



EUROPEAN COMMISSION  
DG Competition

**PUBLIC VERSION**

***Case M.10646 – MICROSOFT / ACTIVISION BLIZZARD***

(Only the English text is authentic)

**REGULATION (EC) No 139/2004  
MERGER PROCEDURE**

---

Article 8(2) Regulation (EC) 139/2004

Date: 15/05/2023

This text is made available for information purposes only. A summary of this decision is published in all EU languages in the Official Journal of the European Union.

Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets.



Brussels, 15.5.2023  
C(2023) 3199 final

**COMMISSION DECISION**

**of 15.5.2023**

**declaring a concentration to be compatible with the internal market and the EEA  
agreement**

**(Case M.10646 – MICROSOFT / ACTIVISION BLIZZARD)**

## TABLE OF CONTENTS

1.	The Parties .....	5
2.	The Operation and the Concentration .....	6
3.	Union Dimension .....	6
4.	The Procedure .....	6
5.	Industry Overview.....	7
6.	Market Definition.....	13
6.1.	Game development and publishing.....	13
6.1.1.	Relevant product market .....	13
6.1.1.1.	Commission precedents .....	13
6.1.1.2.	The Notifying Party's views .....	14
6.1.1.3.	The Commission's assessment.....	15
6.1.1.4.	Conclusion.....	21
6.1.2.	Relevant geographic market.....	22
6.1.2.1.	Commission precedents .....	22
6.1.2.2.	The Notifying Party's view .....	22
6.1.2.3.	The Commission's assessment.....	22
6.1.2.4.	Conclusion.....	22
6.2.	Game distribution.....	22
6.2.1.	Relevant product market .....	23
6.2.1.1.	Commission precedents .....	23
6.2.1.2.	The Notifying Party's view .....	23
6.2.1.3.	The Commission's assessment.....	24
6.2.2.	Relevant geographic market.....	27
6.2.2.1.	Commission precedents .....	27
6.2.2.2.	The Notifying Party's view .....	27
6.2.2.3.	The Commission's assessment.....	27
6.3.	Operating systems for PCs .....	28
6.3.1.	Relevant product market .....	28
6.3.1.1.	Commission precedents .....	28
6.3.1.2.	The Notifying Party's views .....	28
6.3.1.3.	The Commission's assessment.....	28
6.3.2.	Relevant geographic market.....	29
7.	Competitive Assessment .....	29
7.1.	Introduction .....	29
7.1.1.	Rationale for the Transaction .....	29

7.1.2.	Horizontally affected markets .....	30
7.1.2.1.	Development and publishing of video games .....	30
7.1.2.2.	Distribution of video games .....	32
7.1.3.	Vertically affected markets .....	33
7.1.4.	Conglomerate relationships.....	34
7.2.	Market shares .....	35
7.2.1.	Development and publishing of console and PC video games .....	38
7.2.2.	Distribution of PC and console video games .....	44
7.2.3.	Supply of PC OSs.....	45
7.3.	Horizontal non-coordinated effects.....	46
7.3.1.	Legal framework .....	46
7.3.2.	Horizontal non-coordinated effects in the market for development and publishing AAA Role Playing video games .....	48
7.3.2.1.	The Notifying Party's view .....	49
7.3.2.2.	The Commission's assessment.....	49
7.3.3.	Horizontal non-coordinated effects in the market for AAA Racing and Flying games .....	50
7.3.3.1.	Microsoft's main games with racing and flying elements are Microsoft Flight Simulator and Forza, while Activision Blizzard's only title in this category is Crash Team Racing. ....	50
7.3.3.2.	The Notifying Party's view .....	51
7.3.3.3.	The Commission's assessment.....	51
7.3.4.	Horizontal non-coordinated effects in the market for AAA Action and Adventure games.....	52
7.3.4.1.	The Notifying Party's view .....	53
7.3.4.2.	The Commission's assessment.....	54
7.3.5.	Horizontal non-coordinated effects in the market for AAA Shooter (including battle royale) games .....	55
7.3.5.1.	The Notifying Party's view .....	56
7.3.5.2.	The Commission's assessment.....	56
7.3.6.	Horizontal non-coordinated effects in the market for distribution of video games on PC and console.....	57
7.3.6.1.	The Notifying Party's view .....	57
7.3.6.2.	The Commission's assessment.....	58
7.4.	Vertical effects .....	58
7.4.1.	Legal framework .....	58
7.4.2.	Foreclosure of rival developers and publishers of console video games by restricting access to the Microsoft console-specific digital storefronts (customer foreclosure) .	59

7.4.2.1. The Notifying Party’s view .....	60
7.4.2.2. The Commission’s assessment.....	62
7.4.2.3. Conclusion.....	65
7.4.3. Targeted total or partial input foreclosure of Microsoft’s rival distributors of console games .....	65
7.4.3.1. The Notifying Party’s views .....	70
7.4.3.2. The Commission’s Assessment.....	76
7.4.4. Targeted total or partial input foreclosure of rival distributors of PC video games that offer multi-game subscription services .....	108
7.4.4.1. The Notifying Party’s views .....	109
7.4.4.2. The Commission’s Assessment.....	109
7.4.5. Targeted total or partial input foreclosure of rival distributors of console or PC video games that offer cloud game streaming services.....	110
7.4.5.1. The Notifying Party’s views .....	111
7.4.5.2. The Commission’s Assessment.....	114
7.5. Conglomerate Effects .....	138
7.5.1. Legal framework .....	138
7.5.2. Foreclosure of rival providers of PC OS by restricting or degrading access to Activision Blizzard’s native games.....	139
7.5.2.1. The Notifying Party’s views .....	140
7.5.2.2. The Commission’s assessment.....	142
7.5.2.3. Conclusion.....	145
7.5.3. Foreclosure of rival providers of PC OS by restricting or degrading access to Activision Blizzard’s content and to Microsoft’s Game Pass Ultimate.....	145
7.5.3.1. The Notifying Party’s view .....	147
7.5.3.2. The Commission’s assessment.....	150
8. Commitments .....	178
8.1. Introduction .....	178
8.2. Analytical Framework.....	179
8.3. The Initial Commitments .....	180
8.3.1. Description of the Initial Commitments.....	180
8.3.1.1. The Consumer License Commitment.....	180
8.3.1.2. The Streaming Provider License Commitment.....	181
8.3.1.3. Monitoring Trustee and Dispute Resolution .....	182
8.3.2. Results of the First Market Test .....	182
8.3.2.1. The Overall Scope of the Initial Commitments .....	182
8.3.2.2. The Consumer License Commitment.....	184
8.3.2.3. The Streaming Provider License Commitment.....	185

8.3.2.4. Monitoring Trustee and Dispute Resolution .....	187
8.3.3. The Commission’s Assessment of the Initial Commitments .....	187
8.3.3.1. Shortcomings of the Initial Commitments .....	188
8.3.3.2. Other concerns raised by market participants .....	189
8.3.3.3. Overall Assessment of the Initial Commitments .....	194
8.4. The Revised Commitments .....	195
8.4.1. Description of the Revised Commitments .....	195
8.4.2. Results of the Second Market Test.....	196
8.4.3. The Commission’s assessment of the Revised Commitments.....	199
8.4.3.1. Shortcomings of the Revised Commitments.....	199
8.4.3.2. Other concerns raised by market participants .....	201
8.4.3.3. Overall Assessment of the Revised Commitments .....	202
8.5. The Final Commitments.....	202
8.5.1. Description of the Final Commitments.....	202
8.5.2. The Commission’s assessment of the Final Commitments.....	203
8.5.2.1. Adequacy of the Final Commitments to address input foreclosure concerns in relation to the distribution of console and PC games via cloud game streaming services.....	204
8.5.2.2. Adequacy of the Final Commitments to address conglomerate concerns regarding the supply of PC OS.....	205
8.5.2.3. Implementation, Monitoring Trustee and Dispute Resolution.....	206
8.5.2.4. Conclusion.....	207
8.6. Conclusion.....	207
9. Conditions and Obligations.....	207

# COMMISSION DECISION

of 15.5.2023

**declaring a concentration to be compatible with the internal market and the EEA agreement**

**(Case M.10646 – MICROSOFT / ACTIVISION BLIZZARD)**

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union<sup>1</sup>,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No 139/2004 of 20.1.2004 on the control of concentrations between undertakings<sup>2</sup>, and in particular Article 8(2) thereof,

Having regard to the Commission's decision of 8 November 2022 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations,

Having regard to the final report of the Hearing Officer in this case,

Whereas:

## **1. THE PARTIES**

- (1) On 30 September 2022 the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004<sup>3</sup> (the 'Merger Regulation') by which Microsoft Corporation ("Microsoft", US) intends to acquire sole control of Activision Blizzard, Inc. ("Activision Blizzard", US) within the meaning of Article 3(1)(b) of the Merger Regulation (the "Transaction").<sup>4</sup> Microsoft and Activision Blizzard are designated hereinafter as the "Parties" and Microsoft will be referred to as the "Notifying Party".
- (2) **Microsoft** is a global technology company headquartered in Redmond, Washington, US. Microsoft offers a wide range of products and services to customers. Relevant to

---

<sup>1</sup> OJ C 115, 9.8.2008, p.47.

<sup>2</sup> OJ L 24, 29.1.2004, p. 1 ('the Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

<sup>3</sup> OJ L 24, 29.1.2004, p. 1 ('the Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

<sup>4</sup> Publication in the Official Journal of the European Union No C 386, 7.10.2022, p. 8.

the Transaction, Microsoft is active in the video games business as a developer, publisher and distributor of video games for gaming consoles, personal computers (“PCs”) and mobile devices. Microsoft also manufactures and offers the Xbox gaming console and related services, including a game subscription service called Game Pass (available for Xbox and PC).

- (3) **Activision Blizzard** is a developer and publisher of video games based in Santa Monica, California, US. Activision Blizzard develops and publishes video games for gaming consoles, PCs and mobile devices, including franchises such as Call of Duty, World of Warcraft, Diablo and Candy Crush. Activision Blizzard also operates a digital storefront, Battle.net, for the digital distribution of its PC games.

## **2. THE OPERATION AND THE CONCENTRATION**

- (4) Pursuant to a Merger Agreement entered into on 18 January 2022, Microsoft will acquire 100% of the common stock of Activision Blizzard through a merger between Anchorage Merger Sub Inc., a wholly owned subsidiary of Microsoft, and Activision Blizzard, with the latter surviving the merger as a wholly owned, direct subsidiary of Microsoft. Therefore, as a result of the Transaction, Microsoft will acquire sole control of Activision Blizzard within the meaning of Article 3(1)(b) of the Merger Regulation.

## **3. UNION DIMENSION**

- (5) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million (EUR 147 976.1 million) and each of Microsoft and Activision Blizzard have an aggregate EU-wide turnover of more than 250 million (Microsoft: EUR [...] million; Activision Blizzard: [...] million). None of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover in one and the same Member State. Therefore, the Transaction has a Union dimension pursuant to Article 1(2) of the Merger Regulation.

## **4. THE PROCEDURE**

- (6) The Transaction was notified on 30 September 2022.
- (7) After a preliminary examination of the notification and based on the Phase I market investigation, the Commission raised serious doubts as to the compatibility of the Transaction with the internal market and adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation on 8 November 2022 (the “Article 6(1)(c) Decision”). On 9 November 2022, the Commission provided a number of key documents cited in the Article 6(1)(c) Decision to the Notifying Party.
- (8) On 18 November 2022, the Phase II investigation period was extended by ten working days at the request of the Notifying Party pursuant to the first sentence of the second subparagraph of Article 10(3) of the Merger Regulation.
- (9) On 24 November 2022, the Notifying Party submitted its response to the Article 6(1)(c) Decision (the “Article 6(1)(c) Response”).
- (10) On 29 November 2022, a State of Play meeting between the Notifying Party and the Commission took place.
- (11) On 23 January 2023, another State of Play meeting between the Notifying Party and the Commission took place, during which the Commission explained its preliminary findings based on its Phase II investigation.



- (12) After reviewing the available evidence collected during the Phase I and Phase II investigation, the Commission came to the preliminary view that it is likely, and there is even a strong probability, that the Transaction would significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation, and issued a Statement of Objections to the Notifying Party on 31 January 2023 (the “SO”).
- (13) On 14 February 2023, the Notifying Party submitted its written comments on the SO (the “SO Response”).
- (14) An Oral Hearing took place on 21 February 2023.
- (15) On 1 March, the Notifying Party and the Commission met for a State of Play meeting and the Phase II investigation period was extended by ten working days in agreement with the Notifying Party pursuant to the third sentence of the second subparagraph of Article 10(3) of the Merger Regulation.
- (16) On 9 March 2023, the Commission sent a Letter of Facts to inform the Notifying Party about additional factual elements which were not included in the SO and that would be potentially relevant for its final decision (the “Letter of Facts”). The Notifying Party submitted a response to the Letter of Facts (the “Letter of Facts Response”) on 20 March 2023.
- (17) On 16 March 2023, the Notifying Party submitted commitments pursuant to Article 8(2) second subparagraph of the Merger Regulation in order to address the competition concerns identified by the Commission. Accordingly, the legal deadline for the Commission decision was automatically extended by 15 working days, pursuant to Article 10(3) first subparagraph of the Merger Regulation.
- (18) On 17 March 2023, the Commission launched a market test of the commitments submitted by the Notifying Party.
- (19) The Commission gave the Notifying Party detailed feedback on the outcome of the market test during a State of Play meeting on 28 March 2023.
- (20) On 4 April 2023, the Notifying Party submitted revised commitments pursuant to Article 8(2) of the Merger Regulation.
- (21) On 4 April 2023, the Commission launched a second market test to obtain feedback on the revised and final commitments submitted by the Notifying Party.
- (22) On 14 April, the Commission sent a draft of the decision taken pursuant to Article 8(2) of the Merger Regulation (the “Decision”) to the Advisory Committee with the view of seeking the Committee’s opinion. The meeting of the Advisory Committee took place on 28 April 2023 and the Committee issued a positive opinion.

## **5. INDUSTRY OVERVIEW**

- (23) In this Section, the Commission provides an overview of the main markets on which the Transaction will have an impact, in order to provide context for the assessment undertaken in Section 6 and Section 7.
- (24) From a supplier’s perspective, from a game’s conception until the moment it is played by consumers, there are two main activities: (i) game developing and publishing; and (ii) game distribution and marketing.<sup>5</sup>

---

<sup>5</sup> Form CO, paragraph 13.

- (a) Games are developed for PCs, game consoles, and mobile devices (such as smartphones and tablets). Game software development comprises the design, art, programming, and testing of games, usually by one or more development studios. Game publishing involves making video games available to the public under various monetization models, including buy-to-play, free-to-play, or combinations of the two (see in more detail below in recital (29)). There are different types of games, notably premium or “AAA” games and casual games. AAA games is an industry-wide informal category of games used to distinguish games that are developed by large development studios, requiring significant budget and time (up to several years), usually for consumption on multiple gaming devices and platforms.<sup>6</sup> For instance, games like *Call of Duty* (Activision Blizzard), *FIFA* (Electronic Arts or “EA”) and *Grand Theft Auto* (Take-Two) are considered by most to be AAA games due to the sizeable budget required for their production and their popularity. A game’s AAA status may be determined with regard to its budget, complexity, popularity, or a combination of the three. In comparison, “casual” games are relatively simple (in terms of the game mechanics, gameplay and user interfaces), may have smaller developer teams and are less costly to develop (e.g., games available on console and/or PC such as *Mario Kart 8*, *Dauntless*, *Conan Exiles*, *Rocket League*, as well as games available on console, PC and/or mobile such as *Tetris*, *Among Us*, *Candy Crush*, and *Solitaire*).<sup>7</sup>
- (b) Game distribution involves the distribution of games to the public in either physical or digital form, through (i) physical retail and (ii) online download or streaming. In the case of physical distribution, games are distributed on physical media like cartridges or compact discs, and which can be sold either online (e.g., through different merchant websites or platforms) or in brick-and-mortar stores. In the case of digital distribution, games are distributed through online download and/or streaming via digital storefronts, app stores, and/or subscription services. For example, as explained in recitals (90) and (91) below, Microsoft distributes games on Windows PCs via the Microsoft Store or on the Xbox console via the Xbox Store. Microsoft also offers gaming subscription services that include access to console and PC games (PC and Xbox Game Pass (Ultimate) or Xbox Live (Gold)). Game distributors may distribute games which are developed internally, through a first-party developer or studio (“first-party” games), by a game studio that enters into development contracts with a gaming device manufacturer (e.g. Microsoft, Nintendo and Sony) and develops games exclusively for that device (“second-party” games) or which are developed by a third-party developer (“third-party” games). A first-party developer refers to development completed internally by the game publisher, a subsidiary, or a fully integrated studio, and then made available to the public. A third-party developer is an independent developer

---

<sup>6</sup> The Notifying Party submitted in Annex 22 of the Form CO a list of games tracked by the industry analyst Nielsen and the relative classification as between AAA and non-AAA games. The Notifying Party submitted that Nielsen discontinued its’ market tracking service in February 2021 and that the Parties do not create or maintain a similar categorization of games in their records. The Notifying Party is not aware of any universally accepted definition of AAA games. However, the Notifying Party has used its best efforts to complete the classification in the Nielsen data in those instances where a classification was missing – taking into account an expected game development budget and complexity, as well as overall popularity, although there is an element of subjective judgment involved.

<sup>7</sup> Form CO, paragraph 133.

that develops and owns games that are then published by a game publisher.<sup>8</sup> First-party game publishers have exclusive rights over the content they develop and publish, while the distribution of games from third-party publishers is typically governed by licensing agreements.

- (25) From a consumer’s perspective, the industry is characterized by gamers being able to play a game on a given electronic device in two forms:<sup>9</sup>
- (a) As software executed locally on the player’s device. The three principal electronic devices for gameplay are PCs, game consoles, and mobile devices, including smartphones and tablets.
  - (b) Remotely by streaming, where the software is typically executed on the cloud gaming provider’s dedicated infrastructure and streamed to the player’s device. Cloud infrastructure is usually relied upon for game streaming, while the end device can, in principle, be anything from a mobile phone to a smart TV. Streaming games on infrastructure in the cloud is a new mechanism for game delivery, but one that is expected to grow significantly in the coming years.
- (26) Gaming is a highly dynamic industry, and the fastest growing portion of the media and entertainment sector. It is larger than pay-TV, home video (including streaming), cinema, music, books or newspapers & magazines. Today, 3 billion consumers around the world play games, a number that the Notifying Party expects to reach [...] by 2030. Gamers are able to access and play thousands of highly differentiated games on a variety of devices, including PCs, gaming consoles, and mobile devices. The Notifying Party estimates that on a weekly basis, gamers play over [...] different games on its gaming platforms alone. Of the three main gaming devices – PC, console, and mobile – mobile is now the largest in terms of revenues, representing more than half of all gaming services revenue.<sup>10</sup>
- (27) The gaming sector is generally considered to be fragmented, and includes traditional well established gaming companies (*e.g.*, Microsoft, Sony Interactive Entertainment (“Sony”), Nintendo, Tencent, Valve, Activision Blizzard), smaller new entrants focussed on gaming (*e.g.*, Mediatonic, Moon Studios, Purple Lamp, Hello Games) and large technology companies entering the gaming space by offering new services, such as Amazon, Apple, Google<sup>11</sup>, Meta (Facebook Gaming), Netflix, and Nvidia.<sup>12</sup>
- (28) In recent years, the majority of gamers have been purchasing games online, with sales of physical copies of PC and console games in steep decline. Games are typically delivered by downloading to a device, but some services also allow to stream the games via cloud game streaming technology. On PC, there are multiple digital storefronts, such as Steam (by Valve), Epic Games Store, Microsoft Store and Activision Blizzard’s Battle.net. On console, games are distributed through the digital storefronts of the respective console manufacturers, Microsoft (through the Xbox Store), Sony (through the PlayStation Store), and Nintendo (through the Nintendo eShop). On mobile, games are generally distributed as “native apps” that

---

<sup>8</sup> Form CO, paragraph 132. A second-party developer is ordinarily a game studio that enters into development contracts with a gaming device manufacturer, such as Sony, Nintendo, or Microsoft, and develops games exclusively for that device.

<sup>9</sup> Form CO, paragraph 14.

<sup>10</sup> Form CO, paragraphs 15 and 122.

<sup>11</sup> On 29 September 2022, Google announced that its cloud game streaming service Stadia will be discontinued on 18 January 2023 (link available [here](#), [ID7196])

<sup>12</sup> Form CO, paragraph 16.

are written specifically to run on the applicable mobile operating system (in order to provide relevant features and functionality) and distributed through app stores. The Apple App Store is the only app store on iOS devices. On Android, the vast majority of apps are distributed via the Google Play Store, although some Android device manufacturers also have their own app stores (e.g., Samsung’s Galaxy Store).<sup>13</sup>

- (29) Traditionally, games have been monetized on a “buy-to-play” model in which games are bought for an upfront price. Over time, and especially on mobile but also on PC, publishers have offered their games using a “free-to-play” model, whereby games are offered for free and then monetized via in-game purchases (e.g., additional content or other in-game advantages) or in-game advertising. Some free-to-play and buy-to-play games are also monetized via monthly subscription fees that allow players to access the game, or to “unlock” additional content (so-called single-game subscription services). The Notifying Party estimates that the free-to-play model accounts for approximately [...]% of revenue across all platforms in 2021: approximately [...]% of revenue on mobile, approximately [...]% of revenue on PC, and approximately [...]% of revenue on console.
- (30) In addition to purchasing individual games or single-game subscriptions, subscription offers have emerged, which give gamers the option to pay a flat monthly fee to access a library of games that might change over time (so-called multi-game subscription services).
- (31) As regards the games delivery mechanism more generally, in the majority of cases games are downloaded to the users’ devices. However, as mentioned, games can also be streamed from the “cloud”. Cloud refers to the infrastructure necessary to deliver cloud game streaming, which enables gamers to access games across a range of different endpoints. Cloud game streaming is a relatively new<sup>14</sup> delivery mechanism that allows gamers to stream games running on gaming hardware in a remote datacentre to a supported local device (e.g. a PC, mobile device or smart TV) of their choice.<sup>15</sup> In cloud game streaming, a user’s “client” device (such as PC or mobile device) communicates with a server in the cloud, the game runs on the server and a game is streamed from the server to the client device. Depending on the choice of the data centre hardware, the process is different. The hardware in the remote datacentre can either be a console or a PC. For example, Microsoft’s and Sony’s cloud game streaming services are built on the technology of their console platforms. Microsoft’s own cloud gaming service, Xbox Cloud Gaming, operates on dedicated console hardware residing in Microsoft datacentres (and not on Microsoft’s Azure cloud computing platform).<sup>16</sup> For the developers and publishers of console games this effectively means that the development tools which publishers currently use to develop games for the Xbox console can also be used in a cloud game streaming environment as Microsoft does not require publishers to use any specific Microsoft development tools to get a game “ready” for Microsoft’s cloud-based streaming service.<sup>17</sup> Similarly, Sony streams PlayStation console games using PlayStation console hardware hosted in data centres. Besides Microsoft and Sony, no other cloud

---

<sup>13</sup> Form CO, paragraph 124.

<sup>14</sup> Most cloud game streaming services were launched between 2019 and 2020. For example, NVIDIA’s GeForce Now was made available to the public in February 2020, Amazon Luna in September 2020 and Microsoft’s Xbox Cloud Gaming was launched as a feature of Game Pass Ultimate in September 2020. See Form CO, paragraphs 196 – 197.

<sup>15</sup> Form CO, paragraph 125.

<sup>16</sup> Form CO, paragraph 274.

<sup>17</sup> Form CO, paragraph 293.

game streaming provider has set up servers based on consoles at the time of the decision. Other cloud game streaming services, such as Nvidia’s GeForce Now or Amazon Luna, have chosen to stream PC games using servers running on Windows hosted in data centres. The hardware used in the cloud does not reflect the hardware in which the game can be played – e.g. a gamer can play on her or his PC a game that is run on a console in the cloud. Likewise, a game written for the Windows OS can run on a PC in the cloud, while the gamer plays it via streaming on a Chromebook or Mac OS.

- (32) Gaming companies have several technical options for launching cloud-based game streaming, as a means of delivering games. These range from building their own infrastructure (either using inputs from public cloud providers or their own infrastructure), through to white-label services<sup>18</sup> offered by public cloud providers or intermediary companies or using “channels” available on existing cloud-based game streaming services. Gaming companies may also use more than one of these approaches. Providers such as Microsoft, Amazon, Google, Sony, Nvidia GeForce Now, Meta and others have built their own infrastructure. As mentioned, Microsoft has chosen to run Xbox Cloud Gaming on dedicated Xbox consoles in Microsoft data centres, rather than Azure servers. Sony is pursuing a similar strategy. In contrast, Amazon’s strategy is to integrate its cloud game streaming service with AWS. The Luna cloud game streaming service runs PC games on AWS virtual machines.<sup>19</sup> Cloud game streaming providers must acquire streaming rights from a game publisher before it can stream the game title. Some game publishers may licence their games for distribution by means of cloud game streaming or download only. With its first-party content, the cloud game streaming provider decides whether to make games available by means of cloud-based game streaming.<sup>20</sup>
- (33) In addition, cloud game streaming providers currently monetise their service through a variety of business models:
- (a) The buy-to-play model, where the user subscribes to the cloud game streaming service and then can purchase individual games through the cloud provider’s own storefront.
  - (b) The bring-your-own-game (“BYOG”) business model, where the user subscribes to the cloud game streaming service in order to be able to access the hardware in the cloud, and can then play a game she or he has already purchased on a different digital store. At the time of the decision, cloud game streaming providers such as Nvidia GeForce Now and Boosteroid offer this model.
  - (c) The free-to-play model, where the monetisation happens through in-game advertising and in-game purchases.
  - (d) Multi-game subscription services, where users pay a monthly fee to access both the hardware in the cloud, and a game library available through the cloud game

---

<sup>18</sup> Form CO, paragraph 192. Prior to the launch of cloud game streaming, Microsoft considered the possibility of [*business secrets concerning business strategy*]. This would entail [*business secrets concerning Microsoft XCloud strategy*]. Microsoft has had preliminary discussions with [*business secrets concerning business strategy*]. Microsoft offers publishers the option to appear as channels within Game Pass (e.g., EA Play). Further investment would be required in order for Microsoft to be able to offer white-label services to third parties from a technical perspective. Form CO, footnote 502.

<sup>19</sup> Form CO, paragraph 193.

<sup>20</sup> Form CO, paragraph 297.

streaming provider's storefront. At the time of the decision, Microsoft pursues this business model with Game Pass Ultimate.

- (34) Moreover, combinations of the above business models are also possible. For instance, the cloud game streaming service Amazon Luna has both a multi-game subscription, and a BYOG option.
- (35) Industry analysts consider that the emergence of cloud game streaming services and multi-game subscription services are two important trends of the gaming industry.<sup>21</sup> In particular, cloud game streaming services allow gamers to play complex (i.e. hardware-intensive) games on practically any device they own, even on devices that are not performant enough to support such games if run locally. This is because games do not run on gamers' local devices, but on hardware located in servers of cloud providers where the relevant machine (normally a PC or a console) is reproduced.
- (36) For this reason, cloud game streaming is expected to disrupt the video gaming industry. While the current approach is "device-centric", *i.e.*, gamers choose the hardware and then play video games that such hardware supports, cloud game streaming services allow for a "gamer-centric" approach, whereby gamers can stream video games to devices of their choice.
- (37) For example, gamers would be able to play complex console games on entry-level PCs or even mobile devices. As explained by an industry analyst, "[t]hanks to the growing variety of game streaming services, cloud gaming will appeal to both hardcore and casual gamers. This includes those who exhibit interest in the latest triple-A games (but don't have access to a gaming PC or a console) and families looking for casual living room multiplayer entertainment".<sup>22</sup> In addition, as regards PC games, gamers would be able to play PC games designed to run on a specific PC operating system ("OS") also on PCs with other operating systems that would normally not be supported. Most PC games are designed to run on Microsoft's Windows OS and can therefore not run natively on other PC OS.
- (38) Several of the companies mentioned in recitals (29) and (30) above, including Amazon, Nvidia, Meta and Netflix used cloud game streaming services to recently enter the market. The cloud gaming market is expected to rapidly grow in the coming years and could blur the boundaries between devices and between the console ecosystems that currently exist (as mentioned in recital (26) above, console games are distributed digitally only via the stores run by the relevant console manufacturer).<sup>23</sup> While cloud gaming requires the widespread availability of appropriate internet infrastructure (*i.e.*, fast internet connections), the uptake of cloud gaming will likely increase together with the availability of the relevant infrastructure, as better explained in Section 7.4.5.2.1. below.

---

<sup>21</sup> Form CO, Annex 36 – Newzoo 2022 Global Games Market Report; Form CO, Annex 6.65 – Omdia 2022 Trends to Watch: Cloud Gaming and Subscriptions.

<sup>22</sup> Form CO, Annex 6.65 – Omdia 2022 Trends to Watch: Cloud Gaming and Subscriptions, page 4.

<sup>23</sup> Form CO, Annex 36 – Newzoo 2022 Global Games Market Report, p. 78.

## 6. MARKET DEFINITION

(39) The Transaction concerns two levels of the video-gaming value chain, namely game development and publishing as well as game distribution.<sup>24</sup> In addition, Microsoft's activities as a supplier of PC OS are relevant for the assessment of the Transaction.

### 6.1. Game development and publishing

(40) Microsoft develops and publishes games for PCs, consoles and mobile devices through Xbox Game Studios, a collection of Microsoft studios, including the recently acquired ZeniMax studios<sup>25</sup>. Microsoft also publishes games developed by other game developers. Microsoft's game catalogue includes popular franchises such as *Minecraft*, *Forza*, *Elder Scrolls*, *Halo*, and *Fallout*.<sup>26</sup>

(41) Activision Blizzard develops games for PCs, consoles and mobile devices and publishes them in most countries around the world through three business units: Activision Publishing, Inc. ("Activision"), Blizzard Entertainment, Inc. ("Blizzard") and King Digital Entertainment ("King"). Activision and Blizzard generate revenue from full-game (buy-to-play) and in-game sales, from single-game subscriptions, as well as by licensing software to companies that distribute their products which are mostly being made available for PC and console. King delivers content primarily through free-to-play offerings for mobile devices and generates revenue primarily from in-game sales and in-game advertising in its native mobile games. Activision Blizzard's franchises *Call of Duty*, *World of Warcraft*, and *Candy Crush* represented [...] % of its 2021 net revenue.<sup>27</sup>

#### 6.1.1. Relevant product market

##### 6.1.1.1. Commission precedents

(42) In *Microsoft/ZeniMax*, the Commission considered potential segmentations of the market for video game publishing and development on the basis of: (i) gaming platforms (*i.e.*, PC games, console games and mobile games); (ii) game genres (*e.g.*, strategy, simulation, action, adventure, role-playing etc.); or (iii) type of games (*e.g.*, premium or "AAA" games, casual games). The Commission left the precise market definition open.<sup>28</sup> The Commission also considered the above segmentations in *Activision Blizzard/King* and found indications that the game publishing market

---

<sup>24</sup> In addition, Microsoft is also active in the market for the supply of gaming hardware. As Activision Blizzard is not active in this market, the Transaction does not result in a horizontal overlap. As for vertical relationships, Microsoft's market shares in the market for the supply of gaming hardware (even when considering only console hardware) remain below 30% at the worldwide and EEA-wide level. Therefore, the market for the supply of gaming consoles is not vertically affected. In any case, with regard to the vertical relationship with the development and publishing of console video games upstream, the relevant activity downstream is the distribution of video games, *i.e.* the sale of video games, which implies a prior sale of console gaming hardware with the sole purpose of allowing these games to be distributed and then played in that hardware. From this viewpoint, singling out the sale of console hardware as a standalone activity is not meaningful for the purpose of the present Decision. In this regard, the Notifying Party submitted that "*Microsoft's Xbox console is sold at a loss, and to the best of the Parties' knowledge this is the case for other consoles as well. This is because all console vendors expect to recoup (at least some) of this loss from the sale of games and services to the new console owner.*" As the Transaction at hand does not concern such products, the Commission does not assess the market for the supply of gaming hardware alone, and potential vertical relationships connected to it.

<sup>25</sup> See Commission decision of 5 March 2021 in case M.10001 – *Microsoft/ZeniMax*.

<sup>26</sup> Form CO, paragraph 52.

<sup>27</sup> Form CO, paragraphs 59 and 60.

<sup>28</sup> Commission decision of 5 March 2021 in case M.10001 – *Microsoft/ZeniMax*, paragraphs 16 – 21.

could be segmented by gaming platform, and in particular that mobile games could form a separate market from PC and console games, even though it left the market definition open.<sup>29</sup>

#### 6.1.1.2. The Notifying Party's views

- (43) The Notifying Party considers that the game publishing market may currently be segmented between PC/console games and native mobile games.<sup>30</sup> While the distinction between PC and console games has blurred, there remain differences between PC/console games and mobile games, for example in terms of development resources, technical differences and game characteristics (*e.g.*, play session lengths and graphics).<sup>31</sup> However, going forward, convergence between platforms is going to increase further. In any case, the Notifying Party considers that the precise product market definition can be left open for the purpose of assessing this Transaction.<sup>32</sup>
- (44) The Notifying Party considers that it is not warranted to segment the game publishing market based on genre or type of games.<sup>33</sup> As regards game genres, the Notifying Party considers that genre classification is subjective and gamers play different genres on the basis of their personal preferences.<sup>34</sup> From a supply-side perspective, a studio can create games of different genres, or involving elements of multiple genres.<sup>35</sup>
- (45) As regards game types, the Notifying Party submits that there is some evidence of a low degree of demand-side substitution between AAA games and non-AAA games. This is because AAA games offer more complex gameplay features and mechanics, as well as a longer play time. Moreover, there may be also low supply-side substitution from non-AAA games to AAA games, based on the budget and technological innovation that the development of AAA games requires. This would make it burdensome for small studios to switch from non-AAA to AAA games.<sup>36</sup>
- (46) However, the Notifying Party also puts forward that boundaries between AAA and non-AAA games are blurred and subjective. Gamers may play various game types according to their preferences and regardless of the status of the game. Furthermore, certain games initially developed as non-AAA games have become successful and highly regarded over time, involving an increasingly higher budget and larger development teams. At the same time, some games developed on an AAA budget were not considered as such by gamers.<sup>37</sup>
- (47) In addition, the Notifying Party considers that a segmentation of the market according to other possible game types (stand-alone games, browser games, free-to-play and freemium games), as well as by type of gamer (*e.g.*, hardcore vs casual gamer) is not warranted.<sup>38</sup> In any event, the Notifying Party submits that the exact product market definition can be left open for the purpose of assessing this Transaction.

---

<sup>29</sup> Commission decision of 12 February 2016 in case M.7866 – *Activision Blizzard/King*, paragraphs 20 – 26.

<sup>30</sup> Form CO, Chapter 6.2, paragraph 328.

<sup>31</sup> Form CO, Chapter 6.2, paragraphs 323 - 327.

<sup>32</sup> Form CO, paragraph 327.

<sup>33</sup> Form CO, Chapter 6.2, paragraph 346.

<sup>34</sup> Form CO, Chapter 6.2, paragraphs 362 - 363.

<sup>35</sup> Form CO, Chapter 6.2, paragraph 361.

<sup>36</sup> Form CO, Chapter 6.2, paragraph 370.

<sup>37</sup> Form CO, Chapter 6.2, paragraphs 371 - 373.

<sup>38</sup> Form CO, Chapter 6.2, paragraphs 379-386.



- (48) In its Article 6(1)(c) Response, the Notifying Party has submitted an annex with evidence on genre segmentation from gamer’s playing choices.<sup>39</sup> Based on this annex, the Notifying Party argues that (i) there is no agreed-upon classification of games into genres in the gaming industry; (ii) most gamers play games in multiple genres; (iii) gamers’ playing choices change over time; (iv) when gamers start playing a new game, they decrease game time across games of all genres; and (v) gamers’ tastes are heterogeneous. In the SO Response, the Notifying Party reiterates that a segmentation by genre and type is inappropriate and points to the fact that, in its view, the market investigation feedback indicated that such a segmentation is not warranted.<sup>40</sup>

### 6.1.1.3. The Commission’s assessment

#### 6.1.1.3.1. Segmentation based on platform

- (49) The results of the market investigation are inconclusive regarding a possible segmentation of the video game development and publishing product market by platform (PC, console, and mobile<sup>41</sup>). In particular, the market investigation provided no clear support for segmenting the relevant market according to the three platforms or for considering mobile games as distinct from games published for PCs and consoles.<sup>42</sup>
- (50) With regard to demand substitution, market participants submitted mixed replies to the question of whether PC games, console games and mobile games are interchangeable from the perspective of gamers.<sup>43</sup> In particular, developers and publishers of video games replied that games should be differentiated by platform, or at least between PC and console on the one hand, and mobile on the other. Game distributors on the other hand replied that video games should not be differentiated.<sup>44</sup>
- (51) Those market participants who submitted that PC games, console games and mobile games are not interchangeable from the perspective of gamers pointed to the different ways in which each platform operates, as well as the fact that they are directed to different types of gamers.<sup>45</sup>
- (52) In the most substantiated reply to these questions in the market investigation, one respondent submitted that, due to the specifics of PCs, PC games have certain characteristics, which are different from games for other platforms. *“PCs are platforms which can be built from interchangeable parts made by different manufacturers - users enjoy a lot of control over the hardware they have and in consequence, game they can play on it; PCs usually offer compatibility of old*

---

<sup>39</sup> Article 6(1)(c) Response, Annex 44 - CRA - Genres Segmentation Paper.

<sup>40</sup> SO Response, paragraphs 60-67.

<sup>41</sup> The Commission notes that video games can also be distributed via cloud game streaming. However, the Commission does not consider cloud game streaming as a relevant element for the assessment of the market for the development and publishing of video games. This is because cloud game streaming does not provide a different content from what is available for download. In principle, as regards PC and console games, all games available for download can also be played via cloud game streaming without the relevant game developer having to adapt it. As regards the Xbox console, for example, Microsoft explains that [*business secrets concerning game development*]. See Form CO, paragraphs 720 and 291-292.

<sup>42</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, question 6.

<sup>43</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, question 6.1.

<sup>44</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 6 and 6.1.

<sup>45</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, question 6.1.1.

*operating systems with new ones - thanks to this PC gamers can play old and new games on one machine; players who own PCs can choose from a variety of games, including small indie projects which are not distributed on other platforms.”<sup>46</sup>*

- (53) With regard to consoles, the same market participant submitted that *“we believe that to some extent the consoles category might be further divided into non-portable (PlayStation, Xbox) and portable consoles (Switch). Sony and Microsoft compete directly due to the similar design and functionality of their consoles, manufacturing timeline and available content. This is not fully applicable to Switch, which is a small, portable console often owned by players in addition to one of the other consoles and is usually used for playing different types of games, in particular those exclusive to that platform. The [sic] entry barrier for console players seems to be generally lower than for PC gamers due to the ease of initial configuration (customers do not need broad prior knowledge to choose hardware configuration, as hardware is pre-configured and ready to use out-of-the-box and relaxed setup associated with console playing); moreover, hardware price of consoles may be lower relative to similarly capable PCs due to platforms ability to offset lower console prices with margins on games sold through distribution platforms tied to the consoles; console [sic] owners are usually loyal to one particular kind of a platform - either PlayStation or Xbox. Due to the similar functionalities and associations, it is not very common for players to buy both consoles of one generation. It can happen, however, that a player will switch to a console of another manufacturer when a new generation model is available (accepting, however, that the games and in-game progress will not be available on a new platform). From gamers’ perspective, choosing a platform will usually depend on the attractiveness of the hardware (e.g. among friends) and more importantly, the quality and number of exclusive games that particular platform has to offer”<sup>47</sup>*
- (54) With regard to mobile games, the same market participant submitted that *“the entry barrier for mobile games is generally lower in comparison to PC and consoles, as the hardware is widely available and the games are distributed mostly on a free-to-play basis where instead of an obligatory payment, various alternative monetization setups are being introduced (e.g. in-game purchases, in-game ads); mobile games offer convenience and far greater accessibility than PC and console games- they can be played almost everywhere and at any time. due [sic] to the hardware limitations, mobile games category encompasses mostly casual games which usually do not require specific skills or in-depth immersion. Playing sessions on mobile games are generally shorter - it is very common for mobile game players to have multiple, short playing sessions during the day while they commute to work or wait in line”<sup>48</sup>*
- (55) Other market participants indicated that PC and console games would be more interchangeable from the perspective of gamers than mobile games, and pointed to different gaming experiences and technical limitations of mobile games. For instance, one market participant explained that *“PC and console channels are more likely to have complex and resource-intensive games that are consumed on powerful stationary systems, whether on a PC or a dedicated gaming console, potentially with the use of controllers or other peripheral devices. These may be sold in retail stores via physical distribution. In contrast, mobile games are more likely to be consumed*

---

<sup>46</sup> Reply of a market participant to Questionnaire Q1 to video games developers, publishers and distributors, question 6.1.1 [ID1213].

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

*"on the move," utilizing only a phone's hardware, and be less resource-intensive. The pricing, purchase, and monetization of these games can also be quite different, with many mobile games priced much lower or free. Most are easily downloaded from app stores, and may be supported by ad-driven or in-app purchase models. However, it still remains difficult to draw firm lines, and from the gamer perspective we expect there is some degree of substitutability between gaming in all forms".<sup>49</sup>*

- (56) Finally, some market participants indicated that console games, PC games and mobile games are interchangeable for gamers. They argued that “[v]ideo game developers/publishers compete for the attention of gamers across multiple different platforms”<sup>50</sup> and that “[t]here has been significant convergence of games across platforms, with top titles now available on console, PC and mobile”.<sup>51</sup>
- (57) As for supply substitution, market participants provided mixed replies as to whether a developer of video games for either (i) consoles; (ii) PCs or (iii) mobile can switch to developing games for another platform within a short timeframe (e.g. 6 months) and with a low investment.<sup>52</sup>
- (58) Several market participants indicated that, rather than the platform, the decisive factor is the complexity of the video game and, relatedly, the size of the team developing it. One market participant explained that “[a] complex product that took 5 years to develop with a team of 500 developers would take longer to convert from one platform to another than one that was less complex and developed over a shorter timeframe with a smaller team”.<sup>53</sup>
- (59) Some market participants indicated that it might be easier for companies involved in the provision of PC or console games to switch to producing mobile games rather than vice-versa and that the ease of switching depends on the complexity of the product.<sup>54</sup> A market participant submitted that “[d]eveloping PC/console games require substantial development and technical work, hence a large team of engineers and artists to develop the game. Developments for mobile, on the other hand, rely on smaller and more agile teams and development costs are lower”.<sup>55</sup>
- (60) A number of market participants indicated that switching between platforms could not be done within a short time frame and with low investment. They pointed to the different technologies needed for developing games for different platforms.<sup>56</sup>
- (61) In light of the above, for the purposes of this Decision, the Commission concludes that the development and publishing of mobile games does not belong to the same product market as the development and publishing of PC and console games, respectively. The Commission will not assess the potential separate market for the development of mobile games, as the combined market share of the Parties on this

---

<sup>49</sup> Reply of a market participant to Questionnaire Q1 to video games developers, publishers and distributors, question 6.1.1 [ID1118].

<sup>50</sup> Reply of a market participant to Questionnaire Q1 to video games developers, publishers and distributors, question 6.1.1 [ID1185].

<sup>51</sup> Reply of a market participant to Questionnaire Q1 to video games developers, publishers and distributors, question 6.1.1 [ID3329].

<sup>52</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, question 6.2.

<sup>53</sup> Reply of a market participant to Questionnaire Q1 to video games developers, publishers and distributors, question 6.2.1 [ID1112].

<sup>54</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, question 6.2.

<sup>55</sup> Reply of a market participant to Questionnaire Q1 to video games developers, publishers and distributors, question 6.2.1 [ID1210].

<sup>56</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, question 6.2.1.

market remains below 20%. Moreover, the Commission concludes that the product market definition can be left open with regard to a segmentation based on platform between PC and console, as the outcome of the analysis will be the same regardless of whether the Commission considers an overall market for game development and publishing of PC and console games, or potential separate markets for the development of (i) PC; and (ii) console games, respectively.

#### 6.1.1.3.2. Segmentation based on genre

- (62) The Phase I market investigation provided mixed results with regard to a possible segmentation of the video game publishing product market by genre (action and adventure, shooter/battle royale, role-playing games, sports, racing, fighting, and strategy).
- (63) From the demand-side, market participants that expressed a view submitted that in case of a price increase of a given game by, e.g., 10%, gamers would likely switch to a game of the same genre, but also possibly to games of different genres.<sup>57</sup> Some respondents indicated that gamers tend not to be price sensitive, and that in any event price is only one of several factors influencing the choice of game. One respondent submitted that “[w]hile price might be a factor when considering what games to place, other factors including community, playability (how fun is the game), and general company culture impact gamers decisions to play”.<sup>58</sup>
- (64) As for supply-side substitutability, the replies to the market investigation were mixed regarding whether a developer that has so far only developed games of a certain genre (e.g., shooter) could switch easily to developing games of another genre (e.g., strategy) in a short period of time and with minimal costs.<sup>59</sup>
- (65) Moreover, the majority of respondents submitted that games generally compete across genres, but that competition is stronger between games of the same game genre.<sup>60</sup> In addition, several market participants submitted that while there is a wide consensus in the industry that video games can be classified by genre, the dividing line between certain genres is increasingly blurred, and certain games may belong to more than one genre.<sup>61</sup>
- (66) During the Phase II market investigation, the Commission has investigated whether the market for the development and publishing of video games should be segmented by genre and whether such segments constitute separate product markets or should be considered part of one differentiated product market. For this purpose, the Commission has considered data submitted by the Notifying Party as part of its Article 6(1)(c) Response, as well as answers of market participants to Questionnaire Q2 – Phase II Questionnaire, which the Commission sent to video game developers and publishers, distributors and other market participants.
- (67) In Annex 44 of the Article 6(1)(c) Response, the Notifying Party argues that (i) there is no agreed-upon classification of games into genres in the gaming industry; (ii)

---

<sup>57</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, question 9.2.

<sup>58</sup> Reply of a market participant to Questionnaire Q1 to video games developers, publishers and distributors, question 10.1 [ID1179].

<sup>59</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 11 and 11.1.

<sup>60</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 9 and 9.1.

<sup>61</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 7 and 7.1.

most gamers play games in multiple genres; (iii) gamers' playing choices change over time; (iv) when gamers start playing a new game, they decrease game time across games of all genres; and (v) gamers' tastes are heterogeneous. Taken together, according to the Notifying Party, these findings show that there are no clear boundaries between genres and that gamers are likely to substitute between games within and across genres.

