories of harm at phase 2.
26. Vertical effects may arise when a merger involves firms at different levels of the supply chain, for example a merger between a firm and an upstream supplier or a downstream customer. In certain circumstances vertical mergers can weaken rivalry, for example when they result in foreclosure of the merged firm's competitors. This would weaken the constraints that the merged entity faces and, as a result, harm competition and therefore customers.<sup>18</sup>
27. In assessing a foreclosure theory of harm, the CMA's approach is to consider whether three cumulative conditions are satisfied:
- (a) Ability: Would the merged entity have the ability to use its control of inputs (input foreclosure) or to restrict rivals' access to a customer (customer foreclosure) to harm the competitiveness or incentive to compete of its rivals?
  - (b) Incentive: Would it have the incentive actually to do so, ie would it be profitable?
  - (c) Effect: Would the foreclosure of these rivals substantially lessen overall competition?<sup>19</sup>
28. In the following sections we consider how these three cumulative conditions were considered to apply to the theories of harm in the CMA's Phase 1 Decision, and how the CMA proposes to investigate them further in phase 2.

***TOH1: Input foreclosure of rival console gaming platforms (excluding multi-game subscription services)***

29. In the Phase 1 Decision, the CMA found that there was a realistic prospect of an SLC in gaming consoles (together with their digital storefronts) as a result of the Merged Entity engaging in foreclosure strategies such as (i) making Activision content unavailable on rival consoles (ie exclusive to Xbox), (ii) making Activision content available for release on rival console gaming platforms at a later date

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<sup>18</sup> MAGs, paragraph 7.2.

<sup>19</sup> MAGs, paragraph 7.10.

compared to Xbox (ie timed exclusivity), (iii) degrading the quality of Activision gaming content available to rival console gaming platforms, (iv) making features or upgrades of Activision games unavailable to other console gaming platforms (ie content exclusivity), and/or (v) raising the wholesale price of Activision content on rival consoles' gaming platforms.<sup>20</sup>

30. In relation to ability, the CMA found that:

- (a) The Merged Entity would have significant upstream market power in publishing of games for consoles.<sup>21</sup>
- (b) Activision's content is an important input for PlayStation. An economically significant number of PlayStation gamers could switch to Xbox if Activision's content were no longer available (or not available on equal terms) on PlayStation.<sup>22</sup>
- (c) There are few, if any, alternative franchises with CoD's level of brand awareness and popularity amongst gamers.<sup>23</sup>
- (d) Sony is Microsoft's closest competitor in gaming consoles. By contrast, Nintendo offers differentiated hardware and content aimed primarily at a different (eg, more 'family-friendly') customer segment.<sup>24</sup>
- (e) Sony's existing contractual protections (from existing arrangements with Activision) would not undermine Microsoft's ability to engage in partial or total foreclosure because (i) they may not account for all the possible foreclosure mechanisms that could be available to the Merged Entity, (ii) they could be renegotiated or terminated early, and (iii) they may not be enforced depending on the respective parties' respective bargaining positions.<sup>25</sup>

31. In relation to incentive, the CMA found that:

- (a) Financial modelling of the Merger suggests that the Merged Entity's incentive to foreclose Sony may be considerably stronger than suggested by the Parties.<sup>26</sup>
- (b) Microsoft's past business practices suggest that it may be willing to make losses in the short term in order to build scale and increase its user base. In particular, (i) Microsoft has previously acquired publishers and made their upcoming games exclusive to Xbox, even when those publishers had

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<sup>20</sup> Phase 1 Decision, paragraph 152.

<sup>21</sup> Phase 1 Decision, paragraph 173(a).

<sup>22</sup> Phase 1 Decision, paragraph 173(b).

<sup>23</sup> Phase 1 Decision, paragraph 173(c).

<sup>24</sup> Phase 1 Decision, paragraph 174.

<sup>25</sup> Phase 1 Decision, paragraph 175.

