

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

## Decision that undertakings might be accepted

ME/7068/23

The CMA's decision under section 73A(2) of the Enterprise Act 2002 that undertakings might be accepted, 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 for reasons of commercial confidentiality.

### Introduction

1. On 18 January 2022, Microsoft Corporation (**Microsoft**) entered into an agreement to acquire the whole of Activision Blizzard, Inc (**Activision**) (the **Parties**) (the **First Proposed Merger**). The First Proposed Merger was subject to an in-depth phase 2 investigation by the Competition and Markets Authority (**CMA**), with the CMA's Final Report published on 26 April 2023 (the **Final Report**). The Final Report found that, if the First Proposed Merger were to proceed, Microsoft would have the ability and incentive to withhold Activision's games from rival cloud gaming service providers, and that this may be expected to result in a substantial lessening of competition (**SLC**) in cloud gaming services in the UK. The Final Report found that the prohibition of the First Proposed Merger would be the only effective and proportionate remedy to the SLC and any adverse effects which have resulted from, or may be expected to result from, the SLC.
2. On 22 August 2023, the CMA issued its Final Order prohibiting the First Proposed Merger.
3. On 21 August 2023, Microsoft announced that it proposed acquiring 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**) (the **Ubisoft Divestment Agreement**), Activision's global cloud streaming rights (excluding the EEA) for current and future Activision PC and console games (the **Activision Games**), including current and future Activision Games released during the next 15 years (the **Activision Streaming Rights**), will be divested to Ubisoft.<sup>1</sup>

4. The CMA has decided under section 33(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger consists of arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and that this may be expected to result in an SLC within a market or markets in the United Kingdom (the **SLC Decision**).
5. The CMA gave notice pursuant to section 34ZA(1)(b) of the Act to the Parties of the SLC Decision. However, the CMA has not referred the Merger for a phase 2 investigation pursuant to section 33(3)(b) on the date of the SLC Decision in order to allow the Parties the opportunity to offer undertakings to the CMA in lieu of such reference for the purposes of section 73(2) of the Act (**UILs**).
6. Pursuant to section 73A(1) of the Act, if a party wishes to offer UILs, it must do so within the five working day period specified in section 73A(1)(a) of the Act. In this case, the Parties provided a final UILs offer to the CMA in advance of the SLC Decision, on 21 September 2023, intended to address concerns relayed to the Parties during the 'state of play' discussion. This was provided on the basis that, if the CMA did find a realistic prospect of an SLC, the CMA could treat this as the Parties' final UILs offer to the CMA for a decision to be taken under section 73A(2)(b) of the Act whether there are reasonable grounds for believing that the undertaking or a modified version of it might be accepted.
7. The CMA now gives notice, pursuant to section 73A(2)(b) of the Act, to the Parties 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 offer.

### **The undertakings offered**

8. Under section 73 of the Act, the CMA may, instead of making a reference, and for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effect which has or may have resulted from it or may be expected to result

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<sup>1</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.

from it, except from the merger parties concerned UILs to take such action as it considers appropriate.

9. The Parties have structured the Merger in a way that is intended to prevent the competition concerns identified in the Final Report in relation to the First Proposed Merger from arising. Immediately prior to completion of the Merger, the Activision Streaming Rights will be divested to Ubisoft.
10. By divesting the Activision Streaming Rights to Ubisoft, 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 cloud streaming rights to the Activision Games 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.
11. Notwithstanding the largely self-standing nature of the assets being transferred to Ubisoft, the SLC Decision found residual concerns that competition could be substantially lessened as a result of Microsoft's ongoing relationship with Ubisoft. The SLC Decision found residual concerns that Microsoft could still engage in strategies in order to foreclose cloud gaming rivals after the Merger, and 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.
12. To address this SLC, the Parties have offered to give UILs to the CMA (the **Proposed Undertakings**). The UILs aim to ensure that the Ubisoft Divestment Agreement is fully implemented, including in relation to the following aspects:<sup>2</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); [].

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<sup>2</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.