- (68) The majority of the arguments brought forward in Annex 44 of the Article 6(1)(c) Response are based on the Notifying Party's analysis of "telemetry" data that tracks the game time on Xbox devices of a sample of almost [...] gamers.
- (69) The Commission considers that the Notifying Party's analysis of the telemetry data that is presented in Annex 44, has several shortcomings. Most importantly, the Notifying Party's submission that when gamers start playing a new game, they spend less time playing other games across all genres, indicating substitution within and across genres, does not hold up under further examination. First, the evidence provided by the Parties is presented in purely visual form. It is therefore difficult to assess whether the Parties' claim actually holds in quantitative terms. Second, new game titles are released on Xbox very frequently, making it difficult to distinguish the impact of one release from another when they are released in close proximity.
- (70) The Commission provides an alternative examination of the telemetry data using a more robust methodology that addresses these concerns. Specifically, the Commission uses a so-called 'difference-in-differences' methodology that compares the change in game time between gamers who did and who did not play the newly released title. This approach allows to estimate the causal effect of the new release on game time, while controlling for any other factors that may have affected the outcome. Contrary to the Notifying Party's submissions, the Commission's findings indicate that when gamers start playing a newly released game, they mostly spend less time playing other games of the same genre. That is, substitution mostly takes place within genres while substitution across genres is substantially less frequent. This indicates that at least a segmentation of the market for game development and publishing by genre would be appropriate.
- (71) More details on the Notifying Party's approach and the Commission's alternative methodology are set out in Annex 1 to this Decision.
- (72) In its Phase I market investigation, the Commission asked market participants to list the main video games (i.e., the top five particularly representative or popular titles) that belong to each of the following genres: (i) action and adventure; (ii) shooter/battle royale; (iii) role-playing games; (iv) sports (including racing and flying, respectively); (v) fighting; and (vi) strategy. The Commission also asked market participants to indicate a given title under all genres that apply, should they consider that the title belonged to more than one genre.<sup>62</sup> The replies to those questions confirmed that battle royale is part of the shooter genre and that racing is a genre separate from sports. In its Phase II Market Investigation, the Commission therefore listed seven genres, giving the top 5 games for each genre as listed by market participants in Phase I as an example. It asked market participants whether

---

<sup>62</sup> Questionnaire Q1 to video games developers, publishers and distributors, questions 8 to 8.7.1.

they considered it appropriate to distinguish between such genres, both for console<sup>63</sup>, and for PC games<sup>64</sup>.

- (73) The answers of market participants to the Phase II market investigation are nuanced. While some market participants submit that they do not consider a segmentation by genre meaningful, for each of the seven genres<sup>65</sup> a clear majority of the respondents which expressed a view indicated it to be appropriate to distinguish the respective genre from the others. Only a few respondents suggested in their answers that certain games should be allocated to other genres<sup>66</sup> or that other games should be mentioned as representative for the suggested genres<sup>67</sup>.
- (74) Moreover, the respondents indicated in their answers that most often games within the suggested genres compete with each other, whereas games across genres compete less often.<sup>68</sup> However, based on the replies to the market investigation, a degree of across-genre competition still exists.<sup>69</sup>
- (75) Overall, the replies of the market participants indicated that the level of substitution between one genre and another significantly depends on the specific genres examined.<sup>70</sup> The genres “action & adventure” and “role-playing” are considered significantly more substitutable between each other than, for example, “action & adventure” with “sports” or “fighting”. Games in the “shooter” genre are considered to a slightly lower degree substitutable with games in the “action & adventure” genre compared to the degree of substitution between “action & adventure” and “role-playing”, but significantly less so with “sports”, “fighting” or “strategy” games. Overall, “action & adventure” and “role-playing” games seem to be close substitutes, as occurs with “sports” and “racing” games, whereas “fighting” and “strategy” games each have no other genre that is considered substitutable by a significant number of respondents.<sup>71</sup>
- (76) The Commission received mixed evidence also on the feasibility of switching genres for developers<sup>72</sup>. On these topics, the Commission received similar replies for console games and PC games<sup>73</sup>.
- (77) Based on the results of the market investigation, the Commission considers that the market for game development and publishing is highly differentiated on the basis of game genres. In this regard, genres constitute an important distinguishing factor between video games that affects to a certain degree the level of competition between them. However, there exists some uncertainty as to whether such differentiation allows to conclude that all or certain game genres form separate product markets from other genres.
- (78) In light of this, for the purposes of this Decision, the Commission concludes that the relevant product market is the market for the development and publishing of PC and

---

<sup>63</sup> Replies to Questionnaire Q2 - Phase II Questionnaire, question B.A.1.

<sup>64</sup> Replies to Questionnaire Q2 - Phase II Questionnaire, question B.B.1.

<sup>65</sup> The seven suggested genres were (i) action and adventure; (ii) shooter (including battle royale); (iii) role-playing games; (iv) sports; (v) racing; (vi) fighting, and (vii) strategy.

<sup>66</sup> Replies to Questionnaire Q2 - Phase II Questionnaire, question B.A.2.

<sup>67</sup> Replies to Questionnaire Q2 - Phase II Questionnaire, question B.A.3.

<sup>68</sup> Replies to Questionnaire Q2 - Phase II Questionnaire, question B.A.4.

<sup>69</sup> Replies to Questionnaire Q2 - Phase II Questionnaire, question B.A.4.

<sup>70</sup> Replies to Questionnaire Q2 - Phase II Questionnaire, question B.A.4.

<sup>71</sup> Replies to Questionnaire Q2 - Phase II Questionnaire, question B.A.4.

<sup>72</sup> Replies to Questionnaire Q2 - Phase II Questionnaire, questions B.A.5 and B.A.6.

<sup>73</sup> Replies to Questionnaire Q2 - Phase II Questionnaire, comparison of questions B.A.1-6 and B.B.1-6.

console video games. The Commission considers that it can be left open whether this market should be further segmented based on game genres, in particular based on the following genres: (i) action and adventure; (ii) shooter (including battle royale); (iii) role-playing games; (iv) sports; (v) racing; (vi) fighting, and (vii) strategy, as this would not change the outcome of the competitive assessment in this case.

#### 6.1.1.3.3. Segmentation based on type of game

- (79) The results of the Phase I market investigation were inconclusive regarding a possible segmentation of the video game publishing product market by type of video game (AAA games vs. non-AAA games).
- (80) From the demand-side, a slight majority of respondents that expressed a view submitted that games generally compete across different types, but competition is stronger between games of the same type, *i.e.*, games of similar complexity, price point, and design and technical quality.<sup>74</sup>
- (81) From the supply-side, the majority of market participants that expressed a view submitted that game developers focusing on AAA can easily switch to developing a non-AAA game in a short period of time and with minimal costs, while the opposite is not necessarily the case.
- (82) However, market participants were not entirely aligned on this point. For example, one market participant stated that also switching from developing AAA to developing non-AAA games can be challenging, even if still to a lesser extent than vice-versa: “*switching from AAA to a non-AAA development might be challenging as it requires scaling down (plans, team, budget), however it is much easier than the vice-versa situation.*”<sup>75</sup> On the contrary, a few market participants indicated that both switching from developing AAA games to developing non-AAA games and vice-versa is possible in a short period of time and with minimal costs.<sup>76</sup>
- (83) For the purposes of this Decision, the Commission concludes that the relevant product market is the market for the development and publishing of PC and console video games. The Commission considers that the question whether this market should be further segmented based on game types can be left open, as this would not change the outcome of the competitive assessment in this case.

#### 6.1.1.4. Conclusion

- (84) Based on the above, the Commission considers as the relevant product market the overall market for development and publishing of PC and console video games, and leaves open whether narrower separate markets exist on the basis of (i) gaming platforms; (ii) game genres; and (iii) game types.

---

<sup>74</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 12 to 14.1.

<sup>75</sup> Reply of a market participant to Questionnaire Q1 to video games developers, publishers and distributors, question 15.1 [ID1213].

<sup>76</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, question 15.

## 6.1.2. Relevant geographic market

### 6.1.2.1. Commission precedents

(85) In *Microsoft/ZeniMax*<sup>77</sup>, the Commission concluded that the market for the development and publishing of video games is at least EEA-wide, if not worldwide in scope.

### 6.1.2.2. The Notifying Party's view

(86) The Notifying Party submits that the market for the development and publishing of video games is worldwide. In this regard, the Notifying Party submits that developers and publishers typically produce one version of a video game for worldwide distribution (subject to some elements being “localized”), with no significant price differences.<sup>78</sup>

### 6.1.2.3. The Commission's assessment

(87) The majority of respondents to the market investigation indicated that the geographic market for the development and publishing of PC and console video games is at least EEA-wide.<sup>79</sup> The majority of market participants also indicated that the geographic scope of the market would not change for possible segmentations by platform, genre or type of game.<sup>80</sup>

### 6.1.2.4. Conclusion

(88) In light of the above, for the purposes of this Decision, the Commission concludes that the geographic scope of the market for the development and publishing of PC and console video games, as well as potential segments thereof, is at least EEA-wide. The geographic market definition can be left open between EEA-wide and worldwide, as the outcome of the analysis will be the same regardless of such distinction.

## 6.2. Game distribution

(89) Game distribution refers to the distribution of games to the public in either physical or digital form. In the case of physical distribution, games are distributed on physical media like cartridges and compact discs, and sold online or in brick-and-mortar stores. In the case of digital distribution, games are distributed through online download and/or streaming.

(90) Microsoft distributes free-to-play and buy-to-play games in digital form. It operates the Microsoft Store, an app store on Windows PC, through which it distributes first-party and third-party games. Microsoft also offers the Microsoft Store (formally known as the Xbox Store, an Xbox-branded storefront) which can be accessed via an Xbox console, web browser or the Xbox App for Windows. The Microsoft Store for console primarily sells games and subscriptions, but it also supplies consoles and accessories.<sup>81</sup>

---

<sup>77</sup> Commission decision of 5 March 2021 in case M.10001 – *Microsoft/ZeniMax*, paragraph 25.

<sup>78</sup> Form CO, Chapter 6.2, paragraph 389.

<sup>79</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 18 and 18.1.

<sup>80</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 18.2 to 19.2.1.

<sup>81</sup> Form CO, paragraph 53.



- (91) In addition, Microsoft offers the following gaming subscription services that include access to first- and third-party games, online multi-player capabilities, and cloud gaming functionality:
- (a) Xbox Network, also called Xbox Live, is a free service that provides access to certain online functionalities and allows gamers to play some multi-player games online. It also provides access to certain content free-of-charge.
  - (b) Xbox Live Gold is an online multi-player gaming subscription service that allows gamers to play multi-player games with other subscribers and access certain additional gaming content.
  - (c) Xbox Game Pass provides users with access to a library of first- and third-party titles on the Xbox.
  - (d) PC Game Pass provides users with access to a library of first- and third-party titles on a PC.
  - (e) Xbox Game Pass Ultimate is a comprehensive package that includes subscriptions to both PC and console versions of Xbox Game Pass, Xbox Live Gold, and Xbox Cloud Gaming<sup>82</sup>, which allows gamers to stream certain games to a variety of devices.
- (92) Activision Blizzard operates a digital storefront (Battle.net), and also distributes *World of Warcraft* through a single-game subscription service.

#### 6.2.1. Relevant product market

##### 6.2.1.1. Commission precedents

- (93) In *Microsoft/ZeniMax*<sup>83</sup>, the Commission considered whether the market for video game distribution should be segmented according to physical vs. digital distribution. Further, in relation to digital distribution, the Commission considered whether segmentations were appropriate by: (i) gaming platforms (PC, console and mobile); (ii) payment model (upfront payment vs. subscription); and (iii) type of access to games (download vs. streaming). The Commission left open the product market definition as regards physical vs. digital distribution and a possible segmentation by gaming platforms, whereas it found that a segmentation by payment model and type of access was not warranted.

##### 6.2.1.2. The Notifying Party's view

- (94) The Notifying Party notes that there are differences between physical and digital distribution, the latter allowing for a shorter supply chain and providing more direct access to games. Moreover, the Notifying Party also notes that the market has seen a steep decline in the physical distribution of games.<sup>84</sup>
- (95) As regards a possible distinction of the digital distribution market by gaming platforms, the Notifying Party considers that there may be differences especially between digital storefronts selling PC and console games on the one hand and mobile

---

<sup>82</sup> Xbox Cloud Gaming is a technology that allows gamers to play games streamed from the cloud. It can be used to deliver buy-to-play games, free-to-play games, single-game subscriptions, multi-game subscriptions (like Xbox Game Pass), or games in any number of other business models. (Form CO, paragraph 8 and footnote 5). Xbox Cloud Gaming is available as a bundle with the Xbox Game Pass, under the name Xbox Game Pass Ultimate, and as a standalone free-to-play offering for one game, *Fortnite*. (Form CO, paragraph 54).

<sup>83</sup> Commission decision of 5 March 2021 in case M.10001 – *Microsoft/ZeniMax*, paragraphs 37 – 42.

<sup>84</sup> Form CO, Chapter 6.2, paragraph 406.

app stores distributing mobile games on the other.<sup>85</sup> However, the Notifying Party notes that the rise of cloud gaming is blurring the boundaries between platforms as it allows for the same game being distributed across platforms. In any case, the Notifying Party submits that the exact product market definition can remain open for the purpose of assessing this Transaction.<sup>86</sup>

- (96) As regards a possible distinction of the digital distribution market by payment model and type of access, the Notifying Party claims that such segmentations are not accurate. Concerning the payment model, the Notifying Party submits that subscription services are relatively new, and that they need to attract players who would otherwise pay for games upfront (which remains the main payment model for games). Therefore, subscriptions services are constrained by other payment models, and vice-versa. Moreover, the Notifying Party notes that hybrid models, combining subscription and upfront payment elements, are increasingly being adopted.<sup>87</sup> The Notifying Party also considers that it would be inappropriate to distinguish between multi-game and single-game subscription services.<sup>88</sup>
- (97) Concerning the type of access to games, the Notifying Party submits that it would be inappropriate to place downloaded and streamed games in separate markets. Gamers usually do not choose the gaming experience on the basis of whether the game is run locally or in the cloud, but they are rather motivated by other aspects (*e.g.*, graphics, speed, mechanics, game cost etc.). Streaming services therefore need to compete with download gaming options across such factors. In addition, the Notifying Party notes that cloud gaming is nascent and that downloading will remain dominant in the foreseeable future.<sup>89</sup>

#### 6.2.1.3. The Commission's assessment

##### 6.2.1.3.1. Segmentation between physical and digital distribution

- (98) From the demand-side, the majority of respondents to the market investigation that expressed a view on this subject submitted that, based on technical features, pricing, storage, and accessibility, physical and digital video game distribution are interchangeable for gamers.<sup>90</sup>
- (99) From the supply-side, the majority of respondents that expressed a view considered that a video game developer can switch between developing video games for physical to digital distribution channels and vice versa within a short time frame and with minimal costs. However, market participants indicated that while there are no differences in the development of games, it is easier to switch from physical to digital distribution than the other way around.<sup>91</sup>
- (100) In light of the above, for the purposes of this Decision, the Commission concludes that the relevant market is an overall market for game distribution and that this market should not be segmented between physical and digital distribution.

---

<sup>85</sup> Form CO, Chapter 6.2, paragraph 408.

<sup>86</sup> *Ibid.*

<sup>87</sup> Form CO, Chapter 6.2, paragraphs 411 - 412.

<sup>88</sup> Form CO, Chapter 6.2, paragraphs 417 - 421.

<sup>89</sup> Form CO, Chapter 6.2, paragraphs 443 - 446.

<sup>90</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 21 and 21.1.

<sup>91</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 22 and 22.1.

### 6.2.1.3.2. Segmentation based on platform

- (101) The market investigation provided mixed results to the question whether the market for game distribution<sup>92</sup> should be segmented according to the platforms for which games are developed (*i.e.*, PCs, consoles and mobile devices). In particular, the market investigation provided no clear support for segmenting the relevant market according to the three platforms.<sup>93</sup> However, while it is more debated whether PC and consoles form separate distribution markets, a majority of respondents to the Commission’s market investigation indicated that the distribution of mobile games forms a separate market from the distribution via the other platforms. This has also been indicated by certain market participants.<sup>94</sup>
- (102) In particular, some market participants indicated that mobile gamers and PC/console gamers were looking for “[d]ifferent features of storefronts / products”.<sup>95</sup> However, the Commission notes that gamers need to use different hardware to play each of PC, console and mobile games. Therefore, from the perspective of a gamer, a PC game could only be a substitute for a console game if the gamer already owns both types of hardware. However, the lines are getting blurred due to cloud game streaming. In theory, a gamer could access on his or her PC native PC games, or console games from the cloud.
- (103) From the supply-side, market participants indicated that different platforms are not substitutable, as *“mobile games are distributed via “Walled Gardens”<sup>96</sup> that substantially differ from PC digital distribution. Console distribution requires certification that applies to both digital and physical distribution that does not exist for PC distribution”*.<sup>97</sup> Another market participant indicated that *“there is a segment differentiation because of which digital storefronts are currently available on each platform (*i.e.* steam is not available on console) and what content is offered”*.<sup>98</sup> However, certain market participants indicated that the lines were increasingly blurred, as app stores are becoming available on more than one platform: *“For example: the Play Store is available on Chromebooks and Android devices, and Google is in the process of bringing Play Store games to Windows PC users; the ONE Store in Korea has partnered with Tencent and Microsoft to become available on mobile and PC; the Amazon Appstore is available on Windows PCs through the Microsoft Store; and Apple’s App Store is available on iPhones, iPads,*

---

<sup>92</sup> In Questionnaire Q1, questions 23 et seq, the Commission asked for views regarding the market for digital game distribution. However, market participants submitted in reply to question 21.1. that there are no differences in the development of video games for physical and digital distribution. The Commission therefore considers that the replies for digital game distribution are equally valid for the overall market for game distribution (including both physical and digital distribution).

<sup>93</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 23 and 23.1.

<sup>94</sup> Agreed minutes of the conference call with a game developer and publisher of 27 April 2022 [ID469], and Agreed minutes of the conference call with a video game developer and publisher of 13 May 2022 [ID1538].

<sup>95</sup> Reply of a market participant to Questionnaire Q1 to video games developers, publishers and distributors, question 23.1 [ID1213].

<sup>96</sup> Walled gardens refers to the fact that the distribution of mobile games occurs primarily via Apple’s and Google’s app stores, and there is very limited alternative, if not any alternative at all.

<sup>97</sup> Reply of a market participant to Questionnaire Q1 to video games developers, publishers and distributors, question 23.1 [ID1018].

<sup>98</sup> Reply of a market participant to Questionnaire Q1 to video games developers, publishers and distributors, question 23.1 [ID1179].

and MacBooks as Apple markets the ‘continuous’ experience that it offers across devices”.<sup>99</sup>

- (104) However, taking into account that the development and publishing of mobile games on the one hand and of PC or console games on the other hand are different and do not belong to the same market (see 6.1.1.3 above), the Commission considers that the distribution channels for mobile games remain distinct compared to PC or console distribution channels. The fact that a mobile game might be accessed on a PC (e.g., via the Play Store on a Chromebook or via the Apple App Store on a MacBook) does not change that mobile and PC/ console games are distributed via different channels.
- (105) Based on the above, for the purposes of this Decision, the Commission concludes that the distribution of mobile games does not belong to the same market as the distribution of PC and console games, respectively. The Commission will not assess the potential separate market for the distribution of mobile games, as it considers that the Transaction will likely not significantly impede effective competition on this potential market. Moreover, the Commission concludes that the product market definition can be left open with regard to a segmentation based on platform as regards PC and console game distribution, as the outcome of the analysis will be the same regardless of whether the Commission considers an overall market for PC and console game distribution or potential narrower markets for (i) PC game distribution; and (ii) console game distribution.

#### 6.2.1.3.3. Segmentation based on payment model

- (106) The majority of respondents that expressed a view on this subject during the market investigation submitted that the market for game distribution should not be segmented by payment model (buy-to-play vs subscription services).<sup>100</sup> In particular, from the demand-side, the majority of respondents considered that multi-game subscription services and digital storefronts selling games on a buy-to-play basis compete with each other and belong to the same market for (digital) distribution of games.<sup>101</sup> From the supply-side, market participants provided mixed views as to whether a video games distributor selling games on a buy-to-play basis can switch to offering a viable multi-game subscription service in a short period of time and with minimal costs, and vice-versa.<sup>102</sup>
- (107) In light of the above, for the purposes of this Decision, the Commission concludes that the market for game distribution should not be segmented based on payment model.

#### 6.2.1.3.4. Segmentation based on the type of access to video games

- (108) During its market investigation, the Commission asked market participants to provide their views with regard to the *status quo* in the market. The results of the market investigation indicated that the market for game distribution should not be segmented based on the type of access to video games (downloading vs. cloud game

---

<sup>99</sup> A market participant’s reply to Questionnaire Q1 to video games developers, publishers and distributors, questions 23.1 and 6.1.1 [ID3329].

<sup>100</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 24 and 24.1.

<sup>101</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 25 and 25.1.

<sup>102</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 26 and 26.1.

streaming).<sup>103</sup> In particular, from the demand-side, the majority of respondents considered that cloud game streaming services compete with the more traditional access to video games via download, as cloud game streaming constitutes just a different method to access the games.<sup>104</sup> However, market participants indicated that this type of access is particularly relevant for console and PC games, while there are currently limited cloud games streaming services for mobile games.<sup>105</sup> Moreover, both console and PC games are streamed to PCs, mobile devices and smart TVs. While technically, it is possible to stream console and PC video games to consoles, at the time of this decision, this can only be done on Microsoft's console (via a web browser). As for Sony and Nintendo, gamers can only stream their respective cloud game streaming service on each of the two consoles. From the supply-side, market participants provided mixed views as to whether a distributor of video games via download can develop a cloud game streaming service in a short period of time and with minimal costs, and vice-versa.<sup>106</sup>

- (109) In light of the above, for the purposes of this Decision, the Commission concludes that the relevant market is an overall market for PC and console video game distribution and that this market should not be segmented based on type of access.

## 6.2.2. *Relevant geographic market*

### 6.2.2.1. Commission precedents

- (110) In *Microsoft/ZeniMax*, the Commission found that the geographic scope of both physical and digital game distribution is at least EEA-wide, and possibly worldwide.<sup>107</sup>

### 6.2.2.2. The Notifying Party's view

- (111) The Notifying Party indicates that the geographic scope of the market for the digital distribution of games is worldwide, as digital distribution channels are available anywhere in the world without cross-border restrictions.<sup>108</sup>

### 6.2.2.3. The Commission's assessment

- (112) The majority of respondents to the market investigation submitted that the geographic market for game distribution is worldwide, or at least EEA-wide.<sup>109</sup> The majority of market participants also confirmed that the geographic scope of the market would not change for possible segmentations by platform<sup>110</sup> or between physical and digital distribution<sup>111</sup>.

---

<sup>103</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 28 and 28.1.

<sup>104</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 29 and 29.1.

<sup>105</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 29 and 29.1.

<sup>106</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 30 and 30.1.

<sup>107</sup> Commission decision of 5 March 2021 in case M.10001 – *Microsoft/ZeniMax*, paragraphs 45 – 47. Form CO, Chapter 6.2, paragraph 447.

<sup>108</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 32 and 32.1.

<sup>109</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, question 32.1.1.

<sup>110</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 32.2 to 32.3.1.

(113) In any case, the Commission notes that, for the purposes of this Decision, the outcome of the analysis will be the same regardless of whether the Commission considers an EEA-wide or a worldwide geographic market for game distribution.

(114) Therefore, the Commission considers that, for the purpose of this Decision, the question whether the geographic scope of the market for the distribution of PC and video console games is worldwide or EEA-wide can be left open.

### **6.3. Operating systems for PCs**

(115) Microsoft offers two types of licenses of its Windows OS – Windows for desktop PCs (Windows Client) and Windows for servers (Windows Server). The latest version of Windows Client is Windows 11, which was launched in October 2021.

(116) Activision Blizzard does not supply operating systems.

#### *6.3.1. Relevant product market*

##### *6.3.1.1. Commission precedents*

(117) The Commission has previously defined an OS as system software products that control the basic functions of computing devices, such as servers, PCs, tablets and smartphones, and enable its user to use the device and run application software on it.<sup>112</sup> In *Google/Motorola Mobility*, while leaving the exact market definition open, the Commission took the view that OS for PCs and OS for smart mobile devices belong to separate product markets, given that these OS use different hardware and have different performance capacities.<sup>113</sup> This approach was also followed in *Google/Fitbit*<sup>114</sup> and, most recently, confirmed in *Microsoft/Nuance*.<sup>115</sup>

##### *6.3.1.2. The Notifying Party's views*

(118) The Notifying Party generally agrees with the Commission's previous decisional practice. However, it notes that the market definition for OS is increasingly blurred. In particular, the Notifying Party notes that PC OS face increasing competition from mobile operating systems, as demand moves away from traditional laptops and desktops to more mobile computing devices.<sup>116</sup>

##### *6.3.1.3. The Commission's assessment*

(119) The market investigation confirmed that there is a separate market for PC OS, which is distinct from the market for OS for mobile devices, as well as from the market for OS for servers.<sup>117</sup>

(120) With regard to the substitutability of PC OS and OS for mobile devices, market participants indicated that there was no demand-side substitutability between the two. In particular, the two types of OS “*are used in different hardware. They differ*

---

<sup>112</sup> Commission decision of 13 February 2012 in case M.6381 – *Google/Motorola Mobility*, paragraphs 26 and 29-30; Commission decision of 4 December 2013 in case M.7047 – *Microsoft/Nokia*, paragraph 27; Commission decision of 6 December 2016 in case M.8124 – *Microsoft/LinkedIn*, paragraphs 11-15.

<sup>113</sup> Commission decision of 13 February 2012 in case M.6381 – *Google/Motorola Mobility*, paragraphs 26 and 29-30; Commission decision of 4 December 2013 in case M.7047 – *Microsoft/Nokia*, paragraph 27; Commission decision of 6 December 2016 case M.8124 – *Microsoft/LinkedIn*, paragraphs 11-15; Commission decision of 6 September 2018 in case M.8788 – *Apple/Shazam*, recitals 82-85.

<sup>114</sup> Commission decision of 17 December 2020 in case M.9660 – *Google/Fitbit*, recital 95.

<sup>115</sup> Commission decision of 21 December 2021 in case M.10290 – *Microsoft/Nuance*, paragraph 84.

<sup>116</sup> Form CO, paragraphs 489 et seqq.

<sup>117</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 37 to 38.1.

*significantly in terms of user interface, function, performance, software ecosystem, end use, etc*".<sup>118</sup> Moreover, a consumer can buy a license for the Windows OS separately from the hardware (PC or laptop), while she or he can't do the same with Android or iOS (the operating system is only sold in a bundle with a smartphone or tablet). As a market participant explained, "[m]obile device OS is not for sell to end users separately while PC OS does".<sup>119</sup> As for supply-side substitutability, market participants indicated that OS for PC and for mobile devices are based on different architectures and that their development "*requires distinct technology, knowhow, and expertise, so it is difficult for suppliers to readily switch between the two OSs*".<sup>120</sup>

- (121) As for the substitutability of PC OS and OS for servers, market participants indicated that there was no demand-side substitutability, as server OS have specific technical characteristics and are optimized for specific workloads.<sup>121</sup>
- (122) In light of the above, for the purposes of this Decision, the Commission concludes that the relevant market is the one for PC OS.

### 6.3.2. *Relevant geographic market*

- (123) In geographic terms, in line with the Commission precedent in *Microsoft/Nuance*<sup>122</sup>, the Notifying Party submits that the relevant geographic market for OS for PCs is worldwide.<sup>123</sup>
- (124) The Commission's market investigation in the present case has confirmed this approach, as all respondents that expressed a view submitted that the geographic scope of the market is worldwide.<sup>124</sup>
- (125) In light of the above, for the purposes of this Decision, the Commission concludes that the geographic scope of the market for PC OS is worldwide.

## 7. COMPETITIVE ASSESSMENT

### 7.1. Introduction

#### 7.1.1. *Rationale for the Transaction*

- (126) The Notifying Party submits that, by acquiring Activision Blizzard, Microsoft enhances the attractiveness of Microsoft's multi-game subscription service Game Pass by adding Activision Blizzard's popular games to its library, as Microsoft undertakes to move from per-game monetization to a flat-fee subscription model. Microsoft expects the Transaction to improve Game Pass' user engagement and increase its subscriber base, allowing Microsoft to continue investing in Game Pass and cloud gaming functionality.<sup>125</sup> In addition, the Transaction would help Microsoft

---

<sup>118</sup> Reply of a market participant to Questionnaire Q1 to video games developers, publishers and distributors, question 37.1 [ID1236].

<sup>119</sup> Reply of a market participant to Questionnaire Q1 to video games developers, publishers and distributors, question 37.1 [ID1179].

<sup>120</sup> Reply of a market participant to Questionnaire Q1 to video games developers, publishers and distributors, question 37.1 [ID1236].

<sup>121</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, question 38.1.

<sup>122</sup> Commission decision of 21 December 2021 in case M.10290 – *Microsoft/Nuance*, paragraph 88.

<sup>123</sup> Form CO, paragraph 496.

<sup>124</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 39 and 39.1.

<sup>125</sup> Form CO, paragraph 91. While video games are traditionally downloaded to the gamer's device and run therein, game streaming allows users to stream games running in a datacentre to a supported device of their choice. See also Section 5 above.

to (i) extend Xbox store presence across platforms, creating a “Universal Store” spanning multiple platforms and devices, (ii) grow Microsoft’s mobile games offering, and (iii) improve Microsoft’s position in digital (mobile) advertising.

### 7.1.2. *Horizontally affected markets*

#### 7.1.2.1. Development and publishing of video games

- (127) The Transaction creates horizontal overlaps in the market for development and publishing of console, PC and mobile games and potential sub-segments based on game type (AAA and non-AAA) and game genre, worldwide and in the EEA.
- (128) Microsoft publishes PC and console games developed by its 24 game development studios. Examples include the *Minecraft*, *Forza*, *Elder Scrolls*, and *Halo* game titles. Microsoft also publishes games that are developed by second- and third-party developers. In addition, Microsoft develops and publishes native mobile games which are offered for free or as paid games. Microsoft’s leading titles for mobile include the mobile version of *Minecraft* and the developed-for-mobile *Halo: Spartan Assault*.<sup>126</sup>
- (129) A number of games developed and published by Microsoft are considered AAA games including *Halo* and *Elder Scrolls*. Microsoft’s main shooter console games are *Halo*, *Gears of War*, and *Doom*,<sup>127</sup> which are all considered AAA console games.<sup>128</sup>
- (130) Activision Blizzard develops and publishes PC, console, and mobile games through three business units: (i) Activision, which develops and publishes games and content, such as *Call of Duty*, mainly for PC and consoles; (ii) Blizzard, which develops and publishes games, such as *World of Warcraft*, primarily for PCs, and to a limited extent for consoles and mobile platforms; and (iii) King, which is a mobile game developer.<sup>129</sup> Based on financial year 2021 revenues, Activision Blizzard estimates that Activision generates [...]% of its revenues from in-house, first-party games, Blizzard generates [...]%, and King generates [...]%. Of these titles, *Call of Duty*, *Candy Crush*, and *World of Warcraft* represent [...]% of Activision Blizzard’s 2021 net revenues.<sup>130</sup> Activision Blizzard’s three largest franchises in 2021 in terms of revenues on PC and console were *World of Warcraft*, *Call of Duty*, and *Diablo* for PC, and *Call of Duty*, *Crash Bandicoot*, and *Diablo* for consoles.
- (131) A number of games developed and published by Activision Blizzard are considered AAA games such as: *Call of Duty*, *Crash Bandicoot*, *Diablo*, *Overwatch* and *World of Warcraft*. Activision Blizzard’s main shooter games on console are *Call of Duty* and *Overwatch*.<sup>131</sup> Both *Call of Duty* and *Overwatch* are considered AAA console games.<sup>132</sup> The Notifying Party has identified horizontal overlaps between the Parties’ activities in development and publishing of console and PC video games (both AAA and non-AAA) and all plausible narrower segments worldwide and in the EEA, with

---

<sup>126</sup> Form CO, paragraph 137.

<sup>127</sup> The Notifying Party’s Reply to RFI 8, question 2, footnote 22. The Notifying Party submitted that overall, more than 700 games can be categorised as having “shooter” elements.

<sup>128</sup> Form CO, Annex 22.

<sup>129</sup> Form CO, paragraph 138.

<sup>130</sup> Form CO, paragraph 139.

<sup>131</sup> The Notifying Party’s Reply to RFI 8, question 2, paragraph 2.39. The Notifying Party submitted that overall, more than 700 games can be categorised as having “shooter” elements.

<sup>132</sup> Form CO, Annex 22.



respect to the following five genres<sup>133</sup>: (i) action and adventure; (ii) fighting; (iii) racing and flying; (iv) role playing; and (v) shooter (including battle royale).

- (132) With respect to the sports genre, the Transaction leads to a horizontal overlap only in development and publishing of console video games (both AAA and non-AAA) worldwide and in the EEA, because Microsoft does not publish games for PC which can be categorised as relating to “sports”.
- (133) With respect to the strategy genre, the Transaction leads to a horizontal overlap only in development and publishing of PC video games (both AAA and non-AAA) worldwide and in the EEA, because Activision Blizzard does not publish games for console which can be categorised as relating to “strategy”.
- (134) In the market for development and publishing of mobile video games (both AAA and non-AAA), the Parties’ activities only overlap with respect to the strategy genre worldwide and in the EEA.
- (135) For the purpose of the present decision, the Commission carried out its competitive assessment on the basis of the narrowest plausible product market segments identified by the Notifying Party for which market share data is available, and where the Parties’ combined market share exceeds 20% by revenue in 2022. Therefore, the Commission has assessed whether the Transaction gives rise to competition concerns with regard to horizontal non-coordinated effects in the following market segments:
- (a) Development and publishing of AAA Role Playing video games on PC (EEA);
  - (b) Development and publishing of AAA Racing and Flying video games on: (i) PC and console (worldwide); (ii) PC (worldwide); and (iii) console (worldwide);
  - (c) Development and publishing of AAA Action and Adventure video games on: (i) PC and console (worldwide); and (ii) console (worldwide); and
  - (d) Development and publishing of AAA Shooter video games on console (worldwide).
- (136) The Commission notes that the Parties’ market share by revenue also exceeds 20% in certain market segments of development and publishing of console and/or PC video games, which include both AAA and non-AAA video games.<sup>134</sup> However, the Commission has carried out its assessment of horizontal non-coordinated effects by considering only the narrower market segments that include AAA video games only. As explained in recitals (349) and (350) below, AAA video games are high-quality and complex games developed by large game development studios, requiring significant budget and time (up to several years). Due to their characteristics, AAA games enjoy exceptional popularity and user loyalty, drive the majority of revenue in

---

<sup>133</sup> While genres historically have been used in gaming as descriptors of the type of game for organizational purposes and to indicate the gameplay the gamer could expect from a given title, the Notifying Party explained that genre classification is subjective and that different sources may place game titles in different genres. Therefore, the Commission notes that there is no industry-wide applicable classification of games into genres and that different digital storefronts make different decisions as to which games belong to which genre(s). For the purpose of identifying horizontal overlaps and vertical links resulting from the Transaction, the Commission has relied on the categorisation of titles on the Xbox and Windows Stores (for console and PC games) and genre classification from the App Annie database (for mobile games) provided by the Notifying Party in order to allocate the Parties’ and their competitors’ PC and console games to each genre.

<sup>134</sup> This includes only worldwide market segments for development and publishing of: (i) action and adventure console video games and (ii) shooter console video games.

development and publishing and generate significant competitive pressure. Therefore, the Commission considers that the assessment of the competitive dynamics in the market for development and publishing of only AAA console video games applies to the market that includes development and publishing of AAA as well as non-AAA console video games.

#### 7.1.2.2. Distribution of video games

- (137) Furthermore, the Transaction creates horizontal overlaps also with regard to the worldwide and EEA-wide markets for (i) distribution of video games on PC and console, and (ii) distribution of video games on PC. The Parties' activities do not overlap in the distribution of video games on console because Activision Blizzard is only active in the distribution of PC video games.
- (138) Microsoft operates two digital storefronts on PC and console (i.e., the Microsoft Store and the Xbox Store) and a multi-game subscription service (Xbox Live and Game Pass) as well as a cloud game streaming service<sup>135</sup>:
- (a) The Microsoft Store is an app store on Windows PCs, through which it distributes first- and third-party PC and console games by purchase and subscription (via download and streaming).
  - (b) The Xbox Store is an Xbox-branded app store, accessible through the Xbox console.
  - (c) Microsoft also offers two gaming subscription services, Xbox Live and Xbox Game Pass for distribution of console and PC video games.
    - Xbox Live is an online multi-player gaming subscription service, available in two tiers: (i) Xbox Live Gold, which enables multi-player gaming and social elements (e.g., friends lists, audio and visual communication) and offers discounts in the Xbox Store and a monthly set of games for the user to download and keep; and (ii) Xbox Live Free, which enables the gamers to access the social elements of Xbox Live and download Xbox Live content free-of-charge.
    - Xbox Game Pass, a multi-game subscription service, available in two tiers: (i) separate individual subscriptions for either PC or console ("Game Pass PC" and "Game Pass Console"), which provides access to a catalogue of Xbox and PC games from various publishers in return for a monthly subscription fee; and (ii) Game Pass Ultimate, which gives gamers access to all features of Xbox Live Gold, as well as cloud game streaming services for certain games in the Game Pass catalogue that are streaming-enabled.
- (139) Microsoft is not active in the distribution of mobile games. Game Pass Ultimate is already available as: (i) a web app on iOS devices; and (ii) a web app and a native app with limited functionality on Android devices. However, Game Pass Ultimate is not, a "mobile app store" or "digital storefront" in the sense that it does not allow gamers to download games onto their mobile devices or to buy individual games. Instead, Game Pass Ultimate allows gamers to stream certain PC and console games

---

<sup>135</sup> Form CO, paragraph 210. The Notifying Party explained that at present, Microsoft does not directly sell physical copies of its games to consumers through any distribution channel, online or in physical stores. Microsoft does, however, have limited wholesale sales of physical games to distributors and retailers.

that are part of the Game Pass subscription service remotely to their mobile devices, using cloud gaming technology.<sup>136</sup>

- (140) Activision Blizzard is only active in the distribution of PC video games through its digital storefront Battle.net, an app store on PCs.<sup>137</sup> Activision Blizzard does not sell third-party games on Battle.net, or otherwise. Activision Blizzard is not active in the distribution of console video games or distribution of mobile video games.<sup>138</sup>
- (141) For the purpose of the present decision, the Commission carried out its competitive assessment on the basis of the narrowest plausible product market segments identified by the Notifying Party for which market share data is available, and where the Parties' combined market share exceeds 20% by revenue in 2022. A single market met these criteria: the market for the distribution of video games on PC and console (worldwide). Therefore, the Commission has assessed whether the Transaction gives rise to competition concerns with regard to horizontal non-coordinated effects in the worldwide market for distribution of video game on PC and console.
- (142) The Commission' investigation of potential horizontal non-coordinated effects with respect to the Parties' overlapping activities in the distribution of video games does not concern the market and potential sub-segments where the Parties' combined market share by revenue in 2022 is more limited (i.e. below 20%) and that are consequently not vertically affected. By reason of the Parties' limited market share, the Commission finds it unlikely that the Transaction is liable to impede effective competition on such markets.

#### 7.1.3. *Vertically affected markets*

- (143) The Transaction gives rise to a vertical relationship between the Parties' activities in the upstream markets for development and publishing of console and/or PC video games and sub-segments worldwide and in the EEA and Microsoft's activities in the downstream market for distribution of console and/or PC games and sub-segments worldwide and in the EEA.
- (144) In Section 7.4.2., the Commission will assess the impact of a potential customer foreclosure of rival developers and publishers of console video games by restricting their access to the Microsoft console-specific digital storefronts downstream given that the combined entity's market share exceeds 30% by revenue in 2022 in the worldwide downstream market for distribution of console games (where only Microsoft is active). The Commission' investigation of a potential customer foreclosure does not concern other unaffected and related markets downstream given that the Parties' combined market share by revenue in 2022 on those markets is more limited (i.e. below 30%). By reason of the Parties' limited market share on these markets, the Commission finds it unlikely that the Transaction is liable to impede effective competition as a result of the Parties' activities downstream.
- (145) In Section 7.4.3, the Commission will assess the impact of a potential input foreclosure of Microsoft's rival distributors of console games by withholding or

---

<sup>136</sup> Form CO, paragraphs 215 and 216.

<sup>137</sup> Form CO, paragraphs 236-238. Activision Blizzard does not directly sell physical copies of its games to consumers through any distribution channel, online or in physical stores.

<sup>138</sup> Battle net is also an app for mobile devices, however the mobile app does not provide for the downloading of mobile games, but rather serves as a platform for gamers to connect and communicate with other gamers.

degrading access to Activision Blizzard's shooter console video games given that the combined entity's market share by revenue in 2022 exceeds 30% in the upstream market for development and publishing of shooter (including battle royale) console video games worldwide. The Commission's investigation of a potential input foreclosure does not concern related other unaffected markets and potential sub-segments upstream given that the Parties' combined market share by revenue in 2022 on those markets is more limited (i.e. below 30%). By reason of the Parties' limited market share on these markets, the Commission finds it unlikely that the Transaction is liable to impede effective competition as a result of the Parties' activities upstream.

- (146) As described in recitals (31)-(38) above, cloud game streaming represents a growing industry trend that could potentially disrupt the device-based approach that characterizes the industry today. While Activision Blizzard does not licence its games to other cloud game streaming services today, the Commission considers that absent the Transaction, Activision Blizzard would have likely licensed its games to other cloud game streaming services as explained in more detail in recitals (494)-(511) below. Therefore, the Transaction gives rise to a vertical relationship between Activision Blizzard's activities in the upstream market for the development and distribution of PC and console games, respectively, and Microsoft's activities downstream in the distribution of console and PC games. Section 7.4.4 assesses the impact of a potential input foreclosure of Microsoft's rival distributors of console or PC video games that offer cloud game streaming services, by restricting or degrading their access to Activision Blizzard's PC and console video games, while making Activision Blizzard's games available on Xbox Cloud Gaming, the streaming functionality of Game Pass Ultimate.

#### 7.1.4. *Conglomerate relationships*

- (147) Section 7.5 assesses conglomerate relationships between Microsoft's supply of PC OS and Activision Blizzard's publishing of PC and console games, particularly as a result of Microsoft's distribution of games via Game Pass Ultimate's streaming feature.
- (148) Section 7.5.2 assesses the impact on rival providers of PC OS of the possible tying to Windows of Activision Blizzard's PC and mobile games natively available on non-Windows PCs. Section 7.5.3 assesses the impact on rival providers of PC OS of the possible tying strategy whereby Microsoft would restrict or degrade the availability of (i) Activision Blizzard's games on third-party cloud game streaming services and of (ii) Game Pass Ultimate's cloud game streaming feature via rival PC OS.<sup>139 140 141</sup>

---

<sup>139</sup> The Commission has received complaints also as regards Microsoft's supply of physics engines, a type of software that allows computers to create physics phenomena such as rigid and soft body dynamics and fluid dynamics to reproduce the real-world situation. Such engines are critical for the development of video games with complex 3D physical characteristics. According to such complaints, post-Transaction Microsoft would have increased incentives to require developers to use its Havok physics engine, and to degrade Havok's compatibility with competing gaming platforms that currently use Havok, thereby harming competition in the market for the provision of such physics engines. The Commission considers that such possible theory of harm is not merger specific, as Activision Blizzard's games does not carry out any activities that are horizontally or non-horizontally linked to the provision of physics engines. Therefore, the Transaction does not bring about any change in the ability and incentive for Microsoft to foreclose Havok's competitors. In light of this, the Commission has not assessed in this Decision the possible effects of the Transaction in the market for the provision of physics engines.

## 7.2. Market shares

- (149) According to the Horizontal Merger Guidelines<sup>142</sup> and the Non-Horizontal Merger Guidelines<sup>143, 144</sup> in the assessment of the effects of a merger, market shares constitute a useful first indication of the structure of the markets at stake and of the competitive importance of the relevant market players.
- (150) The Notifying Party provided market shares in value (by revenue) and volume (by number of game units sold) for markets for development and publishing of video games and distribution of video games.
- (151) First, the Notifying Party provided market shares in value (by revenue) for 2019, 2020, 2021 and 2022 for the markets for development and publishing of games by platform (on PC, console and mobile), as well as by type of game (AAA and non-AAA) and by game genre.<sup>145</sup> Data has been gathered from three separate game-related business units, namely Microsoft's Xbox and PC gaming units, ZeniMax Media and Mojang AB Studios. To the extent possible, data from all three sources have been combined to generate an aggregate Microsoft estimate in each gaming market segment. The Parties' estimates also draw on a range of third-party market

---

<sup>140</sup> The Commission has received complaints also as regards Microsoft's Jumpstart programme. Jumpstart is a programme under which Microsoft grants PC manufacturers a [...] Windows license rebate if they fulfil certain requirements (mainly consisting of the pre-installation of certain Microsoft apps, programs, software etc). According to the complaint received, the requirements imposed by the Jumpstart programme make it difficult for Microsoft's competitors offering similar apps and programs to compete fairly vis-à-vis PC manufacturers. Post-Transaction, Microsoft could expand the game-related requirements to Jumpstart, especially by adding the Xbox app and Game Pass, thereby reducing the ability of rival gaming platforms to enter into promotional arrangements and to compete with Microsoft's gaming channels. The Commission considers that such possible theory of harm is not merger specific. Not only Microsoft could already implement such strategy, but the Transaction would not bring about any change in Microsoft's ability or incentive to foreclose competitors. Game Pass already allows to download games on Windows PCs only, and Game Pass Ultimate's cloud game streaming feature remains accessible as a web app via browser regardless of its integration into the Jumpstart programme. The Commission has assessed in Section 7.5.3 below Microsoft's ability and incentive to make Game Pass Ultimate's cloud game streaming feature no longer accessible on rival PC OS, as well as the effects of such strategy on competition. In light of this, the Commission has not assessed in this Decision the possible effects of the Transaction in relation to the possible foreclosure of rival distributors of video games due to the Jumpstart programme.

<sup>141</sup> The Commission has also received complaints that the Transaction will harm competition on the market for the provision of cloud services. In particular, Microsoft is active in the provision of cloud services through its Azure business, and it also operates PlayFab, a back-end service that allows developers to use Azure to build and operate games, as well as to analyze gaming data. According to the complaints, Activision Blizzard's games will enhance the importance of Microsoft's cloud game streaming service, therefore post-Transaction Microsoft will have increased incentives to require developers to use PlayFab and Azure in order to develop games for cloud game streaming, especially for distribution via Microsoft's Game Pass Ultimate. The Commission considers that such possible theory of harm is not merger specific, as Activision Blizzard is not active in the supply of any cloud-related services that create competitive links with Microsoft's supply of PlayFab, nor that would change Microsoft's offering post-Transaction. In light of this, the Commission has not assessed in this Decision the possible effects of the Transaction in relation to the foreclosure of rival providers of cloud services.