<sup>26</sup> Phase 1 Decision, paragraph 189.



previously made their content available to all consoles, and (ii) Microsoft has pursued this strategy when acquiring content that is far less valuable than Activision's games, and hence far less likely to divert customers to its console.<sup>27</sup>

- (c) Microsoft could engage in a partial foreclosure strategy, which would allow it to capture the most dedicated CoD gamers—those who would switch to Xbox to benefit from enhanced content, interoperability, or earlier releases—whilst continuing to generate revenues from less dedicated PlayStation CoD gamers who may not have switched to Xbox in response to a total foreclosure strategy.<sup>28</sup>
- (d) The CMA did not identify any persuasive evidence that Microsoft would be deterred from engaging in total or partial foreclosure strategies by the prospect of reputational damage to Xbox or CoD.<sup>29</sup>

32. In relation to effect, the CMA focused on the impact of the Merger on competition in the market for gaming consoles generally, not just on its impact on any specific competitor (eg, Sony). However, since the CMA found that Sony is Microsoft's closest rival in a highly concentrated market for gaming consoles, the CMA considered carefully the impact of the Merger on Sony's competitiveness. The CMA found that, given the importance of CoD to Sony PlayStation and the existence of strong direct and indirect network effects, any foreclosure strategy could have a significant impact on Sony's revenues and user base.<sup>30</sup> The impact of any foreclosure strategy on Sony may be particularly strong at the launch of the next generation of consoles, when both new and existing users decide which console to buy.<sup>31</sup> The CMA found, therefore, that a material impact on Sony's ability to compete would have a detrimental impact on overall competition in the market and ultimately harm consumers (eg through higher prices, reduced quality, or reduced innovation in games and gaming consoles).<sup>32</sup>

### ***TOH2: Input foreclosure of rival multi-game subscription services***

33. The Parties' rivals in multi-game subscription services include providers that, for a regular subscription payment, offer access to a catalogue of games that can be downloaded to a user's PC or console, or otherwise streamed to different devices via cloud.<sup>33</sup>

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<sup>27</sup> Phase 1 Decision, paragraph 194.

<sup>28</sup> Phase 1 Decision, paragraph 198.

<sup>29</sup> Phase 1 Decision, paragraph 200.

<sup>30</sup> Phase 1 Decision, paragraph 203(a).

<sup>31</sup> Phase 1 Decision, paragraph 203(b).

<sup>32</sup> Phase 1 Decision, paragraph 204.

<sup>33</sup> Phase 1 Decision, paragraph 206.

34. The CMA investigated whether the Merged Entity could harm Microsoft's rivals and lessen current and future competition in multi-game subscription services through strategies such as (i) making Activision's content unavailable on rival multi-game subscription services (ie exclusive to Game Pass), (ii) making Activision's content available for release on rival multi-game subscription services at a later date compared to Microsoft's subscription services (ie timed exclusivity), (iii) degrading the quality of Activision's gaming content available to rival multi-game subscription services, (iv) making features or upgrades of Activision's games unavailable to other multi-game subscription services (ie content exclusivity), and/or (v) raising the wholesale price of Activision's content on rival multi-game subscription services.<sup>34</sup>
35. In relation to ability, the CMA found that:
- (a) Multi-game subscription services are becoming increasingly important, and Activision's content would likely be available on those platforms in future.<sup>35</sup>
  - (b) Activision's content may be as important to multi-game subscription services in future as it is to consoles today on a buy-to-play basis.<sup>36</sup>
  - (c) Game Pass is already the strongest provider of multi-game subscription services.<sup>37</sup>
  - (d) Combining Activision's content with Game Pass could raise barriers to entry, entrench Microsoft's position as the leading provider of multi-game subscription services, and substantially reduce existing and potential competition.<sup>38</sup>
36. In relation to incentive, the CMA found that:
- (a) A static quantitative analysis of incentives would not be particularly informative in a dynamic market that exhibits direct and indirect network effects,<sup>39</sup> particularly one that is nascent and rapidly developing, such as multi-game subscription services.<sup>40</sup>
  - (b) Microsoft has publicly stated that one of the most important reasons behind the Merger is to add Activision's content to Game Pass to differentiate it from

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<sup>34</sup> Phase 1 Decision, paragraph 207.

<sup>35</sup> Phase 1 Decision, paragraph 219.

<sup>36</sup> Phase 1 Decision, paragraph 219.

<sup>37</sup> Phase 1 Decision, paragraph 221.

<sup>38</sup> Phase 1 Decision, paragraph 222.

<sup>39</sup> Gaming platforms are two-sided, with users on one side and content providers on the other. Two-sided markets are often characterised by network effects, where the value of the product for customers on one side of the platform depends on the volume of users either on the same side (direct network effects) or on the other side (indirect network effects).