- (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 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.
13. The Proposed Undertakings enable the CMA to monitor and, if necessary, enforce the Parties' compliance with the Proposed Undertakings. This includes allowing for the appointment of a Monitoring Trustee to oversee the Parties' compliance with the Proposed Undertakings, if required by the CMA. The Parties will also be required to provide annual compliance reports to the CMA setting out the steps taken to ensure compliance with the undertakings. The Proposed Undertakings require the Parties to comply with the dispute resolution provisions included in the Ubisoft Divestment Agreement, encompassing a fast-track escalation process and arbitration, and require the Parties to keep the CMA informed of any dispute referred to the fast-track escalation process.<sup>3</sup>

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<sup>3</sup> In addition, the Proposed Undertakings enable the CMA to be involved in any arbitration proceedings arising in relation to assignment of the Ubisoft Divestment Agreement to a third party. Under the terms of the

## The CMA's provisional views

14. The CMA considers that UILs are appropriate when they are clear-cut and capable of ready implementation. The CMA's starting point when assessing undertakings is to seek an outcome that restores competition to the level that would have prevailed absent the merger.<sup>4</sup> The more extensive the competition concerns, the greater the belief must be that the UILs will comprehensively resolve those concerns.<sup>5</sup>
15. In this case, the CMA believes that the divestment of the Activision Streaming Rights, placing those important rights in the hands of an independent third party (with the freedom to deploy those assets as it wishes), would – if executed effectively and in full – prevent Microsoft from having the ability to foreclose rival cloud gaming providers. However, as set out in the SLC decision, the CMA has residual concerns (which the CMA considers give rise to the realistic prospect of an SLC in relation to the supply of cloud gaming services in the UK) relating to the possibility for certain provisions within the Ubisoft Divestment Agreement to be circumvented, terminated, or not enforced. As the Proposed Undertakings substantially reduce these residual risks, the CMA believes that the Proposed Undertakings, or a modified version of them, might be acceptable as a suitable remedy to the SLC identified by the CMA.
16. The CMA also believes at this stage that the Proposed Undertakings may be capable of ready implementation. The Proposed Undertakings would take effect from completion of the Merger. As noted above, 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. If required by the CMA, the Parties also propose to appoint a Monitoring Trustee for the duration of the Proposed Undertakings to help monitor ongoing compliance with the Proposed Undertakings.
17. For these reasons, the CMA currently thinks that there are reasonable grounds for believing that the Proposed Undertakings, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act.
18. The CMA's decision on whether ultimately to accept the Proposed Undertakings or refer the Merger for a phase 2 investigation will be informed by, among other things,

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Ubisoft Divestment Agreement, assignment of the Ubisoft Divestment Agreement by Ubisoft to a third party requires the Parties' consent in certain circumstances, which cannot be unreasonably withheld, delayed, or conditioned. In the event of any dispute in relation to the granting of the Parties' consent being referred to arbitration, the Proposed Undertakings require the Parties to promptly notify the CMA of the dispute and provide the CMA with the opportunity to provide representations on the proposed assignment.

<sup>4</sup> [Mergers remedies \(CMA87\)](#), December 2018, Chapter 3 (in particular paragraphs 3.27, 3.28 and 3.30).

<sup>5</sup> [Mergers remedies \(CMA87\)](#), December 2018, paragraph 3.28.

third party views on whether the Proposed Undertakings are suitable to address the competition concerns identified by the CMA.

19. In addition, in the SLC Decision, the CMA did not find that any efficiency would outweigh the competition concerns it had identified to warrant exercising its discretion not to refer the Merger. Nevertheless, the CMA notes that if the CMA ultimately accepts the Proposed Undertakings, enabling the Merger to proceed, this would allow for the accrual of any RCB relating to the inclusion of Activision Games on Game Pass.

## **Consultation process**

20. Full details of the undertakings offered will be published separately as part of the CMA's consultation on the undertakings offered as required by Schedule 10 of the Act.<sup>6</sup>

## **Decision**

21. The CMA therefore considers that there are reasonable grounds for believing that the Proposed Undertakings offered by the Parties, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act. The CMA now has until Friday 1 December 2023 pursuant to section 73A(3) of the Act to decide whether to accept the undertakings, with the possibility to extend this timeframe pursuant to section 73A(4) of the Act to Wednesday 31 January 2024 if it considers that there are special reasons for doing so. If no undertakings are accepted, the CMA will refer the Merger for a phase 2 investigation pursuant to sections 33(1) and 34ZA(2) of the Act.

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**22 September 2023**

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<sup>6</sup> [CMA2](#), paragraph 8.29.