<sup>142</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Horizontal Guidelines"), OJ C 31, 5.2.2004, p. 5-18.

<sup>143</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Non-Horizontal Guidelines"), OJ C 265, 18.10.2008, p. 6-25.

<sup>144</sup> Horizontal Merger Guidelines, paragraph 14; Non-Horizontal Merger Guidelines, paragraph 24.

<sup>145</sup> The classification of games into AAA was identified based on Nielsen market tracking data whenever available. The categorisation of games by genre is based on Microsoft's Windows and Xbox store data, third party industry analysts' data (NPD, Nielsen), and desk research.

studies and reports.<sup>146</sup> For the categorisation of games into type (AAA and non-AAA) and genre, the Notifying Party has relied on Microsoft's Windows and Xbox store data, NPD data, Nielsen data, and desk research.

- (152) In the present decision, the Commission has relied on the market shares by revenue in 2022 for the purpose of identifying horizontally and vertically affected markets where the Parties' combined market share exceeds 20% (see Section 7.1.2 – 7.1.3. above).
- (153) Second, the Notifying Party provided market shares in volume (by units of game sold) for 2020, 2021 and 2022 for the market for development and publishing of games by platform on console, as well as for market segments by type of game (AAA and non-AAA) and by game genre.<sup>147</sup> The 2020-2022 volume shares are calculated based on data from the industry analyst NPD/GfK. The NPD/GfK data contains volumes only for consoles, and the Notifying Party is not aware of other data sources with volume sales data for PC. However, for the purpose of this Decision, the Commission will not rely on market shares by volume for assessing the market for development and publishing of console games and potential sub-segments. In that respect, the Commission notes that market share by volume provided by the Notifying Party do not show the complete market for development and publishing of console games and potential sub-segments, given that the NPD data excludes volumes (i.e. downloads) of free-to-play games.
- (154) Third, the Notifying Party provided market shares in value (by revenue) for the market for distribution of console, PC and mobile games for 2019, 2020, 2021 and 2022. Microsoft's figures include consumer spend on first-, second-, and third-party games sold through the Windows Store, Bethesda.net, Elderscrollsonline.com, and Minecraft.net. Activision Blizzard figures include revenue generated from the sale of first-party games on Battle.net, as well as the full revenue accrued from the *World of Warcraft* franchise.
- (155) The Commission's assessment of market power usually relies on market shares based on sales, both in value and volume.<sup>148</sup> However, the Commission also notes that, depending on the specific products under investigation, there are nevertheless other metrics that can offer useful information about the structure of the market and market power.<sup>149</sup> This mechanism is reflected in the Commission's past decision practice, which shows that the Commission has regularly resorted to alternative indicators to assess market power particularly in digital markets.<sup>150</sup> For example, with respect to

---

<sup>146</sup> For Microsoft, Microsoft Mercury sales data, ZeniMax sales data, and Mojang sales data; for total markets, Microsoft internal market intelligence data based on third-party sources (Newzoo, SuperData, Nielsen, PwC, IDG, IDC); for other PC & console providers, public financials, Wall Street Equity Research and Nielsen; for other mobile providers, App Annie data.

<sup>147</sup> The NPD/GfK data does not provide a distinction between AAA games and non-AAA games. The classification of games into AAA was identified based on Nielsen market tracking data whenever available. NPD/GfK also provides its own genre classification which the Notifying Party has relied on for these shares.

<sup>148</sup> Market Definition Notice, paragraph 53.

<sup>149</sup> Market Definition Notice, paragraph 54.

<sup>150</sup> See e.g. Commission decision of 3 October 2014 in case M.7217 – *Facebook/WhatsApp*; Commission decision of 18 May 2020 in case M.9064 - *Telia Company/Bonnier Broadcasting Holding*; Commission decision of 7 October 2011 in case M.6281 - *Microsoft/Skype*.

content-driven markets such as in the present case, the Commission has considered that shares based on the time spent by users are relevant.<sup>151</sup>

- (156) Based on the results of the market investigation, the Commission considers that market shares based on alternative metrics may also be relevant for assessing the Parties' and their competitors' position in the segments of the market for development and publishing of video games. Firstly, in addition to overall game sales, game developers and publishers use various metrics to measure the performance of their video gaming content. For example, these are the number of monthly active users ("MAU"), daily active users ("DAU"), game time (hourly, daily, monthly etc.), etc. In the ordinary course of their business, the Parties regularly identify active users of their games by tracking the number of users that play a specific game in a given month in order to measure the overall size of the gamer base for each of the Parties' game titles or franchises. The Parties also record other metrics such as total game-time (in hours) and DAU.<sup>152</sup> Secondly, the respondents to the market investigation confirmed that revenues, MAU and game time are all equally relevant metrics for assessing competition in development and publishing of console video games.<sup>153</sup>
- (157) The Notifying Party provided MAU and game-time data to estimate the Parties' and their competitors' market shares in development and publishing of games on PC and console, also segmented by type of game (AAA and non-AAA) and by game genre.<sup>154</sup> The game time and MAU shares are based on the data from the industry analyst Newzoo. Newzoo provides its own genre classification which the Notifying Party has relied on for the purpose of providing market shares by MAU and game-time.
- (158) In that respect, the Commission notes that there is no industry-wide applicable classification of games into genres, which may differ to a degree between different data providers. Therefore, there may be differences between the genre classification based on Newzoo, the Xbox and Windows Stores relied on by the Notifying Party in order to allocate the Parties' and their competitors' PC and console games to each genre.
- (159) Further, the Commission notes that for market shares by game time and MAU on console, Newzoo tracks user engagement on PlayStation and Xbox only, while Nintendo's data was not available to the Notifying Party. Accordingly, the Commission notes that the market share information by MAU and game time for development and publishing of video games on console provided by the Notifying Party does not account for Nintendo and consequently does not cover the whole market. Nonetheless, for the reasons explained in recitals (155) and (156) above, the Commission considers that the data on MAU and game time on PlayStation and

---

<sup>151</sup> Commission decision of 18 May 2020 in case M.9064 - *Telia Company/Bonnier Broadcasting Holding*, paragraphs 323-326, 338- 339, 350-351 and 356-357, in relation to the market for the wholesale supply of Free To Air and basic pay TV channels.

<sup>152</sup> Form CO, footnote 173.

<sup>153</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 59.1.

<sup>154</sup> The Newzoo data does not provide a distinction between AAA games and non-AAA games. The Notifying Party has thus, on a best effort basis, manually mapped the games accounting for 99% of game time in the Newzoo data to either AAA or non-AAA and assumed that the remaining 1% are non-AAA. Newzoo also provides its own genre classification which the Notifying Party has relied on for these shares.

Xbox remain relevant for assessing the structure of the market for game development and publishing of console games.

- (160) Therefore, the Commission has relied on metrics such as MAU and game time only for an indication of the market structure and the competitive importance of both the merging parties and their competitors, in the affected markets and sub-segments that given the Parties' significant position and third party complaints related to such markets required a more detailed assessment.

7.2.1. *Development and publishing of console and PC video games*

- (161) Other than for the overall market shares by platform in Table 1, the worldwide and EEA-wide market shares by revenue for 2020, 2021 and 2022 compiled in Tables 2-6 below concern only segments of the markets for development and publishing of video games and distribution of video games, which have been identified as affected because the Parties' combined market shares exceed 20% by revenue in 2022 on either the worldwide or EEA-wide level.

- (162) Tables 2-6 provide an overview of both worldwide and EEA-wide market shares for each affected product market.

**Table 1: AAA game development and publishing market (WW and EEA, 2020 – 2022, by revenue)<sup>155 156</sup>**

Party	WW			EEA		
	2020	2021	2022	2020	2021	2022
<b>PC</b>						
Microsoft	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Activision	[5-10]%	[5-10]%	[5-10]%	[10-20]%	[10-20]%	[5-10]%
<b>Combined</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>
Tencent	[30-40]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[10-20]%
Valve Corporation	[5-10]%	[10-20]%	[10-20]%	[20-30]%	[20-30]%	[30-40]%
NetEase	[5-10]%	[5-10]%	[5-10]%	/	/	/
SmileGate	[5-10]%	[5-10]%	[5-10]%	[0-5]%	[0-5]%	[0-5]%
EA	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[10-20]%	[10-20]%
Embrace (THQ) – Perfect World	[0-5]%	[0-5]%	[5-10]%	[5-10]%	[10-20]%	[10-20]%
TakeTwo	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Ubisoft	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Wargaming.net	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Epic Games	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Others	[10-20]%	[10-20]%	[10-20]%	[5-10]%	[5-10]%	[0-5]%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

<sup>155</sup> To provide estimates for the 2022 revenue shares for the markets for development and publishing of games on console and PC, the Notifying Party used actual revenues for the Parties and linear forecasting wherever data is not available. All other third-party publishers are calculated based on a linear forecast of 2021 over 2020 revenues.

<sup>156</sup> Nothing in the case file suggests that market shares for development and publishing of AAA games on this segment are substantially different compared to market shares that consider both AAA and non-AAA games in this segment. Therefore, the Commission provides only those market shares that include only AAA games.



Party	WW			EEA		
<b>Console</b>						
Microsoft	[0-5]%	[5-10]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Activision Blizzard	[5-10]%	[5-10]%	[10-20]%	[5-10]%	[5-10]%	[0-5]%
<b>Combined</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[5-10]%</b>	<b>[5-10]%</b>	<b>[5-10]%</b>
Nintendo	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
EA	[10-20]%	[10-20]%	[20-30]%	[10-20]%	[20-30]%	[20-30]%
Take Two	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%
Sony	[10-20]%	[5-10]%	[5-10]%	[10-20]%	[5-10]%	[5-10]%
Epic Games	[5-10]%	[5-10]%	[0-5]%	[5-10]%	[5-10]%	[0-5-]%
Ubisoft	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%
Bandai Namco	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[5-10]%	[5-10]%
Embracer (THQ) – Perfect World	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[5-10]%
Others	[5-10]%	[10-20]%	[10-20]%	[20-30]%	[20-30]%	[20-30]%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
<b>PC and Console</b>						
Microsoft	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Activision Blizzard	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%
<b>Combined</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>
Tencent	[10-20]%	[10-20]%	[10-20]%	[5-10]%	[5-10]%	[5-10]%
EA	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[20-30]%
Nintendo	[10-20]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%
Take Two	[5-10]%	[5-10]%	[5-10]%	[0-5]%	[0-5]%	[0-5]%
Valve Corporation	[0-5]%	[5-10]%	[5-10]%	[5-10]%	[10-20]%	[10-20]%
Epic Games	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[0-5]%
Embracer (THQ) – Perfect World	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[5-10]%
Others	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[20-30]%	[20-30]%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: Form CO (Annex 91) and Reply to RFI 29 (Annex 4)

(163) The market share information shows that Microsoft is a small player in the market of development and publishing of AAA games, across all platforms and geographical segmentations. Its market shares in 2022 were equal or below [0-5]%, with the exception of console [0-5]% and PC and console [0-5]% worldwide only. While Activision Blizzard's shares by revenue were consistently below [5-10]% in 2022, with the exception of console worldwide ([10-20]%), the Commission notes that Activision Blizzard has managed to consolidate its position as an important video games' publisher worldwide. In the EEA, Activision Blizzard's share of the market has progressively decreased, going from [10-20]% in 2020 to [5-10]% 2022 on PC and from [5-10]% to [0-5]% in the same period on console. Accordingly, the same trend is observable in the Parties' combined shares across all platforms and for PC and console together.

(164) Tencent and Valve are the largest players in development and publishing on AAA PC video games by revenue, followed by a wide range of smaller players, with

shares around (EA and Embracer in the EEA) or below [10-20]%. On console, EA is the market leader both globally ([20-30]%) and in the EEA ([20-30]), with Nintendo ranking second. EA's shares have increased since 2020, while Nintendo's have declined both globally and, to a lesser extent, in the EEA. As for console, besides EA and Nintendo, the market is divided between a long tail of small players. Finally, when we look at the broader market segmentation of PC and console, EA and Tencent are the two largest players worldwide by revenue ([10-20]% and [10-20]%), closely followed by the Parties, with a combined share in 2022 of [10-20]%. In the EEA, the difference that separates the first player, EA, and the second, Valve is larger, with a share gap of around [0-5]%. The Parties account for [5-10]% of the total market by revenue (with a declining trend over the 2020-2022 time period).

- (165) Table 2, Table 3, Table 4 and Table 5 set out the Parties' and their main competitors' market shares, in value (by revenue), within the broader market for development and publishing of console and PC video games segmented by game type (AAA games) and game genre, both in the EEA and worldwide, for 2020, 2021 and 2022. In particular, the tables provide an overview of the Parties' and their main competitors' shares of AAA games within the following horizontally affected genre sub-segments on the relevant platforms: role-playing, racing and flying, action and adventure, and shooter.<sup>157</sup>

**Table 2: Development and publishing of AAA role-playing games (WW and EEA, 2020-2022, by revenue)**<sup>158 159</sup>

Party	WW			EEA		
	2020	2021	2022	2020	2021	2022
<b>PC</b>						
Microsoft	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Activision	[10-20]%	[10-20]%	[10-20]%	[30-40]%	[30-40]%	[30-40]%
<b>Combined</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[40-50]%</b>	<b>[30-40]%</b>	<b>[30-40]%</b>
NetEase	[20-30]%	[20-30]%	[20-30]%	/	/	/
Nexon	[20-30]%	[10-20]%	[10-20]%	[0-5]%	[0-5]%	[0-5]%
Tencent	[5-10]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
Embracer (THQ) - Perfect World	[0-5]%	[5-10]%	[5-10]%	[10-20]%	[20-30]%	[30-40]%
Others	[20-30]%	[10-20]%	[10-20]%	[20-30]%	[10-20]%	[10-20]%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: Reply to RFI 26, Annex 3

- (166) The market shares information shows that Microsoft is a small player in the development and publishing of AAA games with role playing elements on PC, with

<sup>157</sup> These are also the narrowest plausible markets.

<sup>158</sup> To provide estimates for the 2022 revenue shares for the markets for development and publishing of games on console and PC, the Notifying Party used actual revenues for the Parties and linear forecasting wherever data is not available. All other third-party publishers are calculated based on a linear forecast of 2021 over 2020 revenues.

<sup>159</sup> Nothing in the case file suggests that market shares for development and publishing of AAA games on this segment are substantially different compared to market shares that consider both AAA and non-AAA games in this segment. Therefore, the Commission provides only market shares that include only AAA games for this segment.

[0-5]% globally and [0-5]% in EEA in 2022. Moreover, Microsoft’s market share has decreased in the period from 2020 to 2022 both globally and in EEA. However, Activision Blizzard is one of the top-3 players worldwide, accounting for [10-20]% of the market total revenues in 2022. Despite a decline from [30-40]% in 2020 to [30-40]% in 2022, Activision Blizzard is the first player in the EEA. The Parties’ combined higher share in the EEA, [30-40]% compared to [10-20]% in 2022 worldwide, are due to a lower penetration of publishers like NetEase and Nexon in the EEA, that are the first ([20-30]%) and second ([10-20]%) largest players in the worldwide market. Nevertheless, the Parties in the EEA compete against two large players, Embracer ([30-40]%) and Tencent ([10-20]%). Their rapid growth – Embracer especially in two years has more than doubled its shares – overlaps with the Parties’ decrement.

**Table 3: Development and publishing of AAA racing and flying games (WW and EEA, 2020-2022, by revenue)<sup>160</sup>**

Party	WW			EEA		
	2020	2021	2022	2020	2021	2022
<b>PC</b>						
Microsoft	[30-40]%	[30-40]%	[20-30]%	[20-30]%	[20-30]%	[10-20]%
Activision Blizzard	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
<b>Combined</b>	<b>[30-40]%</b>	<b>[30-40]%</b>	<b>[20-30]%</b>	<b>[20-30]%</b>	<b>[20-30]%</b>	<b>[10-20]%</b>
Embracer (THQ) - Perfect World	[30-40]%	[30-40]%	[20-30]%	[50-60]%	[50-60]%	[60-70]%
EA	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%
Others	[20-30]%	[20-30]%	[20-30]%	[5-10]%	[5-10]%	[0-5]%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
<b>Console</b>						
Microsoft	[10-20]%	[20-30]%	[10-20]%	[10-20]%	[20-30]%	[10-20]%
Activision Blizzard	[5-10]%	[5-10]%	[10-20]%	[5-10]%	[5-10]%	[0-5]%
<b>Combined</b>	<b>[30-40]%</b>	<b>[30-40]%</b>	<b>[20-30]%</b>	<b>[20-30]%</b>	<b>[20-30]%</b>	<b>[10-20]%</b>
Nintendo	[40-50]%	[30-40]%	[30-40]%	[30-40]%	[20-30]%	[10-20]%
Embracer (THQ) - Perfect World	[0-5]%	[5-10]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
EA	[10-20]%	[5-10]%	[10-20]%	[5-10]%	[10-20]%	[30-40]%
Others	[10-20]%	[10-20]%	[10-20]%	[30-40]%	[30-40]%	[20-30]%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
<b>PC and Console</b>						
Microsoft	[20-30]%	[30-40]%	[20-30]%	[10-20]%	[20-30]%	[10-20]%
Activision Blizzard	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
<b>Combined</b>	<b>[20-30]%</b>	<b>[30-40]%</b>	<b>[20-30]%</b>	<b>[10-20]%</b>	<b>[20-30]%</b>	<b>[10-20]%</b>
Nintendo	[30-40]%	[20-30]%	[20-30]%	[20-30]%	[10-20]%	[10-20]%
Embracer (THQ) -	[10-20]%	[10-20]%	[20-30]%	[20-30]%	[20-30]%	[40-50]%

<sup>160</sup> To provide estimates for the 2022 revenue shares for the markets for development and publishing of games on console and PC, the Notifying Party used actual revenues for the Parties and linear forecasting wherever data is not available. All other third-party publishers are calculated based on a linear forecast of 2021 over 2020 revenues.

Party	WW			EEA		
	2020	2021	2022	2020	2021	2022
Perfect World						
Others	[30-40]%	[20-30]%	[20-30]%	[30-40]%	[30-40]%	[20-30]%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: Reply to RFI 26, Annex 3

(167) Within the narrow market of AAA games with flying and racing elements, Activision Blizzard’s share estimated to be around [0-5]% on PC and, respectively, [0-5]% globally and [0-5]% in the EEA on console in 2022. On the other hand, Microsoft has a market share on PC of [20-30]% worldwide and [10-20]% in the EEA, while on console the shares decrease to [10-20]% and [10-20]%.

(168) Embracer is the largest player in the market for developing and publishing on PC and console of AAA games with flying and racing elements, who has more than doubled its market shares, going from [10-20]% in 2020 to [20-30]% 2022 globally and from [20-30]% to [40-50]% in the EEA. The Parties’ combined share amounts to [20-30]% worldwide and [10-20]% in the EEA in 2022, granting the Parties the role of second biggest player worldwide and EEA-wide.

**Table 4: Development and publishing of AAA action and adventure games (WW and EEA, 2020-2022, by revenue)<sup>161 162</sup>**

Party	WW			EEA		
	2020	2021	2022	2020	2021	2022
<b>Console</b>						
Microsoft	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Activision Blizzard	[10-20]%	[10-20]%	[20-30]%	[10-20]%	[10-20]%	[5-10]%
<b>Combined</b>	<b>[20-30]%</b>	<b>[20-30]%</b>	<b>[20-30]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>
Sony	[20-30]%	[10-20]%	[5-10]%	[10-20]%	[5-10]%	[5-10]%
Epic Games	[10-20]%	[10-20]%	[5-10]%	[10-20]%	[10-20]%	[5-10]%
Nintendo	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%
Others	[30-40]%	[40-50]%	[50-60]%	[40-50]%	[50-60]%	[60-70]%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
<b>PC and Console</b>						
Microsoft	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Activision Blizzard	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[5-10]%
<b>Combined</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[20-30]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>
Epic Games	[10-20]%	[10-20]%	[5-10]%	[10-20]%	[10-20]%	[10-20]%
Sony	[10-20]%	[5-10]%	[5-10]%	[10-20]%	[5-10]%	[0-5]%

<sup>161</sup> To provide estimates for the 2022 revenue shares for the markets for development and publishing of games on console and PC, the Notifying Party used actual revenues for the Parties and linear forecasting wherever data is not available. All other third-party publishers are calculated based on a linear forecast of 2021 over 2020 revenues.

<sup>162</sup> Nothing in the case file suggests that market shares for development and publishing of AAA games on this segment are substantially different compared to market shares that consider both AAA and non-AAA games in this segment. Therefore, the Commission provides only market shares that include only AAA games for this segment.

Party	WW			EEA		
	2020	2021	2022	2020	2021	2022
Others	[50-60]%	[60-70]%	[60-70]%	[50-60]%	[60-70]%	[70-80]%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: Reply to RFI 26, Annex 3

- (169) On the market for development and publishing of AAA games with action and adventure elements on console, Microsoft has a market share by revenue of [0-5]% worldwide and [0-5]% in the EEA in 2022. Activision Blizzard's market shares by revenue have increased from [10-20]% in 2020 to [20-30]% in 2022 worldwide, while they have consistently decreased in the EEA, from [10-15]% in 2020 to [10-20]% in 2022. On the market for development and publishing of AAA games with action and adventure elements on both console and PC, Microsoft's market share by revenue is below [0-5]% worldwide and below [0-5]% in the EEA. Similarly to the console market, Activision Blizzard's market shares by revenue have increased from [10-20]% in 2020 to [10-20]% in 2022 worldwide, while they have consistently decreased in the EEA, from [10-20]% in 2020 to [5-10]% in 2022.
- (170) Other players in the market are Epic Games with market shares by revenue of [5-10]% and [10-20]% in 2022 worldwide and in the EEA respectively and Sony with market shares by revenue of [5-10]% and [0-5]% in 2022 worldwide and in the EEA. The majority of the market is split between other smaller competitors.

**Table 5: Development and Publishing of AAA shooter games (WW and EEA, 2020-2022, by revenue)<sup>163</sup>**

Party	WW			EEA		
	2020	2021	2022	2020	2021	2022
<b>Console</b>						
Microsoft	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Activision Blizzard	[30-40]%	[20-30]%	[30-40]%	[20-30]%	[10-20]%	[10-20]%
<b>Combined</b>	<b>[30-40]%</b>	<b>[30-40]%</b>	<b>[30-40]%</b>	<b>[20-30]%</b>	<b>[20-30]%</b>	<b>[10-20]%</b>
Epic Games	[20-30]%	[10-20]%	[10-20]%	[20-30]%	[10-20]%	[10-20]%
EA	[5-10]%	[10-20]%	[20-30]%	[10-20]%	[20-30]%	[20-30]%
Others	[20-30]%	[20-30]%	[20-30]%	[40-50]%	[40-50]%	[40-50]%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: Reply to RFI 26, Annex 3

- (171) In the market for development and publishing of AAA shooter console video games, the Parties' share of the market by revenue was [30-40]% worldwide and [10-20]% in the EEA. Activision Blizzard accounts for [30-40]% and [10-20]% of the market worldwide and EEA-wide, respectively. On the other hand, Microsoft represented only [0-5]% of the total market revenues globally and [0-5]% in the EEA. Other developers and publishers with notable market shares by revenue are Epic Games and EA with more than [10-20]% market share by revenue worldwide and in the

<sup>163</sup> To provide estimates for the 2022 revenue shares for the markets for development and publishing of games on console and PC, the Notifying Party used actual revenues for the Parties and linear forecasting wherever data is not available. All other third-party publishers are calculated based on a linear forecast of 2021 over 2020 revenues.

EEA. Other smaller players comprise the remaining [40-50]% of the market in the EEA and [20-30]% worldwide.

### 7.2.2. Distribution of PC and console video games

(172) Table 6 sets out the Parties' and their main competitors' market shares by revenue, within the broader market for distribution of console and PC video games and the narrower markets for distribution of PC video games on the one hand and console video games on the other hand, both in the EEA and worldwide, for 2020, 2021 and 2022.

**Table 6: Overall game distribution (WW and EEA, 2020 - 2022, by revenue)**

Party	WW			EEA		
	2020	2021	2022	2020	2021	2022
<b>PC</b>						
Microsoft	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[0-5]%	[0-5]%
Activision Blizzard	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%
<b>Combined</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>
Tencent	[20-30]%	[20-30]%	[20-30]%	[10-20]%	[10-20]%	[10-20]%
Valve Corporation	[20-30]%	[20-30]%	[20-30]%	[40-50]%	[50-60]%	[40-50]%
NetEase	[10-20]%	[10-20]%	[10-20]%	/	/	/
EA	[0-5]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[10-20]%
Others	[10-20]%	[10-20]%	[20-30]%	[10-20]%	[10-20]%	[10-20]%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
<b>Console</b>						
Microsoft	[30-40]%	[30-40]%	[30-40]%	[10-20]%	[10-20]%	[20-30]%
Activision Blizzard	/	/	/	/	/	/
<b>Combined</b>	<b>[30-40]%</b>	<b>[30-40]%</b>	<b>[20-30]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[20-30]%</b>
Sony	[50-60]%	[50-60]%	[40-50]%	[60-70]%	[60-70]%	[60-70]%
Nintendo	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
EA	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Square Enix	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
<b>PC and Console</b>						
Microsoft	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
Activision Blizzard	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[0-5]%
<b>Combined</b>	<b>[20-30]%</b>	<b>[20-30]%</b>	<b>[20-30]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>
Sony	[20-30]%	[20-30]%	[20-30]%	[30-40]%	[30-40]%	[30-40]%
Nintendo	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%
Tencent	[10-20]%	[10-20]%	[10-20]%	[5-10]%	[5-10]%	[5-10]%
Valve	[10-20]%	[10-20]%	[10-20]%	[20-30]%	[20-30]%	[20-30]%
Others	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: Form CO (Annex 91), Reply to RFI 26 (Annex 4), Reply to RFI 29 (Annex 5).

- (173) With respect to shares by revenue for overall video games distribution, the market information shows that Microsoft is a small player across PC games both globally and in the EEA, while its shares on console in 2022 were [20-30]% worldwide and [20-30]% in the EEA. In the EEA, Microsoft has increased its shares for console video games from [10-20]% in 2020 to [20-30]% to 2022. In the same time period, Sony has experienced a decline in its EEA shares, from [60-70]% to [60-70]%. Nevertheless, Sony still holds a leading position in the market of overall games distribution on console both globally and in the EEA. The third largest player is Nintendo that has maintained its market share in the last three years and currently accounts for [10-20]% of the total market.
- (174) On PC, the Parties' combined shares in 2022 accounted for [10-20]% both in the EEA and worldwide. The two geographical markets differ when it comes to competitors and their presence in the market. Valve Corporation is the strongest player in both but its shares in the EEA are substantially higher ([40-50]%) compared to its share worldwide ([20-30]%). Furthermore, a China-based firm, NetEase, appears to be inactive in the EEA market for overall games distribution, while its shares globally account for [10-20]% of the total market.
- (175) Finally, by taking into account both platforms together, the Parties' combined share in 2022 was [20-30]% worldwide and [10-20]% in the EEA. Microsoft contributes to most of it, while Activision Blizzard's shares cover less than [0-5]% of the total market. For what concerns competition, Sony still holds a leader position, with [20-30]% shares worldwide and [30-40]% in the EEA. Sony is then followed by Microsoft globally ([10-20]%) and by Valve Corporation in the EEA ([20-30]%).

7.2.3. *Supply of PC OSs*

- (176) Table 7 sets out the Parties' and their main competitors' market share in the market for the supply of PC OSs.

**Table 7: Average monthly share of supply of PC OSs (WW and EEA, 2020-2022)**

Operating System	WW			EEA		
	2020	2021	2022	2020	2021	2022
Microsoft Windows	[70-80]%	[70-80]%	[70-80]%	[70-80]%	[70-80]%	[70-80]%
Mac OS X	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
Linux	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Chrome OS	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Others	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: Reply to RFI 8(Annex 73) and Reply to RFI 34

- (177) Microsoft's market share in the market for the supply of PC OSs was [70-80]% in 2022 worldwide and [70-80]% in the EEA, substantially higher compared to Apple, the second biggest player in the market; Mac OS X accounts for [10-20]% and [10-20]% of the market, globally and in the EEA. Lastly, Linux and Chrome OS have a small presence in the market, less than [0-5]% both in the EEA and globally.

### 7.3. Horizontal non-coordinated effects

- (178) Based on the market shares by revenue<sup>164</sup> in 2022 provided by the Notifying Party, the Commission has identified five product market segments where the Parties' combined market share exceeds 20% by revenue in 2022 either on a worldwide or EEA-wide level.
- (a) Development and publishing of AAA Role Playing video games on PC (EEA);
  - (b) Development and publishing of AAA Racing and Flying video games on: (i) PC and console (worldwide); (ii) PC (worldwide); and (iii) console (worldwide);
  - (c) Development and publishing of AAA Action and Adventure video games on: (i) PC and console (worldwide); and (ii) console (worldwide);
  - (d) Development and publishing of AAA Shooter video games on console (worldwide); and
  - (e) Distribution of video games on PC and console (worldwide).
- (179) The Commission will therefore not provide a separate assessment of the impact of the Transaction on the markets for development and publishing of video games and distribution of video games and their sub-segments, where the Parties' activities are limited so that their combined market share is below 20% by revenue in 2022 and where accordingly competition concerns are unlikely to arise.
- (180) Where the Transaction does not result in a significant impediment of competition on a narrow affected market segment, the Commission considers that the Transaction will also not result in a significant impediment of competition on related broader unaffected market segments given that the Parties' combined market share by revenue in 2022 on those markets is even more limited (i.e. below 20%).

#### 7.3.1. Legal framework

- (181) Under Article 2(2) and (3) of the Merger Regulation, the Commission must assess whether a proposed concentration would significantly impede effective competition in the internal market or in a substantial part of it, in particular through the creation or strengthening of a dominant position. In this respect, a merger may entail horizontal and/or vertical effects.<sup>165</sup>
- (182) Horizontal effects are those deriving from a concentration where the undertakings concerned are actual or potential competitors of each other in one or more of the relevant markets concerned. The Commission appraises such effects in accordance with the Horizontal Merger Guidelines.<sup>166</sup>
- (183) The Horizontal Merger Guidelines describe horizontal non-coordinated effects as follows: "*A merger may significantly impede effective competition in a market by removing important competitive constraints on one or more sellers who consequently have increased market power. The most direct effect of the merger will be the loss of competition between the merging firms. For example, if prior to the merger one of*

---

<sup>164</sup> Unless specified otherwise, the market share information specified in this Decision will refer to market shares by revenue.

<sup>165</sup> Vertical effects are those deriving from a concentration where the undertakings concerned are active on different or multiple levels of the supply chain. A concentration may involve both types of effects.

<sup>166</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Horizontal Merger Guidelines"), OJ C 31,05.02.2004.



*the merging firms had raised its price, it would have lost some sales to the other merging firm. The merger removes this particular constraint. Non-merging firms in the same market can also benefit from the reduction of competitive pressure that results from the merger, since the merging firms' price increase may switch some demand to the rival firms, which, in turn, may find it profitable to increase their prices. The reduction in these competitive constraints could lead to significant price increases in the relevant market".*<sup>167</sup>

- (184) Generally, a merger that gives rise to such non-coordinated effects would significantly impede effective competition by creating or strengthening of the dominant position of a single firm post-merger.
- (185) However, under the substantive test set out in Article 2(2) and (3) of the Merger Regulation, mergers that do not lead to the creation or the strengthening the dominant position of a single firm may create competition concerns in oligopolistic markets. Indeed, the Merger Regulation recognises that, in oligopolistic markets, it is all the more necessary to maintain effective competition.<sup>168</sup> This is in view of the more significant consequences that mergers may have on such markets. For this reason, the Merger Regulation provides that: "*under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition.*"<sup>169</sup>
- (186) Paragraph 24 of the Horizontal Merger Guidelines, which sets out the economic rationale underlying non-coordinated anti-competitive effects in horizontal mergers, states that a merger may significantly impede effective competition in a market by removing important competitive constraints on one or more firms. This paragraph furthermore clarifies that the most direct effect of the merger will be the loss of competition between the merging firms. In order to assess whether a notified merger will result in a significant impediment of effective competition on the basis of non-coordinated effects, the Commission therefore needs to analyse primarily the extent of the competitive constraint imposed pre-merger by each of the merging parties on each other. Paragraph 24 of the Horizontal Merger Guidelines also clarifies that the removal of the rivalry between the parties may have consequences on the other players, who may find it profitable to increase their prices. The ultimate effect would thus typically be price increases by the merging parties but also by competitors in the relevant market.
- (187) The Commission carries out an overall assessment of the likely effects of the Transaction arising from the elimination of important competitive constraints, taking into consideration the overall body of evidence in its file. The conclusion that a transaction leads to a significant impediment of effective competition is reached taking into account the degree to which all the relevant factors, including the ones

---

<sup>167</sup> Horizontal Merger Guidelines, paragraph 24.

<sup>168</sup> Merger Regulation, recital 25.

<sup>169</sup> Merger Regulation, recital 25. Similar wording is also found in paragraph 25 of the Horizontal Merger Guidelines. See also Commission decision of 2 July 2014 in case M.7018 – Telefónica Deutschland/E-Plus, recital 113; Commission decision of 28 May 2014 in case M.6992 – Hutchison 3G UK/Telefónica Ireland, recital 179; Commission decision of 12 December 2012 in case M.6497 – Hutchison 3G Austria/Orange Austria, recital 88.

listed in paragraphs 27 - 38 of the Horizontal Merger Guidelines, are present in the case under consideration.

- (188) The Horizontal Merger Guidelines list a number of factors, which may influence whether or not significant horizontal non-coordinated effects are likely to result from a merger. However, not all of these factors need to be present to make significant non-coordinated effects likely and it is not an exhaustive list.<sup>170</sup>
- (189) Among the factors listed in the Horizontal Merger Guidelines are: the large market shares of the merging firms; the fact that the merging firms are close competitors; the limited possibilities for customers to switch suppliers; the fact that the merged entity would be able to hinder expansion by competitors; and the fact that the merger would eliminate an important competitive force.<sup>171</sup>
- (190) As regards the elimination of an important competitive force, according to the Horizontal Merger Guidelines, some firms have more of an influence on the competitive process than their market share would suggest. A merger involving such a firm may change the competitive dynamics in a significant anticompetitive way, in particular in a market that is already concentrated
- (191) Finally, the Horizontal Merger Guidelines describe a number of factors, which could counteract the harmful non-coordinated effects of the merger on competition, that is, the likelihood of buyer power, entry, efficiencies and the fact that one of the merging parties is a failing firm ("failing firm defence").<sup>172</sup>
- 7.3.2. *Horizontal non-coordinated effects in the market for development and publishing AAA Role Playing video games*
- (192) Microsoft's main games with role playing elements are *The Elder Scrolls* and *Fallout* titles both published by ZeniMax. Activision Blizzard's main video games in this space are *World of Warcraft* (only available on PC) and *Diablo*.<sup>173</sup>
- (193) The combined entity's EEA-wide market share in the market for development and publishing of AAA role playing PC video games exceeded 20% in 2022 ([30-40]%) by revenue. Therefore, the Commission has assessed whether the Transaction gives rise to competition concerns with regard to horizontal non-coordinated effects in the EEA-wide market for the distribution of AAA role playing PC video games. The Transaction gives rise to a horizontal overlap in the market also on a worldwide level. In this respect, however, the Parties' activities do not give rise to an affected market given that their worldwide market share ([10-20]%) is limited and below 20% in 2022. By reason of the Parties' limited market share and the unlikelihood of a significant impediment to competition arising in the narrower plausible EEA-wide market (see recitals (200)-(204) below), the Commission finds it unlikely that the Transaction is liable to impede effective competition in the worldwide market for development and publishing of PC AAA role playing video games.
- (194) Further, the Transaction gives rise to horizontal overlap in the market for development and publishing of AAA role playing **console** video games. However,

---

<sup>170</sup> Horizontal Merger Guidelines, paragraph 26.

<sup>171</sup> Horizontal Merger Guidelines, paragraphs 27 et seq.

<sup>172</sup> Horizontal Merger Guidelines, paragraphs 64-91.

<sup>173</sup> The Notifying Party's Reply to RFI 8, question 2 footnote 20. The Notifying Party notes that some genres are sub-segmented, highlighting the variations within a single category and the fluidity of gameplay elements common across genres. For example, [*business secrets regarding business strategy*].

the combined entity's market share is materially smaller and below 20% worldwide ([5-10]%) and in the EEA ([0-5]%) in 2022. In this respect, the Parties' activities do not give rise to affected markets under any plausible geographic market definition. Therefore, by reason of the Parties' limited market share, the Commission finds it unlikely that the Transaction is liable to impede effective competition in the worldwide and EEA-wide market for development and publishing of console AAA role playing video games.

- (195) Finally, the Transaction gives rise to horizontal overlap in the broader market for development of AAA role playing console and PC video games. However, the combined entity's market share by revenue remains below 20% worldwide ([10-20]%) and in the EEA ([10-20]%) in 2022. In this respect, the Parties' activities do not give rise to affected markets under any plausible geographic market definition. Therefore, by reason of the Parties' limited market share, the Commission finds it unlikely that the Transaction is liable to impede effective competition in the worldwide and EEA-wide market for development and publishing of console and PC AAA role playing video games.

#### 7.3.2.1. The Notifying Party's view

- (196) The Notifying Party submits that the Transaction would not give rise to any competitive concerns in relation to the affected market for development and publishing of AAA role playing PC video games in the EEA for the following reasons.
- (197) First, the Notifying Party submitted that, while the Parties' combined share in the development and publishing of role playing PC video games exceeded 20% in 2021 in the EEA, the Transaction results in a very minor increment ([0-5]%) in the EEA in 2021.<sup>174</sup>
- (198) Second, the Notifying Party notes that the Parties' EEA-wide share in the development and publishing of role-playing PC video games is higher than compared to worldwide levels, due to the lower penetration of publishers like NetEase, Nexon and NCSoft. However, according to the Notifying Party, the Parties remain constrained also on the EEA-wide market by a number of large publishers such as Embracer/Perfect World, Tencent, CD Projekt, Nexon and EA.<sup>175</sup>
- (199) Third, the Notifying Party submits that on both PC and console, the Parties are also constrained by a long tail of successful smaller publishers, such as Pearl Abyss (*Black Desert Online*), Studio Wildcard (*ARK: Genesis*), Sega (*Phantasy Star Online*), Techland (*Dying Light*), ConcernedApe (*Stardew Valley*) and Playstack (*Mortal Shell*).<sup>176</sup>

#### 7.3.2.2. The Commission's assessment

- (200) The Commission considers that the Transaction does not result in a significant impediment of effective competition in the horizontally affected segment of the market for development and publishing of AAA role playing PC video games (in the EEA) for the following reasons.<sup>177</sup>

---

<sup>174</sup> The Notifying Party's Reply to RFI 8, question 2, paragraph 2.36.

<sup>175</sup> The Notifying Party's Reply to RFI 8, question 2, paragraph 2.37.

<sup>176</sup> The Notifying Party's Reply to RFI 8, question 2, paragraph 2.38.

<sup>177</sup> The combined entity's EEA-wide market share by revenue also exceeds 20% in a market for development and publishing of role-playing video games (AAA and non-AAA games) on (i) PC and (ii) console and PC. However, given the significant competitive pressure of AAA games, the Commission

- (201) First, while both Parties are active in development and publishing of AAA role playing PC video games in the EEA, the Commission observes that the increment brought about by Microsoft in this market is limited: [0-5]% by revenue on PC in 2022.
- (202) Second, in the market for development and publishing of AAA role playing PC video games, the combined entity will remain constrained by two large developers and publishers– Embracer/Perfect World (*Fantasy Westward* series, *Eve Online*) and Tencent (*Archeage*, *Path of Exile*), who significantly expanded their share of the market from 2020 to 2022. Embracer/Perfect World more than doubled its market share by revenue from [10-20]% in 2020 to [30-40]% in 2022 in the EEA, and Tencent grew its market share by revenue from [10-20]% in 2020 to [10-20]% in 2022 in the EEA. In fact, Embracer/Perfect World accounts for a similar share of the market as the combined entity in 2022 ([30-40]%, compared to [30-40]% of the combined entity by revenue) in the EEA.
- (203) Finally, the Commission notes that it has not received any complaints from the respondents to the market investigation regarding horizontal non-coordinated effects on the horizontally affected segments of the market for development and publishing of AAA role playing video games in the EEA.
- (204) In light of the above, the Commission concludes that the Transaction does not result in a significant impediment of effective competition in the horizontally affected segment of the market for development and publishing of PC AAA role playing video games in the EEA.

### 7.3.3. *Horizontal non-coordinated effects in the market for AAA Racing and Flying games*

7.3.3.1. Microsoft’s main games with racing and flying elements are *Microsoft Flight Simulator* and *Forza*, while Activision Blizzard’s only title in this category is *Crash Team Racing*.<sup>178</sup>

- (205) In the market for development and publishing of AAA racing and flying PC video games the combined entity’s market share exceeds 20% by revenue worldwide in 2022 ([20-30]%). Therefore, the Commission has assessed whether the Transaction gives rise to competition concerns with regard to horizontal non-coordinated effects in the worldwide market for the distribution of AAA racing and flying PC video games. The Transaction gives rise to horizontal overlap in the market also on the EEA level. In this respect, however, the Parties’ activities do not give rise to an affected market given that their EEA-wide market share ([10-20]%) is limited and below 20% in 2022. By reason of the Parties’ limited market share, the Commission finds it unlikely that the Transaction is liable to impede effective competition in the EEA-wide market for development and publishing of PC AAA racing and flying video games.
- (206) Further, in the market for development and publishing of AAA racing and flying **console** video games the combined entity’s market share exceeds 20% in 2022 by revenue ([20-30]%) only on a worldwide level in 2022. Therefore, the Commission has assessed whether the Transaction gives rise to competition concerns with regard

---

considers that the competitive dynamics of the market that includes development and publishing of only AAA games applies in particular to the market that includes development and publishing of AAA as well as non-AAA games.

<sup>178</sup> The Notifying Party’s Reply to RFI 8, question 2, paragraph 2.29. The Notifying Party notes that overall, more than 300 games can be categorised as having “racing and flying” elements.

to horizontal non-coordinated effects in the worldwide market for the distribution of AAA racing and flying console video games. The Transaction also gives rise to horizontal overlap in the market also on the EEA level. In this respect, however, the Parties' activities do not give rise to an affected market given that their EEA-wide market share ([10-20]%) is limited and below 20% in 2022. By reason of the Parties' limited market share, the Commission finds it unlikely that the Transaction is liable to impede effective competition in the EEA-wide market for development and publishing of console AAA racing and flying video games.

- (207) Finally, in the market for development and publishing of AAA racing and flying of **both console and PC** video games the combined entity's market share by revenue exceeds 20% in 2022 ([20-30]%) only on a worldwide level. The Transaction also gives rise to horizontal overlap in the market also on the EEA level. In this respect, however, the Parties' activities do not give rise to an affected market given that their EEA-wide market share ([10-20]%) is limited and below 20% in 2022. By reason of the Parties' limited market share, the Commission finds it unlikely that the Transaction is liable to impede effective competition in the EEA-wide market for development and publishing of console and PC AAA racing and flying video games.

#### 7.3.3.2. The Notifying Party's view

- (208) The Notifying Party submits that the Transaction would not give rise to any competitive concerns in relation to the market for development and publishing of AAA racing and flying on each PC and console, or in relation to the development and publishing of AAA racing and flying video games on the wider market including both console and PC video games for the following reasons.
- (209) First, the Notifying Party considers that the Parties' activities barely overlap, with Activision Blizzard's share being miniscule (estimated to be less than [0-5]% worldwide and in the EEA on PC, and ca. [0-5]% on console worldwide).<sup>179</sup>
- (210) Second, the Notifying Party submits that the Parties' offerings are highly differentiated. According to the Notifying Party, *Microsoft Flight Simulator* is a state-of-the-art hyper-realistic flying simulation that can be used with flight simulating hardware in order to learn the basic concepts of real-world aircraft piloting. Similarly, *Forza* offers realistic racing experiences with software replicas of real-world cars and (often) racing circuits. In contrast, Activision Blizzard's *Crash Team Racing* is an arcade-style kart racing game, which is not designed to offer the highly realistic racing and flying experiences that *Forza* and *Flight Simulator* are known for, respectively.<sup>180</sup>

#### 7.3.3.3. The Commission's assessment

- (211) In the first place, the Commission considers that the Transaction does not result in a significant impediment of effective competition in the horizontally affected segments of the market for development and publishing of AAA racing and flying video games on:(i) PC (worldwide); and (ii) console (worldwide); for the following reasons.
- (212) First, while both Parties are active in development and publishing of AAA racing and flying of each PC and console video games worldwide, the Commission observes that the increment brought about by Activision Blizzard is negligible, irrespective of

---

<sup>179</sup> The Notifying Party's Reply to RFI 8, question 2 paragraph 2.30.

<sup>180</sup> The Notifying Party's Reply to RFI 8, question 2, paragraph 2.30.

the market segmentation: (i) less than [0-5]% on PC in 2022 worldwide; and (ii) less than [0-5]% on console in 2022 worldwide.

- (213) Second, the combined entity's market share in development and publishing of AAA racing and flying console video games is only slightly above 20% [20-30]% in 2022, and thus well below the 25% threshold set by the Horizontal Merger Guidelines for concentrations that are presumed to be compatible with the internal market.<sup>181</sup>
- (214) Third, the Parties will remain competitive constrained by developers and publishers with significant share of the market, irrespective of the market segmentation. On PC, Embracer/Perfect World (*Monster Energy Super Cross*, *Moto GP*, *Hot Wheels Unleashed*) remains the market leader with more than [40-50]% market share by revenue in 2022 worldwide. On console, Embracer/Perfect World comes close to the combined entity in the share by revenue ([10-20]% compared to the combined entity's [20-30]% in 2022) worldwide, while EA (*F1 2021*, *Need for Speed*, *Grid*) also has a significant market share ([10-20]% in 2022) worldwide. In addition, a trail of large publishers will continue to provide meaningful competition in development and publishing of AAA racing and flying PC and console video games worldwide, such as Sony (*Gran Turismo*), Digital Bros (*Assetto Corsa*), Bandai Namco (*Ace Combat*) and Ubisoft (*The Crew*).
- (215) In the second place, the Commission considers that the Transaction does not raise competition concerns on the horizontally affected broader market for development and publishing of AAA racing and flying video games that includes both console and PC video games (worldwide).
- (216) While the Parties' activities overlap in development and publishing of AAA racing and flying PC and console video games worldwide, the Commission observes that their combined market shares are limited ([20-30]%), and thus below the 25% threshold set by the Horizontal Merger Guidelines for concentrations that are presumed to be compatible with the internal market.<sup>182</sup>
- (217) Finally, the Commission notes that it has not received any complaints from the respondents to the market investigation regarding horizontal non-coordinated effects on the horizontally affected segments of the market for development and publishing of AAA racing and flying video games: (i) PC (worldwide); or (ii) console (worldwide); or (iii) console and PC (worldwide).
- (218) In light of the above, the Commission concludes that the Transaction does not result in a significant impediment of effective competition in the horizontally affected segments of the market for development and publishing of AAA racing and flying video games on: (i) PC (worldwide); (ii) console (worldwide); or (iii) on console and PC (worldwide).