<sup>40</sup> Phase 1 Decision, paragraph 224.

other multi-game subscription services, suggesting that it could have the incentive to make Activision's content exclusive to Game Pass.<sup>41</sup>

- (c) Microsoft's first-party titles are not available on any multi-game subscription services other than Game Pass, even where those titles are available for purchase on rival consoles.<sup>42</sup>
- (d) Microsoft's internal documents further highlighted its incentives to foreclose rivals in multi-game subscription services.<sup>43</sup>
- (e) Third parties told the CMA that Microsoft would benefit from making Activision's content exclusive to Game Pass, and that this would be consistent with Microsoft's behaviour in relation to past acquisitions, including that of ZeniMax Media, where Microsoft did not uphold its promise to continue making Bethesda content available on multiple stores and platforms.<sup>44</sup>

37. In relation to effect, the CMA found that:

- (a) Game Pass holds a strong position in multi-game subscription services pre-Merger, and most of its competitors are significantly smaller in terms of user base and revenues.<sup>45</sup>
- (b) Most Game Pass rivals lack the popularity and range of content that Game Pass would own post-Merger. Given the importance of Activision's content, current and future rivals could be affected by any foreclosure strategies using that content.<sup>46</sup>
- (c) Multi-game subscription services is a nascent market that exhibits both direct and indirect network effects. Combining Game Pass, as the strongest incumbent, with Activision's important gaming catalogue could substantially reduce competition as a result of total or partial foreclosure or a combination of both. This could raise barriers to entry, reduce the number of competitors to one or only a few providers, and significantly increase Microsoft's market power. The Merger may cause this effect, or at least accelerate this process, thereby depriving consumers of a longer period of competition between platforms.<sup>47</sup>

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<sup>41</sup> Phase 1 Decision, paragraph 226.

<sup>42</sup> Phase 1 Decision, paragraph 227.

<sup>43</sup> Phase 1 Decision, paragraphs 228 and 229.

<sup>44</sup> Phase 1 Decision, paragraphs 230 and 231.

<sup>45</sup> Phase 1 Decision, paragraph 233.

<sup>46</sup> Phase 1 Decision, paragraph 233.

<sup>47</sup> Phase 1 Decision, paragraph 234.

### ***TOH3: Foreclosure of cloud-gaming service providers through leveraging Microsoft's ecosystem***

38. Cloud gaming technology allows gamers to stream games running on gaming hardware in a data centre to their choice of supported device. Cloud gaming is a nascent and rapidly developing market that is expected to grow significantly in the future.<sup>48</sup>
39. At phase 1, the CMA found that (i) Microsoft already has an advantage over rival cloud gaming service providers due to its broad multi-product ecosystem, including a leading gaming console, a leading cloud platform, and the leading PC OS, and (ii) Microsoft could leverage this ecosystem together with Activision's gaming content to strengthen network effects, raise barriers to entry, and hence foreclose rivals in cloud gaming services.<sup>49</sup>
40. In relation to Microsoft's pre-existing strengths across its ecosystem, the CMA found that:
- (a) **Users and content.** Microsoft is one of only three global gaming console providers. This gives Microsoft two important advantages over most other existing and potential cloud gaming service providers. First, Microsoft already has a large user base to which it can promote its cloud gaming services. Second, Microsoft already has a large gaming library through Xbox Game Studios, which includes a collection of 24 first-party development studios. Given the strong network effects in these markets, the CMA found that Microsoft's existing user base, content, and relationships with third-party game publishers may already give Microsoft a significant advantage over cloud gaming services rivals without these strengths.<sup>50</sup>
  - (b) **Cloud Platform (Azure).** Microsoft has one of the world's leading cloud platforms. The CMA found that access to a strong cloud infrastructure on competitive terms is important to compete effectively in cloud gaming services. As such, the CMA found that Microsoft's vertically integrated cloud platform may already give it an advantage over rival cloud gaming service providers who do not have a similar cloud infrastructure.<sup>51</sup>
  - (c) **Operating system (Windows).** Microsoft owns Windows OS, which is the market leader in the supply of PC OSs. The CMA understands that OS software provides the interface between videogame applications and the underlying gaming hardware and software, such that cloud gaming service providers require an OS license to run games designed for that OS. The

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<sup>48</sup> Phase 1 Decision, paragraph 236.

<sup>49</sup> Phase 1 Decision, paragraph 239.

<sup>50</sup> Phase 1 Decision, paragraphs 249–253.

<sup>51</sup> Phase 1 Decision, paragraphs 254–259.

