

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

## Notice of consultation on consent under the Final Order

Notice of consultation on whether to give consent to Microsoft Corporation to acquire Activision Blizzard, Inc. (excluding Activision Blizzard's non-EEA cloud streaming rights) under paragraph 12 of the [Microsoft and Activision Merger Inquiry Order 2023](#) made by the CMA pursuant to section 84 of the Enterprise Act 2002 (the **Act**).

### INTRODUCTION AND BACKGROUND

1. On 18 January 2022, Microsoft Corporation (**Microsoft**) entered into an agreement to acquire the whole of Activision Blizzard, Inc. (**Activision**) (the **First Proposed Merger**).
2. 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 (the **Final Report**).<sup>1</sup>
3. 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 a substantial lessening of competition (**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.
4. On 22 August 2023, the CMA issued its Final Order prohibiting the First Proposed Merger.<sup>2</sup> Under paragraph 12 of the Final Order, Microsoft may not acquire an

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<sup>1</sup> [Final Report](#), paragraph 7.212

<sup>2</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

interest in Activision or any entity holding an interest in Activision for ten years without the CMA's consent.

5. Microsoft has since agreed to acquire Activision excluding Activision's cloud streaming rights outside of the European Economic Area (**EEA**) (the **Merger**). Immediately prior to the Merger, pursuant to a divestiture agreement between Activision and Ubisoft Entertainment SA (**Ubisoft**), 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 divested to Ubisoft.<sup>3</sup>
6. The Merger may not proceed without the consent of the CMA under paragraph 12 of the Final Order.
7. On 22 September 2023, the CMA published its phase 1 decision relating to the Merger (the **Phase 1 Decision**). In that decision, the CMA stated that it 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.<sup>4</sup> Specifically, 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.
8. On 21 September 2023, the Parties offered undertakings in lieu of reference (**UILs**) to the CMA for the purposes of section 73(2) of the Act.
9. The CMA has now given notice to the Parties, pursuant to section 73A(2)(b) of the Act, that it considers that there are reasonable grounds for believing that the undertakings offered, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act and that it is considering the Parties' offer (the **UIL Provisional Acceptance Decision**).<sup>5</sup>
10. The CMA is separately consulting on the UIL Provisional Acceptance Decision.
11. In this consultation, the CMA is seeking views on whether it should grant consent to Microsoft to proceed with the Merger under paragraph 12 of the Final Order.

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decision in relation to the remedy for the First Proposed Merger: see [Final decision on possible material change of circumstances/special reasons](#).

<sup>3</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.

<sup>4</sup> See [Microsoft / Activision Blizzard \(ex-cloud streaming rights\) merger inquiry](#).

<sup>5</sup> See [Microsoft / Activision Blizzard \(ex-cloud streaming rights\) merger inquiry](#).

## MICROSOFT'S REQUEST FOR CONSENT TO THE MERGER

12. Microsoft approached the CMA on 23 August 2023 requesting consent for the Merger to proceed.<sup>6</sup>
13. Microsoft submitted that, in circumstances where the CMA ultimately approves the Merger, either unconditionally or subject to UILs, the CMA would have satisfied itself that the cloud gaming SLC which the Final Order was designed to remedy would not be expected to arise as a result of the Merger. According to Microsoft, in such circumstances it would be incumbent upon the CMA to also grant consent for the Merger under the Final Order and a failure to do so would be irrational.<sup>7</sup>
14. Microsoft submitted that granting consent would be the natural and appropriate consequence of a decision to approve the Merger, either unconditionally or subject to UILs. According to Microsoft, where the Merger has been approved there will be no basis for the particular terms of a prior order to preclude the completion of the Merger. Microsoft submitted that the effectiveness of the Final Order in achieving its original aim will not be undermined by granting consent if the cloud gaming SLC detailed in the Final Report will not arise as a result of the Merger. According to Microsoft, in those circumstances no further justification for the grant of consent would be necessary.<sup>8</sup>
15. Microsoft further submitted that, in any event, the divestment of the Activision Streaming Rights to Ubisoft would also amount to a change in circumstances since the Final Report. According to Microsoft, as a result of that change in circumstances, there is no prospect that the cloud gaming SLC detailed in the Final Report will arise, such that it would be appropriate to grant consent for the Merger.<sup>9</sup>

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<sup>6</sup> Application for consent for Microsoft to acquire Activision Blizzard under the Microsoft and Activision Merger Inquiry Order 2023, 23 August 2023 (**the Consent Application**).

<sup>7</sup> Consent Application, paragraph 1.4.

<sup>8</sup> Consent Application, paragraph 1.7.

<sup>9</sup> Consent Application, paragraph 1.8. Microsoft submitted more broadly that the divestment of the Activision Streaming Rights eliminates the competitive concerns the Final Order was designed to address. Microsoft submitted that the divestment is a substantial modification of the merger which attracted the Final Order, and comprehensively addresses the cloud gaming SLC detailed in the Final Report and its adverse effects. Microsoft submitted that the new arrangements comprehensively remove Microsoft's ability to engage in an input foreclosure strategy as a result of the Merger and that it has no means of offering Activision Blizzard games on Xbox Cloud Gaming in the UK without licensing the rights from Ubisoft (see Consent Application, Section C). The CMA refers to the Phase 1 Decision, where the CMA found a realistic prospect of an SLC in cloud gaming services in the UK as a result of the Merger, and the UIL Provisional Acceptance Decision, where the CMA gave notice that it considers there are reasonable grounds for believing that the UILs offered, or a modified version of them, might be accepted by the CMA.

## CONSIDERING MICROSOFT'S REQUEST

16. The CMA's approach to granting consent under a remedy will depend on the individual circumstances affecting a particular undertaking or order and its terms.
17. In determining whether to give consent under the Final Order in this case, the CMA is considering whether allowing the Merger by granting this consent would undermine the effectiveness of the Final Order in terms of meeting its aim to remedy the cloud gaming SLC detailed in the Final Report. The consent decision is separate from the Phase 1 Decision described above and the CMA's decision of whether to accept UILs following the UIL Provisional Acceptance Decision and the separate consultation relating to UILs. However, the Phase 1 Decision and the CMA's ultimate decision on UILs are relevant to the consent decision.
18. The scope of the CMA's consent decision is limited to determining whether or not to grant consent under paragraph 12 of the Final Order for Microsoft and Activision to implement the Merger.
19. Before reaching a decision on whether or not to grant consent, the CMA invites representations from any person or persons who wish to comment on the request for consent to the Merger under paragraph 12 of the Final Order, and whether there are any reasons why consent should not be given in the event the CMA decides to approve the Merger with UILs.
20. Representations should be made in writing to the CMA and be addressed to:  
[Microsoft.Activision.P1@cma.gov.uk](mailto:Microsoft.Activision.P1@cma.gov.uk)

**Deadline for comments: Friday 6 October 2023**