#### 7.3.4. *Horizontal non-coordinated effects in the market for AAA Action and Adventure games*

- (219) Microsoft's main game franchises that can broadly be categorised as action and adventure are *Minecraft*, *Sea of Thieves*, *Fallout*, and *The Elder Scrolls*. Activision

---

<sup>181</sup> Horizontal Merger Guidelines, para. 18.

<sup>182</sup> Horizontal Merger Guidelines, para. 18.

Blizzard's main franchises with the same genre elements are *Call of Duty* and *Overwatch*, which also feature in the shooter category.<sup>183</sup>

- (220) In the market for development and publishing of AAA action and adventure console video games, the combined entity's market share exceeds 20% by revenue in 2022 worldwide ([20-30]%). Therefore, the Commission has assessed whether the Transaction gives rise to competition concerns with regard to horizontal non-coordinated effects in the worldwide market for the distribution of AAA action and adventure console video games. The Transaction gives rise to horizontal overlap in this market segment also on the EEA level. In this respect, however, the Parties' activities do not give rise to an affected market because combined entity's EEA-wide market share remains below 20% by revenue in 2022 ([10-20]%). By reason of the Parties' limited market share, the Commission finds it unlikely that the Transaction is liable to impede effective competition in the EEA-wide market for development and publishing of console AAA action and adventure video games.
- (221) The Transaction gives rise to horizontal overlaps in the market for the development and publishing of **PC** AAA action and adventure video games. In this respect, however, the Parties' activities do not give rise to affected markets under any possible geographic market definition. The combined entity's market shares are limited and remain below 20% by revenue in 2022 both worldwide ([10-20]%) and in the EEA ([10-20]%). Therefore, by reason of the Parties' limited market share, the Commission finds it unlikely that the Transaction is liable to impede effective competition in the worldwide and EEA-wide market for development and publishing of PC AAA action and adventure video games.
- (222) In the market for development and publishing of **both console and PC** AAA action and adventure video games, the combined entity's market shares exceeds 20% by revenue in 2022 ([20-30]%) only on a worldwide level. Therefore, the Commission has assessed whether the Transaction gives rise to competition concerns with regard to horizontal non-coordinated effects in the worldwide market for the distribution of AAA action and adventure console and PC video games. The Transaction also gives rise to horizontal overlap in this market segment also on the EEA level. In this respect, however, the Parties' activities do not give rise to an affected market because combined entity's EEA-wide market share remains below 20% by revenue in 2022 ([10-20]%). By reason of the Parties' limited market share, the Commission finds it unlikely that the Transaction is liable to impede effective competition in the EEA-wide market for development and publishing of console and PC AAA action and adventure video games.

#### 7.3.4.1. The Notifying Party's view

- (223) The Notifying Party submits that the Transaction does not give rise to any competitive concerns in relation to the market for development and publishing of AAA action and adventure console video games, or in relation to the development and publishing of AAA action and adventure video games on the wider market including PC and console video games for the following reasons.
- (224) The Notifying Party considers that on the market for development and publishing of AAA action and adventure console video games, the Parties remain constrained by a

---

<sup>183</sup> The Notifying Party's Reply to RFI 8, question 2, paragraph 2.22 and footnote 15. The Notifying Party notes that overall, there are more than 3,500 games that can be categorised as having "action & adventure" elements.

number of larger publishers worldwide, such as Epic Games (*Fortnite*); Sony (*Horizon*, *Marvel Spider-Man*, *God of War*, *Uncharted*); EA (*Anthem*, *Star-Wars Jedi: Fallen Order*, *Mass Effect*, and *Battlefield*); and Ubisoft (*Assassins' Creed*, *Far Cry*, *Prince of Persia*, *Immortals Fenyx Rising*, *Watchdogs*, and others).<sup>184</sup>

- (225) In addition, the Notifying Party submits that on both PC and console, the Parties compete against a long tail of successful smaller publishers such as Capcom (*Resident Evil*), Double Eleven (*Rust*), IO Interactive (*Hitman*), Focus Entertainment (*Insurgency: Sandstorm*) and Hi-Rez Studios (*Smite*).<sup>185</sup>

#### 7.3.4.2. The Commission's assessment

- (226) The Commission considers that the Transaction does not result in a significant impediment of effective competition in the horizontally affected segments of the market for development and publishing of (i) AAA action and adventure console video games (worldwide); and (ii) AAA action and adventure console and PC video games (worldwide) for the following reasons.<sup>186</sup>
- (227) First, the Parties' combined share by revenue in development and publishing of AAA action and adventure console video games worldwide is limited, irrespective of the metric applied. On console, the Parties' combined market share by revenue is limited in 2022 ([20-30]%) worldwide, and thus well below the 25% threshold set by the Horizontal Merger Guidelines for concentrations that are presumed to be compatible with the internal market.<sup>187</sup> Similarly, the Parties' combined market share by revenue barely exceeds 20% in 2021 ([20-30]%) and 2020 ([20-30]%) on console worldwide.
- (228) Furthermore, the wider market for development and publishing of AAA action and adventure video games that includes both PC and console video games is affected by account of the Parties' combined market share by revenue in 2022 worldwide, which barely exceeds 20% threshold ([20-30]%). The Parties' combined market share is thus well below the 25% threshold set by the Horizontal Merger Guidelines for concentrations that are presumed to be compatible with the internal market.<sup>188</sup>
- (229) Second, the Commission observes that the increment brought about by Microsoft in development and publishing of AAA action and adventure video games, on console as well as on console and PC, is limited (below [0-5]% by revenue worldwide in 2022).
- (230) Third, the market for development and publishing of AAA action and adventure console video games hosts a large number of credible competitors. All large developers and publishers are active in this market on the worldwide level, such as Epic Games ([5-10]% by revenue in 2022); Ubisoft ([5-10]% by revenue in 2022); Nintendo ([5-10]% by revenue in 2022); Take Two ([5-10]% by revenue in 2022) and EA ([5-10]% by revenue in 2022). The competitive landscape is similar in the

---

<sup>184</sup> The Notifying Party's Reply to RFI 8, question 2, paragraph 2.24.

<sup>185</sup> The Notifying Party's Reply to RFI 8, question 2, paragraph 2.25.

<sup>186</sup> The combined entity's worldwide market share by revenue in 2022 also exceeds 20% in a market for development and publishing of action and adventure console video games (both AAA and non-AAA games) ([20-30]%). However, given the significant competitive pressure of AAA games, the Commission considers that the competitive dynamics of the market that includes development and publishing of only AAA games applies in particular to the market that includes development and publishing of AAA as well as non-AAA games.

<sup>187</sup> Horizontal Merger Guidelines, para. 18.

<sup>188</sup> Horizontal Merger Guidelines, para. 18.



wider market including both console and PC video games of the action and adventure genre worldwide.

- (231) Finally, the Commission notes that it has not received any complaints from the respondents to the market investigation regarding horizontal non-coordinated effects on the affected segments of the market for development and publishing of AAA action and adventure video games on: (i) console (worldwide); or of (ii) console and PC (worldwide).
- (232) In light of the above, the Commission concludes that the Transaction does not result in a significant impediment of effective competition in the horizontally affected segments of the market for development and publishing of AAA action and adventure video games on: (i) console (worldwide); or on (ii) console and PC (worldwide).
- 7.3.5. *Horizontal non-coordinated effects in the market for AAA Shooter (including battle royale) games*
- (233) Microsoft's main games with shooter elements are *Halo*, *Gears of War*, and *Doom*. Activision Blizzard's main games with these elements are *Call of Duty* and *Overwatch*.<sup>189</sup>
- (234) In the worldwide market for development and publishing of AAA shooter console video games, the combined entity's market share exceeds 20% by revenue in 2022 worldwide ([30-40]%). Therefore, the Commission has assessed whether the Transaction gives rise to competition concerns with regard to horizontal non-coordinated effects in the worldwide market for the distribution of AAA shooter console video games.
- (235) The Transaction gives rise to a horizontal overlap in this market segment also on the EEA level. In this respect, however, the Parties' activities do not give rise to an affected market because the combined entity's EEA-wide market share remains below 20% by revenue in 2022 ([10-20]%). Therefore, by reason of the Parties' limited market share and the unlikelihood of a significant impediment to competition arising in the narrower plausible EEA-wide market (see recitals (242)-(246) below), the Commission finds it unlikely that the Transaction is liable to impede effective competition in the EEA-wide market development and publishing of console shooter video games.
- (236) Furthermore, the Transaction also gives rise to horizontal overlaps in the market for the development and publishing of **PC** shooter video games. In this respect, however, the Parties' activities do not give rise to affected markets under any plausible geographic market definition. The combined entity's market shares are limited and remain below 20% by revenue in 2022 both worldwide ([5-10]%) and in the EEA ([5-10]%).
- (237) The Transaction also gives rise to horizontal overlaps in the market for the development and publishing of **both console and PC** shooter video games. In this respect, however, the Parties' activities do not give rise to affected markets under any plausible geographic market definition. The combined entity's market shares remain below 20% by revenue in 2022 both worldwide ([10-20]%) and in the EEA ([5-10]%).

---

<sup>189</sup> The Notifying Party's Reply to RFI 8, question 2, paragraph 2.39. The Notifying Party submitted that overall, more than 700 games can be categorised as having "shooter" elements.

(238) Therefore, by reason of the Parties' limited market share, the Commission finds it unlikely that the Transaction is liable to impede effective competition in the worldwide and EEA-wide market for (i) development and publishing of PC shooter video games or (ii) development and publishing of both console and PC shooter video games.

#### 7.3.5.1. The Notifying Party's view

(239) The Notifying Party submits that the Transaction would not give rise to any competitive concerns in relation to the market for development and publishing of AAA shooter console video games for the following reasons.

(240) First, the Notifying Party considers that the increment resulting from the Transaction remains limited worldwide. In addition, the Parties remain constrained by other global publishers such as Epic Games, EA and Ubisoft.<sup>190</sup>

(241) Second, the Notifying Party submits that the Parties are constrained by a long tail of successful smaller publishers such as Krafton (*PUBG*), Facepunch Studios (*Rust*), Focus Home Interactive (*Insurgency: Sandstorm*), Digital Extremes (*Warframe*), 1047 Games (*Splitgate*) and Team17 (*Hell Let Loose*).<sup>191</sup>

#### 7.3.5.2. The Commission's assessment

(242) The Commission considers that the Transaction does not result in a significant impediment of effective competition in the horizontally affected market segment for development and publishing of AAA shooter console video games (worldwide) for the following reasons.<sup>192</sup>

(243) First, while both Parties are active in development and publishing of AAA shooter console video games worldwide, the Commission observes that the increment brought about by Microsoft is limited and decreasing rapidly. On a worldwide level by revenue, the increment was less than 5% in 2021 ([0-5]%) and 2020 ([0-5]%) and only [0-5]% in 2022 worldwide.

(244) Second, large developers and publishers also have a presence on the market and provide meaningful competition to the merged entity worldwide: EA (*Battlefield*, *Apex Legends*, *Titanfall*, *Star Wars Battlefront*, and others) with [20-30]% share by revenue worldwide, Epic Games (*Fortnite*) with [10-20]% share by revenue worldwide and Ubisoft (*Tom Clancy*) with [5-10]% share by revenue worldwide.

(245) Finally, the Commission notes that it has not received any complaints from the respondents to the market investigation regarding horizontal non-coordinated effects on the market for development and publishing of AAA shooter console games (worldwide).

(246) In light of the above, the Commission concludes that the Transaction does not result in a significant impediment of effective competition in the horizontally affected market for development and publishing of AAA shooter console video games (worldwide).

---

<sup>190</sup> The Notifying Party's Reply to RFI 8, question 2, paragraph 2.43.

<sup>191</sup> The Notifying Party's Reply to RFI 8, question 2, paragraph 2.45.

<sup>192</sup> The combined entity's worldwide market share by revenue in 2022 also exceeds 20% in a market for development and publishing of shooter console video games (both AAA and non-AAA games) ([30-40]%). However, given the significant competitive pressure of AAA games, the Commission considers that the competitive dynamics of the market that includes development and publishing of only AAA games applies in particular to the market that includes development and publishing of AAA as well as non-AAA games.

7.3.6. *Horizontal non-coordinated effects in the market for distribution of video games on PC and console*

- (247) In the market for distribution of console and PC video games the merged entity's share exceeds 20% when considering market shares by revenue on a worldwide level ([20-30]% in 2022). Therefore, the Commission has assessed whether the Transaction gives rise to competition concerns with regard to horizontal non-coordinated effects in the worldwide market for the distribution of console and PC video games.
- (248) The EEA-wide market for distribution of console and PC video games is not horizontally affected, given that the Parties' combined share is below 20% by revenue in the EEA in 2022 ([10-20]%). By reason of the Parties' limited market share, the Commission finds it unlikely that the Transaction is liable to impede effective competition in the EEA-wide market for distribution of console and PC video games.
- (249) The Transaction results in a horizontal overlap also with regard to narrower worldwide and EEA-wide market for distribution of video games on PC. In this respect, however, the Parties' activities do not give rise to an affected market because the combined entity's market share remains below 20% by revenue in 2022 worldwide ([10-20]%) and in the EEA ([10-20]%). Therefore, the Commission will not provide a separate assessment of the impact of the Transaction on the market for distribution of PC video games. By reason of the Parties' limited market share, the Commission finds it unlikely that the Transaction is liable to impede effective competition in the worldwide and EEA-wide market for distribution of video games on PC.

7.3.6.1. The Notifying Party's view

- (250) The Notifying Party submits that the Transaction would not give rise to any competitive concerns in relation to the market for distribution of console and PC video games (worldwide) for the following reasons.
- (251) First, the Notifying Party submits that the merged entity's market shares will be low, below the 25% threshold set by the Horizontal Merger Guidelines for concentrations that are presumed to be compatible with the internal market.<sup>193</sup> Furthermore, the increment brought about by Activision Blizzard is very low, since it has never exceeded [0-5]% in the last three years. In addition, the merged entity's post-Transaction HHI is also limited ([...]).<sup>194</sup>
- (252) Second, the Notifying Party points out that there are a large number of strong competitors in the distribution of console and PC games worldwide. In particular, Sony has higher market shares (above [20-30]%), and other prominent competitors include Valve and Tencent, with market shares above [10-20]%, as well as Nintendo and NetEase.<sup>195</sup>
- (253) Third, according to the Notifying Party Microsoft and Activision Blizzard are not close competitors, since the large majority of Microsoft's revenues derive from the

---

<sup>193</sup> Horizontal Merger Guidelines, para. 18.

<sup>194</sup> Notifying Party's reply to the Commission's RFI 33, question 1.

<sup>195</sup> *Ibid.*

distribution of console games, while Activision Blizzard does not distribute games via console storefronts.<sup>196</sup>

- (254) Therefore, the Notifying Party considers that the Transaction would not give rise to any competitive concerns in relation to the worldwide market for distribution of console and PC video games.

#### 7.3.6.2. The Commission's assessment

- (255) The Commission considers that the Transaction does not result in a significant impediment of effective competition in the worldwide market for distribution of console and PC video games for the following reasons.

- (256) First, while both Parties are active in distribution of console or PC video games worldwide, the Commission observes that the increment brought about by Activision Blizzard by virtue of its digital storefront Battle.net is limited – [0-5]% in 2022. Therefore, the merger specific change brought about by the Transaction is not significant and does not improve the merged entity's competitive position significantly.

- (257) Second, the combined entity will remain competitively constrained by the market leader – Sony, who holds almost [20-30]% of the market ([20-30]% in 2020, [20-30]% in 2021 and [20-30]% in 2022). In addition, there are several large distributors of console and PC games that act as strong competitors such as Valve ([10-20]% in 2022) and Tencent ([10-20]% in 2022), both leaders in the distribution of PC games. Overall, the Commission also notes that the market for the distribution of console and PC games is rather fragmented, especially because many game publishers also distribute their PC games via their own website or digital storefront.

- (258) Third, the Commission considers, as pointed out by the Notifying Party, that Activision Blizzard does not distribute console games, which on the contrary are distributed only by Sony, Microsoft and Nintendo. Therefore, Microsoft is not acquiring a particularly close competitor active in the distribution of console games.

- (259) Finally, the Commission notes that it has not received any complaints from the respondents to the market investigation regarding horizontal non-coordinated effects on the market for distribution of console and PC video games.

- (260) In light of the above, the Commission concludes that the Transaction does not result in a significant impediment of effective competition on the worldwide market for distribution of console and PC video games as a result of horizontal, non-coordinated effects.

## 7.4. Vertical effects

### 7.4.1. Legal framework

- (261) Under Articles 2(2) and 2(3) of the Merger Regulation, the Commission must assess whether a proposed concentration would significantly impede effective competition in the internal market or in a substantial part of it, in particular through the creation or strengthening of a dominant position.

- (262) According to the Non-Horizontal Guidelines, non-coordinated effects may significantly impede effective competition as a result of a vertical merger if such merger gives rise to foreclosure. Foreclosure occurs where actual or potential

---

<sup>196</sup> *Ibid.*

competitors' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing those companies' ability and/or incentive to compete.<sup>197</sup> Such foreclosure may discourage entry or expansion of competitors or encourage their exit.<sup>198</sup>

- (263) The Non-Horizontal Guidelines distinguish between two forms of foreclosure. Input foreclosure occurs where the merger is likely to raise the costs of downstream competitors by restricting their access to an important input. Customer foreclosure occurs where the merger is likely to foreclose upstream competitors by restricting their access to a sufficient customer base.<sup>199</sup>
- (264) Foreclosure may also take more subtle forms, such as the degradation of the quality of inputs supplied. In its assessment, the Commission may consider a series of alternative or complementary possible strategies.<sup>200</sup>
- (265) In assessing the likelihood of an anticompetitive foreclosure scenario, the Commission examines, first, whether the merged entity would have, post-merger, the ability to substantially foreclose access to inputs or customers, second, whether it would have the incentive to do so, and third, whether a foreclosure strategy would have a significant detrimental effect on competition. In practice, these factors are often examined together as they are closely intertwined.<sup>201</sup>
- 7.4.2. *Foreclosure of rival developers and publishers of console video games by restricting access to the Microsoft console-specific digital storefronts (customer foreclosure)*
- (266) The combined entity's EEA-wide and worldwide market share by revenue in the downstream market for the distribution (including digital storefronts, multi-game subscription services, and cloud game streaming services) of (i) PC and console video games, and (ii) PC video games is significantly below 30% in 2022:
- (a) Distribution of PC and console video games: [20-30]% worldwide; [5-10]% EEA;
  - (b) Distribution of PC video games: [10-20]% worldwide; [10-20]% in the EEA.
- (267) The combined entity's EEA-wide market share by revenue in the downstream market for the distribution of console games is significantly below 30% in 2022 ([20-30]%). However, the combined entity holds [30-40]% of share by revenue in the potential market for the distribution of console games worldwide in 2022.
- (268) Given that the combined entity's market share exceeds 30% by revenue in 2022 only in the worldwide downstream market for distribution of console games, the Commission has assessed the risk of (i) total foreclosure of rival publishers of console video games through Microsoft's refusal to carry competing console video games on its downstream console platform, i.e., the Xbox Store; and (ii) partial foreclosure of rival publishers of console video games through for instance, an increase in distribution fees or a degradation of the terms and conditions under which Microsoft is willing to carry these rival games on its console platform. The Commission has carried out its assessment on the basis of a total foreclosure

---

<sup>197</sup> Non-Horizontal Guidelines, paragraph 18.

<sup>198</sup> Non-Horizontal Guidelines, paragraph 29.

<sup>199</sup> Non-Horizontal Guidelines, paragraph 30.

<sup>200</sup> Non-Horizontal Guidelines, paragraph 33.

<sup>201</sup> Non-Horizontal Guidelines, paragraph 32.

scenario. The Commission considers that the same considerations and conclusions set out below apply, *a fortiori*, also to a partial foreclosure scenario.

- (269) The Commission' investigation of a potential customer foreclosure does not concern other unaffected and related markets downstream given that the Parties' combined market share by revenue in 2022 on those markets is more limited (i.e. below 30%). By reason of the Parties' limited market share, the Commission finds it unlikely that the Transaction is liable to significantly impede effective competition as a result of the Parties' activities downstream.

#### 7.4.2.1. The Notifying Party's view

- (270) The Notifying Party submits that the merged entity would not have the ability nor the incentive to engage in a successful customer foreclosure strategy. Furthermore, the Notifying Party submits that a possible customer foreclosure strategy would in any case not affect competition in the upstream market for the development and publishing of console games, under any conceivable product and geographic market definitions.

##### 7.4.2.1.1. Ability to engage in customer foreclosure

- (271) The Notifying Party submits that, while Microsoft may have the technical ability to restrict access to its console digital storefronts by rival developers and publishers of video games, it would not have the ability to foreclose them.
- (272) First, the Notifying Party argues that Microsoft would not be able to rely purely on its own first-party content post-Transaction. On the contrary, to provide an attractive console ecosystem, it would still have to rely on third-party video games to attract gamers to the Xbox console. In this regard, the Notifying Party points out that Microsoft has performed [...] in the past compare to Sony and Nintendo in the market for the distribution of console games, and, according to the Notifying Party, this is attributed at least in part to its comparative [...]. As the performance of consoles is linked to the amount of attractive games they offer, it would be imperative for Microsoft to continue offering third-party games.<sup>202</sup>
- (273) Second, the Notifying Party notes that, should Microsoft restrict third-party developers' access to the Xbox console, such developers would spend less time developing games for Xbox and focus on rival consoles, thus bringing more games, potentially exclusive games, to the latter.<sup>203</sup>
- (274) Third, the Notifying Party stresses that the Xbox ecosystem is smaller compared to the Sony and Nintendo's ecosystems. Third-party developers and publishers of console games have [...] negotiating power vis-à-vis Microsoft, such that should Microsoft restrict access to the Xbox console, publishers would switch to other consoles without foregoing a [...] of their revenues. In light of this, a customer foreclosure strategy would be self-defeating for Microsoft.<sup>204</sup>
- (275) Fourth, the emergence of new gaming platforms launched by companies such as Google, Amazon, Facebook and Netflix means, according to the Notifying Party, that video games developers and publishers are less reliant on any single distribution

---

<sup>202</sup> Form CO, paragraph 728.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.*

platform, and have significant alternatives should Microsoft cease to distribute their games.<sup>205</sup>

- (276) Fifth, the Notifying Party argues that the Transaction would not affect the bargaining power of third-party developers and publishers vis-à-vis Microsoft, given Activision Blizzard's limited market shares in the upstream markets for game development and publishing.<sup>206</sup>
- (277) Therefore, for the reasons set out above, the Notifying Party considers that, post-Transaction, it would not have the ability to foreclose third-party developers and publishers of console games by restricting access to the Xbox platform.

#### 7.4.2.1.2. Incentive to engage in customer foreclosure

- (278) The Notifying Party submits that the merged entity would not have the incentive to foreclose third-party game developers and publishers by restricting access to its console digital storefronts.
- (279) First, the Notifying Party argues that it would have a clear incentive not to reduce the availability of third-party games on the Xbox console post-Transaction. In this regard, the Notifying Party states that an as broad range of popular games as possible is vital for the commercial success of a console, since this is the primary way to attract more gamers.<sup>207</sup> Moreover, the Notifying Party reiterates that the last two console generations, when Sony and Nintendo outperformed Microsoft, indicate that the performance of a console is linked to the amount of attractive gaming content it offers compared to its rivals.
- (280) Second, the Notifying Party claims that, post-Transaction, the merged entity's share of the upstream game publishing market will be limited. Therefore, it would not be possible for the merged entity to rely solely on its own first-party content to offer an attractive console gaming platform, and it would need to continue attracting prominent third-party games, also in light of the fact that Sony's PlayStation has a d\* would continue to have more exclusive games than Microsoft's Xbox.<sup>208</sup>
- (281) Therefore, for the reasons set out above, the Notifying Party considers that the merged entity would not have the incentive to foreclose third-party developers and publishers of console games by restricting access to the Xbox platform.

#### 7.4.2.1.3. Impact on effective competition

- (282) The Notifying Party submits that, should the merged entity engage in a customer foreclosure strategy against third-party developers and publishers of console games, this would not have significant effects on competition in the upstream market for console games publishing.
- (283) In this regard, the Notifying Party reiterates that console game developers and publishers would have multiple alternatives to Microsoft's Xbox to publish their game, and would not be deprived of an essential customer. In particular, the Notifying Party submits that Sony's market position in consoles amounts to "*super-dominance*"<sup>209</sup> when considering Sony and Microsoft alone. In this scenario, Sony

---

\* Should read: 'and'.

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid.*

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid.*

<sup>209</sup> SO Response, paragraph 187.

would have a share of the market of [80-90]% by revenues, [70-80]% by volume and [80-90]% by installed base, which shows that Sony is significantly stronger than Microsoft.<sup>210</sup>

- (284) For this reason, even if the merged entity engaged in a customer foreclosure strategy, rival developers and publishers of console games would have sufficient and effective alternatives to distribute their games.

#### 7.4.2.2. The Commission's assessment

- (285) The Commission considers that the merged entity would not have the ability and incentive to foreclose third-party developers and publishers of console games, regardless of how the market is segmented by product or geography, by restricting access to the Xbox platform. Furthermore, the Commission considers that, should the merged entity engage in such a foreclosure strategy, the impact on effective competition in any plausible market for the development and publishing of console games would not be significant.

##### 7.4.2.2.1. Ability to engage in customer foreclosure

- (286) While Microsoft could technically implement a customer foreclosure strategy, the Commission considers that the combined entity will not have the ability to engage in a successful customer foreclosure strategy since there appear to be sufficient economic alternatives in the downstream market for upstream rivals to sell their video games.

- (287) First, market shares indicate that Microsoft, through the Xbox console platform, is an important distributor of console video games, with a worldwide market share of [30-40]% (2022) in the potential market for the distribution of console games. However, the Commission notes that Microsoft's market share in such market is relatively small compared to the market share of Sony in particular. More specifically, as indicated in Table 13 above, Sony has a market share of [40-50]% worldwide. Nintendo with a market share of [10-20]% worldwide is relatively smaller but still represents a strong competitor, through its popular Switch console. Moreover, considering only Microsoft's Xbox and Sony's PlayStation, which are the closest competitors as explained in recitals (398) and (399) below, Microsoft's relative position to Sony is even smaller especially in the EEA, where the ratio between Xbox and PlayStation is approximately [...] % by revenues in favour of PlayStation.<sup>211</sup> These figures clearly indicate that third-party console game developers and publishers would have significant alternative distributors of console games available, that would allow them to reach a broad audience, should the merged entity restrict access to the Xbox console.

- (288) The above emerges also from the results of the market investigation. The majority of respondents indicated that Sony's PlayStation is the most attractive platform for developers and publishers to distribute their console games. In this regard, only one respondent indicated that Xbox is more important than Sony's and Nintendo's consoles, while the large majority of respondents indicated that Microsoft's rivals, especially Sony, are more important.<sup>212</sup> Therefore, Microsoft does not constitute an essential customer for console game developers and publishers.

---

<sup>210</sup> SO Response, paragraphs 185 – 188.

<sup>211</sup> See SO Response, paragraph 187. These percentages represent the shares by revenues of Microsoft and Sony in a potential console market without Nintendo.

<sup>212</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 69.



- (289) Second, console games developers and publishers usually do not rely on a single console platform for the distribution of their games, and tend to use as many channels as possible to reach a broader audience. In this regard, almost the entirety of respondents that expressed a view submitted that game developers and publishers seek to distribute their games as widely as possible across platforms.<sup>213</sup> Therefore, should one of such platforms cease to distribute third-party console games, game developers and publishers would maintain alternative distribution channels. Furthermore, the majority of respondents that expressed a view also indicated that it would be relatively easy, for console games publishers, to switch to distributing games from one console platform to another,<sup>214</sup> for example in case of games that are exclusive to a specific console. The majority of respondents that expressed a view also indicated that, should Microsoft cease to distribute third-party games via the Xbox console, they would be able to find alternative distribution channels.<sup>215</sup> Therefore, the Commission considers that third-party console game developers and publishers would be able to turn to other console game distributors in case of a foreclosure strategy, and would still be able to continue to reach end customers.
- (290) Third, the Commission considers, as already assessed above, that post-Transaction Activision Blizzard's games would give a strong push to the Xbox console should they become exclusive to it. However, even in such scenario, it is highly implausible that Microsoft would be able to rely exclusively on its first-party games. As stated by the Commission in *Microsoft/ZeniMax*, as well as by the Notifying Party, content is the primary factor for competition between consoles.<sup>216</sup> Therefore, the larger the population of games that Microsoft can secure for Xbox, the more competitive Xbox will be against rival consoles. Ceasing to publish third-party console games would diminish the quantity of games available on Xbox to the benefit of other consoles, to which third-party console game developers would switch.
- (291) Fourth, while a majority of the respondents to the market investigation submitted that the Transaction would increase Microsoft's bargaining power vis-à-vis third-party game developers and publishers<sup>217</sup>, the Commission considers that such higher bargaining power would not provide Microsoft with the ability to foreclose competitors in the upstream market. The Commission notes that, currently, console game developers and publishers enjoy a significant bargaining power vis-à-vis console manufacturers, despite the fact that game developers have only limited options to distribute their games on console digitally, namely the storefronts of the three console distributors that exist in the market (Microsoft, Sony and Nintendo). This is demonstrated by the fact that current standard commercial arrangements, especially with prominent developers such as EA, Take Two and Epic Games, provide for a [...] revenue-split in favour of game publishers.<sup>218</sup> Therefore, in light of the importance that third-party content will continue to have for Microsoft post-Transaction, as assessed above, the Commission considers it implausible that Microsoft's bargaining position would improve to such an extent that would make Microsoft able to impose its own terms unilaterally. This is also corroborated by the

<sup>213</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 63.

<sup>214</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 64.1.

<sup>215</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 68.

<sup>216</sup> Commission decision of 5 March 2021 in case M.10001 – *Microsoft/ZeniMax*, paragraph 83: "...rich and differentiated content is key to a console's ability to attract, engage and retain players". See also Form CO, paragraph 729.

<sup>217</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 72.

<sup>218</sup> [...].

fact that no respondents to the market investigation expressed concerns that Microsoft would significantly alter commercial relationships in its favour post-Transaction, or stop distributing third-party games *tout-court*.

- (292) Therefore, for the reasons set out above, the Commission considers that the merged entity would not have the ability to foreclose third-party developers and publishers of console games by restricting access to the Xbox platform.

#### 7.4.2.2.2. Incentive to engage in customer foreclosure

- (293) The Commission considers that, post-Transaction, the merged entity would not have the incentive to engage in customer foreclosure.

- (294) First, as mentioned above, content is the primary factor for competition between consoles. Therefore, even post-Transaction, Microsoft would have the incentive to continue offering as many video games as possible via the Xbox console, to maximize its attractiveness vis-à-vis end customers as compared to rival consoles. As also pointed out by the Notifying Party, this is incompatible with a customer foreclosure strategy which, on the contrary, would reduce the amount of video games available on Xbox. This is also indicated by Microsoft's internal documents and industry reports: for example, it is mentioned that “[*business secrets from internal documents*].”<sup>219</sup>

- (295) Second, the results of the market investigation indicate that Microsoft would not have the incentive to restrict third-party publishers' access to the Xbox platform.<sup>220</sup> Instead, Microsoft would maintain the interest in broadening the games catalogue available on Xbox.

- (296) One market participant specified that “It is important for Microsoft to have a broad range of attractive games on its storefronts. Otherwise, it will risk reducing the appeal of its storefronts to gamers and developers/publishers.”<sup>221</sup> On this point, another market participant stressed that “Despite this transaction, we believe it will still be in Microsoft's high interest to bring 3<sup>rd</sup> party content to the platform to make it more compelling to its existing and potential customers”.<sup>222</sup> Finally, one market participant also highlighted that “Platform success is based on reach and availability of both exclusive and non-exclusive games. More exclusive titles will not eliminate consumers' desire for access to non-exclusive games. Reducing availability of non-exclusive games is likely to create a negative impact on Microsoft more so than adding additional exclusive games”.<sup>223</sup> Therefore, the results of the market investigation show that Microsoft would keep the incentive to distribute third-party games even if it were to make Activision Blizzard's games exclusive to the Xbox.

- (297) For the reasons set out above, the Commission considers that the merged entity would not have the incentive to foreclose third-party developers and publishers of console games by restricting access to the Xbox platform.

#### 7.4.2.2.3. Impact on effective competition

- (298) The Commission considers that, should the merged entity restrict third-party publishers' access to the Xbox platform, there would be no significant impact on

---

<sup>219</sup> IDG Consulting annual white paper (2020) [MSFT-EC-01942329].

<sup>220</sup> [...].

<sup>221</sup> Reply of a market participant to Questionnaire Q1 to video game developers, publishers and distributors, question 73.1.

<sup>222</sup> *Ibid.*

<sup>223</sup> *Ibid.*

effective competition on the upstream market for the development and publishing of console games.

- (299) First, as assessed above, given the existence of multiple alternatives to Microsoft to which video game publishers can supply their content, console game publishers would not be deprived of an essential customer, and could still rely on multiple alternative distribution channels to reach end customers.
- (300) In particular, should Microsoft cease to distribute third-party console games, rival console game publishers could switch to developing their video games for the PlayStation or the Nintendo Switch consoles, and could do so in a relatively short period of time. Furthermore, the Commission notes that, except for third-party console games that are exclusive to the Xbox, console game publishers already develop versions of their console games for more than one console, as demonstrated by the fact, as mentioned above, that they usually seek to distribute their games on as many platforms as possible. Therefore, in most cases, console game publishers already have a PlayStation or a Switch version of their console games, and do not need to port Xbox games to other consoles.<sup>224</sup>
- (301) Second, respondents to the market investigation did not raise any concerns regarding the impact of a possible customer foreclosure strategy by Microsoft. On the contrary, the large majority of respondents to the market investigation that expressed a view indicated that the impact of the Transaction on the upstream market for game development and publishing would be neutral.<sup>225</sup>
- (302) Therefore, for the reasons set out above, the Commission considers that, should the merged entity engage in a customer foreclosure strategy, it would not have a significant impact on competition on the upstream market for the development and publishing of console games.

#### 7.4.2.3. Conclusion

- (303) In light of the above, the Commission concludes that the Transaction does not give rise to a significant impediment of effective competition on any plausible market or sub-segment for the development and publishing of console games, as a result of the foreclosure by Microsoft of rival developers and publishers of console games from accessing the Xbox digital storefront.

#### 7.4.3. *Targeted total or partial input foreclosure of Microsoft's rival distributors of console games*

- (304) The Commission considers that the Transaction is not capable of resulting in a significant impediment of effective competition in distribution of console or PC video games, or in the distribution of console and PC video games, worldwide or in the EEA, arising from the Parties' activities in any plausible markets for development and publishing of console and PC games upstream where the Parties' combined market share by revenue in 2022 on those upstream markets is limited in the EEA and worldwide (i.e., below 30%).
- (305) The combined entity's market share only exceeds 30% by revenue in 2022 in the upstream markets for: (i) development and publishing of shooter (including battle

---

<sup>224</sup> In this regard, the Commission notes that, as indicated by the Notifying Party, Sony has [...] times more exclusive titles than Microsoft, therefore the number of Xbox exclusives is relatively limited. See Phil Spencer's presentation for the Oral Hearing of 21 February 2023, slide 6.

<sup>225</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 93.

royale) console video games and (ii) development and publishing of AAA shooter (including battle royale)<sup>226</sup> console video games, worldwide in 2022:

- (a) Development and publishing of shooter (including battle royale) console video games: By revenue: [30-40]% worldwide (2022); [10-20]% in the EEA (2022); and
- (b) Development and publishing of AAA shooter (including battle royale) console video games: By revenue: [30-40]% worldwide (2022); [10-20]% in the EEA (2022)

(306) In addition, Sony – a game developer and publisher of PC and console games and a distributor of console games – put forward a complaint that the combined entity would have the ability and the incentive to foreclose Sony’s console (PlayStation) and Sony’s multi-game subscription service on console (PlayStation Plus) from having access to Activision Blizzard’s AAA shooter console franchise *Call of Duty*. In particular, Sony argued that, by completely restricting access to *Call of Duty*, the combined entity would [...] Sony’s PlayStation console business and PlayStation multi-game subscription service.<sup>227</sup> Furthermore, Sony argued that even if the combined entity agreed to make *Call of Duty* available on PlayStation consoles, it could deploy various strategies to partially foreclose access to *Call of Duty*.<sup>228</sup> In addition, Sony argued that even if Microsoft agreed to make *Call of Duty* available on PlayStation consoles on parity with Xbox consoles, it could make *Call of Duty* available solely on Microsoft’s console multi-game subscription service (Xbox Game Pass) without making it available on Sony’s multi-game subscription service on console. According to Sony, such partial foreclosure strategies would degrade the competitiveness of Sony’s PlayStation console business, weaken competition in distribution of console games, and cause harm to independent game developers and consumers.<sup>229</sup>

(307) The Commission has therefore looked into the risk of a targeted input foreclosure of rival distributors in the downstream market for distribution of console games, worldwide and in the EEA, through a restricted access to the combined entity’s AAA shooter console games. In particular, the Commission has assessed whether the Parties have the ability and incentive to foreclose Microsoft’s rivals in the downstream market for distribution of console games, by (i) totally restricting access to Activision Blizzard’s AAA shooter (including battle royale) console games to competitors of Microsoft’s Xbox; or by (ii) degrading the terms under which

---

<sup>226</sup> For the purpose of this Decision, the Commission considers battle royale genre to be part of the shooter genre, as per recital (72). Therefore, any reference to “shooter” genre in this section will also imply “battle royale”, as part of the market for development and publishing of shooter games.

<sup>227</sup> SIE, Cornerstone Research and RBB Economics economic analysis: “*Microsoft Incentives Analysis – Non-Confidential Summary for CMA*” [ID3534]; SIE, Cornerstone Research and RBB Economics economic analysis: “*Microsoft-Activision Anticompetitive Effects Analysis, Non-Confidential Summary for EC*”, see paragraphs 9-11 [ID3534].

<sup>228</sup> According to SIE, the combined entity could employ various pricing strategies to disadvantage PlayStation, release *Call of Duty* on Xbox ahead of its release on PlayStation, degrade the quality and performance of *Call of Duty* on PlayStation compared to Xbox, degrade *Call of Duty* to ignore PlayStation-specific features (e.g., better controller haptics), restrict or degrade multiplayer experience on PlayStation, making in-game content or features exclusive to Xbox indefinitely or for a limited period, and bundle new releases of *Call of Duty* with the next generation Xbox. SIE, “*Assessment of the Anti-competitive Effects of Different Microsoft Foreclosure Strategies*”, Section II. [ID3533].

<sup>229</sup> SIE, “*Assessment of the Anti-competitive Effects of Different Microsoft Foreclosure Strategies*”, [ID3533].

Activision Blizzard’s AAA shooter (including battle royale) console games are made available to rival distributors of console games (e.g., by making certain features of Activision Blizzard’s games exclusively available on the Xbox, or exclusively available on the Xbox only for a certain period of time; or degrading technical support of Activision Blizzard’s console games on non-Xbox consoles); or by (iii) making Activision Blizzard’s games exclusively available on Microsoft’s console multi-game subscription service (Xbox Game Pass) but withholding it from competing multi-game subscription services on console. The Commission also assessed the importance of Activision Blizzard’s AAA shooter (including battle royale) console games as an input for distributors of console games. The Commission likewise sought to establish whether such a foreclosure strategy may have a negative impact on competition in the downstream market for distribution of console games.

- (308) The Commission notes that the combined entity’s worldwide market share by revenue also exceeds 30% in a worldwide market for development and publishing of shooter console video games, which includes both AAA and non-AAA games. However, the Commission has carried out its assessment of potential input foreclosure by considering only the narrower worldwide market for development and publishing of AAA shooter console games upstream. Given that all of Activision Blizzard’s and Microsoft’s shooter console games are considered AAA, that AAA games drive the majority of revenue in development and publishing and generate significant competitive pressure, the Commission considers that the assessment of the competitive dynamics in the market for development and publishing of only AAA console video games applies to the market that includes development and publishing of AAA as well as non-AAA console video games. Therefore, the Commission considers that the same considerations and conclusions apply, *a fortiori*, also when considering the wider upstream market for development and publishing of shooter console video games which includes both AAA and non-AAA games.
- (309) Finally, the combined entity’s market share by revenue is below 30% in 2022 in the narrower EEA-wide upstream markets for: (i) development and publishing of shooter (including battle royale) console video games and (ii) development and publishing of AAA shooter (including battle royale) console video games. Out of an abundance of caution, the Commission has also assessed the risk of input foreclosure resulting from the Parties’ activities in the upstream EEA-wide market segments related to AAA shooter console video games, particularly given that, according to the alternative metrics (MAU or game-time), the combined entity’s market share exceeds 30% in 2022 as indicated in Tables 8 and 9 below.

**Table 8: Development and Publishing of AAA shooter games (WW and EEA, 2020-2022, by MAU)**

Party	WW			EEA		
	2020	2021	2022	2020	2021	2022
<b>Console</b>						
Microsoft	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Activision Blizzard	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[30-40]%
<b>Combined</b>	<b>[30-40]%</b>	<b>[30-40]%</b>	<b>[30-40]%</b>	<b>[30-40]%</b>	<b>[30-40]%</b>	<b>[30-40]%</b>
Epic Games	[20-30]%	[10-20]%	[10-20]%	[20-30]%	[20-30]%	[20-30]%
Take Two	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
Electronic Arts	[10-20]%	[10-20]%	[10-20]%	[5-10]%	[10-20]%	[5-10]%
Ubisoft	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%

Party	WW			EEA		
	2020	2021	2022	2020	2021	2022
<b>Console</b>						
Others	[5-10]%	[5-10]%	[5-10]%	[0-5]%	[5-10]%	[0-5]%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: Reply to RFI 26, Annex 5

(310)

**Table 9: Development and publishing of AAA shooter games (WW and EEA, 2020-2022, by game-time)**

Party	WW			EEA		
	2020	2021	2022	2020	2021	2022
<b>Console</b>						
Microsoft	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Activision Blizzard	[30-40]%	[30-40]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%
<b>Combined</b>	<b>[30-40]%</b>	<b>[30-40]%</b>	<b>[30-40]%</b>	<b>[20-30]%</b>	<b>[30-40]%</b>	<b>[20-30]%</b>
Epic Games	[30-40]%	[20-30]%	[20-30]%	[30-40]%	[30-40]%	[30-40]%
EA	[5-10]%	[10-20]%	[10-20]%	[0-5]%	[5-10]%	[5-10]%
Take Two	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
Sony Interactive Entertainment	[5-10]%	[5-10]%	[5-10]%	[0-5]%	[0-5]%	[0-5]%
Ubisoft	[0-5]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%
Others	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Total	100,0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: Reply to RFI 26, Annex 5

(311)

(312) **The Parties' activities in the upstream market:** Microsoft's publishes PC and console games developed by its 24 game development studios. Microsoft's top ten game franchises by revenue (2021) across all platforms, including console, include: *Minecraft* (adventure/crafting/shooter/sandbox game available on Xbox, PlayStation, Nintendo, PC and mobile), *Forza* (simulation racing game available on Xbox and PC), *Elder Scrolls* (role-playing / adventure / action game available on Xbox, PlayStation and PC), and *Halo* (science fiction shooter / action game available on Xbox and PC), *Fallout* (Futuristic role playing / adventure / shooter / action game available on Xbox, PlayStation and PC), *Sea of Thieves* (adventure / action / role-playing game available on Xbox and PC), *Doom* (shooter / action again available on Xbox, PlayStation, Nintendo and PC), *Flight Simulator* (amateur flight simulation game available on Xbox and PC) and *Deathloop* (shooter / action game available on Xbox, PlayStation and PC). A number of console games developed and published by Microsoft are considered AAA games including *Halo* and *Elder Scrolls*. Microsoft's main shooter console games are *Halo*, *Gears of War*, and *Doom*,<sup>230</sup> which are all considered AAA console games.<sup>231</sup>

(313) Activision Blizzard's three largest console game franchises in 2021 by revenue were *Call of Duty* (shooter/action game available on Xbox, PlayStation and PC, with mobile version and free-to-play battle royale version), *Crash Bandicoot* (available on

<sup>230</sup> The Notifying Party's Reply to RFI 8, question 2, paragraph 2.25. The Notifying Party submitted that overall, more than 700 games can be categorised as having "shooter" elements.

<sup>231</sup> Form CO, Annex 22.

Xbox, PlayStation, Nintendo, PC and mobile), and *Diablo* (role-playing / action game available on Xbox, PlayStation and PC).<sup>232</sup> A number of console games developed and published by Activision Blizzard are considered AAA games: *Call of Duty*, *Crash Bandicoot*, *Diablo* and *Overwatch*. Activision Blizzard's main shooter games on console are *Call of Duty* and *Overwatch*.<sup>233</sup> Both *Call of Duty* and *Overwatch* are considered AAA console games.<sup>234</sup>

- (314) Activision Blizzard's key console game is a AAA shooter game franchise *Call of Duty*. *Call of Duty* accounted for the vast majority (more than [80-90]%) of Activision Blizzard's total console revenues in 2021.
- (315) **The Parties' activities in the downstream market.** Console games are distributed only by three console platform holders. Microsoft, Nintendo and Sony each distribute games via their console storefronts, which are the centralized distribution channels for their respective consoles. As explained in recitals (28), (138) and (139) above, Microsoft distributes its console video games via the Xbox Store, an Xbox-branded app store, accessible through the Xbox console, and two gaming subscription services, Xbox Live and Xbox Game Pass. Nintendo consoles use the Nintendo eShop, and Sony PlayStation consoles use the PlayStation Store, which are accessed through the respective console's dashboard. While independent developers and publishers can advertise console versions of their games, for example, on their own websites, they cannot offer these games for download to the console.<sup>235</sup>
- (316) Microsoft, Nintendo and Sony each offer first-party games as well as third-party games. On its latest console hardware, Microsoft distributes its first-party games such as *Minecraft*, *Forza*, *Elder Scrolls* and *Halo* game titles. Sony distributes its first-party game titles such as *Demon's Souls*, *God of War*, *Marvel's Spider-Man*. Microsoft and Sony distribute games from franchises developed by independent third party developers and publishers such as *Assassin's Creed* (Ubisoft), *Battlefield*, *FIFA* (both EA), *Fortnite* (Epic Games) and others.<sup>236</sup> Nintendo's first-party game titles include titles exclusive to Nintendo, such as *Super Mario*, *Pokemon*, *Legend of Zelda*, *Donkey Kong* and *Animal Crossing*. Nintendo also distributes third party content such as *Guitar Hero*, *Just Dance*, *Mario and Sonic*, *Lego Star Wars*.<sup>237</sup>
- (317) Activision Blizzard's console games are currently distributed by Microsoft (on the Xbox console) and Sony (on the PlayStation console), while only a small portion of Activision Blizzard's game franchises are distributed by Nintendo (the Nintendo Switch console), including: *Crash Bandicoot*, *Tony Hawk's Pro Skater*, *Diablo*, and *Overwatch*. In particular, Activision Blizzard's key console franchise *Call of Duty* is currently only distributed on the Xbox and PlayStation consoles, while it is not distributed on Nintendo.<sup>238</sup>

---

<sup>232</sup> Form CO, paragraph 140.