CMA found that, by owning Windows, Microsoft already has several advantages over rival cloud gaming service providers in terms of (i) cost, (ii) unrestricted access to Windows OS (rivals currently have access only to Windows Server, which some consider to be inferior for gaming to Windows Client), and (iii) promotions, as Microsoft can engage in promotional strategies using Windows to attract PC users to its cloud gaming service.<sup>52</sup>

41. In relation to ability, the CMA found that, although Microsoft already has advantages over rivals pre-Merger, the Merger would significantly strengthen its integrated offering. Absent the Merger, rivals could still hope to compete against Microsoft by offering a different value proposition that is stronger on at least some parameters of competition (for example, by offering a better gaming catalogue at a lower price). Following the Merger, it may be significantly more difficult for rivals to compete against Microsoft on any parameter of competition, as Microsoft would have by far the strongest integrated offering across cloud, computer OSs, and gaming content. The investment required by a competitor to develop an offering that could compete effectively with that of Microsoft could be significantly increased following the Merger.<sup>53</sup>
42. In addition, the CMA found that the Merger could strengthen Microsoft's gaming ecosystem, such that foreclosure strategies that may not have succeeded absent the merger could succeed after the Merger, especially when deployed in combination. These could include:<sup>54</sup>
- (a) **Gaming content.** Engaging in total or partial foreclosure strategies using the Merged Entity's gaming content (as set out in TOH1 and TOH2);
  - (b) **Azure.** Denying access to Microsoft's cloud platform to rival cloud gaming services providers (or offering it on worse terms, including price, location, and/or processing power); and
  - (c) **Windows.** Denying access to a Windows OS licence (or offering it on worse terms, including price).
43. In relation to incentive, the CMA found that acquiring Activision's content could change Microsoft's incentive to engage in foreclosure strategies using its ecosystem. Acquiring Activision's attractive gaming content could allow Microsoft to attract more users to its cloud gaming services platform. Given the strength of network effects in this market, this could make a foreclosure strategy using Microsoft's broader ecosystem more effective, thereby increasing Microsoft's incentive to engage in the foreclosure strategies described above (in

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<sup>52</sup> Phase 1 Decision, paragraphs 260–269.

<sup>53</sup> Phase 1 Decision, paragraph 274.

<sup>54</sup> Phase 1 Decision, paragraph 275.

circumstances where it may not have had the incentive to do so absent the Merger).<sup>55</sup>

44. In relation to effects, the CMA found that the market for cloud gaming services is at an early stage of development, and that the competitive landscape could change significantly over the coming years. The CMA found that strengthening network effects and raising barriers to entry as described in this theory of harm could affect all current and potential rivals in cloud gaming services. In particular, it could make it very difficult for new and recent entrants without the required technological capabilities and gaming content to compete effectively against Microsoft. The CMA found that, absent the Merger, either these competition concerns would not materialise, or customers would at least benefit from a longer period of competition between platforms vying to be the 'winning platform' in these markets prior to any tipping occurring.<sup>56</sup>
45. The CMA also found that the competition concerns identified in this theory of harm could have consequences for the game publishing market. If Microsoft were to acquire significant market power in cloud gaming services, it could become a *de facto* gatekeeper between game publishers and gamers. This could have knock-on effects on independent game developers and publishers who compete against Microsoft's own gaming portfolio, ultimately giving it the ability to control access to gamers, charge high fees for game distribution, and manipulate game rankings.<sup>57</sup>

## Countervailing factors

46. We will consider whether there are countervailing factors which are likely to prevent or mitigate any SLC that we may find. Some of the evidence that is relevant to the assessment of countervailing factors may also be relevant to our competitive assessment.
47. We will consider evidence of entry and/or expansion by third parties and whether entry and/or expansion would be timely, likely and sufficient to prevent any SLC from arising as a result of the Merger.<sup>58</sup>
48. We will also consider any relevant evidence submitted to us by the Parties that the Merger is likely to give rise to efficiencies that will enhance rivalry, such that the Merger may not be expected to result in an SLC.

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<sup>55</sup> Phase 1 Decision, paragraphs 284–288.

<sup>56</sup> Phase 1 Decision, paragraphs 289–292.

<sup>57</sup> Phase 1 Decision, paragraph 293.

<sup>58</sup> MAGs, paragraphs 8.28–8.43.

## Possible remedies and relevant customer benefits

49. Should we conclude that the Merger may be expected to result in an SLC within one or more markets in the UK, we will consider whether, and if so what, remedies might be appropriate.
50. In any consideration of possible remedies, we may have regard to their effect on any relevant customer benefits that might be expected to arise as a result of the Merger and, if so, what these benefits are likely to be and which customers would benefit.<sup>59</sup>

## Responses to this issues statement

51. Any party wishing to respond to this issues statement should do so in writing, no later than **Friday 28 October 2022** by emailing [microsoft.activision@cma.gov.uk](mailto:microsoft.activision@cma.gov.uk).

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<sup>59</sup> [Merger Remedies \(CMA87\)](#), paragraphs 3.4 and 3.15–3.24.