<sup>233</sup> The Notifying Party's Reply to RFI 8, question 2, paragraph 2.25. The Notifying Party submitted that overall, more than 700 games can be categorised as having "shooter" elements.

<sup>234</sup> Form CO, Annex 22.

<sup>235</sup> Form CO, paragraph 164.

<sup>236</sup> [https://www.ign.com/wikis/playstation-5/PS5\\_Games\\_List](https://www.ign.com/wikis/playstation-5/PS5_Games_List)

<sup>237</sup> <https://gamerant.com/best-third-party-nintendo-switch-games/#dragon-quest-11-s>

<sup>238</sup> The last *Call of Duty* title was release on Nintendo console in 2013, after which Activision Blizzard opted not to produce *Call of Duty* for Nintendo's console Wii U. According to the Notifying Party, Activision Blizzard decided to stop shipping new titles on the Wii U because [*business secrets from internal documents*]. According to the Notifying Party, Activision Blizzard is technically capable of adding *Call of Duty* titles to the Switch. However, the Commission notes that Activision Blizzard has nonetheless decided to focus on publishing its key franchise on PlayStation and Xbox since 2013. In

#### 7.4.3.1. The Notifying Party's views

(318) The Notifying Party submits that the merged entity will not have the ability or the incentive to foreclose competing distributors of console games.<sup>239</sup> Moreover, the Notifying Party submits that Microsoft has publicly and privately committed to keep Activision Blizzard's content available to purchase on rivals' consoles.<sup>240</sup> In relation to this potential theory of harm, the Notifying Party has submitted an economic paper.<sup>241</sup>

##### 7.4.3.1.1. Ability to engage in input foreclose

(319) The Notifying Party submits that Microsoft does not have the ability to foreclose distributors of console games, *i.e.*, rival consoles (Sony's PlayStation and Nintendo's Nintendo Switch).<sup>242</sup>

(320) In the Form CO, the Notifying Party considers that the Parties do not have any market power in the development and publishing of console games, given their very limited market shares by value in the market ([10-20]% worldwide, [5-10]% EEA).<sup>243</sup> In addition, according to the Notifying Party, rival consoles have built a strong reputation and enjoy a high degree of brand loyalty by players.<sup>244</sup> In particular, the Notifying Party considers that Sony has built an established base of gamers loyal to its brand. The Notifying Party also submits that end-consumers multi-home between gaming consoles.<sup>245</sup>

(321) Furthermore, the Notifying Party considers that Activision Blizzard's content is not an important input for distributors of console games.<sup>246</sup> According to the Notifying Party, the games publishing market is highly competitive with a large number of rival third-party publishers owning popular game franchises. As a result, a range of alternative video gaming content with comparable appeal remains available.<sup>247</sup> Moreover, the Notifying Party explains that competing distributors already offer a differentiated portfolio of games to consumers as part of their product offering.<sup>248</sup> The Notifying Party provides Nintendo as an example of a distributor that, even without Activision Blizzard's principal console franchise *Call of Duty* on its console, remains a leading provider of console hardware by volume.<sup>249</sup>

(322) In its Article 6(1)(c) Response, the Notifying Party further argues that Microsoft does not have the ability to foreclose Sony by engaging in a targeted total or partial input foreclosure.

(323) In the first place, the Notifying Party submits that the Parties do not have market power upstream for the following reasons. First, the Parties' low combined market shares by value and volume demonstrate the lack of upstream market power even in

---

addition, the Commission understands that Activision Blizzard has considered [*business secrets from internal documents*]. Notifying Party's reply to RFI 23.

<sup>239</sup> Form CO, paragraph 637.

<sup>240</sup> Form CO, paragraphs 906 and 640.

<sup>241</sup> The Notifying Party's reply to RFI 1, question 36: "Microsoft/Activision: Estimating incentives to withhold Activision games from other consoles", paragraph 2.

<sup>242</sup> Form CO, paragraphs 643 and 669.

<sup>243</sup> Form CO, paragraph 646.

<sup>244</sup> Form CO, paragraph 653.

<sup>245</sup> Form CO, paragraph 653.

<sup>246</sup> Form CO, paragraph 643.

<sup>247</sup> Form CO, paragraphs 644, and 648-650.

<sup>248</sup> Form CO, paragraph 644.

<sup>249</sup> Form CO, paragraph 644.



the narrowest plausible market segmentations. The Parties' combined shares by value or volume do not exceed 30% globally or in the EEA in 2021 in the wider market for development and publishing of console games even in the narrowest plausible market segmentation (AAA shooter (including battle royale) console games).<sup>250</sup> The Notifying Party argues that the circumstances in this case do not merit departing from the Commission's established decisional practice, which considers that competition concerns are unlikely to arise in vertical relationships with market shares below 30%.<sup>251</sup> Second, the value and volume market shares would be the most relevant indicators of market power in the market for game development and publishing.<sup>252</sup> The Notifying Party argues that the Commission does not properly substantiate why market shares by value or volume would be insufficient proxies for market power in this case, and why alternative metrics (e.g., MAU or game-time) would be more appropriate to measure the Parties' market power.<sup>253</sup> The Notifying Party argues that the mere fact that the Commission relied on metrics other than volume or value market shares in certain past cases dealing with unrelated markets does not allow the Commission to consider alternative metrics in the present case.<sup>254</sup> In addition, according to the Notifying Party, in none of its most recent decisions concerning gaming has the Commission even looked at alternative metrics.<sup>255</sup> Third, the Parties would lack upstream market power even based on these alternative metrics as the share of MAU and game-time of the Parties are below the 30% threshold as well.<sup>256</sup>

- (324) In the second place, the Notifying Party submits that no Activision Blizzard content (including *Call of Duty*) is important for console distributors, let alone "must have" for the following reasons. First, Activision Blizzard would be one of many game publishing companies with popular content, and not the largest one.<sup>257</sup> The Notifying Party argues that the development and publishing market is highly competitive and that the Commission itself reached that conclusion in *Microsoft/ZeniMax* only a year and a half ago. In addition, Microsoft's downstream console competitors, Nintendo and Sony, are major publishers of console games in their own right. Nintendo would be the largest publisher globally (with a revenue of [10-20]% on console worldwide), [...] the size of Activision Blizzard. Sony would be the fourth largest publisher globally (with a revenue share of [5-10]% on console worldwide), roughly [...] in size to Activision Blizzard. Second, the consumer choice between PlayStation, Nintendo and Xbox would not be driven by the availability of a single franchise, including *Call of Duty*, on those platforms.<sup>258</sup> The Notifying Party submits that the Xbox [...] data demonstrates that Activision Blizzard's content does not drive console platform adoption. Third, while *Call of Duty* would be a significant and popular franchise, it is by no means unique in terms of average spend, game-time and preferences in comparison to other popular games.<sup>259</sup> In that regard, the Notifying Party submits that the Xbox [...] data demonstrates that *Call of Duty* gamers play, spend and choose their games in a similar manner as gamers of other major

---

<sup>250</sup> The Article 6(1)(c) Response, paragraph 44.

<sup>251</sup> The Article 6(1)(c) Response, paragraphs 36-42.

<sup>252</sup> The Article 6(1)(c) Response, paragraphs 36-42.

<sup>253</sup> The Article 6(1)(c) Response, paragraphs 39-42.

<sup>254</sup> The Article 6(1)(c) Response, paragraph 42.

<sup>255</sup> The Article 6(1)(c) Response, paragraph 40.

<sup>256</sup> The Article 6(1)(c) Response, paragraphs 46-49.

<sup>257</sup> The Article 6(1)(c) Response, paragraphs 52-55.

<sup>258</sup> The Article 6(1)(c) Response, paragraphs 59-65.

<sup>259</sup> The Article 6(1)(c) Response, paragraphs 66-72.

franchises. Fourth, contrary to the Commission’s conclusion in the Article 6(1)(c) Decision, Activision Blizzard’s games would not be a “must-have” for Sony.<sup>260</sup> The Notifying Party argues that Activision Blizzard games are not unique but similar to many other franchises in terms of their popularity, commercial success and longevity. For example, contrary to the Commission’s finding, the Notifying Party argues that *Call of Duty* is not “widely regarded as one of or even the most successful franchise in the video gaming industry” and submits different sources showing that numerous alternative third-party games are available with comparable or better awareness relative to *Call of Duty*, and that *Call of Duty* is consistently outranked in reviews of the best games by other publishers’ games across platforms. Fifth, *Call of Duty* would be substitutable with other popular franchises.<sup>261</sup> Activision Blizzard’s experience with the unpopular *Call of Duty: Vanguard* title would show that *Call of Duty*’s popularity varies over time and that gamers switch to other franchises. Sixth, new entrants, such as Valve’s Steam Deck, would have been able to successfully enter the console market without distributing *Call of Duty*.<sup>262</sup>

(325) In the SO Response, the Notifying Party restates a number of its arguments from the Form CO and its Article 6(1)(c) Response, in addition to raising additional points and putting forward some new evidence.

(326) First, the Notifying Party submits that the Parties do not have the requisite market power to foreclose Sony post-Transaction given that (i) it is inappropriate to segment the games publishing market based on type of game and/or genre; (ii) the Commission’s assessment significantly departs from the Commission’s Non-Horizontal Merger Guidelines and its decisional practice, which the Commission is obliged to follow.<sup>263</sup> Second, the Notifying Party submits that it is implausible that *Call of Duty* and Activision Blizzard games are an important input for console competition, in particular given that Activision Blizzard is only one of many game publishers in a highly fragmented market and is smaller than Sony and that *Call of Duty* does not drive console choice.<sup>264</sup> Third, according to the Notifying Party, Sony can deploy timely and effective counter-strategies against any Microsoft’s hypothetical foreclosure attempts given that (i) Sony is a bigger publisher than Activision Blizzard that can easily develop another popular AAA shooter game; (ii) Sony is a market leader in the distribution of console games that can easily retaliate against Microsoft in case of hypothetical foreclosure by entering into exclusive agreements with large independent developers and publishers.<sup>265</sup> Finally, the Notifying Party submits that there are no grounds for the Commission to assume that Sony could be foreclosed on its console irrespective of whether gamers access content through buy-to-play or multi-game subscription services.<sup>266</sup>

#### 7.4.3.1.2. Incentive to engage in input foreclosure

(327) The Notifying Party submits that Microsoft does not have the incentive to foreclose distributors of console games, *i.e.*, rival consoles (Sony’s PlayStation and Nintendo’s Nintendo Switch) and providers of subscription services on console.<sup>267</sup>

---

<sup>260</sup> The Article 6(1)(c) Response, paragraph 73.

<sup>261</sup> The Article 6(1)(c) Response, paragraph 88.

<sup>262</sup> The Article 6(1)(c) Response, paragraphs 89-91.

<sup>263</sup> SO Response, paragraphs 58-83.

<sup>264</sup> SO Response, paragraphs 86-125.

<sup>265</sup> SO Response, paragraphs 126-136.

<sup>266</sup> SO Response, paragraphs 137-144.

<sup>267</sup> Form CO, paragraph 654.

- (328) In the Form CO, the Notifying Party considers that Microsoft has prevailing economic incentives to continue making Activision Blizzard’s games available for rival consoles. First, the Notifying Party considers that withholding popular content, and particularly, the *Call of Duty* franchise, from rival consoles would result in a severe “backlash” from the highly engaged gamers’ community, and cause Microsoft significant reputational and financial damage.<sup>268</sup> Similarly, given that *Call of Duty* is an established multi-platform game with a strong base of PlayStation gamers, the Notifying Party would expect severe backlash from the *Call of Duty* gamers if *Call of Duty* were to be removed from Sony’s PlayStation.<sup>269</sup> Second, given that *Call of Duty* is an established multiplayer game with a wide gaming community spanning across multiple platforms, Microsoft would particularly have no incentive to miss the financial opportunity of expanding the *Call of Duty* franchise across platforms and consoles.<sup>270</sup> Third, according to the Notifying Party, because of the widespread usage of cross-platform play (“cross-play” – *i.e.*, the ability for gamers to interact online with gamers on other, different, platforms), any total or partial foreclosure strategy would risk undermining the experience of Xbox and PC gamers playing *Call of Duty*, jeopardizing the fame of the franchise and its wide appeal and undermining Microsoft’s valuation of Activision Blizzard.<sup>271</sup>
- (329) Furthermore, the Notifying Party submits that discontinuing the distribution of Activision Blizzard’s most popular game *Call of Duty* on Sony’s PlayStation platform would result in a substantial loss of revenue in the market for development and publishing of console games, without generating greater sales in the market for distribution of console games.<sup>272</sup> As part of an economic paper, the Notifying Party provided a model that calculates the proportion of PlayStation *Call of Duty* gamers who would need to purchase an Xbox console in order for the benefits of a withholding strategy to outweigh the costs for Microsoft.<sup>273</sup> The model concluded that this critical number of PlayStation *Call of Duty* gamers and the equivalent number of additional Xbox console units is too high for a foreclosure strategy to be realistically profitable.<sup>274</sup>
- (330) In addition, according to the Notifying Party, several factors make switching *en masse* unlikely and thus affect the number of users switching to Xbox console. For example (i) the switching costs involved in changing platform, (ii) the differentiated content available across competing console platforms, (iii) the degree of console brand loyalty, (iv) users focusing most of their game purchases on a preferred console platform while purchasing Xbox as a secondary console, which considerably decreases the lifetime value which Microsoft could expect to earn from an Xbox user.<sup>275</sup>
- (331) Finally, the Notifying Party notes that competing console providers would have the option to allow Microsoft’s game streaming service Game Pass to be accessed

---

<sup>268</sup> Form CO, paragraph 655.

<sup>269</sup> Form CO, paragraph 656.

<sup>270</sup> The Notifying Party’s reply to RFI 17, question 1a), paragraphs 30-37.

<sup>271</sup> The Notifying Party’s reply to RFI 17, question 1a), paragraphs 38-45.

<sup>272</sup> Form CO, paragraphs 663-665. The Notifying Party submitted that while Activision Blizzard also publishes other game franchises on console, *Call of Duty* accounted for [80-90]% of total Activision Blizzard’s console revenues in 2021, which makes it a natural candidate for evaluating a hypothetical content-withholding strategy.

<sup>273</sup> The Notifying Party’s reply to RFI 1, question 36.

<sup>274</sup> *Ibid.*

<sup>275</sup> Form CO, paragraph 667.

through the console browsers. In that scenario, gamers would be able to access Activision Blizzard's content on Game Pass without the need to switch consoles or multi-home.<sup>276</sup>

- (332) In its Article 6(1)(c) Response, the Notifying Party further argues that Microsoft does not have an incentive to foreclose Sony post-Transaction by withholding *Call of Duty* or making certain features of *Call of Duty* available exclusively on Xbox.
- (333) First, the Notifying Party submits that withholding *Call of Duty* from PlayStation would be a commercially unsound strategy. Microsoft's deal value modelling anticipates that [40-50]% of overall *Call of Duty* revenue on PC and console would come from licensing to PlayStation. The foreclosure strategy would imply giving up the equivalent of [10-20]% of the overall deal value and [10-20]% of current total annual revenue of Microsoft's Xbox business for the uncertain prospect of diverting gamers from PlayStation to Xbox.<sup>277</sup>
- (334) Second, the Notifying Party submits that the Commission's preliminary analysis of the combined entity's incentives to engage in total input foreclosure strategies with respect to Sony (the "Commission model") is flawed for several reasons<sup>278</sup>: (i) the Commission's analysis focuses narrowly on console diversion, ignoring the fact that some *Call of Duty* players would divert to playing the game on PC instead to another console; (ii) the Commission model suggests that for the purpose of estimating the value of an additional sale of an Xbox console, one should not consider the "Life-Time Value" (LTVs) but the average gross margin from an Xbox Series X|S user instead (which is what LTV in fact is); (iii) the Commission's analysis disregards the decline in console LTVs over a console generation despite evidence showing that Xbox LTVs [...]; (iv) the Commission's comments on the assumptions underlying the combined entity's financial incentive to engage in content withholding (the "CRA model") are selective, and do not consider a series of conservative assumptions that the CRA model contains.
- (335) Third, the Notifying Party submits that even the Commission model confirms that withholding *Call of Duty* from rival consoles would not be a profitable strategy for Microsoft.<sup>279</sup> The Commission model leads to critical diversion ratios that are even higher than the CRA model and the critical diversion level analysed by the Commission is unlikely to be met as it would need to assume that all PlayStation gamers who played *Call of Duty* for at least [...] hours would need to switch to Xbox in response to the foreclosure strategy. In addition, the Notifying Party submits additional data to show the [...] in the LTVs for Xbox estimated in the CRA model.
- (336) Fourth, the Notifying Party submits that additional factors support the assessment in the CRA model, in particular<sup>280</sup>: (i) the likelihood of switchers in the period 2024-2028 following the release of generation 10 console devices; (ii) the gross margin accrued by the combined entity on *Call of Duty* content on PlayStation in light of the existing partnership between Sony and Activision; (iii) the discrepancy between the

---

<sup>276</sup> Form CO, paragraph 667 and Table 94.

<sup>277</sup> The Article 6(1)(c) Response, Comments on the analysis in Annex 1 to the European Commission 6(1)(c) Decision, page 3.

<sup>278</sup> The Article 6(1)(c) Response, Comments on the analysis in Annex 1 to the European Commission 6(1)(c) Decision, pages 3-5.

<sup>279</sup> The Article 6(1)(c) Response, Comments on the analysis in Annex 1 to the European Commission 6(1)(c) Decision, pages 3-5.

<sup>280</sup> The Article 6(1)(c) Response, Comments on the analysis in Annex 1 to the European Commission 6(1)(c) Decision, pages 3-5.

Commission model's assumption that *Call of Duty* will generate constant revenue over time through 2028 and the Commission's assessment set out in the Article 6(1)(c) Decision that *Call of Duty* will remain a leader in console gaming; and (iv) the presence of direct network effects that are likely to further increase the financial losses from the foreclosure strategy.

- (337) In the SO Response, the Notifying Party restates a number of its arguments from the Form CO and its Article 6(1)(c) Response.

#### 7.4.3.1.3. Impact on effective competition

- (338) The Notifying Party submits in the Form CO that a foreclosure strategy would have minimal impact on rival console businesses such that anticompetitive foreclosure effects would not materialize.<sup>281</sup> First, the Notifying Party explains that exclusivity strategies are not uncommon in the games industry. Other market participants would offer a catalogue of first- and third-party published exclusive content that cannot be accessed on Xbox, and both Sony's and Nintendo's exclusive first-party games rank among the best-selling in Europe and worldwide. Second, the Notifying Party notes that even if some gamers were to divert to Microsoft's platforms as a result of a withholding strategy, it is highly implausible that PlayStation, the established market leader in the market for distribution of console games, could be anti-competitively foreclosed in a way that would hurt consumers. Finally, the Notifying Party considers that no sizeable portion of gamers would divert from PlayStation to Xbox such that Sony would lose a meaningful number of its user base.
- (339) In the Article 6(1)(c) Response, the Notifying Party further elaborates that even if Microsoft were to withhold Activision Blizzard games and *Call of Duty* in particular from Sony, no anticompetitive effects would arise.
- (340) First, the Notifying Party argues that Sony is the leading console provider, which could not be foreclosed as a result of a restricted access to a single franchise, *Call of Duty*.<sup>282</sup> According to the data submitted by the Notifying Party, even if all PlayStation *Call of Duty* players switched to Xbox: (i) Sony's PlayStation console would continue to have the largest installed base; and (ii) PlayStation would still be bigger than Xbox by MAU; (iii) Sony would not lose significant revenue. In addition, according to the Xbox [...] data and Activision Blizzard's data, the switching rate would be limited because console gamers have interests that are wider than playing an Activision Blizzard franchise. Second, the Notifying Party argues that historical exclusivity arrangements of *Call of Duty* have not marginalized – let alone foreclosed – Sony or Microsoft.<sup>283</sup> Sony's position did not suffer as a result of partial exclusivity rights that Microsoft agreed with Activision Blizzard over the *Call of Duty* content in the past. According to the Notifying Party, Sony grew its console share while Microsoft's Xbox had *Call of Duty* marketing exclusivity. In addition, according to the Xbox [...] data and Activision Blizzard's data, the switching rate would be limited because console gamers have interests that are wider than playing an Activision Blizzard franchise.
- (341) Third, the Notifying Party argues that Sony's current arrangements with Activision Blizzard for exclusivity rights over *Call of Duty* provide Sony with effective contractual protections at least until [*business secrets concerning timing*]<sup>284</sup>. Fourth,

---

<sup>281</sup> The Notifying Party's response to RFI 17, question 1, paragraphs 46-61.

<sup>282</sup> The Article 6(1)(c) Response, paragraphs 100-102.

<sup>283</sup> The Article 6(1)(c) Response, paragraphs 116-118.

<sup>284</sup> The Article 6(1)(c) Response, paragraphs 120-121.

the Notifying Party argues that Sony could effectively counter any foreclosure Microsoft could attempt post-Transaction, in particular for the following reasons:<sup>285</sup> (i) Sony already has an extensive and successful first-party game catalogue and exclusive arrangements with third-party publishers, and Sony has announced plans to launch even more first-party games; (ii) Sony has the necessary resources to develop a new AAA game given its large studio footprint with over 20 studios that is poised to grow further; (iii) Sony will continue to have the ability to work with third-party developers that have also produced hit titles.

(342) In the SO Response, the Notifying Party restates a number of its arguments from the Form CO and its Article 6(1)(c) Response, in addition to raising additional points and putting forward some new evidence.

(343) First, the Notifying Party submits that given Sony's leading position in consoles today, even in the most extreme hypothetical foreclosure scenarios, Microsoft could not foreclose Sony post-Transaction. Sony's significant position in consoles is further amplified by its meaningful position in the upstream market for development and publishing, which provides it with ample content to counter any foreclosure strategy.<sup>286</sup> Second, the Notifying Party commissioned an independent Internet-based market research and data analytics firm, to run a survey of console gamers across five of the largest EU Member States across the Union's geographies: Germany, Spain, France, Italy and Poland ("YouGov Survey"). The YouGov Survey found that at most only 5.3% of PlayStation gamers in the EEA would switch to Xbox as a result of a hypothetical withholding of *Call of Duty* from PlayStation.<sup>287</sup>

#### 7.4.3.2. The Commission's Assessment

(344) For the reasons set out below and based on the results of the market investigation, the Commission has reached the conclusion that Microsoft would likely not have the ability to engage in a targeted total or partial input foreclosure strategy with regard to Microsoft's competitors in the downstream market for distribution of console video games, and particularly its closest competitor in the downstream market – Sony. Further, the Commission concluded that Microsoft would not have the incentive to engage in an input foreclosure strategy with regard to Sony. Irrespective of whether Microsoft has either the ability or the incentive to foreclose Sony, the Commission concluded that such foreclosure strategy would not have a significant detrimental effect on competition in the distribution of console games.

##### 7.4.3.2.1. Ability to engage in foreclosure

(345) For the reasons set out below, the Commission has reached the conclusion that Microsoft would likely not have the ability to engage in a targeted total or partial input foreclosure strategy with regard to rival distributors of console games and particularly Sony, Microsoft's main competitor in the downstream market for distribution of console video games. The Commission has found that: (i) AAA games and particularly AAA shooter (including battle royale) console video games are important inputs for the downstream market for distribution of console games; as well as that (ii) the merged entity likely has market power in the upstream market for development and publishing of AAA shooter (including battle royale) console games; and that (iii) the merged entity will likely have the ability – both technically

---

<sup>285</sup> The Article 6(1)(c) Response, paragraphs 122-126.

<sup>286</sup> SO Response, paragraphs 189-195

<sup>287</sup> SO Response, paragraphs 202-209.

and contractually – to restrict or degrade access to Activision Blizzard’s AAA shooter console games post-Transaction. However, the Commission considered that Sony would likely have effective and timely counter-strategies that it could deploy in order to react to potential foreclosure strategies.

#### 7.4.3.2.1.1. Console games as an important input for distributors of console games

- (346) According to the Non-Horizontal Merger Guidelines, input foreclosure may raise competition problems only if it concerns an important input for the downstream product. This is the case, for example, when the input concerned represents a significant cost factor relative to the price of the downstream product. Irrespective of its cost, an input may also be important for other reasons. For instance, the input may be a critical component without which the downstream product could not be manufactured or effectively sold on the market, or it may represent a significant source of product differentiation for the downstream product. It may also be that the cost of switching to alternative inputs is relatively high.<sup>288</sup>
- (347) In the first place, the Commission notes that game content is a critical feature of competition between distributors of console games (gaming consoles and subscription services). As already observed by the Commission in *Microsoft/ZeniMax*, “*having a broad range of attractive games is the **single most important factor** for driving the success of a console*”<sup>289</sup> (emphasis added). In particular, competitive success is primarily determined by the quality and the diversity of video games. According to the market intelligence provider IDG, which focuses on the technology sector, content in the gaming industry remains the “*paramount success factor*”, and without offering a portfolio of successful and differentiated content, “*a game platform cannot survive*”.<sup>290</sup> Respondents to the Phase I and Phase II market investigation equally consider that game content drives the competition between distributors of console video games. For example, one market respondent noted that “*content is essential. Players in the videogame industry must offer as much content as possible with great software*”<sup>291</sup>, and another that “[*t*]he content is what drives the users of a particular platform”.<sup>292</sup> Sony noted that the most important factor driving consumers’ decisions is the quality and number of games available on a console.<sup>293</sup> According to Microsoft’s internal documents, [*business secrets from internal documents on console gaming*].<sup>294</sup> (emphasis added).
- (348) Moreover, games that are available only on the console of one distributor but not on others may represent a significant source of differentiation for the distribution of console games downstream. This is because exclusive games might influence the choice of a console especially at the stage of the initial console purchase, even if in the future this might be less important due to cloud game streaming. As explained in *Microsoft/ZeniMax*, “*Console-specific storefronts are available exclusively to users of the respective console, because the console manufacturer runs the storefronts through which players can purchase the related console games. [...] once video*

---

<sup>288</sup> See Non-Horizontal Guidelines, paragraph 34.

<sup>289</sup> Commission decision of 5 March 2021 in case M.10001 – *Microsoft/ZeniMax*, paragraph 79.

<sup>290</sup> Form CO, Annex 6.27, page 28.

<sup>291</sup> Reply of a market participant to Questionnaire Q1 to video game developers, publishers and distributors, question 10.1 [ID1191].

<sup>292</sup> Reply of a market participant to Questionnaire Q2 - Phase II Questionnaire, question C.A.5. [ID4163].

<sup>293</sup> Sony’s non-confidential reply to CMA RFI of 25 May 2022, Tranche 2 response, paragraph 14.2 [ID1383].

<sup>294</sup> Form CO, Annex 6.12– [...].

*game players buy a certain console, they essentially become locked-in to that console's ecosystem. Exclusive video games could therefore encourage the purchase of the relevant consoles.*"<sup>295</sup> Each game distributor has exclusive rights over first-party games and/or third-party games based on an exclusivity agreement. As several market respondents indicated, video games distributed exclusively on a specific console provide a competitive advantage because they encourage users to purchase the relevant console. For example, one market respondent explained that *"From gamers' perspective, choosing a platform will usually depend on the attractiveness of the hardware (e.g. among friends) and more importantly, the quality and number of exclusive games that particular platform has to offer."*<sup>296</sup>

- (349) In particular, the Commission notes that AAA games are an important input to the distribution of console games. AAA games have high levels of popularity and/or complexity, and are developed by large development studios, requiring significant budget and time (up to several years).<sup>297</sup> Due to large development investments, AAA games offer a deeply immersive entertainment experience that attracts large audiences. As one market respondent noted, *"An average user wants to play blockbuster games that have complex plots, detailed open worlds to explore and high-quality graphics, and are widely discussed. In-depth content is normally secured by AAA titles."*<sup>298</sup> The availability of AAA games is therefore a strong driver in choosing which console platform the user will adopt.<sup>299</sup> As one market respondent explained, the availability of AAA games is an important factor in a users' choice of a console game distributor because they want to secure valuable content in return for their investment in the console hardware: *"From a player standpoint, there is an investment that is made at the outset to access games on a particular platform (e.g. purchase of hardware) therefore availability of AAA titles on the platform is important as part of making their initial decision around which platform to access titles."*<sup>300</sup> And another respondent added that *"AAA games – which players perceive to be the top tier of both technical prowess and quality – are sought-after by gamers who want to know that the hardware they own (or will own) is being utilised to the fullest extent possible."*<sup>301</sup>
- (350) The Commission acknowledges that in some market respondents' view, game type, including whether a game is considered AAA or not, may not be the key factor for a users' choice of games, and that gamers switch regularly between AAA and non-AAA games.<sup>302</sup> However, the Commission notes that, given that they generally enjoy high development and marketing budgets, and are developed to provide high quality and complex game experience, AAA games are generally expected to attract a large user base and drive high user engagement levels. As one market respondent noted *"generally speaking AAA games may be expected to perform well (albeit success can vary significantly by title) such that having such games could help a distributor*

---

<sup>295</sup> Commission decision of 5 March 2021 in case M.10001 – *Microsoft/ZeniMax*, paragraph 105.

<sup>296</sup> Reply of a market participant to Questionnaire Q1 to video game developers, publishers and distributors, question 6.1.1 [ID1213].

<sup>297</sup> Form CO, paragraph 133.

<sup>298</sup> Reply of a market participant to Questionnaire Q2 - Phase II Questionnaire, question C.A.5. [ID3323]

<sup>299</sup> Form CO, Annex 36, page 48. Newzoo 2022 Consumer Insights survey shows [...] % of console players are highly motivated by immersion of big screen AAA console games.

<sup>300</sup> Reply of a market participant to Questionnaire Q2 - Phase II Questionnaire, question C.A.5. [ID4103]

<sup>301</sup> Reply of a market participant to Questionnaire Q2 - Phase II Questionnaire, question C.A.5.

<sup>302</sup> Reply of a market participant to Questionnaire Q2 - Phase II Questionnaire, question C.A.5. [ID3998]



*compete more effectively.*<sup>303</sup> Consequently, given their characteristics, AAA games have a high potential to generate exceptional user loyalty and disproportionately influence consumers' decisions when purchasing a gaming console or a subscription service. A large majority of market investigation respondents considered that offering a catalogue of AAA games matters for the competitiveness of console game distributors, and almost half of the respondents considered that it is very important to distribute AAA games.<sup>304</sup> In that regard, one market respondent explained that *“AAA games are typically [sic] the core of any catalogue. AAA games drive the industry, introduce the latest technology advancements and are the most attractive for general audience.”*<sup>305</sup>, and another respondent concluded that *“Triple A games are important to console developers, especially if those games are exclusive to a console. Most average gamers rely on word of mouth and media to choose a game to play. Triple A games have the most marketing and general consumer awareness. While indie games are popular, triple A games are a must to be competitive in the marketplace.”*<sup>306</sup>

7.4.3.2.1.2. AAA shooter (including battle royale) console games are an important input to the downstream market for console game distribution

(351) Further, the Commission notes that games of shooter (including battle royale) genre are an important input for console game distributors.

(352) The market investigation provided indications that some genres (and particularly shooter) are particularly important for competition in console game distribution because they drive console adoption and user engagement compared to other game genres. For example, one market respondent explains that *“It appears that the typical customer of a game console at launch and even a few years into a console's availability is one who is looking for high-quality action and graphics experiences from their console gaming. For Sony and Microsoft platforms - you will frequently see a major focus on Action/Adventure/Shooter, and Sports and Racing titles around the first few years of a console lifecycle. Later on in a product's lifecycle - a wider genre mix becomes more important, inviting a broader array of players to the experience (for example - families, more casual players).”*<sup>307</sup>

(353) The large majority of the market investigation respondents expressing an opinion on this subject considered that AAA shooter (including battle royale) games are very important for the competitiveness of console game distributors.<sup>308</sup> A number of market respondents considered that this type of console games is very important, if not crucial, for console game distributors. According to several market respondents, this genre is among the most popular genres, which has a large potential to attract and retain a large user base and therefore drive the choice and adoption of consoles. For example, one market participant commented that *“Shooting-style games will typically be among the most interesting game types to the first-adopter audience of any new console generation, and will continue to remain popular even as any generation of hardware ages. Shooter games can be considered to represent the backbone of AAA game experiences on both consoles and PC (excepting Nintendo Switch)”*, further adding that *“Offering such titles is very important as they will be*

<sup>303</sup> Reply of a market participant to Questionnaire Q2 - Phase II Questionnaire, question C.A.5.

<sup>304</sup> Replies to Questionnaire Q2 - Phase II Questionnaire, question C.A.4.

<sup>305</sup> Reply of a market participant to Questionnaire Q2 - Phase II Questionnaire, question C.A.5. [ID4175]

<sup>306</sup> Reply of a market participant to Questionnaire Q2 - Phase II Questionnaire, question C.A.5. [ID4112]

<sup>307</sup> Reply of a market participant to Questionnaire Q2 - Phase II questionnaire to competitors, question C.A.7.

<sup>308</sup> Replies to Questionnaire Q2 - Phase II Questionnaire, question C.A.8.

among the primary titles that the game player is looking for”.<sup>309</sup> Another market participant noted that “Shooters and battle royale games are in the top categories of genre of games in popularity for players”, adding that “The ability to offer a range of titles within this genre is therefore important for user acquisition and retention”.<sup>310</sup> Another market participant stated that “Shooters are one of the most played genres in consoles and, in fact, most of the very well-known videogames fit in this category. It is a must-have in any videogame service.”<sup>311</sup> In addition, according to a third party analyst, shooter was the top video game genre across the globe in 2021. Shooter games ranked as the most-played gaming genre for virtually all age groups except for online users aged 55 to 64 years, where it ranked third. Action-adventure were the second-most popular gaming genre, ranking second across all age groups.<sup>312</sup> Finally, some market participants explained that shooter games drive console adoption and retain high levels of user engagement even long after a user first acquires a console. For example, one market participant argued that “Shooting-style games will typically be among the most interesting game types to the first-adopter audience of any new console generation, and will continue to remain popular even as any generation of hardware ages”.<sup>313</sup>

- (354) Based on the results of the market investigation, the Commission considers that AAA shooter (including battle royale) console games may represent a significant source of differentiation for a console game distributor as (i) they attract a significant portion of users; (ii) and they account for a significant share of game-time.
- (355) The Xbox user data corroborates the fact that shooter games are a particularly important genre. Compared to all other genres of games distributed on Xbox, the shooter genre shows the highest daily and monthly playtime levels on Xbox and days played per month in 2021 worldwide and in the EEA.<sup>314</sup> Further, Microsoft’s own internal analysis of user engagement on Xbox shows that shooter games have the [business secrets concerning Microsoft’s Xbox user data] share of user engagement on Xbox worldwide, both by game time and consumer spend on game purchases and add-ons. For example, Microsoft found that shooter games [business secrets concerning Microsoft’s Xbox user data].<sup>315</sup> In another internal document, Microsoft noted that shooter games [business secrets concerning Microsoft’s Xbox user data].<sup>316</sup> Further, Microsoft found that shooter games [business secrets concerning Microsoft’s Xbox user data]. Shooter games alone accounted for [business secrets concerning Microsoft’s Xbox user data]% of total spend on Xbox, while the remaining spend is distributed across [business secrets concerning Microsoft’s Xbox user data]%.<sup>317</sup> Microsoft’s internal player engagement assessments confirmed [business secrets concerning Microsoft’s Xbox user data].<sup>318</sup> [business secrets concerning Microsoft’s Xbox user data].

---

<sup>309</sup> Reply of a market participant to Questionnaire Q2 - Phase II Questionnaire, question C.A.9

<sup>310</sup> Reply of a market participant to Questionnaire Q2 - Phase II Questionnaire, question C.A.9 [ID4103].

<sup>311</sup> Reply of a market participant to Questionnaire Q2 - Phase II Questionnaire, question C.A.9 [ID4249].

<sup>312</sup> Statista, Most popular video game genres among internet users worldwide as of 3<sup>rd</sup> quarter 2022, by age group, <https://www.statista.com/statistics/1263585/top-video-game-genres-worldwide-by-age/>, [ID7221].

<sup>313</sup> Reply of a market participant to Questionnaire Q2 - Phase II Questionnaire, question C.A.9 [ID3329].

<sup>314</sup> Form CO, Annex 79.

<sup>315</sup> Microsoft’s internal document – [...], [ID1087-52085 MSFT-EC-01318761].

<sup>316</sup> The Notifying Party’s reply to RFI 8, Annex 6.107, page 2.

<sup>317</sup> The Notifying Party’s reply to RFI 8, Annex 6.107, page 28.

<sup>318</sup> Form CO, Annexes 6.105- 6.107.

(356) Further, the Notifying Party provided an estimated proportion of all gamers worldwide and in the EEA that have played shooter and battle royale games on console and PC based on the industry analyst Newzoo data for December 2020, 2021 and January to May 2022. The data shows that relative to the games of shooter genre, other genres (other than action and adventure) account for significantly lower share of engaged users on console and PC. According to the worldwide data for 2021, [...]% of MAU played a shooter game and [...]% a battle royale game in 2021. Only action and adventure ([...]%) and sports ([...]%) games attracted significant portions of users, while other game genres accounted for [...]% or less of MAUs. According to the EEA data for 2021, [...]% of MAUs played a shooter game, and [...]% a battle royale game in 2021. Only adventure ([...]%) and sports ([...]%) games also attracted significant portions of users, while other game genres accounted for [...]% or less of MAUs. Similarly, the Notifying Party provided a ranking of the most “popular video game formats” played by internet users by age group as of January 2022 by the third-party data provider, DataReportal. This data similarly shows that shooter games enjoy significant popularity. Shooter games (excluding battle royale) consistently ranked as the most played genre by gamers under 55 years of age as of January 2022.<sup>319</sup>

7.4.3.2.1.3. Activision Blizzard’s AAA shooter console games are an important input to the downstream market for console game distribution

(357) Activision Blizzard is one of the largest console game developers and publishers. In 2022, Activision Blizzard's annual revenue amounted to USD 7.53 billion, which is more than the revenue of any other game developer and publisher.<sup>320</sup> Activision Blizzard benefits from a vast gaming portfolio of game franchises that generate billion USD revenue. Its biggest revenue driver is the long-running tentpole AAA shooter franchise *Call of Duty*, for which new game titles are released every year since 2003. As of April 2021, the *Call of Duty* series has sold over 400 million units. As noted in its announcement of the Transaction by the Notifying Party, Activision Blizzard holds “*iconic franchises from the Activision, Blizzard and King studios like ‘Warcraft’, ‘Diablo’, ‘Overwatch’, ‘Call of Duty’ and ‘Candy Crush’.*”<sup>321</sup> When setting out the rationale of the Transaction, Microsoft emphasized the competitive potential of Activision Blizzard’s content: “*With Activision Blizzard’s nearly 400 million monthly active players in 190 countries and three billion-dollar franchises, this acquisition will make Game Pass one of the most compelling and diverse lineups of gaming content in the industry.*”<sup>322</sup> The results of the market investigation also indicate that Activision Blizzard’s games important or very important to distributors of console games.<sup>323</sup> For example, one respondent explained that “*Activision Blizzard's games and franchises are very important to third-party distributors of console games, particularly because of their long-standing popularity with an*

---

<sup>319</sup> Form CO, paragraph 369.

<sup>320</sup> Craft, Activision Blizzard competitors and similar companies, 2023, <https://craft.co/activision-blizzard/competitors>, [ID7198].

<sup>321</sup> Microsoft, “Microsoft to acquire Activision Blizzard to bring the joy and community of gaming to everyone, across every device”, 2022, <https://news.microsoft.com/2022/01/18/microsoft-to-acquire-activision-blizzard-to-bring-the-joy-and-community-of-gaming-to-everyone-across-every-device/>, [ID7209].

<sup>322</sup> Ibid.

<sup>323</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 46.1.

immense user base.”<sup>324</sup> Another respondent considered that “Activision Blizzard games are critical to competition in high-end gaming (including in console, PC, and streaming)”.<sup>325</sup>

- (358) In an internal document made in the context of [*business secrets from an internal document on content publishers*].<sup>326</sup> The Notifying Party emphasized to the Commission that the document was not intended to [*business secrets from an internal document on content publishers*]. However, the Commission notes that the document identifies [*business secrets from an internal document on content publishers*]<sup>327</sup>). The document further states that “[...]”. In the same document, [...].

**Figure 1**

[*business secrets from an internal document on content publishers*].

Source: Form CO, Annex 6.31

- (359) **Activision Blizzard’s AAA shooter franchise Call of Duty.** Activision Blizzard’s most notable franchise on console is Call of Duty, an AAA shooter game, which accounted for the vast majority (more than [80-90]%)<sup>328</sup> of Activision Blizzard’s total console revenues in 2021. As explained in recital (317) above, Activision Blizzard’s console games are currently generally available on Microsoft’s and Sony’s consoles, while only a small portion of Activision Blizzard’s games are distributed on Nintendo’s console. In particular, Activision Blizzard’s key console franchise *Call of Duty* is currently distributed only on the Xbox and PlayStation consoles, and it is not distributed on Nintendo.
- (360) Based on the results of its market investigation, the Commission considers that the game titles released as part of Activision Blizzard’s AAA shooter game franchise *Call of Duty* are an important input to the downstream market of console game distribution for the following reasons.
- (361) First, the *Call of Duty* franchise is widely regarded as one of or even the most successful franchise in the video gaming industry given its longevity, profitability and frequency of new content release. Since its release in 2003, it has been one of the longest running, bestselling and top grossing video game franchises worldwide.<sup>329</sup> According to industry experts, *Call of Duty* is the “largest annualized AAA premium franchise in the games market” and “an evergreen IP on console”.<sup>330</sup> Another study found that: “*Call of Duty’s* significance to entertainment at large cannot be overstated. The brand was the only video game IP to make it into the top 10 of all entertainment brands among fanatics, joining powerhouses like *Star Wars*, *Game of Thrones*, *Harry Potter*, and *Lord of the Rings*.”<sup>331</sup> The respondents to the market

---

<sup>324</sup> Reply of a market participant to Questionnaire Q1 to video game developers, publishers and distributors, question 46.1.1 [ID3329].

<sup>325</sup> Reply of a market participant to Questionnaire Q1 to video game developers, publishers and distributors, question 94 [ID1446].

<sup>326</sup> Form CO, Annex 6.31. Notifying Party’s response to RFI 2, question 27, paragraph 27.1.

<sup>327</sup> Form CO, Annex 6.31, page 4.

<sup>328</sup> The Notifying Party’s reply to RFI 1, question 36

<sup>329</sup> Statista, Call of Duty – Statistics and Facts, 2022, <https://www.statista.com/topics/8300/call-of-duty-cod/#dossierKeyfigures>, [ID7204].

<sup>330</sup> Sony’s observations on certain of Microsoft’s public statements of 3 October 2022, Annex 1 (IDG Consulting, IDG-SIE Publisher Structure Project), page 35 [ID3529].

<sup>331</sup> GameDaily, “Report: Call of Duty has the most passionate fan base among 2019’s top gaming brands” 2019, <https://gamedaily.biz/article/1460/report-call-of-duty-has-the-most-passionate-fan-base-among-2019s-top-gaming-brands-interpret#:~:text=News->

investigation also highlighted the commercial success of the *Call of Duty* franchise. For example, one respondent referred to the *Call of Duty* as an “iconic” franchise, with “each new release of the game is instantly a best seller across the world which drives conversations in the gaming industry and amongst players”.<sup>332</sup> Another respondent referred to it as a “record-breaking” franchise explaining that “most of the numbers that the franchise has managed to achieve, have never been achieved before and are unlikely to be surpassed by any other franchises in the near future.”<sup>333</sup>

- (362) Activision Blizzard releases new *Call of Duty* game titles on an annual basis, all of which consistently occupy the top of the selling console game titles rankings every year.<sup>334</sup> The Notifying Party provided the lists of top bestselling 20 console game titles and franchises worldwide and in the EEA for the past three calendar years, based on third-party sources (NPD and GfK) procured by the Notifying Party in its ordinary course of business.<sup>335</sup> On console, two different *Call of Duty* titles were among the top three bestselling video games worldwide in 2020 and 2021: featuring as first and third in 2020 and second and third in 2021.<sup>336</sup> *Call of Duty* was the only franchise with two titles among top 10 console titles worldwide. Further, the Notifying Party provided lists of top 10 bestselling franchises on Xbox. The *Call of Duty* franchise was one of the top two franchises on Xbox in 2018, 2019 and 2020, by digital sales including in-game purchases, featuring as second in 2018 and 2019 and first in 2020.<sup>337</sup> In addition, *Call of Duty* was the bestselling franchise on Xbox in 2019, 2020 and 2021 by digital and physical sales excluding in-game purchases.<sup>338</sup>
- (363) Second, a great majority of market respondents expressing an opinion consider that particularly the *Call of Duty* franchise is important or very important to distributors of console games.<sup>339</sup> One respondent considered that “*Call of Duty* is the leading franchise for Activision and one of the most selling games in the [first-person shooter] & battle royale genres”<sup>340</sup>, and another noted that “*Call of Duty* is an iconic franchise; each new release of the game is instantly a best seller across the world which drives conversations in the gaming industry and amongst players. It is therefore very important to distributors.”<sup>341</sup> In fact, some market participants noted

---

[.Report%3A%20Call%20of%20Duty%20has%20the%20most%20passionate%20fan%20base,2019's%20top%20gaming%20brands%20%5BInterpret%5D&text=Activision's%20shooter%20franchise%20be at%20out.all%20entertainment%20brands%20for%20fanatics](#), [ID7230].

332 Reply of a market participant to Questionnaire Q1 to video game developers, publishers and distributors, question 47.1.1 [ID1126].

333 Reply of a market participant to Questionnaire Q1 to video game developers, publishers and distributors, question 58.1 [ID3329].

334 Statista, Call of Duty – Statistics and Facts, 2022, <https://www.statista.com/topics/8300/call-of-duty-cod/#dossierKeyfigures>, [ID7204].

335 Statista, Call of Duty – Statistics and Facts, 2022, <https://www.statista.com/topics/8300/call-of-duty-cod/#dossierKeyfigures>, [ID7204].

336 Form CO, Tables 81-83.

337 Form CO, Tables 87-89.

338 Form CO, Tables 90-93.

339 Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 47.1.

340 Reply of a market participant to Questionnaire Q1 to video game developers, publishers and distributors, question 47.1.1 [ID1210].

341 Reply of a market participant to Questionnaire Q1 to video game developers, publishers and distributors, question 47.1 [ID1126].

that “Activision Blizzard’s content is diverse and some games can be considered as must-have, especially Call of Duty.”<sup>342</sup>

- (364) Third, the importance of Activision Blizzard’s *Call of Duty* franchise for console game distributors is also reflected in the Notifying Party’s internal documents.
- (365) In some of its internal documents, Activision Blizzard [*business secrets from Activision Blizzard’s internal documents on game titles*]. For example, one Activision Blizzard’s document notes that [*business secrets from an Activision Blizzard’s internal document on game titles*].<sup>343</sup>
- (366) In an internal document, [*business secrets from an Activision Blizzard’s internal document on game titles*]. The document notes that [*business secrets from an Activision Blizzard’s internal document on game titles*].<sup>344</sup> The Notifying Party noted that the document contains statements about [...]. For example, the document mentions [*business secrets from an Activision Blizzard’s internal document on game titles*].”<sup>345</sup> However, the Commission notes that [*business secrets from an Activision Blizzard’s internal document on game titles*].
- (367) In another internal document, Activision Blizzard analyses the [*business secrets concerning business strategy*] of Activision Blizzard’s partnership with Sony to [*business secrets concerning business strategy*]. Activision Blizzard notes that the partnership has [*business secrets concerning business strategy*] during the last console generation: “[*business secrets concerning business strategy*]”. In the document, Activision Blizzard explains that “[*business secrets concerning business strategy*]” and that [*business secrets concerning business strategy*].<sup>346</sup>
- (368) In another one of its internal documents, Activision Blizzard assessed [*business secrets concerning business strategy*]. In the document, Activision Blizzard noted that in the calendar year 2020 [*business secrets concerning business strategy*]. In addition, the document notes that [*business secrets concerning business strategy*]. Finally, the document notes that [...]. On this basis, *Call of Duty* sold [*business secrets concerning business strategy*] units, followed by [*business secrets concerning business strategy*].<sup>347</sup> Other franchises sold [*business secrets concerning business strategy*]. The Notifying Party submitted that the calendar year 2020, which the document concerns, is not representative. According to the Notifying Party, in 2020 [*business secrets concerning business strategy*]. In addition, the Notifying Party submitted that the statements in the document do not give insight on the particular strength of *Call of Duty* vis-à-vis third-party titles.<sup>348</sup> The Commission notes that the calendar year 2020 unfolded under specific circumstances such as the Covid-19 pandemic, and to which at least a part of Activision Blizzard’s as well as its competitors’ strong performance can be attributed. However, the Commission also considers that the document indicates the commercial potential of Activision Blizzard’s *Call of Duty* franchise, as well as that no other AAA shooter game achieved comparable success. In any event, the Commission notes that the

---

<sup>342</sup> Agreed minutes of the meeting/conference call of 26 April 2022 with a market participant, paragraph 16 [ID244]. See also replies to Questionnaire Q1 to video game developers, publishers and distributors, question 47.1.1.

<sup>343</sup> Activision Blizzard’s internal document – [...].

<sup>344</sup> Activision Blizzard’s internal document – [...].

<sup>345</sup> The Letter of Facts Response, page 12.

<sup>346</sup> Activision Blizzard’s internal document – [...], [ID ABK-2REC-00281242].

<sup>347</sup> Activision Blizzard’s internal document – [...] [ID: ABK-2R-01775896].

<sup>348</sup> The Letter of Facts Response, page 13.

commercial success of Activision Blizzard’s latest *Call of Duty* title released in October 2022 *Call of Duty: Modern Warfare 2* is setting new franchise records. In its press release, Activision Blizzard reported that “Modern Warfare II is the highest grossing entertainment opening of 2022.” Adding that (i) “*Modern Warfare II is the #1 top selling opening in franchise history topping \$800 million in sell-through following its first three days of release.*” And that (ii) “*Following its October launch, Call of Duty: Modern Warfare II delivered the highest opening-quarter sell-through in franchise history.*”<sup>349</sup>

- (369) Fourth, Microsoft’s Xbox [*business secrets concerning methodology*] data and Sony’s PlayStation data show that Call of Duty factors in the consumers’ decision to purchase a console.
- (370) According to the data provided by the Notifying Party, a material proportion of gamers play Call of Duty in the very initial period of the console usage. In the period between 2016 and 2022, [20-30]% of gamers played the franchise within a month of activating their new Xbox console.<sup>350</sup> In addition, the Notifying Party provided a proportion of users that played Call of Duty as their first game after activating a new Xbox between 2016 and 2022.<sup>351</sup> According to the data, relative to other AAA game franchises, a significant share of gamers plays Call of Duty as their first game after purchasing Xbox. Over the entire 2016-2022 period, Call of Duty has the second highest share of gamers that play it first after activating a new Xbox ([10-20]%) and only Fortnite has a slightly higher share ([10-20]%) than Call of Duty. In addition, none of the top AAA franchises with a meaningful share of Xbox users that play them as a first game on their Xbox console are classified as shooter games by the Xbox Store: FIFA ([10-20]%), Minecraft ([5-10]%) GTA ([5-10]%) and NBA 2K ([0-5]%).
- (371) Sony’s PlayStation data for 2021 shows that *Call of Duty* is the [...] franchise on the first day of purchase of a PlayStation console, [...] other most selling AAA shooter franchises on PlayStation such *Fortnite* and *Apex Legends*.<sup>352</sup> In addition, Sony’s PlayStation data shows that a substantial share of PlayStation gamers spend a significant amount of their time playing *Call of Duty* within 4 weeks of a new title release. Based on the total engagement hours on PlayStation for AAA franchises between 2017 and 2021, within 4 weeks of a new title release in the franchise, *Call of Duty* ranks [...], [...] of other AAA shooter franchises *Fortnite*, *Apex Legends* and *Battlefield*.<sup>353</sup> The Notifying Party submitted that the inclusion of free-to-play titles, one of which is *Call of Duty: Warzone*, significantly overstates the importance of *Call of Duty*. According to the Notifying Party, many gamers may decide to play free-to-play games first when they purchase a new console because they do not have a large library of games yet or because they are free.<sup>354</sup> In addition, based on the Xbox data, the Notifying Party estimated that if free-to-play titles were excluded from the analysis, the share of gamers who play *Call of Duty* as their first franchise

---

<sup>349</sup> Activision Blizzard, “Modern warfare II crosses 1 billion sell-through 10 days, fastest in franchise history”, 2022, <https://investor.activision.com/news-releases/news-release-details/modern-warfare-ii-crosses-1-billion-sell-through-10-days-fastest>, [ID7197].

<sup>350</sup> The Notifying Party’s reply to RFI 26, Table 5.1.

<sup>351</sup> The Notifying Party’s reply to RFI 26, Table 6.1.

<sup>352</sup> Sony, “Observations on the Importance of Call Of Duty to Attract & Retain Gamers”, 18 November 2022 (ID: 3538), paragraph 8.

<sup>353</sup> Sony, “Observations on the Importance of Call Of Duty to Attract & Retain Gamers”, 18 November 2022 (ID: 3538), paragraph 13.

<sup>354</sup> The Letter of Facts Response, paragraph 19.

in 2022 would decrease. However, the Commission understands that even after excluding free-to-play titles from the analysis, *Call of Duty* would remain the most played AAA shooter game franchise on the first day of the users' console purchase. In any event, the Commission considers that the market investigation provided no indication to segment the market for development and publishing of games based on their payment model, where games of different payment models equally compete. In addition, the Notifying Party itself explained that “[f]ree to play games are not simply offered for free, they are monetized products whose revenue generation should not be disregarded” as well as that “a majority of console games are paid for and not free-to-play. In any event, the highest spending actually comes from in-game purchases.”<sup>355</sup> Furthermore, the Commission notes that by removing free-to-play AAA shooter games, the Notifying Party disregards AAA shooter console games based on the free-to-play business model such as *Fortnite* and *Apex Legends*, which generate a meaningful number of engagement hours on PlayStation and are relevant to the competitive dynamics in AAA shooter genre.

(372) Fifth, Sony's PlayStation user data indicates that Activision Blizzard's console games are an [...] source of PlayStation's revenue.<sup>356</sup> In particular, a significant percentage of user engagement on PlayStation is driven by the *Call of Duty* franchise alone. For example, *Call of Duty* consistently ranks among the top [...] franchises on PlayStation by game-time on PlayStation between 2017 and 2022.<sup>357</sup> According to consumer surveys conducted by Sony [...], *Call of Duty* is among the [...] franchises on PlayStation and gamers are more interested in purchasing *Call of Duty* than [...] on PlayStation from a third-party publisher.<sup>358</sup>

(373) Finally, the [*business secrets concerning agreement terms*] demonstrates Activision Blizzard's bargaining power in business negotiations with console game distributors for the distribution of its AAA shooter games. Based on the current agreement between Activision Blizzard and Sony, [*business secrets concerning agreements terms*].<sup>359</sup>

(374) On the basis of all these elements, and for the purposes of this Decision, the Commission concludes that the upstream development and publishing of console games, in particular Activision Blizzard's console games due to the significance of AAA shooter games (including battle royale) in its catalogue, considered either as a segment in the overall upstream market for the development and publishing of console games or a narrow upstream market for AAA shooter (including battle royale) console games, are an important input for the downstream market for console game distribution overall.

7.4.3.2.1.4. The merged entity holds market power in the narrow upstream market for AAA shooter (including battle royale) console games

(375) First, the Commission notes that the combined entity holds significant market shares in the development and publishing of shooter (including battle royale) console games worldwide, irrespective of the exact product market segmentation.

---

<sup>355</sup> The Article 6(1)(c) Response.

<sup>356</sup> Sony, Cornerstone Research and RBB Economics economic analysis: “Microsoft-Activision Anticompetitive Effects Analysis, Non-Confidential Summary for EC”, see paragraphs 9-11 [ID3534].

<sup>357</sup> Sony's non-confidential reply to RFI 2, question 16 [ID3532].

<sup>358</sup> Sony, Cornerstone Research and RBB Economics economic analysis: “Microsoft-Activision Anticompetitive Effects Analysis, Non-Confidential Summary for EC”, see paragraphs 9-11 [ID3534].

<sup>359</sup> The Notifying Party's reply to RFI 24, question 1, paragraph 1.3.



- (376) In the SO, the Commission assessed the combined entity's market share by revenue in the market for development and publishing of shooter (including battle royale) console games (including both AAA and non-AAA games), since nothing in the case file suggests that only considering games classified as AAA within a given genre changes market shares substantially compared to considering all games in such genre. The Commission considered that the combined entity's market share by revenue in shooter (including battle royale) console games (including both AAA and non-AAA) are close to or exceed 30% worldwide. In 2021, the Parties' combined market share by revenue was [20-30]% worldwide. However, the Parties' combined market share was above 30% worldwide in 2020 ([30-40]%), where Activision Blizzard alone had [30-40]%. The Parties' competitors in the space account for smaller share of the market, most notably Epic Games with a popular battle royale game *Fortnite* ([20-30]%) while other developers and publishers are much smaller competitors in the space: EA (*Battlefield*, *Apex Legends*, *Titanfall*, *Star Wars Battlefront* and others) ([10-20]%) and Ubisoft (*Tom Clancy*) ([5-10]%). No other publisher had market share exceeding [0-5]% worldwide.
- (377) In the SO Response, the Notifying Party submitted that even in the narrowest plausible segment of development and publishing of shooter console games that includes AAA only type of games, the Parties' combined market shares based on value (by revenue) and volume are below the 30% threshold specified in the Non-Horizontal Guidelines. According to the Notifying Party, this showed that competition concerns are unlikely to arise from this Transaction and that the present case does not merit an extensive investigation.<sup>360</sup> However, the Commission notes that the Notifying Party relies only on EEA-wide market shares of the narrowest product market of AAA shooter console games to demonstrate that the Parties' combined shares generally remain below or at 30%, and therefore shows only the narrowest geographic market of AAA shooter console games but not a broader worldwide level. Indeed, the combined entity's EEA-wide market share by revenue is lower and does not exceed 30% in 2022, 2021 or 2020. Nonetheless, based on the data provided by the Notifying Party, the Commission notes that when considering market shares by revenue for the most narrow product segment on a worldwide level, the combined entity's market share in development and publishing of shooter console games classified as AAA by revenue exceeds 30% in the last three calendar years: 2022 ([30-40]%), 2021 ([30-40]%) and 2020 (30-40]%). In the worldwide market, Activision Blizzard alone has been the market leader in the past three years. The Parties' largest competitor worldwide is EA with [20-30]% share, followed by Epic Games with [10-20]% share and Ubisoft with [5-10]% in 2022.<sup>361</sup>
- (378) Further, the Notifying Party argued that even when considering the alternative metrics such as MAU and game-time in the narrowest plausible segment of development and publishing of shooter console games that includes AAA only type of games, the Parties' combined market shares remain below 30%.<sup>362</sup> However, the Commission notes that the Parties' combined market share in development and publishing of AAA shooter console games does in fact exceed 30% in the EEA when considering shares by MAU ([30-40]%), or is at [30-40]% when considering shares by game-time in the EEA in 2021, and are thus not below 30% threshold.<sup>363</sup> In

---

<sup>360</sup> SO Response, paragraph 82.

<sup>361</sup> The Notifying Party's reply to RFI 26, Annex 3.

<sup>362</sup> SO Response, paragraph 81.

<sup>363</sup> SO Response, Table 1.

addition, when considering shares of AAA shooter (including battle royale) console games by MAU and game-time provided by the Notifying Party based on the industry analyst's Newzoo data (see Tables 7 and 8 above), which tracks MAU and game-time on Xbox and PlayStation, the combined entity's market share exceeds 30% on a worldwide and the EEA-wide level by MAU and at least on a worldwide level by game-time.<sup>364</sup> When considering the proportion of MAU on PlayStation and Xbox, the combined entity's share in the market for development and publishing of AAA shooter console games comes close to 40% worldwide ([30-40]%) and exceeds 35% in the EEA ([30-40]%) in 2022. On a worldwide level, the combined entity is a clear market leader while the competing developers and publishers have a share that is two times or more lower. The largest competitors trailing the combined entity are Epic Games ([10-20]%), Take two ([10-20]%) and EA ([10-20]%). The competitive landscape is similar in the EEA, where the combined entity accounts for [30-40]% of MAU on PlayStation and Xbox. The combined entity is a market leader in development and publishing of AAA shooter console games also when considering the proportion of game-time on PlayStation and Xbox worldwide in 2022. On a worldwide level, the combined entity holds [30-40]% of game-time. The largest competitors include Epic Games ([20-30]%), Take two ([10-20]%) and EA ([10-20]%). The user engagement with the combined entity's AAA shooter console games by game-time is lower in the EEA, where the combined entity's share does not exceed 30% in 2022 ([20-30]%).

- (379) The combined entity accounts for the highest share of user engagement by MAU and game-time also when looking at the Notifying Party's data tracking MAU and game-time for AAA shooter console games on Xbox.<sup>365</sup> The Parties' combined proportion of MAU on Xbox exceeds 30% in 2021 at least worldwide: [30-40]% worldwide and [20-30]% in the EEA. Similarly, the Parties' combined proportion of game-time (million hours played on Xbox) exceeds 30% in 2021 both worldwide and in the EEA: [30-40]% worldwide and [30-40]% in the EEA. The publisher with the second largest proportion of MAU and game-time was Epic Games, with a lower proportion of MAU ([20-30]% worldwide) and game-time ([20-30]% worldwide). Other competing developers and publishers of AAA shooter games have significantly smaller proportion of MAU and game-time on Xbox. For example, only EA and Ubisoft had more than [5-10]% of game-time or MAU worldwide: EA ([10-20]% by game-time, [10-20]% by MAU), Ubisoft ([5-10]% by game-time, [5-10]% by MAU). The competitive landscape is similar in the EEA.
- (380) Second, based on the available evidence on consumer spend, game-time and proportion of AAA shooter (including battle royale) console game users on Xbox, the Commission considers that the competing AAA shooter (including battle royale) console games are significantly weaker alternatives compared to Activision Blizzard's shooter console games.
- (381) In particular, the Xbox [*business secrets concerning methodology*] data shows that Call of Duty has and attracts a significantly larger user base compared to other AAA shooter console games while only one game franchise (Fortnite) holds similar user base proportion. The Notifying Party provided the proportion of the total engagement on Xbox accounted for by Call of Duty gamers and other AAA shooter franchises' gamers, measured by the total spend on Xbox, total in-game spend, and total hours on Xbox accounted for by gamers playing Call of Duty for more than [20-30]%, [50-

---

<sup>364</sup> The Notifying Party's reply to RFI 26, Annex 1.

<sup>365</sup> The Notifying Party's reply to RFI 23, Annex 1.1. and 1.2.

60]% and [80-90]% of their yearly game time in 2020, 2021, and 2022.<sup>366</sup> The data shows that relative to other AAA shooter console franchises, Activision Blizzard's Call of Duty franchise accounts for a significant portion of total Xbox users, total Xbox time and spend. More specifically, users that spend more than 20% of their yearly game-time on Xbox on Call of Duty account for [10-20]% of Xbox users, [20-30]% of total Xbox hours, and [20-30]% of total spend on Xbox. Comparing the top 5 AAA shooter (including battle royale) franchises on Xbox, only Fortnite generates levels of engagement comparable to Call of Duty gamers. More specifically, users that spend more than 20% of their yearly game-time on Xbox on Fortnite account for [10-20]% of Xbox users, [20-30]% of total Xbox hours, and [20-30]% of total spend on Xbox. Other top AAA shooter franchises (GTA, Apex Legends, Tom Clancy, Destiny) trail significantly behind Call of Duty and generate significantly less users, game-time and consumer spend on Xbox, whether individually or taken together. For example, users that spend more than 20% of their yearly game-time on Xbox on GTA account for [0-5]% of Xbox users, [5-10]% of total Xbox hours, and [5-10]% of total spend on Xbox.

- (382) Further, the Xbox [*business secrets concerning methodology*] data shows that *Call of Duty* franchise is capable of maintaining long periods of high user engagement levels. The Notifying Party provided the daily total minutes played on the *Call of Duty* franchise games, and, separately for other popular AAA shooter (including battle royale) franchises *Apex Legends*, *Destiny*, *Fortnite*, *GTA*, and *Tom Clancy / Rainbow Six*, for years 2019-2022 respectively. The Notifying Party clarified that events that impact on franchise game-time (for all franchises examined) include new title releases, the COVID pandemic (with game-time on all franchises going up beginning of March 2020) and seasonality, with game-time increasing during holiday periods. However, the data shows that in terms of total game-time measured by daily total minutes played, *Call of Duty* has long and sustained periods of high engagement levels that are further amplified by new title and content releases. *Fortnite* is the only AAA shooter (including battle royale) franchise with the game-time comparable to *Call of Duty*. Other top AAA shooter (including battle royale) franchises (*GTA*, *Apex Legends*, *Tom Clancy*, *Destiny*) generate substantially lower levels of game-time. The peaks in engagement levels that follow new title releases of these franchises are not maintained but rather drop to earlier, lower game-time levels.<sup>367</sup>
- (383) Finally, the Xbox [*business secrets concerning methodology*] data shows that Activision Blizzard's holds significantly higher MAU and game-time compared to the franchises of other game developers and publishers within that genre. For example, Activision Blizzard's *Call of Duty* and *Overwatch* franchises generated together [...] million MAU on Xbox in 2021 and [...] on Xbox.<sup>368</sup> The only game franchise that is comparable to Activision Blizzard's franchises in this genre is Epic Games' *Fortnite*, a third-person shooter (battle royale) franchise. In 2021, *Fortnite* generated [...] million MAU and [...] million hours on Xbox. By contrast, none of the other competing game franchises generated more than [...] million MAU and [...] million hours on Xbox in 2021.<sup>369</sup>

<sup>366</sup> The Notifying Party's reply to RFI 26, Table 4.2.

<sup>367</sup> The Notifying Party's reply to RFI 23, Figures 12.5-12.8. See also monthly figures in Annexes 12.47 – 12.92

<sup>368</sup> Call of Duty alone generated [...] million MAU on Xbox in 2021 and [...] million hours on Xbox.

<sup>369</sup> Notifying Party's Reply to RFI 23, Annex 10.

- (384) The Commission notes that the information on the MAU and game time outlined above does not include data from games published on the Nintendo console. However, the Commission considers that this should not undermine the representativeness of the data for the purpose of assessing the merged entity’s market power in the market for game development and publishing on console upstream.
- (385) Nintendo’s position in the market for AAA shooter (including battle royale) games is negligible (Nintendo had less than [0-5]% of market share by revenue in 2021). Second, Nintendo does not compete closely with the Parties in the upstream market for development and publishing of AAA shooter (including battle royale) console games.<sup>370</sup> Nintendo primarily competes with games that are developed and published by its in-house studios, and that are distributed solely on its Nintendo consoles. Nintendo’s first-party games account for the majority of Nintendo’s gaming software sales. In the fiscal year ending March 2021, games published by Nintendo accounted for [70-80]% of its dedicated video game platform software sales revenues.<sup>371</sup> As one market respondent explained, *“Nintendo has their own IP (such as Mario) that is not available elsewhere, and focuses on enlarging their audience through innovative concepts, such as the Ring Fit fitness proposition (an integrated proposition of role-playing game and fitness equipment).”*<sup>372</sup> In addition, according to the market investigation feedback, Nintendo has a very distinct game content that that does not focus on graphically intensive and complex AAA games.<sup>373</sup> According to market participants, Nintendo rather focuses on family entertainment and casual games: *“Nintendo focuses more on family entertainment and casual gamers with a cheaper console and titles. Nintendo titles have less hardware requirements than those in Sony/Microsoft consoles and the look and feel is less serious”*.<sup>374</sup> In fact, several market participants noted that Nintendo’s console game content mainly consists of games that are less graphically intensive, which require less hardware power and which its console hardware can support. For example, one market respondent noted that *“the hardware capabilities of Nintendo consoles are often technically inferior to those of Sony and Microsoft (each also growing closer to PC architecture), making it more difficult to release high-end AAA games that especially want to showcase complex open worlds and high-quality graphics.”*<sup>375</sup> Similarly, another market respondent explained that *“Nintendo’s console is technically less powerful compared to both rivals. Nintendo therefore has fewer high-end AAA games in its portfolio, opting instead to focus on a larger share of first-party indie and unique video games.”*<sup>376</sup>

---

<sup>370</sup> Form CO, Annex 68.

<sup>371</sup> Statista, Nintendo 1P games sales share 2019-2021, 2021, <https://www.statista.com/statistics/234658/nintendo-1p-games-sales-share/>, [ID7210].

<sup>372</sup> Agreed minutes of the meeting/conference call of 26 April 2022 with a market participant, paragraph 15 [ID244].

<sup>373</sup> As well as supplying console hardware, Nintendo develops and publishes console and mobile games. Nintendo’s portfolio of console games includes popular franchises such as The Legend of Zelda and the Super Mario series, as well as a range of other franchises including Pokémon and Animal Crossing.

<sup>374</sup> Reply of a market participant to Questionnaire Q2 - Phase II Questionnaire, question C.A.13. [ID 4249].

<sup>375</sup> Reply of a market participant to Questionnaire Q2 - Phase II Questionnaire, question C.A.A.10 [ID : 4271].

<sup>376</sup> Reply of a market participant to Questionnaire Q2 - Phase II Questionnaire, question C.A.13. [ID 4271].

7.4.3.2.1.5. The merged entity has contractual and technical ability to restrict or degrade access to Activision Blizzard's AAA shooter (including battle royale) console games

- (386) As explained in recital (315) above, console games are generally distributed through console-owned digital storefronts. Console-specific storefronts are available exclusively to users of the respective console because the console manufacturer runs the storefronts through which players can purchase the related console games. Once users buy a certain console, they essentially become locked-in to that console's ecosystem. Exclusive video games could therefore encourage the purchase of the relevant consoles.
- (387) Microsoft, Nintendo and Sony each distribute first-party games, as well as third-party games. Distributors of console games have exclusive rights over the content that they develop and publish internally by a game studio they own. By contrast, the distribution of games developed by third-party publishers is typically governed by licensing agreements.
- (388) Post-Transaction, Microsoft will have control and exclusive rights over its first-party games, including all Activision Blizzard's games, which are developed and published by game development studios it owns. Therefore, Microsoft will have a contractual and technical ability to restrict (withhold or degrade) access to Activision Blizzard on Sony's and Nintendo's consoles.<sup>377</sup>
- (389) In this regard, the Commission notes that Activision Blizzard has a number of agreements in place with Sony, including a co-marketing arrangement with respect to Call of Duty, which provide Sony with contractual protections until [...].<sup>378</sup> The current Call of Duty co-marketing arrangement is expected to run until [*business secrets concerning agreement terms*]. Under these agreements, Activision Blizzard granted [...].<sup>379</sup> In addition, during the [*business secrets concerning agreement terms*], Activision Blizzard may not [...]. Microsoft made public statements about continuing to comply with the terms of the agreements between Activision Blizzard and Sony for additional three years post-Transaction (i.e. to the end of 2027). However, the Commission notes that Microsoft has not concluded any legally binding agreement in that regard. Therefore, post-Transaction, Microsoft will have the contractual and technical ability to restrict access to Activision Blizzard's console games by Sony.
- (390) Finally, several market investigation respondents considered that, in addition to completely restricting access to Activision Blizzard's console games, Microsoft could degrade the terms under which Activision Blizzard's console games are made available to competing console game distributors: (i) by making Activision Blizzard's games available for a release on competing consoles at a later date compared to Xbox; (ii) by making certain features of Activision Blizzard's games exclusively available only on the Xbox; (iii) by making certain features of Activision Blizzard's games exclusively available on the Xbox for a certain period of time; (iv)

---

<sup>377</sup> As explained in recital (359) above, Activision Blizzard's console games are currently mainly distributed by Microsoft and Sony, on their respective consoles. Nintendo distributes only a small portion of Activision Blizzard's game franchises on its Nintendo consoles, including Activision Blizzard's AAA shooter console game *Overwatch*. However, Activision Blizzard's largest AAA shooter game franchise by revenue, *Call of Duty*, is currently only distributed on the Xbox and PlayStation consoles, and not on Nintendo.

<sup>378</sup> Form CO, paragraph 824.

<sup>379</sup> Form CO, paragraph

degrading the quality of Activision Blizzard's games available on competing consoles); and (v) degrading interoperability of Activision Blizzard's games with competing consoles.<sup>380</sup>

- (391) On the basis of all these elements, the Commission concludes that the merged entity has the contractual and technical ability to engage in a targeted total or partial input foreclosure strategy vis-à-vis Microsoft's main competitor in the downstream market for console game distribution, Sony's PlayStation by restricting or degrading access to Activision Blizzards console games (overall console games and AAA shooter (including battle royale) console games).

7.4.3.2.1.6. Effective and timely counter-strategies that downstream competitors could deploy in order to react to potential foreclosure strategies

- (392) The Commission considers that there are sufficient effective and timely counter-strategies that Microsoft's rival distributors of console games downstream, particularly Sony, could deploy.

- (393) First, the Commission notes that, like Microsoft and Nintendo, Sony is a vertically integrated distributor of console games, which develops and publishes popular AAA console games in its own game development studios. In 2022, Sony's market share in development and publishing of console games is similar to or higher than the market share of Microsoft, irrespective of the metric considered. For example, Sony's market share by revenue in development and publishing of AAA console games was [0-5]% worldwide in 2022 (Microsoft's was [0-5]%). While Sony's market share of AAA console games decreased in 2022 compared to previous years, the Commission notes that in 2020, Sony's market share by revenue in development and publishing of AAA console games reached [10-20]% and surpassed even the Parties' combined market share ([10-20]%). The Commission understands that the growth of Sony's market share was prompted by new releases of Sony's popular first-party console game franchises that occurred throughout 2020.<sup>381</sup> Indeed, Sony released several new game titles based on several of game franchises owned by Sony in 2020, such as *The Last of Us Part II*, *Demon's Souls*, *Ghost of Tsushima*, *Spider-Man: Miles Morales*, which were very popular among PlayStation owners.<sup>382</sup> In addition, all of these game titles remain exclusively available on either the latest (PlayStation 5) or the previous PlayStation console generation (PlayStation 4), and they cannot be accessed and played on Microsoft's or Nintendo's consoles. The Commission acknowledges that development and publishing of AAA console games is hit driven and that market shares are impacted by factors such as new game title releases, seasonality as well as special circumstances such as the Covid-19 pandemic in 2020. However, the Commission considers that this example reflects the strength of Sony's PlayStation catalogue and its potential to reduce Sony's reliance on Activision Blizzard's AAA shooter console games and mitigate the effects of any Microsoft's foreclosure strategy.

- (394) Furthermore, the results of the market investigation also indicate that Sony's first-party games would continue to secure the overall attractiveness of Sony's

---

<sup>380</sup> Replies to Questionnaire Q2 - Phase II Questionnaire, question C.A.18.

<sup>381</sup> See e.g. IGN, The best PlayStation exclusive of 2020, <https://www.ign.com/articles/best-ps4-ps5-exclusives-2020>, accessed on 9 Apr., [ID7223].

<sup>382</sup> Two of these titles (*Spider-Man: Miles Morales* and *The Last of Us Part II*) were voted as "Game of the Year" on PlayStation 5 and PlayStation 4, respectively <https://blog.playstation.com/2020/12/18/playstation-blog-2020-game-of-the-year-the-winners/>, [ID7256]

PlayStation even if Sony’s offering of exclusive AAA shooter console games would be less strong if Microsoft restricted Sony’s access to *Call of Duty*. As one respondent indicated: “*Sony does not have many AAA shooters at present, and would continue to not have many AAA shooters if Call of Duty was exclusive to a Microsoft platform. However - **players are choosing Sony for their first-party titles rather than the available of shooters***” (emphasis added). The same respondent further explained “[...] *At the same time we do not believe that sole exclusivity of CoD will shift the overall perception of Microsoft portfolio's attractiveness - **Sony still seems to have more impactful first-party games portfolio and Microsoft would probably need to introduce more exclusive titles to change this optics.***”<sup>383</sup> (emphasis added) In that regard, the majority of respondents to the market investigation providing their view, considered that compared to other console game distributors, Sony’s PlayStation has currently the most attractive exclusive content, as well as that post-Transaction Sony would continue to offer similarly attractive content as Microsoft (while Nintendo would offer the most attractive exclusive console games).<sup>384</sup> For example, one market respondent submitted that “[u]ndoubtedly, Sony would continue to have a much stronger overall first-party console slate. Sony is known throughout the industry for its top-tier single-player titles like *Marvel's Spider-man*, the *Uncharted* series, *The Last of Us* series, *God of War* series, and many top franchises” as well as that “*Nintendo's first-party franchises are among some of the strongest in the industry, especially with their broad-audience series like *Zelda*, *Splatoon*, *Mario*, etc. They would be unaffected by Call of Duty exclusivity.*”<sup>385</sup> Therefore, Sony’s first-party exclusive console games would remain an effective alternative that Sony could rely on in response to a restricted access to Activision Blizzard’s AAA shooter games and mitigate any effects of the foreclosure.

- (395) Second, as explained further in recitals (417)-(422) below, Sony has been the leading distributor of console games with a very large share of the market worldwide and particularly in the EEA. In distribution of console games, Sony currently accounts for half of the market worldwide ([40-50]% by revenue in 2022) and the majority of the EEA market ([60-70]% by revenue in 2022). In addition, Sony has been the leader in the console landscape for the past two and a half decades, with three of PlayStation console generations in the top 4 of consoles ever released based on the estimated lifetime unit sales.<sup>386</sup> A leading position in console game distribution and supply of console hardware grants Sony significant resources and bargaining power. For instance, in 2015 Sony was able to offer more attractive commercial conditions to Activision Blizzard that prompted the publisher to conclude an agreement with Sony after having exclusivity agreements with Microsoft in the period 2005-2015. Sony offered [...]. As a result, Activision Blizzard chose to agree with Sony for certain timed exclusivity on Activision Blizzard’s content, without reaching such agreement with Microsoft.<sup>387</sup>

<sup>383</sup> Reply of a market participant to Questionnaire Q2 - Phase II Questionnaire, question C.A.16-2 [ID3334]

<sup>384</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 60.1. and 60.2.

<sup>385</sup> Reply of a market participant to Questionnaire Q2 - Phase II Questionnaire, question C.A.16-2 [ID3334]

<sup>386</sup> Statista, Nintendo switch about to Leapfrog PlayStation 4, 2022, <https://www.statista.com/chart/18903/video-game-console-sales/>, accessed on 23 March, [ID7205].

<sup>387</sup> Notifying Party’s reply to RFI 24, question 1. Form CO, footnote 916.

- (396) Similarly, Sony could reduce its reliance on Activision Blizzard’s AAA shooter console games and negotiate exclusivity agreements with other developers of popular AAA console games such as Epic Games, EA, Ubisoft and Take-Two. In fact, Sony explained that it continuously explores opportunities to negotiate partnerships with third party developers and publishers to increase the attractiveness of its PlayStation console: “[Sony] regularly discusses potential partnerships (which involve marketing support and/or development funding) as well as subscription services agreements to bring games into PlayStation Plus with developers and publishers.”<sup>388</sup> Therefore, Sony is regularly entering into agreements for many of highly anticipated third-party game releases for either a full or a timed exclusivity. For example, a number of well-known AAA third-party game franchises will be released in calendar year 2023 and are contractually exclusive to PlayStation consoles for a determined period of time.<sup>389</sup> For example, *Final Fantasy XVI* (Square Enix), a game title from the *Final Fantasy* game franchise first released in 1987, will be exclusive to PlayStation 5 for at least six months before becoming available on other platforms.<sup>390</sup> In addition, Sony and Epic Games recently negotiated new exclusive *Fortnite* bundle with cosmetic items for PlayStation players on a timed-exclusive basis for the new season of *Fortnite*.<sup>391</sup>
- (397) As explained in recital (349) above, developing high quality AAA console games generally implies a significant investment of time and resources. In addition, the Commission understands that the game development budgets have been increasing. For example, the industry analyst IDG estimates that most AAA console games releases required a budget between USD 50-150 million on average five years ago, while today’s development costs reach USD 200 million or higher.<sup>392</sup> However, given Sony’s development and publishing resources, portfolio of popular console games IP and long standing partnerships with large independent developers and publishers can make the investment to produce a popular AAA first-party game or sponsor a production of a high quality AAA console game of another developer and publisher.
- (398) On the basis of all these elements, the Commission concludes that the competing console game distributors (particularly Sony) would have effective and timely counter-strategies in response to the merged entity’s potential foreclosure strategies.

#### 7.4.3.2.1.7. Conclusion

- (399) On the basis of all these elements, the Commission concludes that the merged entity would not have the ability to engage in a total or partial targeted input foreclosure strategy by restricting or degrading access to Activision Blizzard’s AAA shooter

<sup>388</sup> Sony’s reply to RFI 3, question 5, paragraph 5.1 [ID3539]

<sup>389</sup> Sony’s reply to RFI 3, question 9, paragraph 9.1. [ID3539] Sony, PlayStation in 2023 – highlights, <https://blog.playstation.com/2022/12/15/playstation-in-2023-highlights/>, accessed on 23 March 2023, [ID7217],

<sup>390</sup> IGN, “Final Fantasy 16 volgesn PlayStation 5 reclame half jaar exclusief, <https://nl.ign.com/final-fantasy-xvi/140450/news/final-fantasy-16-volgens-playstation-5-reclame-half-jaar-exclusief>, 2023, accessed on 23 March 2023, [ID7212]

<sup>391</sup> Gamerant. “PlayStation gest another exclusive Fortnite bundle”, 2021, <https://gamerant.com/playstation-exclusive-fortnite-bundle/#:~:text=Fortnite%20releases%20a%20new%20bundle.items%20added%20to%20the%20game>. Accessed on 9 April, [ID7216].

<sup>392</sup> Sony’s observations on certain of Microsoft’s public statements of 3 October 2022, Annex 1 (IDG Consulting, IDG-SIE Publisher Structure Project), page 35 [ID3529].



(including battle royale) console games vis-à-vis rival distributors of console games, and in particular Sony.

7.4.3.2.2. Incentive to foreclose

- (400) In the first place, the Commission notes that Sony is a particularly close competitor to Microsoft in the downstream market for the distribution of console games. Sony is therefore likely to be the primary target of the merged entity's foreclosure strategy. Compared to Microsoft and Sony, Nintendo's console hardware has different technical specifications than Xbox and PlayStation and is less powerful. For example, one market participant explained that Nintendo's console (Nintendo Switch) is "*a small, portable console often owned by players in addition to one of the other consoles and is usually used for playing different types of games, in particular those exclusive to that platform.*"<sup>393</sup> Another market participant noted that "[Nintendo's] proposition is different from that of Microsoft and Sony", and further explained that this is because "*Nintendo has their own IP (such as Mario) that is not available elsewhere, and focuses on enlarging their audience through innovative concepts, such as the Ring Fit fitness proposition (an integrated proposition of role-playing game and fitness equipment).*"<sup>394</sup> Another market respondent also pointed out that while Nintendo's Switch is a "*fully-fledged console along with Xbox and PlayStation*", "*Microsoft's Xbox and Sony's PlayStation are more similar to each other than the Nintendo Switch. The latter is targeted at a younger audience and has a range of exclusives that have a different style and are more cartoon-like than games usually played on other consoles*".<sup>395</sup> Furthermore, some game developers and publishers in Phase II market investigation noted that Nintendo's different technical specifications require a different type of development work than when developing and publishing a game on PlayStation and Xbox consoles: "*Xbox and PlayStation have converged in terms of technical architecture and specifications; Nintendo (Switch) is a very different use case, with hardware capacities significantly lower to enable its portable capacity. At least for high end titles, adding a very different platform such as a portable device has major implications in development and user experience [sic].*"<sup>396</sup> Another market respondent noted that this is particularly the case with graphically intensive and complex games, such as AAA games: "*Each console requires a separate build anyway. In case of big and complex games, porting them to Nintendo Switch may require significantly more effort or be simply impossible due to hardware constraints.*"<sup>397</sup>
- (401) Furthermore, a majority of market respondents in Phase II expressing a view on this subject considered that Sony and Microsoft compete particularly closely in the distribution of AAA shooter (including battle royale) games, while Nintendo is a distant competitor that does not focus on this type of games.<sup>398</sup> One market respondent notes that "*traditionally there are more AAA shooters available on*

---

<sup>393</sup> Reply of a market participant to Questionnaire Q1 to video game developers, publishers and distributors, question 6.1.1. [ID 1213]

<sup>394</sup> Agreed minutes of the meeting/conference call of 26 April 2022 with a market participant, paragraph 15. [ID 244]

<sup>395</sup> Agreed minutes of the meeting/conference call of 26 April 2022 with a market participant, paragraph 13. [ID 244]

<sup>396</sup> Reply of a market participant to Questionnaire Q2 - Phase II Questionnaire, question C.A.A.10 [ID3334]

<sup>397</sup> Replies to Questionnaire Q2 - Phase II questionnaire to competitors, question C.A.A.10.

<sup>398</sup> Replies to Questionnaire Q2 - Phase II Questionnaire, question C.A.14.

*Microsoft/Sony (both platforms) or exclusive to the Sony/Microsoft platform”*.<sup>399</sup> Another market respondent notes that “*Sony competes most closely with Xbox because they offer a number of similar/overlapping AAA Shooter titles which Nintendo does not offer. In our own opinion, Sony's console also has higher technical specifications more comparable with Xbox than Nintendo's, allowing the games to be played in similar ways*”.<sup>400</sup> In addition, Activision Blizzard’s console games are currently generally available on Microsoft’s and Sony’s consoles, while only a small portion of Activision Blizzard’s games are distributed on Nintendo’s console. In particular, Activision Blizzard’s key console franchise *Call of Duty* is currently distributed only on the Xbox and PlayStation consoles, and it is not distributed on Nintendo.

- (402) However, the Commission takes the view that, regardless of whether Microsoft has the ability to foreclose, the merged entity would not have the incentive to engage in a targeted total or partial foreclosure strategy by restricting or degrading access to Activision Blizzard’s console games (console games overall and shooter (including battle royally) console games) vis-à-vis Microsoft’s main competitor in the downstream market for console game distribution, Sony.
- (403) First, restricting or degrading access to Activision Blizzard’s console games would likely not be profitable for Microsoft if Activision Blizzard’s console games (overall console games, or more narrowly AAA shooter (including battle royale) console games) were not available on PlayStation. In that regard, the Commission firstly notes that Activision Blizzard is dependent on the distribution of its console video games on PlayStation where it generates much of its console video games revenues. The majority of Activision Blizzard’s worldwide revenues from the sale of its video games on console (approximately [60-70]% in 2021) comes from the PlayStation platform. By comparison, Activision Blizzard’s console revenues from the sale of video games are [...] lower on Xbox (only around [30-40]% in 2021).<sup>401</sup> The proportion of Activision Blizzard’s console revenues coming from PlayStation is even higher in the EEA. More than [80-90]% of Activision Blizzard’s console revenues were generated on PlayStation in 2021 in the EEA, while only approximately [10-20]% came from Xbox in 2021.<sup>402</sup>
- (404) Further, Microsoft provided a detailed explanation of the methodology behind the calculation of Microsoft’s valuation of Activision Blizzard.<sup>403</sup> The Commission notes that Microsoft’s deal valuation model is not based on limiting the distribution of Activision Blizzard’s console games on PlayStation. Rather, [*business secrets concerning the deal valuation*]. Therefore, the Commission considers that in order to compensate the substantial loss of revenues from the PlayStation platform resulting from its foreclosure strategy, Microsoft would need to be able to count on strong revenue prospects from its Xbox business and on a significant proportion of PlayStation users that would switch to Xbox. As discussed in recital (405) below, the Commission’s quantitative analysis shows that the actual switching rates would be low and that a total foreclosure strategy would consequently not be profitable to Microsoft.

---

<sup>399</sup> Replies to Questionnaire Q2 - Phase II Questionnaire, question C.A.15. [ID4103]

<sup>400</sup> Replies to Questionnaire Q2 - Phase II Questionnaire, question C.A.15.

<sup>401</sup> Form CO, Annex 39.

<sup>402</sup> Ibid.

<sup>403</sup> Form CO, Annex 13.1

- (405) Second, the Commission’s quantitative analysis shows that the merged entity would lack the incentives to engage in total input foreclosure strategies with respect to Sony. In its analysis, the Commission considered the trade-off between decreased upstream sales and increased downstream sales. If the merged entity withheld *Call of Duty* from Sony PlayStation post-Transaction, this would increase Microsoft’s downstream console sales because a proportion of the foreclosed customers would switch to the Xbox console in order (to continue) to play *Call of Duty*. However, foreclosure would likely also decrease Activision Blizzard’s upstream sales of *Call of Duty*, as Activision Blizzard would lose the revenues from PlayStation customers that are foreclosed and who decide not to buy Microsoft’s console downstream product, the Xbox. The Commission’s analysis implies that Microsoft’s losses resulting from such a foreclosure strategy would likely outweigh the potential gains. The details of this analysis are set out in Annex 1 of this Decision.
- (406) To support its claim that Microsoft would have the financial incentive to withhold Activision Blizzard’s console games from Sony, Sony presented an economic analysis of costs and benefits to Microsoft’s strategy of restricting Sony’s access to Activision Blizzard’s *Call of Duty* franchise. According to Sony, Microsoft would extract higher profits from a *Call of Duty* player on Xbox than by selling a copy of the game on PlayStation, because Microsoft would earn both the margin that it would have earned from selling on PlayStation as a third party, in addition to the margin that Sony would have earned as a platform margin.<sup>404</sup> In addition, according to Sony, it is likely that Microsoft would also collect additional revenues from subscription services and accessories that the *Call of Duty* users would further generate.<sup>405</sup>
- (407) The Commission considers that Sony’s analysis most likely overestimates the combined entity’s incentives to foreclose Sony post-Transaction. First, Sony’s analysis is subject to important uncertainties because it relies on platform revenues from the Sony PlayStation platform, which differ from spending on the Xbox platform.<sup>406</sup> Second, Sony considers that gamers that spend a certain share of their game time on *Call of Duty* would switch to Xbox in case of foreclosure.<sup>407</sup> However, the Commission submits that also the absolute level of user engagement, for example, in terms of game time hours per week, should be taken into account, see Section 2.3 of Annex 1 to this Decision. Doing so reduces the number of potential switchers substantially. Third, Sony makes additional assumptions that lead to an overestimation of the incentives to switch. For example, Sony assumes that gamers who switch to Xbox would increase their platform spending by 20%, based on a public statement by Microsoft that Game Pass leads to 20% more spending.<sup>408</sup> However, the Commission submits that it seems invalid to assume a causal link between gamers joining Game Pass and an increase in their spending on gaming content.
- (408) Third, the market investigation did not provide convincing evidence that post-Transaction Microsoft would have an incentive to engage in a partial foreclosure vis-

---

<sup>404</sup> Sony, Cornerstone Research and RBB Economics economic analysis: “Microsoft Incentives Analysis – Non-Confidential Summary for CMA” [ID3534].

<sup>405</sup> Sony’s non-confidential reply to RFI 2, questions 6 and 7 [ID3532].

<sup>406</sup> Sony, Cornerstone Research and RBB Economics economic analysis: “Microsoft Incentives Analysis – Non-Confidential Summary for CMA”, paragraph 9 [ID3534].

<sup>407</sup> Sony, Cornerstone Research and RBB Economics economic analysis: “Microsoft Incentives Analysis – Non-Confidential Summary for CMA”, paragraph 13 [ID3534].

<sup>408</sup> Sony, Cornerstone Research and RBB Economics economic analysis: “Microsoft Incentives Analysis – Non-Confidential Summary for CMA”, paragraph 10 [ID3534].

à-vis Sony, by for example increasing the price at which it would make Activision Blizzard content available for distribution via the PlayStation console.

- (409) In the SO, the Commission had preliminarily concluded that the Transaction might improve the combined entity's position in future negotiations with Sony, giving Microsoft an incentive to increase the price at which Activision Blizzard's content would be available for distribution on PlayStation. In view of the evidence assessed by the Commission post-SO, including the facts contained in the Notifying Party's Reply to the SO, the Commission no longer maintains this concern.
- (410) Firstly, the Commission's initial reasoning was in large part based on a bargaining model that describes general upstream-downstream relation in a vertical chain but does not reflect some specific aspects of the current case that may have a significant impact on foreclosure incentives. In particular, the price setting for console games significantly differs from the model's assumptions (and from other media markets). Secondly, the Commission's revised vertical arithmetic finds that there are no incentives to engage in total foreclosure. As a result of this revised quantitative analysis, also the quantitative incentive of Microsoft to engage in partial foreclosure via increasing the price of Activision Blizzard's content substantially decreases in the Commission's model. Finally, the qualitative reasons why significant competitive harm due to total foreclosure is unlikely in the current case also apply to the question of partial foreclosure. For these reasons, the Commission considers that the totality of evidence on file does not allow maintaining concerns regarding partial input foreclosure via increasing the price of Activision Blizzard's content to the requisite legal standard.
- (411) Fourth, the market investigation results indicate that Microsoft would not have an incentive to totally or partially restrict the distribution of Activision Blizzard's console games, and particularly *Call of Duty*, on competing console platforms, including multi-game subscription services.<sup>409</sup> In fact, most of the respondents to the market investigation expressing an opinion on Microsoft's incentives, consider that Microsoft would in fact have incentives to keep Activision Blizzard's console games available on other consoles.<sup>410</sup> Similarly, most of the respondents to the market investigation taking a view consider that Microsoft would have the incentive to keep distributing *Call of Duty* on competing console platform. In that regard, several market respondents noted that the combined entity would have an economic incentive to distribute on as many platforms as possible and reach as many users as possible. For example, one market respondent noted that "*To the extent it would receive some sort of license payments or royalty from those third parties or similar compensation, there would be a clear economic incentive.*"<sup>411</sup> (emphasis added) Another market respondent noted that "*Microsoft will have an incentive for their games, [Call of Duty] included, to reach as many players as possible wherever they are in the world and regardless of the business model. So there remains an incentive to distribute them on other platforms / subscription services.*"<sup>412</sup> One market respondent noted that Sony's large console user base in particular will provide an

---

<sup>409</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 56.1. and 56.2.

<sup>410</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 56.1. and 56.2.

<sup>411</sup> Reply of a market participant to Questionnaire Q1 to video game developers, publishers and distributors, question 56.1.1.

<sup>412</sup> Reply of a market participant to Questionnaire Q1 to video game developers, publishers and distributors, question 56.2.1.

economic incentive for the combined entity to continue distributing on PlayStation: “Given the greater install base of PlayStation compared to Xbox, we believe Microsoft will continue to distribute [Activision Blizzard’s] games via the Sony console.”<sup>413</sup> The Commission notes that only a few market respondents considered that Microsoft would not be incentivized to make Activision Blizzard’s console games available on competing multi-game subscription services on console.<sup>414</sup>

- (412) In addition, the respondents to the market investigation do not anticipate that a meaningful user base would switch from PlayStation to Xbox in response to Microsoft’s foreclosure strategy. In fact, only 3 market respondents out of 7 respondents expressing an opinion consider that a significant proportion of gamers would switch to Xbox, while 2 out of 7 respondents consider that only the “most engaged players” would probably switch to Xbox in case of a foreclosure.<sup>415</sup>
- (413) In light of the above, the Commission considers that the merged entity would not have the incentive to engage in a targeted total or partial foreclosure strategy by restricting or degrading access to Activision Blizzard’s AAA shooter console games vis-à-vis Microsoft’s rival distributors of console games and particularly Sony.

#### 7.4.3.2.3. Impact on effective competition

- (414) Some market participants expressed concerns that the Transaction would impede Sony’s competitive position,<sup>416</sup> and some market investigation respondents expect that the Transaction would have a negative impact on the overall downstream market for console game distribution.<sup>417</sup> Therefore, the Commission’s assessment will focus on the likely effects of the Transaction on Sony, Microsoft’s main competitor in the downstream market for distribution of console games.
- (415) However, regardless of whether Microsoft has either the ability or the incentive to foreclose rival distributors of console games, the Commission considers that such strategy will unlikely have any significant detrimental effect on Sony or on competition in the downstream market for distribution of console games.
- (416) In the first place, the Commission considers that irrespective of the effects of Microsoft’s total or partial foreclosure strategies on Sony, Sony will remain a sufficiently credible competitor downstream post-Transaction for the following reasons.
- (417) First, the Commission notes that Sony holds a significant market position in distribution of console games and is a leading supplier of console hardware.
- (418) Sony has been the leading distributor in the downstream market for distribution of console games, worldwide and particularly in the EEA, based on the market shares the Notifying Party provided for the past four years. Moreover, the Commission notes that Sony holds very large market shares reaching or exceeding [50-60]%. In 2022, in the market for distribution of console games, Sony accounts for [...] of the market worldwide ([40-50]% by revenue in 2022) and more than [50-60]% of the same market in the EEA ([60-70]% by revenue in 2022). Sony’s worldwide share by

---

<sup>413</sup> Reply of a market participant to Questionnaire Q1 to video game developers, publishers and distributors, question 56.1.1.

<sup>414</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 56.

<sup>415</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 52.

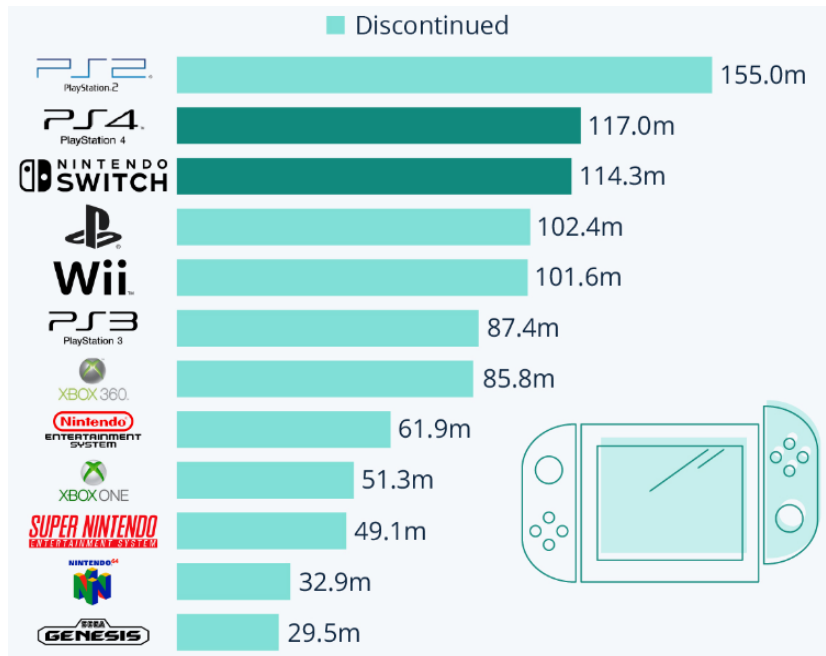
<sup>416</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 93.2.

<sup>417</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 93.2. Replies to Questionnaire Q2 - Phase II Questionnaire, question D.1.1.

revenue is similar or higher in 2019 ([50-60]%), 2020 ([50-60]%) and 2021 ([50-60]%). In the EEA, Sony's share by revenue exceeds or remains just below [70-80]% in 2019 ([70-80]%), 2020 ([60-70]%) and 2021 ([60-70]%).<sup>418</sup> While Sony's market share has been decreasing since 2019, the Commission notes that the overall size of the market for distribution of console games has in fact been increasing at the same period.

- (419) Sony has a very large market share even when considering the sale of console hardware by installed base in the period of four consecutive years provided by the Notifying Party. Sony's share by volume (hardware units) has remained close to [30-40]% worldwide ([30-40]% in 2018, [30-40]% in 2019, [30-40]% in 2020 and [30-40]% in 2021). Nintendo achieved a higher share ([40-50]% in the period 2018-2021), while Microsoft's share is significantly smaller ([10-20]% in the period 2018-2021). Similar to the console game distribution, Sony's share is even higher in the EEA where it comes close to [40-50]% in the period 2018-2021 ([40-50]% in 2018, ([40-50]% in 2019, ([40-50]% in 2020 and ([40-50]% in 2021). In the EEA, Nintendo's share is closer to Sony's ([40-50]% the period 2018-2021) while Microsoft is even smaller than at the worldwide level ([10-20]% the period 2018-2021).
- (420) The Commission further notes that Sony has been the leader in the console landscape for the past two and a half decades. As Figure 2 shows, three of PlayStation console generations are in the top 4 of consoles ever released based on the estimated lifetime unit sales. According to official figures from Sony, the company sold more than 155 million PlayStation 2 units since its launch, making it the most successful video game console.<sup>419</sup>

Figure 2



Source: company reports (as of September 2022), Statista

<sup>418</sup> Form CO (Annex 91), Reply to RFI 26 (Annex 4), Reply to RFI 29 (Annex 5)

<sup>419</sup> Statista, Nintendo switch about to Leapfrog PlayStation 4, 2022, <https://www.statista.com/chart/18903/video-game-console-sales/>, accessed on 23 March, [ID7205].

- (421) In addition, the Commission understands that Sony’s PlayStation is the only console game distributor that is no longer selling its current generation console hardware at loss.<sup>420</sup> In fact, in its earnings releases for the third quarter of the financial years 2022, Sony reports that the number of active PlayStation users and their engagement has significantly increased for PlayStation’s last console generation: “[d]ue to the penetration of PS5, the percentage of PS5 users in the number of monthly active users (“MAU”) in December increased to about 30%. Engagement metrics of users who transitioned from PlayStation 4 (“PS4”) to PS5, such as their PS Plus subscription rate, gameplay time, and average spending amount are significantly higher than those when they played on PS4, so we will continue to focus on accelerating the transition of PS4 users to PS5. In addition, nearly 30% of PS5’s MAUs are users who never used PS4, so, with the spread of PS5, the acquisition of new users is progressing”.<sup>421</sup> In addition, as the size of the market for distribution of console increases in size, Sony forecasts that the user engagement will increase due to the penetration of its PlayStation 5 and the popular titles available on the console: “Although total game-play time of all PlayStation users during the quarter was down 3% year-on-year, it was up 6% compared to the prior quarter, and it was up 14% in December compared with the prior month. We believe that user engagement is on a recovery trend due to the penetration of PS5 and the contribution of hit titles.”<sup>422</sup>
- (422) Finally, the Commission notes that Sony’s market position is even more significant in distribution of console games when considering only the competition between two closely competing consoles, Microsoft’s Xbox and Sony’s PlayStation, and excluding Nintendo’s activities from the competitive landscape. For example, when considering the sale of console hardware excluding Nintendo, Sony is a leading player worldwide and particularly in the EEA with more than 60% and around [80-90]% share, respectively. Sony’s worldwide a share of console hardware in 2021 is [70-80]% by revenue, [60-70]% by volume and [60-70]% by installed base. Sony’s EEA share in 2021 is even higher: [80-90]% by revenue, [70-80]% by volume and [80-90]% by installed base. By comparison, Microsoft’s share is [...] smaller based on al\* metrics (value, volume, installed base).<sup>423</sup>
- (423) Second, as explained in recitals (393) and (394) above, Sony is a vertically integrated console game distributor that develops and publishes popular AAA console games in its own game development studios that increase the attractiveness of the PlayStation platform.
- (424) Third, as a leading console game distributor, Sony has a large bargaining power and resources to negotiate exclusivity with independent developers and publishers, and easily switch to adequate alternative inputs. As explained in recital (395) and (396) above, Sony could reduce its reliance on Activision Blizzard’s AAA shooter console games and negotiate exclusivity agreements with other developers of popular AAA console games such as Epic Games, EA, Ubisoft and Take-Two.

<sup>420</sup> PCmag, “Sony says \$499 PS5 no longer sells at loss”, <https://www.pcmag.com/news/sony-says-499-ps5-no-longer-sells-at-a-loss>, 2021, accessed on 22 March 2023, [ID7219].

\* Should read: ‘all’.

<sup>421</sup> Sony, Q3 FY2022 Consolidated Financial Results, [https://www.sony.com/en/SonyInfo/IR/library/presen/er/pdf/22q3\\_sonyspeech.pdf](https://www.sony.com/en/SonyInfo/IR/library/presen/er/pdf/22q3_sonyspeech.pdf), accessed on 23 March, [ID7195].

<sup>422</sup> Ibid.

<sup>423</sup> SO Response, paragraphs 187 and 188.

- (425) In that regard, the Commission notes that the majority of respondents to the market investigation expressing an opinion considered that Sony's PlayStation is the most attractive console platform for third-party developers and publishers to distribute their console video games.<sup>424</sup> Further, the market investigation indicated that given the size of its console game distribution business, Sony is and will likely remain an attractive distribution channel and valuable partner for independent console game developers and publishers post-Transaction irrespective of the foreclosure strategy that the combined entity deployed. In that regard, Sony submitted that "*While [Sony] may continue to partner with third-party game developers and publishers to broaden the appeal of the PlayStation platform post-Transaction, these partnerships are unlikely to drive similar levels of gameplay, engagement, or console purchasing decisions as Call of Duty. Alternative partnerships will therefore not be able to mitigate or offset the losses SIE would incur from total or partial foreclosure strategies with regard to Call of Duty.*" However, the Commission considers that given its significant leadership in console game distribution, Sony will be able to offset any losses incurred by Microsoft's foreclosure strategies in the market for distribution of console games. The Commission notes that since 2015, Sony has been making [...] towards its co-marketing arrangement with Activision Blizzard.<sup>425</sup> Sony explained that as a result of Sony's investments, *Call of Duty* has become an important part of PlayStation's competitive offering and PlayStation is seen as the best console for playing *Call of Duty* globally.<sup>426</sup> This shows that Sony has sufficient resources to offer the commercial conditions favourable enough to compel most of game developers and publishers to distribute their games on PlayStation and agree to limited forms of exclusivity agreements. The Commission considers that nothing would prevent Sony from re-directing this investment to intensively invest in associating PlayStation console with the content of other large console game developers and publishers such as for example Epic Games, EA, Ubisoft or Take-Two in order to maintain its strength on the downstream market. Given its resources and capabilities, Sony can use different marketing and promotion strategies, such as consumer reminders, special deal offerings, and bundles with consoles, that can grow sales of any video game.<sup>427</sup>
- (426) In that regard, several respondents to the market investigation considered that multiple factors such as the size of a user base, the commercial conditions of the distribution agreement and the investment offered by the console game distributor are all relevant factors that impact the choice of a console game distributor. Therefore, even if Microsoft totally or partially restricted Sony's access to Activision Blizzard's *Call of Duty*, Sony's large PlayStation user base and available resources will provide sufficient incentives for independent companies to develop and publish games for PlayStation. Several respondents to the market investigation considered

---

<sup>424</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 69.

<sup>425</sup> Sony's reply to RFI 3, question 7, paragraph 7.2. [ID3539] [*business secrets concerning agreement terms*]. In addition, PlayStation consoles can be sold together with *Call of Duty* titles to introduce franchise fans to the platform and expose new PlayStation gamers to *Call of Duty*.

<sup>426</sup> Sony's reply to RFI 3, question 7 paragraph 7.3. [ID3539]

<sup>427</sup> For example, Sony recently announced special PlayStation 5 exclusives for *Grand Theft Auto* including free early access to the new *GTA Online*, which will cost USD 9.99 for Xbox Series players. Additionally, the bundle *GTA V* and *GTA Online* will be half price for PlayStation 5 players but full price for Xbox Series players until June 2023. Videogames chronicle, "Here's the launch trailer for *Grand Theft Auto* on PS5 and Xbox Series XS", 2022, <https://www.videogameschronicle.com/news/heres-the-launch-trailer-for-grand-theft-auto-5-on-ps5-and-xbox-series-x-s/> accessed on 23 March 2023, [ID7214].



that the combined entity's foreclosure strategy would generally not affect their incentives to develop and publish games on PlayStation except in unlikely scenarios where Sony's share of the market for distribution of console games dropped from to below 10% and if Sony lost more than half of its user base.<sup>428</sup>

- (427) In the second place, the Commission considers that the total foreclosure strategy implemented by the merged entity post-Transaction is unlikely to cause significant consumer harm through increased prices or restricted choice, nor cause losses to Sony's user base that would inhibit Sony's potential to invest in innovation and quality.
- (428) First, the Commission considers that the portion of PlayStation users that may switch to Xbox in the short to medium term if *Call of Duty* were made exclusive to Xbox would unlikely be significant.
- (429) As explained in the analysis of incentives in recital (405) above, the Commission's quantitative analysis set out in Annex 1 shows that the switching rate in case of a total input foreclosure would be very low. The rate of gamers who spent at least [...] hours on *Call of Duty* in 2021 and who would switch from PlayStation to Xbox in case of a total input foreclosure would be [...] % or less. As explained in recital (405) above, the switching rates of this level would render the input foreclosure strategy unprofitable so that the Parties would not even have an incentive to withhold *Call of Duty* from Sony PlayStation. In addition, the Commission notes that a consumer survey commissioned by the Notifying Party with respect to users from several EU Member States<sup>429</sup> corroborates the Commission's quantitative analysis showing that the switching rate in case of a total input foreclosure would be very low.<sup>430</sup>
- (430) Second, the Commission considers that a potential total or partial foreclosure strategy would unlikely cause losses to Sony's user base and/or inhibit its potential to invest in innovation and quality.
- (431) In its observations on the importance of *Call of Duty* for PlayStation and the effects of foreclosure, Sony claimed that Microsoft's foreclosure strategy would cause Sony to [...] that would diminish its\* ability to fund further investment. In that regard, Sony first considered that *Call of Duty* is a significant element of PlayStation as it is played on [...] of PlayStation devices. More specifically, Sony submitted that *Call of Duty* players represent [50-60] % of PlayStation's user base.<sup>431</sup> Sony explained that these calculations are based on the number of unique devices (PlayStation 4 or PlayStation 5) that recorded any playtime (i.e., more than zero seconds) on *Call of*

---

<sup>428</sup> See replies to Questionnaire Q2 – Phase II questionnaire, question C.A.A.11.

\* Should read: 'its'.

<sup>429</sup> The Notifying Party's survey is not applicable to the worldwide markets, as its sample is limited to users from several EU Member States: Germany, Spain, France, Italy and Poland. The survey therefore does not account for users from countries such as US and UK, where *Call of Duty* and games of AAA shooter genre is relatively more popular

<sup>430</sup> SO Response, Annex II.A.3. According to the survey covering the EU Member States mentioned above, only just over [0-5] % of all PlayStation owners on average across the five countries covered by the survey said they would have purchased an Xbox instead of a PlayStation if *Call of Duty* had not been available on PlayStation at the time of their PlayStation purchase. In addition, the survey shows that only just over [0-5] % of those survey respondents who reported they were planning to purchase a PlayStation as their next console device said they would purchase an Xbox instead if future *Call of Duty* releases were not available on PlayStation.

<sup>431</sup> Sony's reply to RFI 3, question 6, paragraph 6.6 [ID3539] When considering the top 20 franchises based on the number of devices that ever play a game, Sony considered that "*Call of Duty is in a league of its own*" while other AAA game franchises such as *Fortnite*, *GTA* and *FIFA* are [...].

*Duty* in 2021.<sup>432</sup> Sony also considered that in order to properly assess harm to Sony and to competition, the Commission should consider Sony's loss of revenues not from the *Call of Duty* spend on PlayStation but also from the overall PlayStation platform spend of *Call of Duty* gamers. In that regard, Sony submitted that "*Call of Duty* players", i.e. devices with a positive engagement with *Call of Duty*, accounted for [...] % of overall PlayStation platform spend.

- (432) However, the Commission considers that Sony's analysis overestimates the effects of the foreclosure strategy. In particular, the Commission considers that Sony's approach to estimating the size of the *Call of Duty* user base overestimates the share of PlayStation gamers and losses Sony would incur as a result of a foreclosure. Firstly, the Commission considers that this approach risks overinflating the levels of PlayStation users' attachment to *Call of Duty* because it disregards the absolute level of engagement of a PlayStation user with *Call of Duty*. Sony's approach therefore captures users who do not engage with *Call of Duty* in any meaningful way. In addition, when considering for example users who allocate 0-5% (i.e., less than [...] hours annually on average) of their total playtime to *Call of Duty*, it is reasonable to assume that such users are more engaged with other AAA franchises instead, and that they are less likely to switch to Xbox in response to a restricted access to *Call of Duty*. As explained further in Annex 1, the Commission considers that the absolute level of engagement is an important variable in assessing the rate of switching resulting from a restricted access to Activision Blizzard's *Call of Duty* franchise. Secondly, Sony's approach overinflates the levels of the engagement of the *Call of Duty* user base with the PlayStation platform overall. This in consequence overestimates the loss of revenues associated with the restricted access to *Call of Duty*, and the impact on Sony's ability and incentive to invest in future partnerships with third-party game developers, development of its own games and its console hardware.
- (433) In the third place, the partial foreclosure strategies implemented by the merged entity post-Transaction are unlikely to significantly impede competition in the downstream market for console game distribution.
- (434) First, the Commission notes that both Microsoft and Sony have negotiated some exclusivity arrangements for the distribution of Activision Blizzard's *Call of Duty* in the past, which have not had significant effects on their activities in the downstream market for distribution of console games.
- (435) Activision Blizzard has consistently released *Call of Duty* at the same time on multiple platforms and consoles every year since 2003. As such, *Call of Duty* has never been fully exclusive to a single platform or console in its 20-year history. However, the Commission notes that both Microsoft's and Sony's consoles have, at one time or another, benefited from forms of partial exclusivity in relation to Activision Blizzard's *Call of Duty*.<sup>433</sup> Previously, these exclusivity arrangements

---

<sup>432</sup> Sony's reply to RFI 3, question 10, paragraph 10.1. [ID3539] Sony considered that this approach best captures the total *Call of Duty* user base. According to Sony, users who allocate 0-5% of total playtime to *Call of Duty* play on average [...] hours annually. To put this into context, Sony pointed to public sources suggesting that on average 8-10 hours is sufficient to complete the single player campaign in *Call of Duty: Modern Warfare 2*. By contrast, users who allocate 5-10% of their total playtime to *Call of Duty* play on average [...] hours annually. Accordingly, Sony considered that the delta between the 0-5% and 5-10% cohorts highlights that higher thresholds may inadvertently remove an important customer segment.

<sup>433</sup> Activision Blizzard's reply to RFI 24, question 1.

have included: (i) exclusive console marketing arrangements following the release of new titles and downloadable content; (ii) priority access to new maps (until these were phased out following the introduction of cross-platform play); (iii) exclusive access to the online alpha version of the game and access to the beta version of the game 5 days earlier than gamers on Xbox consoles or PC; (iv) game bonuses such as extra “tier skips” on the battle pass; (v) the ability to access additional “experience points” (e.g., through exclusive events); and (vi) certain in-game character customizations and content bundles.<sup>434</sup> Nonetheless, the evidence shows that such arrangements have not had a significant impact on Sony’s or Microsoft’s ability to compete in distribution of console games.

- (436) Between 2005 and 2015, Microsoft had a number of agreements with Activision Blizzard including a series of supplemental agreements in relation to specific *Call of Duty* titles.<sup>435</sup> However, Microsoft’s internal documents show that the benefits of the exclusivity [*business secrets concerning business strategy*]. When preparing for renegotiation of the agreements at the end of 2015, Microsoft was [...]. For example, the Xbox finance department considered that [*business secrets concerning business strategy*].<sup>436</sup> In addition, the 30-day exclusive for downloadable content was viewed as [*business secrets concerning business strategy*].<sup>437</sup> Instead, Microsoft would require “[*business secrets concerning business strategy*]”. Furthermore, the CEO of Xbox Phil Spencer briefed the CEO of Microsoft Satya Nadella on the Activision discussions on 18 March 2015. He outlined the prior deal, including [*business secrets concerning business strategy*]. However, he cautioned against [*business secrets concerning business strategy*].<sup>438</sup>
- (437) Moreover, during Xbox’s marketing exclusivity over *Call of Duty* titles in that period, Sony’s share of console sales grew. For example, when compared to Xbox, PlayStation’s share of console sale increased six percentage points in the period between 2010 and 2015.

---

<sup>434</sup> SO Reply, paragraph 217.

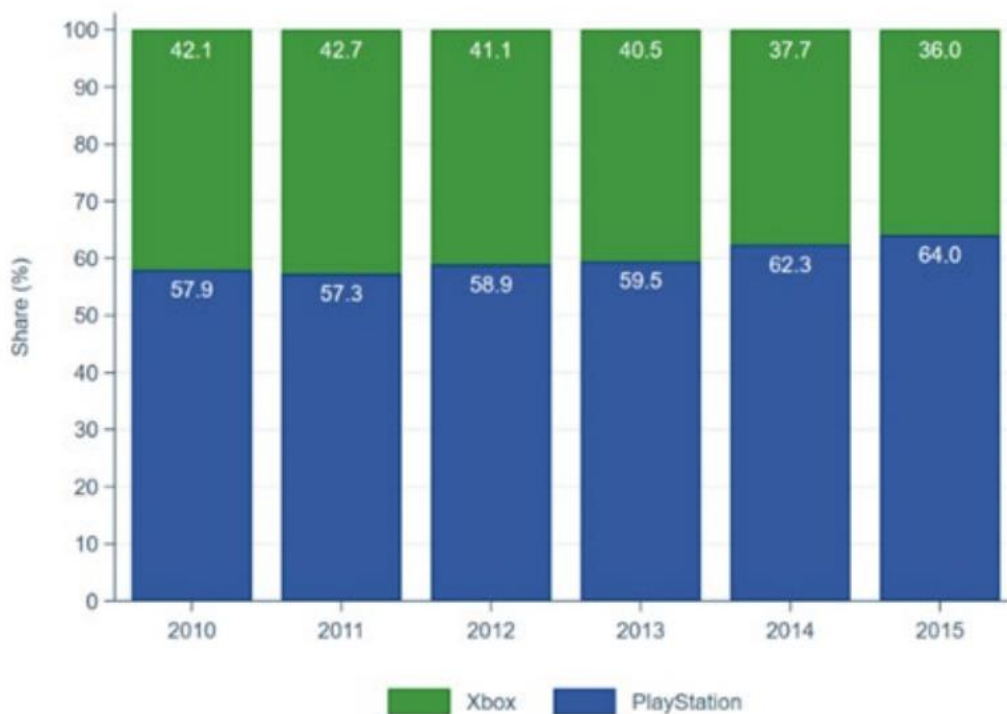
<sup>435</sup> Form CO, paragraph 813. Under these agreements, [*business secrets concerning agreement terms*]. In addition, Xbox gamers received time-limited priority access to certain downloadable content (“DLC”) (i.e., multi-player maps and certain add-ons map packs) around 30 days earlier than gamers on PlayStation or PC. *Call of Duty* games were, however, released on Xbox, PlayStation, PC, and certain other platforms at the same time

<sup>436</sup> Form CO, Annex 6.70.

<sup>437</sup> Form CO, Annex 6.71.

<sup>438</sup> Form CO, Annex 6.72.

Figure 3: PlayStation and Xbox sales and share during Call of Duty exclusivity period (2010-2015)



Source: CRA analysis, using games Addressable Market Metrics Database

(438) Similarly, since 2015, Activision Blizzard has concluded agreements with Sony for limited exclusivity over certain Call of Duty titles. In particular, under the current arrangement, Sony receives *[business secrets concerning agreement terms]*.<sup>439</sup> However, the evidence brought before the Commission does not show that the impact (positive or negative) of such arrangements has been significant. A number of Activision Blizzard’s internal documents indicate that *[business secrets concerning agreement terms]*.<sup>440</sup> For example, an Activision Blizzard document shows *[business secrets concerning agreement terms]*. Nielsen found that only *[business secrets concerning agreement terms]* and the same conclusion applied to Xbox One.<sup>441</sup> Similarly, an internal Activision Blizzard’s document assessing the impact of the “Sony/Call of Duty” partnership on Sony’s PlayStation in *[business secrets concerning agreement terms]* observed *[business secrets concerning agreement terms]*.<sup>442</sup> Finally, when asked about the impact of its exclusivity agreements with Activision Blizzard, Sony submitted that “*[i]t is difficult to estimate the impact of such arrangements*” and has not produced evidence demonstrating that the anticipated gains resulting from such agreements have materialised nor that the impact on the PlayStation business has been material.<sup>443</sup>

<sup>439</sup> Form CO, paragraph 818. Activision Blizzard provided priority access to PlayStation players for certain map packs for a period from 2015 until 2019. With the advent of cross-platform play, whereby gamers can play in multi-player mode across multiple consoles and platforms, this term has been phased out.

<sup>440</sup> Notifying Party’s reply to RFI 24, paragraph 1.24.

<sup>441</sup> Form CO, Annex 16.

<sup>442</sup> Activision Blizzard’s internal document [...], [ID 1428-76032 or ABK-2R-01446770].

<sup>443</sup> Sony’s reply to RFI 1, question 12, paragraph 12.1. [ID3531]

- (439) Second, in the SO, the Commission preliminarily concluded that the Transaction might substantially improve the combined entity's position in future negotiations with Sony, based on which Microsoft could increase the price at which Activision Blizzard content would be distributed on PlayStation. In view of the evidence assessed by the Commission after the SO, including the facts contained in the Notifying Party's Reply to the SO, the Commission no longer maintains this concern. Firstly, the Commission's initial reasoning was in large part based on a bargaining model that describes a general upstream-downstream relation in a vertical chain but does not reflect some specific aspects of the current case that may have a significant impact on foreclosure incentives. In particular, the price setting for console games significantly differs from the model's assumptions (and from other media markets). Secondly, the Commission's revised vertical arithmetic analysis finds that there are no incentives to engage in total foreclosure. As a result of this revised quantitative analysis, also the quantitative incentive of Microsoft to engage in partial foreclosure via increasing the price of Activision Blizzard's content substantially decreases in the Commission's model. Thirdly, the qualitative reasons why significant competitive harm due to total foreclosure is unlikely in the current case also apply to the question of partial foreclosure via increasing the price of Activision Blizzard's content.
- (440) In the fourth place, while the Commission's assessment Section 7.4.4.3.4 focused on the likely effects of the Transaction on Sony, the Commission considers that effects would even be less likely to occur if one takes into account Nintendo's position in console game distribution. The majority of respondents to the market investigation do not believe the Transaction would negatively impact the market for the distribution of console games. Only three respondents (including Sony) considered that the Transaction would have a negative impact with respect to this downstream market. However, the majority of respondents considers that the Transaction would have a neutral impact instead, while one respondent thinks that the Transaction would have a positive impact on distribution of console games.<sup>444</sup>
- (441) As explained in recital (357) above, only a small portion of Activision Blizzard's game franchises are distributed by Nintendo. In particular, Call of Duty, which is Activision Blizzard's largest AAA shooter console game by revenue is currently only distributed on the Xbox and PlayStation consoles. In fact, only [0-5]% of Activision Blizzard's worldwide revenues comes from the sale of its console games on Nintendo
- (442) Finally, the Commission notes that Microsoft and Nintendo signed the Letter of Intent on [...] 2022 (the "Nintendo LOI") based on which Microsoft has committed to develop and publish future console versions of the Call of Duty title for native execution on the Nintendo platform for at least 10 years from the later of 30 August 2024 and the date of completion of the Transaction.<sup>445</sup> However, this development does not materially impact the conclusion resulting from the Commission's assessment of the effects of the merged entity's foreclosure strategy. Given the differences in hardware specifications between Nintendo's current console on the one hand and PlayStation and Xbox current consoles on the other hand, it is unclear whether the format and the quality in which *Call of Duty* would be made available on Nintendo, and whether it would be comparable to the *Call of Duty* games published on PlayStation and Xbox today. In fact, Nintendo submitted that "*Nintendo expects that Call of Duty on its consoles will reflect the technical features of those*

---

<sup>444</sup> See replies to Questionnaire Q2 – Phase II questionnaire, questions D.1 and D.2.

<sup>445</sup> The Notifying Party's reply to RFI 23, questions 6 and 8.

consoles.”<sup>446</sup> In that respect, in its SO Response, the Notifying Party submitted that Nintendo is expected to launch soon a new higher specification console that would become an even stronger competitive constraint on PlayStation and Xbox. However, the Commission’s market investigation produced no evidence on whether and when Nintendo will launch a next generation console nor whether the specifications of this new hardware would be more or less comparable to the specifications of Sony’s and Microsoft’s current console generations. In that regard, Nintendo submitted that “*The process of constant development work has been affirmed generally by Nintendo on several occasions publicly*”.<sup>447</sup> In light of these facts, the Commission considers that whether and to what extent PlayStation and Xbox users would consider Nintendo as an alternative console for playing the *Call of Duty* franchise remains uncertain, irrespective of the agreement signed between Microsoft and Nintendo.

#### 7.4.3.2.4. Conclusion

- (443) In light of the above, the Commission considers that the Transaction will not significantly impede effective competition on the downstream market for distribution of console video games worldwide or in the EEA, as a result of the merged entity’s targeted total or partial input foreclosure strategy by restricting or degrading access upstream to Activision Blizzard’s AAA shooter console video games.
- (444) Given that, as just established, the Transaction will not lead to a significant impediment of effective competition on the narrower downstream product market for distribution of console video games worldwide and in the EEA, and given that the Parties’ combined market share by revenue in 2022 on all upstream plausible markets for development and publishing of console and PC video games is limited in the EEA and worldwide (i.e., below 30%), the Commission considers that the Transaction is unlikely to result in a significant impediment of effective competition in the broader downstream market for distribution of console and PC video games or in the related narrower market for distribution of PC video games, worldwide and in the EEA, as a result of the merged entity’s targeted foreclosure of rival distributors of console and PC video games by restricting or degrading access upstream to Activision Blizzard’s video games.

#### 7.4.4. Targeted total or partial input foreclosure of rival distributors of PC video games that offer multi-game subscription services

- (445) The Commission has investigated whether the Notifying Party has the ability and incentive to foreclose competing distributors of PC video games that offer multi-game subscription services. In the Article 6(1)(c) Decision opening the in-depth investigation, the Commission raised serious doubts with regard to this category of competitors in the market for the distribution of PC video games. However, following the in-depth assessment of the evidence on file, including the review of internal documents of Activision Blizzard and replies to the Commission’s market investigation, the Commission did not find sufficient evidence to sustain this concern. The Commission therefore concludes that the Transaction does not lead to significant impediment of effective competition on the market for the distribution of console or PC video games as a result of the foreclosure of competing providers of multi-game subscription services.

---

<sup>446</sup> Nintendo’s reply to RFI 1, question 7b [ID5260]

<sup>447</sup> Nintendo’s reply to RFI 1, question 2 [ID5260]

#### 7.4.4.1. The Notifying Party's views

- (446) The Notifying Party submitted that it will not have the ability to foreclose its rivals in a potential market for PC multi-game subscription services. This is because Activision Blizzard games such as *Call of Duty* or *World of Warcraft* are not an important input. In particular, *World of Warcraft* is a single-game subscription service that has never been made available on multi-game subscription services and cannot easily be integrated into one.<sup>448</sup> In addition, game distribution on PC mainly takes place through buy-to-play stores, such as Valve's Steam, which is the clear market leader in PC game distribution.<sup>449</sup>
- (447) With regard to incentive, the Notifying Party submitted that [*business secrets concerning business strategy*]. It submits that wide distribution across differentiated channels might be attractive, but that it depends on [*business secrets concerning business strategy*].<sup>450</sup>
- (448) The Notifying Party submitted that, even if it were to withhold Activision Blizzard's games from rival PC multi-game subscription services, this would not result in anti-competitive effects. This is because multi-game subscription services are only one of the ways in which gaming content is paid for and Activision Blizzard's games would remain available to purchase on PC, or in the case of *World of Warcraft*, by single-game subscription service.<sup>451</sup> Moreover, Activision Blizzard's content is not available on any multi-game subscription services for PC today, but this has not hindered any of the providers of such services active on the market today from entering the market.<sup>452</sup>

#### 7.4.4.2. The Commission's Assessment

- (449) The Commission considers that multi-game subscription services are a payment model for the distribution of PC games that will constantly grow and gain importance in the coming 5-10 years. The Commission gathered views from market participants on how multi-game subscription services will develop in the next 5-10 years, also in connection to how this will impact demand for different payment models. With regard to the supply of multi-game subscription services, the majority of respondents that expressed a view expects it to grow in the coming years, with multi-game subscription services becoming increasingly popular. Some respondents pointed out that the supply of multi-game subscription services will consolidate around a few large players.<sup>453</sup> In relation to this, it was pointed out by a few respondents that building successful multi-games subscription services requires significant organizational and financial efforts.
- (450) Similarly, with regard to the demand for multi-game subscription services, market participants generally indicated that such demand is expected to increase. Some respondents specified that it will grow by a moderate extent, whereas others submitted that it will increase drastically. It was in any case specified that the buy-to-play model will remain an option.<sup>454</sup> According to the majority of market participants that expressed a view, the main driver for growth of the demand for multi-game

---

<sup>448</sup> Form CO, paragraphs 702 to 706; the Notifying Party's reply to RFI 17, question 1c), paragraph 86.

<sup>449</sup> Form CO, paragraphs 707 to 712.

<sup>450</sup> The Notifying Party's reply to RFI 17, question 1c), paragraph 87.

<sup>451</sup> Form CO, paragraph 719.

<sup>452</sup> The Notifying Party's reply to RFI 17, question 1c), paragraphs 89 to 92.

<sup>453</sup> Replies to Questionnaire Q2 – Phase II Questionnaire, question B.C.1.

<sup>454</sup> Replies to Questionnaire Q2 – Phase II Questionnaire, question B.C.2.

subscription services will be content and price. In particular, respondents generally indicated that a broad and attractive portfolio of games will be key to attract users' demand, in light of the fact that the payment model allows gamers to access a broad library of titles which would otherwise be more expensive if purchased on a standalone basis. Some respondents also specified that the availability of new games from the day of their release will be key for driving demand for multi-game subscription services.<sup>455</sup>

- (451) Finally, the majority of respondents that expressed a view indicated that, going forward, subscription services will increasingly compete against the buy-to-play model, as consumers will resort more to subscription as a substitute to purchasing video games on a buy-to-play basis on PC.<sup>456</sup>
- (452) However, based on the in-depth assessment of the evidence on file, the Commission did not find sufficient evidence to sustain concerns regarding the targeted foreclosure of distributors of PC games that offer multi-game subscription services. This is because Activision Blizzard does not license its PC video games to any distributor of PC video games via a multi-game subscription service at the time of this Decision, nor did the Commission find sufficient evidence that it would have started doing so absent the Transaction.
- (453) In particular, the evidence indicates that, absent the Transaction, Activision Blizzard would have not started licensing its PC video games to a third-party multi-game subscription service, as it considered [*business secrets concerning business strategy*].
- (454) Internal documents of Activision Blizzard indicate that [*business secrets concerning business strategy*] and concluded [*business secrets concerning business strategy*] that the cannibalisation rate would lie between [*business secrets concerning business strategy*].<sup>457</sup> Therefore, Activision Blizzard concluded that [*business secrets concerning business strategy*].<sup>458</sup> This was confirmed by the Commission's market investigation, where several market participants pointed to Activision Blizzard's reluctance to license its games to a multi-game subscription service, and in particular on the release date.<sup>459</sup> The Commission therefore considers that, even if Microsoft had the ability and incentive to engage in an input foreclosure strategy by withholding Activision Blizzard's games from competing PC multi-game subscription services, this would not lead to any change of the competitive landscape in comparison with the counterfactual.
- (455) The Commission therefore concludes that the Transaction will not lead to a significant impediment of effective competition on the market for the distribution of console or PC video games as a result of the foreclosure of competing providers of multi-game subscription services.

#### 7.4.5. Targeted total or partial input foreclosure of rival distributors of console or PC video games that offer cloud game streaming services

- (456) Microsoft has been one of the first distributors to offer multi-game subscription services for console (Xbox Game Pass) and PC games (Game Pass for PC), as well

---

<sup>455</sup> Replies to Questionnaire Q2 – Phase II Questionnaire, question B.C.3.

<sup>456</sup> Replies to Questionnaire Q2 – Phase II Questionnaire, question B.C.5.

<sup>457</sup> See the Notifying Party's Article 6(1)(c) Response – Vertical Effects, paragraph 160 with further references.

<sup>458</sup> See the Notifying Party's Article 6(1)(c) Response – Vertical Effects, paragraph 158 with further references.

<sup>459</sup> Replies to Questionnaire Q2 – Phase II Questionnaire, question C.B.C.5.



as a bundled offering that contains console and PC games for download, as well as a cloud game streaming service, Xbox Cloud Gaming, which allows streaming Xbox console games on PCs, mobile devices (through browser-based web apps) or smart TVs (Game Pass Ultimate). In particular with regard to cloud game streaming, the Commission considers that this relatively new type of access to video games allowed entry in the last three years for companies not previously active in the distribution of video games. It is a developing and quickly growing part of the market with the potential to substantially change the competitive dynamics in the market for the distribution of PC and console games.

- (457) The Commission has therefore investigated whether the Notifying Party has the ability and incentive to foreclose competing distributors of console or PC video games that offer cloud game streaming services, either by (i) restricting their access to Activision Blizzard's PC and console video games, while making Activision Blizzard's games available on Xbox Cloud Gaming, the streaming functionality of Game Pass Ultimate; or by (ii) degrading the terms under which Activision Blizzard's PC and console games are made available on competing distributors of console or PC video games that offer cloud game streaming services (e.g., by making certain features of Activision Blizzard's games exclusively available on Game Pass; or degrading technical support of Activision Blizzard's games). The Commission sought the view of market participants on the importance of Activision Blizzard's content as an important input for distributors of console or PC video games that offer cloud game streaming services. The Commission sought to establish whether such a foreclosure strategy may have a negative impact on competition in the overall market for the distribution of video games; as well as potential narrower markets for the distribution of console, PC, and console and PC video games.

#### 7.4.5.1. The Notifying Party's views

- (458) The Notifying Party submitted that the merged entity would not have the ability to foreclose any cloud gaming service by withholding Activision Blizzard's content. First, Activision Blizzard has decided not to make its games available on any cloud game streaming service to date and can therefore not be considered an important input.<sup>460</sup> Second, the Notifying Party itself is just a small player in cloud gaming services, with an estimated segment share of only approximately [0-5]%.<sup>461</sup> [...].<sup>462</sup> With regard to incentive, the Notifying Party submitted that it would not have the incentive to foreclose competing cloud game streaming services, as Xbox Cloud Gaming [*business secrets concerning business strategy*].<sup>463</sup> In addition, the deals the Notifying Party closed with competing cloud game streaming services reflect a genuine desire to distribute Activision Blizzard's content broadly. Finally, cloud gaming is expected to have only limited consumer adoption. The Notifying Party expects cloud-based streaming to account for only [0-5]% of the total consumer spend on gaming by 2025.<sup>464</sup> The Notifying Party therefore submitted that no

---

<sup>460</sup> Form CO, paragraphs 722 et seq.

<sup>461</sup> Form CO, paragraph 724.

<sup>462</sup> See the Notifying Party's submission of 13 October 2022, as well as the Notifying Party's reply to RFI 16, question 2. The Notifying Party submitted that Xbox Cloud Gaming only streams Xbox console games. The Notifying Party is [*business secrets concerning business strategy*].

<sup>463</sup> Letter of Facts Response, paragraphs 46 to 55.

<sup>464</sup> Form CO, paragraph 725.

possible anticompetitive effects will arise in relation to cloud gaming services, or the broader console and PC digital distribution segments that they fall within.<sup>465</sup>

#### 7.4.5.1.1. Ability to foreclose

- (459) In particular, the Notifying Party argued in the Article 6(1)(c) Response that, contrary to the Commission's view of the counterfactual, industry participants do not see cloud game streaming services becoming the main way to access gaming content in the near future in the market for the distribution of console and PC games.
- (460) Cloud game streaming services would not be expected to grow rapidly in the coming years. This is because their success would remain uncertain at best, cloud gaming would be an unproven technology that remains inferior to the download-to-play experience, and *[business secrets concerning business strategy]* other major technology companies would have been able to identify a path to profitability for cloud gaming.
- (461) With regard to Activision Blizzard specifically, the Notifying Party submitted that it does not offer its games via cloud game streaming services, *[business secrets concerning business strategy]*. Activision Blizzard's games would not be suitable for cloud game streaming due to *[business secrets concerning business strategy]*. Moreover, internal documents show that Activision Blizzard's senior management *[business secrets concerning business strategy]*.
- (462) In the SO Response, the Notifying Party restated a number of its arguments from the Form CO and its Article 6(1)(c) Response, in addition to raising additional points and putting forward some new evidence.
- (463) First, with regard to the cloud game streaming on consoles, the Notifying Party submitted that PlayStation gamers can only access Sony's own cloud game streaming service, and Nintendo gamers can only access the Nintendo cloud gaming service. Therefore, the Transaction cannot have any impact on the market for the distribution of console games.<sup>466</sup>
- (464) Second, with regard to the cloud game streaming on PC, the Notifying Party submitted that, first, downloading games remains the predominant means of accessing games and that cloud game streaming services have only a [...] penetration of approximately [0-5]% by PC users.<sup>467</sup> Second, since Activision Blizzard's games are not available for cloud game streaming on Microsoft's Game Pass Ultimate today, the Notifying Party looked at the share of Windows 10 and 11 PCs that played any downloaded Activision Blizzard game in 2021. The Notifying Party submitted that this was the case for only [0-5]% of Windows 10 and 11 PCs. The Notifying Party submitted that there is no indication that Activision Blizzard games would be more popular on cloud game streaming services accessed on a PC than when downloaded to a PC.<sup>468</sup>
- (465) In addition, the evidence does not support that the availability of Activision Blizzard content is particularly important for rival cloud game streaming providers on PC. This is because several PC cloud game streaming services emerged without Activision Blizzard content, there is a vast array of PC titles that could support any competitive response to the hypothetical withholding of Activision Blizzard content,

---

<sup>465</sup> Form CO, paragraph 726.

<sup>466</sup> SO Response, paragraph 231.

<sup>467</sup> SO Response, paragraph 232.

<sup>468</sup> Ibid.

and it is likely that other major publishers would also make their games available on cloud game streaming.<sup>469</sup> The Notifying Party also submitted that there is a significant number of untapped customers should cloud game streaming services wish to expand.<sup>470</sup>

- (466) Finally, the Notifying Party submitted that Activision Blizzard does not have market power in the upstream PC game publishing segment, given its limited market share even in the narrowest plausible segments ([20-30]% in shooters, [20-30]% in AAA shooters and [10-20]% in role-playing games) and the availability of a number of established competitors who will continue to constrain Activision Blizzard.<sup>471</sup>

#### 7.4.5.1.2. Incentive to foreclose

- (467) The Notifying Party argued that it would have no incentive to foreclose competing providers of cloud game streaming services. Its incentives would be in line with past conduct following studio acquisitions, as it has never taken existing first-party content away from competing cloud game streaming services as a result of an acquisition.
- (468) In the SO Response, the Notifying Party restated a number of its arguments from the Form CO and its Article 6(1)(c) Response, in addition to raising additional points and putting forward some new evidence.
- (469) First, the Notifying Party submitted that the growth of Xbox Cloud Gaming in PC and console is not one of the primary strategic drivers of the Transaction.<sup>472</sup>
- (470) Second, in cases where Microsoft has [*business secrets concerning business strategy*] in the past, this was due to the respective service streaming the games without existing licensing agreements.<sup>473</sup> Moreover, Microsoft has in the past made first-party titles available on other cloud game streaming services, such as PlayStation Plus and Google Stadia.<sup>474</sup>
- (471) Third, the Notifying Party submitted that it has no incentive to pursue a foreclosure strategy in relation to a highly uncertain and [*business secrets concerning business strategy*], such as cloud game streaming.<sup>475</sup>

#### 7.4.5.1.3. Impact on effective competition

- (472) The Notifying Party submitted that no anticompetitive effects will arise even if Activision Blizzard's content was made exclusive to Game Pass and Xbox Cloud Gaming. It argued that neither Nvidia, the "clear market leader" in cloud gaming, nor other providers of cloud game streaming services could be foreclosed. In particular for Nvidia, it has sufficient content to remain the leader in the race for the provision of cloud games streaming services and has managed to achieve this success without any Activision Blizzard content. Moreover, not having access to Activision Blizzard's content would not force any supplier of cloud game streaming services to exit the market. Finally, even if the Notifying Party made Activision Blizzard's games exclusive to Xbox Cloud Gaming, Sony and Steam would remain the market leaders in the overall market for the distribution of console and PC games.

---

<sup>469</sup> Ibid.

<sup>470</sup> Ibid.

<sup>471</sup> Ibid.

<sup>472</sup> SO Response, paragraph 233.

<sup>473</sup> Ibid.

<sup>474</sup> SO Response, paragraph 321.

<sup>475</sup> SO Response, paragraph 233.

- (473) In the SO Response, the Notifying Party restated a number of its arguments from the Form CO and its Article 6(1)(c) Response, in addition to raising additional points and putting forward some new evidence.
- (474) With regard to console cloud game streaming, the Notifying Party submitted that Sony’s cloud game streaming service is nascent and is expected to capitalize on Sony’s existing content library and subscription base, which is larger than Microsoft’s.<sup>476</sup>
- (475) With regard to PC cloud game streaming, the Notifying Party submitted that, first, Game Pass Ultimate cannot foreclose cloud game streaming competitors, because the cloud game streaming feature of Game Pass Ultimate has achieved [*business secrets concerning business strategy*] penetration.<sup>477</sup>
- (476) Second, Microsoft does not have downstream market power, as its shares of the downstream cloud game streaming segment are well below the level that gives rise to foreclosure concerns. In particular, Xbox Cloud Gaming has a market share of [10-20]% by MAU on PC in the EEA and of [20-30]% by MAU on PC worldwide.<sup>478</sup>
- (477) Third, given the low penetration rates of cloud game streaming on PC, it is implausible that PC game distribution could be foreclosed.<sup>479</sup>
- (478) Fourth, rival PC cloud game streaming providers will be an effective constraint on Microsoft post-Transaction.<sup>480</sup> In particular, Nvidia has established itself as the largest supplier of cloud game streaming without Activision Blizzard content and cannot be foreclosed.<sup>481</sup>
- (479) Finally, the Notifying Party submitted that the bring-your-own-game business model will remain a significant constraint on Xbox Cloud Gaming on PC.<sup>482</sup>

#### 7.4.5.2. The Commission’s Assessment

- (480) For the reasons set out below and based on the results of the market investigation during Phase I and Phase II, the Commission considers that the Notifying Party would have the ability and incentive to foreclose competing distributors of console and PC video games that offer cloud game streaming services by restricting access to Activision Blizzard’s PC and console games. Moreover, if the Notifying Party engaged in such a foreclosure strategy, the anticompetitive effects would likely be significant. The Commission therefore considers that the Transaction would result in a significant impediment of effective competition on the market for the distribution of console and PC games.

##### 7.4.5.2.1. The likely future development of cloud game streaming services

- (481) Based on an Omdia report of 2022, cloud gaming and subscriptions are expected to become an increasingly important part of the games market, assuming “*continued collaboration between telcos and cloud gaming companies as well as global improvement in the quality of internet connections*”. The report expects cloud gaming to go from 3% in 2022 to 5.3% in 2025 of the total worldwide spend on

---

<sup>476</sup> SO Response, paragraph 324.  
<sup>477</sup> SO Response, paragraphs 326 to 330.  
<sup>478</sup> SO Response, paragraph 331.  
<sup>479</sup> SO Response, paragraphs 332 and 333.  
<sup>480</sup> SO Response, paragraphs 334 to 336.  
<sup>481</sup> SO Response, paragraphs 337 to 340.  
<sup>482</sup> SO Response, paragraphs 341 to 345.

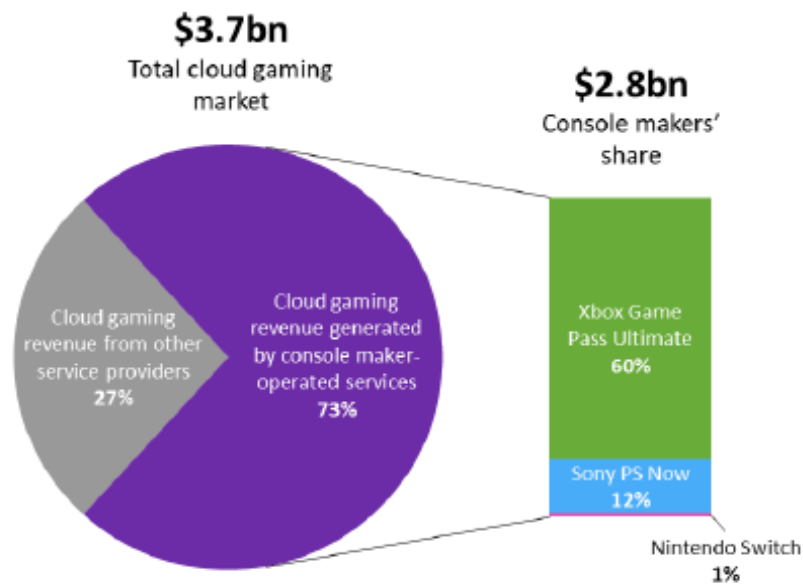
games content and services (including console, PC, mobile and cloud).<sup>483</sup> However, the Commission notes that such shares are calculated on the basis of the overall gaming market (including mobile games, that represent the largest portion of consumer spend), which indicates that they may represent a higher share on the market for PC and console games only. On the other hand, all revenues from offers that combine multi-game subscription and cloud-game streaming services have been included in these figures,<sup>484</sup> overstating the total size of revenues for cloud-game streaming services.

(482) Within cloud gaming, the console-based cloud gaming revenue accounted for 73% of the total global cloud gaming market in 2021. Moreover, Microsoft’s Xbox Game Pass Ultimate accounted for 60% of the total global cloud gaming market in 2021.<sup>485</sup> However, the report also expects that “*Microsoft and Sony’s share of the total cloud gaming market will gradually decrease in the coming years, as other services take off globally*”.<sup>486</sup> In this regard, the Commission notes that Microsoft appears to have a first-mover advantage in cloud game streaming, but also faces increasing competition from rival cloud game streaming services.

**Figure 4**

**Console makers were responsible for just under three-quarters of the total cloud gaming market in 2021**

**Cloud gaming market revenue, by service provider, global, 2021**



Note: All revenue generated by Xbox Game Pass Ultimate and Sony PlayStation Now were included in the sizing. Nintendo Switch revenue is derived from sales of “Cloud Version” games.  
Source: Omdia’s Cloud Gaming and Subscription Revenue Forecast: 2021–26

© 2021 Omdia

*Form CO, Annex 6.65 – Omdia 2022 Trends to Watch: Cloud Gaming and Subscriptions, p. 10.*

<sup>483</sup> Form CO, Annex 6.65 – Omdia 2022 Trends to Watch: Cloud Gaming and Subscriptions, p. 5.  
<sup>484</sup> Form CO, Annex 6.65 – Omdia 2022 Trends to Watch: Cloud Gaming and Subscriptions, p. 10.  
<sup>485</sup> Form CO, Annex 6.65 – Omdia 2022 Trends to Watch: Cloud Gaming and Subscriptions, p. 10.  
<sup>486</sup> Form CO, Annex 6.65 – Omdia 2022 Trends to Watch: Cloud Gaming and Subscriptions, p. 10.

- (483) Moreover, industry reports have been progressively more optimistic on the future and significance of cloud game streaming:
- (a) In the Omdia Report “2021 Trends to Watch: Cloud Gaming and Subscriptions”, it is stated that “[t]he year 2021 will be a landmark one for cloud gaming [...] As household entertainment budgets are squeezed, partly as a result of the ongoing COVID-19 pandemic, cloud-gaming and game-subscription services will prove to be an attractive route to premium titles for more price-conscious consumer [...]”.<sup>487</sup>
  - (b) In the forecasts of the Newzoo Global Cloud Gaming Report of 2021, global cloud gaming paying users and revenue are expected to continue to have a steady growth: “In the base scenario, we continue to estimate that there will be 23.7 million paying cloud gaming users globally by the end of 2021, which are expected to grow to 60.7 million by 2024. In the optimistic scenario, we expect there will be 80.3 million paying users by 2024, whereas our pessimistic scenario sees only 40.9 million paying users by the same year. In 2021, those 23.7 million paying users will spend a combined \$1.6 billion on cloud gaming services and games played via the cloud. Revenues are expected to grow to \$6.5 billion by 2024 in the base scenario. In our latest optimistic scenario, this combined spend will reach \$9.3 billion by 2024. In the pessimistic scenario, revenues are expected to grow at a considerably slower rate, only reaching \$4.1 billion by 2024”.<sup>488</sup> The same report points out that: “Microsoft stands most to gain if cloud gaming is a success among consumers. The company is funneling its current subscribers into xCloud by adding the service to its Game Pass Ultimate subscription at no extra cost”.<sup>489</sup> This is comparable to the global consumer spend estimated by Microsoft based on its own data.<sup>490</sup>
  - (c) In the Newzoo’s 2022 Global Games Market Report, while it is noted that, for the first time since the Newzoo’s tracking, there is a forecasted decline in global games market revenues – as “games market will generate \$184.4 billion in 2022, down -4.3% year on year” – cloud gaming “[...] is one of the bright spots in this year’s market” and its revenues will grow to “\$8.2 billion by 2025”. It is further highlighted that “[t]he cloud gaming market has matured significantly since the new wave of services launched in 2019, and new cloud gaming services continue to launch”.<sup>491</sup>
  - (d) Omdia’s Cloud Gaming and Subscription Revenue Forecast states that cloud gaming “revenues will be approaching \$12bn by 2026” and will experience a growth of 39% from 2021 to 2022. The publicly available information on the report specifically acknowledges that “It’s been largely driven by Xbox Game Pass Ultimate with its millions of subscribers, who, since the end of 2020 have

---

<sup>487</sup> Annex 6.53 to the Form CO, page 4.

<sup>488</sup> Annex 6.68 to the Form CO, page 135 and 136. The Commission notes that the figures by Newzoo include revenues from monthly fees for cloud platforms like GeForce NOW, i.e., money not spend on games but for access to the cloud gaming infrastructure, but that for revenues from services that also offer the download of games (e.g., Game Pass Ulltimate) only “a representative share of the revenues generated via cloud gaming” has been taken into account.

<sup>489</sup> Ibid, page 97.

<sup>490</sup> See the Notifying Party’s SO Response, paragraph 247, Table 10.

<sup>491</sup> Newzoo “The Games Market in 2022: The Year in Numbers”, December 2022 [ID5244].

*been able to stream games to smartphones, tablets, PCs, and soon, smart TVs*".<sup>492</sup>

- (484) This finding is further supported by evidence submitted by market participants in reply to the Phase II market investigation, showing that the technical specifications of at least some cloud game streaming services are already sufficiently performant to support the streaming of complex, graphics-intensive game.
- (a) Nvidia, for instance, submitted that “[t]he quality of cloud gaming already matches or exceeds the quality of local gaming for most gamers and will only improve with time”.<sup>493</sup> In particular the Ultimate tier of GeForce Now offers “streaming at up to 240 frames per second from the cloud with full ray tracing and DLSS 3 [i.e. deep learning super sampling] [...] click-to-pixel latency below 40 milliseconds”.<sup>494</sup> Nvidia submitted that its cloud game streaming service GeForce Now can provide high-performance gaming on low-performance devices, has a low latency and is more affordable than buying comparable hardware to update your PC.<sup>495</sup>
- (b) The cloud game streaming service Boosteroid currently supports “4K 60FPS [i.e. frames per second] gaming streaming capability” and has created “an optimal server infrastructure that ensures advanced cloud gaming experiences with ultra-low latency, high image quality, and flawless performance”. It will moreover “[s]oon [...] launch a hardware solution capable of delivering 4K at 60-240 fps game streaming — a true game changer. This solution will enable more sophisticated gaming on the cloud, providing even better gameplay quality than the current industry standard”.<sup>496</sup>
- (485) Moreover, cloud game streaming services appear not only to be technologically viable, but also offer compelling reasons for gamers of graphics-intensive games, such as Call of Duty, to use such services.
- (a) A third-party analysis of [business secrets from an internal document] that an analyst sent to [business secrets from an internal document] explains that [business secrets from an internal document]. In particular [business secrets from an internal document].<sup>497 498</sup>
- (486) In addition, the Commission asked market participants to provide their views on how cloud game streaming services will develop in the next 5-10 years.<sup>499</sup> Market participants provided mixed replies on how the supply of and demand for cloud game streaming services will likely develop in this time frame.
- (487) With regard to the supply of cloud game streaming services, the majority of market participants that expressed a view submitted that they expected this type of services to grow in the next 5-10 years. Several market participants indicated that the growth of cloud game streaming services will accelerate with the adoption of 5G and improvement of internet technology overall. However, some market participants also pointed to the significant “cost to deliver high-quality, low latency cloud stream

---

<sup>492</sup> “Omdia forecasts cloud gaming to nudge \$12bn by 2026”, 27 September, 2021 [ID5243].

<sup>493</sup> Nvidia’s non-confidential reply to RFI 3, question 7 [ID4879].

<sup>494</sup> Ibid.

<sup>495</sup> Ibid.

<sup>496</sup> Boosteroid’s reply to Questionnaire Q2 – Phase II Questionnaire, annex “Boosteroid success case”.

<sup>497</sup> Microsoft’s internal document - [...], [ID1303-52523 or MSFT-EC-01517743].

<sup>498</sup> Ibid.

<sup>499</sup> Replies to Questionnaire Q2 – Phase II Questionnaire, section B.D.

*delivery*” and the fact that today, offering cloud game streaming services might not be commercially viable, though some expected that this would change in the next 5-10 years. Some market participants considered that these two factors increased the barriers to entry and expansion in the area of cloud game streaming services, as providers would have to have a certain scale to be able to overcome these hurdles.<sup>500</sup>

- (488) With regard to the demand for cloud game streaming services, the majority of market participants that expressed a view consider that the demand for cloud game streaming services will increase significantly once the internet technology improves. A minority of respondents even considered that in 5-10 years, cloud game streaming services could equal or overtake the demand for console and PC gaming.<sup>501</sup> Another market participant provided a more differentiated view, expecting the demand for such services to increase drastically in geographies “*in which end users cannot afford the hardware required to play videogames (videocards, consoles,...)*”, while “[*i*]n the rest of the countries (mainly in Europe, Japan and North America) even if the demand will increase, it will not be so significant since players can update their hardware every 1-2 years”.<sup>502</sup>
- (489) Market participants mentioned the following aspects as the main drivers of consumer choice of cloud game streaming services (in varying order): (i) cost of the service; (ii) availability of the service; (iii) quality and breadth of content; and (iv) technological capabilities (e.g. latency, multi-player, cross-platform, add-on content).<sup>503</sup>
- (490) The majority of market participants that expressed a view consider that consumers will resort more to playing a game via cloud game streaming as a substitute to downloading games in the next 5-10 years, both on console and on PC.<sup>504</sup>
- (491) In the SO Response and the Letter of Facts Response, the Notifying Party submitted that there is no reliable evidence to suggest that cloud game streaming will disrupt the industry.<sup>505</sup> The Notifying Party submitted that the evidence from the Parties and wider industry participants is that cloud game streaming will remain only a limited part of the gaming industry in the future. As such, cloud game streaming is and will remain an ancillary feature, which complements existing console and PC services.<sup>506</sup> However, the Commission notes that recent entries in the market for the distribution of console and PC games have taken place in the area of cloud game streaming services (notably, the recent entries of Nvidia, Boosteroid, Google, Amazon, and Meta). Most of these new entrants did not distribute video games via console or PC before entering the market with cloud game streaming services. The Commission therefore considers that these recent entries are an indication that cloud game streaming services are not just an ancillary feature limited to complementing other distribution channels, but have the potential to disrupt the way video games are distributed. It is also an area in which companies have invested<sup>507</sup> and continue to invest in. For instance, Amazon has expanded the geographic scope of its cloud game streaming service from the US (where Amazon Luna launched in March 2022) to

---

<sup>500</sup> Replies to Questionnaire Q2 – Phase II Questionnaire, question B.D.1.

<sup>501</sup> Replies to Questionnaire Q2 – Phase II Questionnaire, question B.D.2.

<sup>502</sup> Replies to Questionnaire Q2 – Phase II Questionnaire, question B.D.2 [ID4249].

<sup>503</sup> Replies to Questionnaire Q2 – Phase II Questionnaire, question B.D.3.

<sup>504</sup> Replies to Questionnaire Q2 – Phase II Questionnaire, questions B.D.4 and B.D.5.

<sup>505</sup> SO Response, paragraph 238; Letter of Facts Response, paragraph 32.

<sup>506</sup> Letter of Facts Response, paragraph 32.

<sup>507</sup> Form CO, paragraph 808.



Canada, the UK and Germany on 22 March 2023.<sup>508</sup> Boosteroid launched its cloud game streaming service in autumn 2019, had set up 11 data centres in Europe by early 2022, and at the date of the Decision runs 18 data centres in Europe and the US.<sup>509</sup>

(492) Based on the above, the Commission considers that cloud game streaming services are well placed to disrupt the way console and PC games are distributed, and will therefore become an important part of the distribution of console and PC games in the near future. A first-mover advantage in this developing part of the market could therefore have a significant impact on the competitive dynamics in the market going forward.

(493) In this context, the Commission has assessed Activision Blizzard’s plans to start licensing its video games to cloud game streaming providers (section 7.4.4.2.2.), the merged entity’s ability (Section 7.4.4.2.3.) and incentive (Section 7.4.4.2.4.) to foreclose rival providers of cloud game streaming services and the effect of such a foreclosure strategy on effective competition (Section 7.4.4.2.5.).

#### 7.4.5.2.2. Activision Blizzard’s plans to start licensing its video games to cloud game streaming providers

(494) The Commission takes note of the Notifying Party’s submission in the Article 6(1)(c) Response that “*Activision Blizzard’s content has never been distributed on any cloud streaming platform, and is not authorized on any cloud streaming platform today*”<sup>510</sup>, and that Activision Blizzard [*business secrets concerning business strategy*].

(495) However, based on Activision Blizzard’s internal documents, the Commission considers it likely that, absent the Transaction, Activision Blizzard would have started licensing its video games, including *Call of Duty* titles, to cloud game streaming services, and in particular those that have a BYOG, buy-to-play or free-to-play business model. This is for the following reasons.

(496) In the past years, Activision Blizzard’s employees have discussed [*business secrets concerning business strategy*]. They have assessed [*business secrets concerning business strategy*].

(497) In an internal presentation of 31 October 2020, Activision Blizzard considered that [*business secrets concerning business strategy*].<sup>511</sup>

#### Figure 5

[...]

(498) In the same presentation, Activision Blizzard assesses [*business secrets concerning business strategy*]. At the time of this analysis, Activision Blizzard recommended [*business secrets concerning business strategy*].<sup>512</sup>

---

<sup>508</sup> See Amazon Luna, “Luna now available in Germany, the united Kingdom and Canada, and prime members get even more access to great games, 2022, <https://amazonluna.blog/luna-now-available-in-germany-the-united-kingdom-and-canada-and-prime-members-get-even-more-b9400b9f18e1>, last accessed on 11 April 2023, [ID7208].

<sup>509</sup> See Boosteroid’s reply to Questionnaire Q2 - Phase II Questionnaire, question A.3, as well as Boosteroid, “Boosteroid launches new data center in Sweden to support rapid user growth in Nordic countries”, 2022, <https://boosteroid.com/blog/2022/01/18/boosteroid-launches-new-data-center-in-sweden-to-support-rapid-user-growth-in-nordic-countries/>, [ID7203].

<sup>510</sup> Article 6(1)(c) Response, paragraph 163.

<sup>511</sup> Activision Blizzard’s internal document - [...], [ID1428-65395 or ABK-2R-01297791].

<sup>512</sup> Activision Blizzard’s internal document - [...], [ID1428-65395 or ABK-2R-01297791].

- (499) Less than half a year later, in a draft presentation from March 2021 concerning [business secrets concerning business strategy], Activision Blizzard evaluates [business secrets concerning business strategy]. The criteria for the evaluation are [business secrets concerning business strategy].<sup>513</sup> While at that stage, the presentation concluded that [business secrets concerning business strategy], it also acknowledged that [business secrets concerning business strategy].<sup>514</sup>
- (500) A few months later, in an internal e-mail conversation end of August 2021 regarding [business secrets concerning business strategy], the Chief Operating Officer at Activision, said [business secrets concerning business strategy].<sup>515</sup>
- (501) Rob Kostich, President of Activision Publishing responsible for developing, producing, and distributing games from its internal and subsidiary studios, replied in the same conversation: [business secrets concerning business strategy].<sup>516</sup>
- (502) Moreover, Activision Blizzard started [business secrets concerning business strategy].
- (503) Activision Blizzard has [business secrets concerning business strategy]. In March 2021, it asked detailed questions on [business secrets concerning business strategy].<sup>517</sup>
- (504) In an internal document of December 2021, senior managers at Activision Blizzard discuss whether or not to [business secrets concerning business strategy].<sup>518</sup> While the managers acknowledge that [business secrets concerning business strategy] in the past, they discuss that [business secrets concerning business strategy]. At the end of the conversation, [business secrets concerning business strategy].<sup>519</sup>
- (505) In an e-mail of mid-December 2021 [business secrets concerning business strategy].<sup>520</sup> This document indicates that, just a month prior to the announcement of the Transaction on 18 January 2022, Activision Blizzard was [business secrets concerning business strategy]. The involved senior managers were confident that [business secrets concerning business strategy].
- (506) Indeed, internal documents indicate that [business secrets concerning business strategy]. On the day of the announcement, an Activision Blizzard employee prepared an overview of [business secrets concerning business strategy]. Under the heading [business secrets concerning business strategy], the overview mentions [business secrets concerning business strategy].<sup>521</sup>
- (507) Finally, while [business secrets concerning business strategy] the Commission considers it very likely that Activision Blizzard would have continued exploring [business secrets concerning business strategy] absent the Transaction. As shown above, already pre- Transaction, the views regarding cloud game streaming [business secrets concerning business strategy].

---

<sup>513</sup> Activision Blizzard's internal document - [...], [ID1428-61165 or ABK-2R-01224029].

<sup>514</sup> Activision Blizzard's internal document - [...], [ID1428-61165 or ABK-2R-01224029].

<sup>515</sup> Activision Blizzard's internal document - [...], [ID1428-20452 or ABK-2R-00540525].

<sup>516</sup> Activision Blizzard's internal document - [...] [ID1428-20452 or ABK-2R-00540525].

<sup>517</sup> Activision Blizzard's internal document - [...], [ID1528-62999 or ABK-2R-01252206].

<sup>518</sup> [BUSINESS SECRETS – SENIOR MEMBERS].

<sup>519</sup> Activision Blizzard's internal document - [...], [ID1444-18570 ABK-2R-02971731].

<sup>520</sup> Activision Blizzard's internal document - [...], [ID1428-60541 or ABK-2R-01215599].

<sup>521</sup> Activision Blizzard's internal document - [...], [ID1416-31264 or ABK-2R-03398890].

(508) By way of example, in a draft presentation regarding [*business secrets concerning business strategy*] of August 2021, Activision Blizzard described that [*business secrets concerning business strategy*]. It defines [*business secrets concerning business strategy*]. Due to [*business secrets concerning business strategy*], the slide recommended to [*business secrets concerning business strategy*].<sup>522</sup>

**Figure 6**

[...].

(509) In particular, the Commission understands that Activision Blizzard was concerned with [*business secrets concerning business strategy*]. Licensing the games to a cloud game streaming service with [*business secrets concerning business strategy*] on the other hand, would have allowed Activision Blizzard to [*business secrets concerning business strategy*].

(510) Finally, the Commission notes that several of Activision Blizzard's competitors that develop AAA console and PC games are currently licensing their games to third-party cloud game streaming services (e.g. Take Two, Ubisoft, Electronic Arts, Bandai Namco).<sup>523</sup> In particular with regard to Nvidia's cloud game streaming service GeForce Now, several developers and publishers of AAA [...]. All of these publishers, except for [...]. In the meantime, [...].<sup>524</sup> The Commission considers this an additional indication that, absent the Transaction, Activision Blizzard would have also started licensing its games to cloud game streaming services going forward.

(511) Based on the above, the Commission considers it likely that, absent the Transaction, Activision Blizzard would have started licensing its games to cloud game streaming providers in the short to mid-term.

7.4.5.2.3. Ability to foreclose

(512) The Commission considers that the Notifying Party would have the ability to engage in a foreclosure strategy with regard to competing distributors of console and PC video games that offer cloud game streaming services. First, AAA console and PC games in general, and Activision Blizzard's AAA console and PC games in particular, are an important input for distributors of console and PC video games that offer cloud game streaming services. Second, Activision Blizzard has market power as its PC and console games are particularly attractive content that would bring substantial value in attracting more consumers to such emerging services. Third, the Notifying Party would have the ability to – technically and contractually – restrict or degrade access to Activision Blizzard's games. Fourth, there are no effective and timely counter-strategies that downstream competitors could deploy in order to react to potential foreclosure strategies.

7.4.5.2.3.1. Console and PC games, and in particular Activision Blizzard's games, are an important input for downstream distributors of console and PC video games that offer cloud game streaming services

(513) According to the Non-Horizontal Guidelines, input foreclosure may raise competition problems only if it concerns an important input for the downstream product. This is the case, for example, when the input concerned represents a

---

<sup>522</sup> Activision Blizzard's internal document – [...], [ID1416-28031 or ABK-2R-03207911].

<sup>523</sup> See replies to Questionnaire Q2 – Phase II questionnaire, questions C.C.A.1 (for console games) and C.C.B.1 (for PC games).

<sup>524</sup> See Nvidia's non-confidential reply to RFI 3, question 5 of 24 January 2023. [ID3449]

significant cost factor relative to the price of the downstream product. Irrespective of its cost, an input may also be important for other reasons. For instance, the input may be a critical component without which the downstream product could not be manufactured or effectively sold on the market, or it may represent a significant source of product differentiation for the downstream product. It may also be that the cost of switching to alternative inputs is relatively high.<sup>525</sup>

- (514) Video games are an important input for a cloud game streaming service, as such a service cannot be effectively offered on the market without video games.
- (515) Based on the Notifying Party's submission, as well as internal documents<sup>526</sup>, the Notifying Party considers its main competitors in the supply of cloud game streaming services to be Amazon (with Amazon Luna), Google (with Google Stadia, which was however discontinued on 18 January 2023), Sony (with PlayStation Now), Meta (with Facebook Gaming), Nvidia (with GeForce Now)<sup>527</sup> and Tencent ([...])<sup>528</sup> as well as smaller players such as [...]. Among these players, only Microsoft and Sony rely on console-based hardware in the cloud, while all other players run their cloud game streaming services on PC-based hardware in the cloud.<sup>529</sup> Moreover, at the time of the Decision, the competitors listed above monetize their cloud game streaming service through different business models.<sup>530</sup> Looking at the rivals that Microsoft considers to be its main competitors, Sony offers a cloud game streaming service bundled with a multi-game subscription service, Nvidia has a BYOG business model and Amazon has a hybrid model, with a multi-game subscription offer and a BYOG offer. Based on the counterfactual described under Section 7.4.5.2.2, the Commission considers it most likely that, absent the Transaction, Activision Blizzard would have started licensing its video games to cloud game streaming services that do not pursue a multi-game subscription business model, and in particular to those that have a BYOG, buy-to-play or free-to-play business model. The Commission notes that, at the time of the Decision, only cloud game streaming providers that allow the streaming of PC games have a BYOG model. At the time of the Decision, the only competitor with a console games cloud streaming service is Sony, who has a multi-game subscription service.
- (516) Depending on the hardware in the remote datacentre that cloud game streaming services rely on, either console or PC games are an important input for downstream distributors of video games that offer cloud game streaming services.
- (517) Moreover, the results of the Phase I market investigation indicate the importance of attractive games, and in particular AAA games, for the success of cloud game streaming services. For instance, a market participant submitted that “[n]ascent gaming platforms, [...] require access to a catalog of must-have games. Their success with consumers depends to a large degree on their ability to access AAA games that gamers expect from a major gaming platform. Experts agree that cloud gaming platforms need the right content, both in quality and quantity, to attract and retain customers. A cloud platform's game portfolio—particularly its blockbuster

---

<sup>525</sup> See non-Horizontal Guidelines, paragraph 34.

<sup>526</sup> See for instance Annex 6.13 – [...], slide 54; Form CO, Annex 6.64 - [...]

<sup>527</sup> Form CO, paragraph 197.

<sup>528</sup> Form CO, Annex 6.12, slide 54.

<sup>529</sup> Form CO, paragraph 198. While Nintendo also offers a cloud game streaming service, it is very limited in scope and offers PC games.

<sup>530</sup> See also recital (31) above.

AAA games—will be a key to its value proposition and “ultimately will be either a driver or a roadblock for growth”.<sup>531</sup>

- (518) The majority of developers and publishers of console and PC games responding to the Phase II market investigation consider that the main drivers of consumer choice of cloud game streaming services are price, technical performance, the availability of different game genres and the availability of exclusive AAA games and/or exclusive content of AAA games.<sup>532</sup> Moreover, they consider the availability and quality of content to be an important parameter of competition between cloud game streaming services, alongside price and technical performance.<sup>533</sup>
- (519) The importance of attractive games being available for streaming is confirmed in internal documents that state that [*business secrets concerning business strategy*].<sup>534</sup>
- (520) The results of the market investigation indicate that Activision Blizzard’s content could be an important or very important input for cloud game streaming. This is because it offers popular content and “*some of the most compelling titles*”.<sup>535</sup>
- (521) This finding is further supported by the following evidence from Microsoft’s and Activision Blizzard’s internal documents:
- (a) In its internal document produced for Microsoft by [*business secrets concerning business strategy*] it is stated that [*business secrets concerning business strategy*].<sup>536</sup>
  - (b) In an internal e-mail correspondence addressed to [*business secrets concerning business strategy*] Microsoft employees discuss [*business secrets concerning business strategy*].<sup>537</sup>
  - (c) In an Activision Blizzard’s internal document of January 2022, Activision Blizzard compares [*business secrets concerning business strategy*].<sup>538</sup> The Commission considers the comparisons below are an indication for the importance of other games in Activision Blizzard’s portfolio, such as World of Warcraft, [*business secrets concerning business strategy*].

---

<sup>531</sup> A market participant’s reply to Questionnaire Q1 to video games developers, publishers and distributors, question 6.2.1 [ID3329]. The market participant referred in its reply to the following publication: Christophe Firth et al., *Is cloud gaming at the tipping point?*, Kearney, 17 August 2021, <https://www.kenarney.com/communications-media-technology/article/-/insights/is-cloud-gaming-at-the-tipping-point>, [ID7207].

<sup>532</sup> Replies to Questionnaire Q2 - Phase II questionnaire to competitors, question C.C.A.8 and C.C.B.9.

<sup>533</sup> Replies to Questionnaire Q2 - Phase II questionnaire to competitors, question C.C.A.9 and C.C.B.10.

<sup>534</sup> Form CO, Annex 6.16 – [...]

<sup>535</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, questions 46.2 to 46.2.1 [ID1126].

<sup>536</sup> Microsoft’s internal document - Microsoft’s internal document - [...], [ID1303-66971 or MSFT-EC-01905520].

<sup>537</sup> Microsoft’s internal document - [...] [ID1400-47432 or MSFT-EC-00181863].

<sup>538</sup> Activision Blizzard’s internal document - [...] [ID1428-84058 or ABK-2R-01569238].

Figure 7

[...]

Figure 8

[...]

Figure 9

[...]

7.4.5.2.3.2. Activision Blizzard has market power in the upstream market for the development and publishing of PC and console games

(522) Market shares are the standard starting point to assess market power as part of the Commission’s competitive assessment. Market shares (and related concentration levels) “provide useful first indications” of the structure of the markets at stake and of the competitive importance of the relevant market players.<sup>539</sup>

(523) On the basis of the data provided by the Parties, the Parties’ combined 2022 market share by revenue is below 30% in the upstream market for development and publishing of console and PC video games, ([10-20]% worldwide and [5-10]% in the EEA), as well as in the potential narrower markets for the development and publishing of PC games ([5-10]% worldwide and [5-10]% in the EEA) and console games ([10-20]% worldwide and [5-10]% in the EEA).

(524) However, the Parties have higher combined market shares by revenue when looking at certain plausible segments. On the plausible segment for the development and publishing of AAA role playing games on PC, the Parties had a combined market share by revenue in 2022 of [10-20]% worldwide and [30-40]% EEA-wide.<sup>540</sup> When looking at other metrics, such as MAU or game time, the combined share of the Parties is even higher, as Tables 10 and 11 below indicate. When looking at MAU, the Parties combined share was [30-40]% worldwide and [30-40]% EEA-wide in 2022. As for the combined share by game time, the Parties had [30-40]% worldwide and [40-50]% EEA-wide on PC and console, [30-40]% worldwide and [40-50]% EEA-wide on PC in 2022.

(525)

**Table 10 Development and Publishing of AAA role playing games – PC (WW and EEA, 2020-2022, by MAU)**

Party	WW			EEA		
	2020	2021	2022	2020	2021	2020
<b>PC</b>						
Microsoft	[10-20]%	[10-15]%	[5-10]%	[10-20]%	[10-15]%	[10-20]%
Activision Blizzard	[30-40]%	[20-30]%	[20-30]%	[40-50]%	[30-40]%	[30-40]%
<b>Combined</b>	<b>[50-60]%</b>	<b>[30-40]%</b>	<b>[30-40]%</b>	<b>[50-60]%</b>	<b>[40-50]%</b>	<b>[50-60]%</b>
miHoYo	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
Square Enix	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%
Bandai Namco Entertainment	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[0-5]%	[0-5]%
Perfect World Entertainment	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[0-5]%	[0-5]%
Smilegate	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[0-5]%	[0-5]%
Others	[20-30]%	[30-40]%	[20-30]%	[20-30]%	[30-40]%	[20-30]%

<sup>539</sup> Horizontal Merger Guidelines, paragraph 14.

<sup>540</sup> See recital (165), Table 2 above.

Party	WW			EEA		
	2020	2021	2022	2020	2021	2022
<b>PC</b>						
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: Reply to RFI 26, Annex 5

**Table 11: Development and publishing of AAA role-playing games – PC (WW and EEA, 2020-2022, by game-time)**

Party	WW			EEA		
	2020	2021	2022	2020	2021	2022
<b>PC</b>						
Microsoft	[5-10]%	[5-10]%	[5-10]%	[0-5]%	[5-10]%	[0-5]%
Activision Blizzard	[60-70]%	[30-40]%	[30-40]%	[70-80]%	[40-50]%	[40-50]%
<b>Combined</b>	<b>[60-70]%</b>	<b>[40-50]%</b>	<b>[30-40]%</b>	<b>[70-80]%</b>	<b>[40-50]%</b>	<b>[40-50]%</b>
miHoYo	[10-20]%	[10-20]%	[10-20]%	[5-10]%	[10-20]%	[10-20]%
Square Enix	[5-10]%	[20-30]%	[10-20]%	[5-10]%	[10-20]%	[10-20]%
Smilegate	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[0-5]%	[10-20]%
Others	[10-20]%	[10-20]%	[20-30]%	[5-10]%	[20-30]%	[20-20]%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: Reply to RFI 26, Annex 5

(526) On the plausible segment for the development and publishing of AAA shooter (including battle royale) console games, their combined market shares by revenue in 2022 were [30-40]% worldwide and [10-20]% EEA-wide.<sup>541</sup> The Parties' largest competitor worldwide is Epic Games, which publishes a popular battle royale game Fortnite ([20-30]%). Other competitors are much smaller in that space. As indicated in Tables 11 and 12 below, when looking at shares by MAU, the Parties combined share was [30-40]% worldwide and [30-40]% EEA-wide on PC and console, [20-30]% worldwide and [20-30]% EEA-wide on PC and [30-40]% worldwide and [30-40]% EEA-wide on console in 2022. As for shares by game time, the Parties had a combined share of [20-30]% worldwide and [20-30]% EEA-wide on PC and console, [30-40]% worldwide and [20-30]% EEA-wide on console, and [20-30]% worldwide and [10-20]% EEA-wide on PC in 2022.

**Table 12: Development and Publishing of AAA shooter games – PC/console (WW and EEA, 2020-2022, by MAU)**

Party	WW			EEA		
	2020	2021	2022	2020	2021	2022
<b>PC</b>						
Microsoft	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Activision Blizzard	[20-30]%	[10-20]%	[20-30]%	[10-20]%	[10-20]%	[20-30]%
<b>Combined</b>	<b>[20-30]%</b>	<b>[10-20]%</b>	<b>[20-30]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[20-30]%</b>
Epic Games	[10-20]%	[5-10]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
Valve	[20-25]%	[10-20]%	[10-20]%	[5-10]%	[10-20]%	[20-25]%
Electronic Arts	[5-10]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[5-10]%
Take Two	[10-20]%	[5-10]%	[5-10]%	[10-20]%	[10-20]%	[10-20]%
Others	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

<sup>541</sup> See Table 5 above.

Party	WW			EEA		
	2020	2021	2022	2020	2021	2022
<b>Console</b>						
Microsoft	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Activision Blizzard	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[30-40]%
<b>Combined</b>	<b>[30-40]%</b>	<b>[30-40]%</b>	<b>[30-40]%</b>	<b>[30-40]%</b>	<b>[30-40]%</b>	<b>[30-40]%</b>
Epic Games	[20-30]%	[10-20]%	[10-20]%	[20-30]%	[20-30]%	[20-30]%
Take Two	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
Electronic Arts	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
Ubisoft	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%
Others	[5-10]%	[5-10]%	[5-10]%	[0-5]%	[5-10]%	[5-10]%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: Reply to RFI 26, Annex 5

**Table 13: Development and publishing of AAA shooter games– PC/console (WW and EEA, 2020-2022, by game-time)**

Party	WW			EEA		
	2020	2021	2022	2020	2021	2022
<b>PC</b>						
Microsoft	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Activision Blizzard	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
<b>Combined</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[20-30]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>
Epic Games	[10-20]%	[10-20]%	[10-20]%	[20-30]%	[10-20]%	[10-20]%
Riot Games	[5-10]%	[10-20]%	[10-20]%	[0-5]%	[5-10]%	[10-20]%
Valve	[20-30]%	[10-20]%	[10-20]%	[20-30]%	[10-20]%	[10-20]%
Others	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[30-40]%	[30-40]%
Total	100%	100%	100%	100%	100%	100%
<b>Console</b>						
Microsoft	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Activision Blizzard	[30-40]%	[30-40]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%
<b>Combined</b>	<b>[30-40]%</b>	<b>[30-40]%</b>	<b>[30-40]%</b>	<b>[20-30]%</b>	<b>[20-30]%</b>	<b>[20-30]%</b>
Epic Games	[30-40]%	[20-30]%	[20-30]%	[30-40]%	[30-40]%	[30-40]%
Electronic Arts	[5-10]%	[10-20]%	[10-20]%	[0-5]%	[5-10]%	[5-10]%
Take Two	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
Sony Interactive Entertainment	[5-10]%	[5-10]%	[5-10]%	[0-5]%	[0-5]%	[0-5]%
Ubisoft	[0-5]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%
Others	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Total	100,0%	100,0%	100.0%	100.0%	100.0%	100.0%

Source: Reply to RFI 26, Annex 5

(527) Based on the above, the Commission notes that Activision Blizzard provides some of the most successful games in terms of market shares in game genres that attract large engagement and high spending among gamers, such as AAA shooter games and AAA role-playing games. These types of games would enable cloud game streaming services to attract significant numbers of new subscribers.

(528) Given the importance of high quality, popular content in attracting users to the emerging cloud game streaming services, the Commission considers that it is likely that the merged entity would have a strong bargaining position towards downstream distributors. Activision Blizzard has an offering of games that is particularly



attractive for cloud game streaming services, as it offers several successful brands in a variety of genres. For instance, in addition to the AAA shooter franchise *Call of Duty*, Activision Blizzard offers the popular AAA massively multi-player role-playing game *World of Warcraft*, which attracts an even higher user engagement and a higher monetization than *Call of Duty*,<sup>542</sup> as well as the AAA role-playing/action franchise *Diablo*. As another example, in 2021 four Activision Blizzard games ranked among the top-20 PC games per MAUs, including three *Call of Duty* titles and *World of Warcraft*.<sup>543</sup> In relation to this, it is worth noting that Microsoft franchises also appear in these rankings, in particular *Minecraft* which ranked as the number one PC game per MAUs in 2020, 2021 and the first half of 2022.<sup>544</sup> The Commission also notes that Activision Blizzard has offered *World of Warcraft* as a single-game subscription since 2005. It is the only massively multi-player role-playing game on the market able to extract a monthly fee.

- (529) On the basis of the above, and for the purposes of this Decision, the Commission concludes that the merged entity has market power in the upstream market for development and publishing of console and PC video games.

7.4.5.2.3.3. The merged entity has the technical and contractual ability to restrict or degrade access to Activision Blizzard's games

- (530) As discussed in Section 7.4.3.2.1.5, the merged entity will have exclusive control over the licensing rights for Activision Blizzard's games. Moreover, as Activision does not currently license cloud game streaming rights to any third party, there are no contractual obligations in place preventing it from refusing access to its games going forward.<sup>545</sup>

- (531) The Commission considers that the merged entity would also have the ability to degrade the access of competitors to Activision Blizzard's games compared to the counterfactual described in Section 7.4.5.2.2 in which absent the Transaction, Activision Blizzard would start licensing its games to several providers of cloud game streaming services, and in particular such with a BYOG, buy-to-play or free-to-play business model. The merged entity could for instance provide access to competitors at a later stage than to Microsoft, degrade the quality of games on other cloud game streaming services or make certain features or upgrades only available on Microsoft's Game Pass (Ultimate).

- (532) The Commission notes that several providers currently offer cloud game streaming services standalone, i.e. with a buy-to-play or bring your own game business model (e.g. Nvidia's GeForce Now, Boosteroid), as part of a multi-game subscription service (e.g. PlayStation Plus), or in a hybrid business model combining subscription and buy-to-play (e.g. Amazon Luna). Depending on the business model, gamers can buy the games from the provider of the cloud game streaming service, or log into an account they have with a subscription service or digital storefront and play the game from that account on the rented hardware in the cloud. Besides the Notifying Party, relevant providers of cloud game streaming services relying on console games as an input are Sony (PlayStation Plus and PlayStation Plus Premium) and Nintendo

---

<sup>542</sup> See recital (521)(521) above.

<sup>543</sup> Form CO, Annex 24 – Top 20 Titles by MAU.

<sup>544</sup> *Ibid.*

<sup>545</sup> The agreements that Microsoft has reached with Nvidia, Boosteroid and Ubitus regarding the licensing of Activision Blizzard games are conditional upon the closing of the Transaction and will be assessed in Section 8 below.

Switch Online. Relevant providers of cloud game streaming services relying on PC games as an input are Tencent, Nvidia GeForce Now (who is not technically active in game distribution, but rather offers access to cloud gaming hardware, on which you can play games that you already own), Amazon Luna (at the time of the Decision only available in the US, UK, Canada and Germany), Shadow, Vortex, Utomik, Blacknut, Boosteroid and Ludium Lab.

(533) The merged entity could decide to withhold or degrade access from Activision Blizzard's games for all distributors of PC and console games that offer cloud game streaming services.

7.4.5.2.3.4. There are no effective and timely counter-strategies that downstream competitors could deploy in order to react to potential foreclosure strategies

(534) The Commission considers that, should the merged entity restrict or degrade access to Activision Blizzard's games via rival cloud-game streaming services, the latter would not have effective and timely counter-strategies at their disposal.

(535) The Non-Horizontal Merger Guidelines establish that "*The merged entity would only have the ability to foreclose downstream competitors if, by reducing access to its own upstream products or services, it could negatively affect the overall availability of inputs for the downstream market in terms of price or quality. This may be the case where the remaining upstream suppliers are less efficient, offer less preferred alternatives, or lack the ability to expand output in response to the supply restriction [...]*".<sup>546</sup>

(536) First, the Commission considers that access to a large catalogue of popular content is key for the ability of cloud game streaming services to compete, as indicated also in Microsoft's internal documents.<sup>547</sup>

(537) For instance, in an internal document, Microsoft considered the potential of exclusive game franchises (and particularly first-party AAA games) to drive consumers' adoption of cloud game streaming: [*business secrets from an internal document*].<sup>548</sup> Microsoft goes on to explain that [*business secrets from an internal document*].<sup>549</sup>

(538) In this regard, also one distributor of video games via cloud game streaming services stressed that access to popular content is the main barrier to growth.<sup>550</sup>

(539) Second, while pre-Transaction, no cloud game streaming service was authorized to offer Activision Blizzard's games, post-Transaction, Microsoft will be able to include the games in its cloud game streaming service. The games will add to Microsoft's pre-existing portfolio of AAA games and are likely to accelerate the growth of Game Pass considerably. In particular, as discussed under Section 7.4.5.2.3.2. above, Activision Blizzard has a number of successful console and/or PC franchises in the shooter/battle royale and the role-playing genres. In terms of shooters, Activision Blizzard offers *Call of Duty* and *Overwatch*, both on console and on PC. In terms of role-playing games, it offers *World of Warcraft* (on PC only) and *Diablo* (both on console and on PC). Shooter/battle royale and role-playing games in general, and Activision Blizzard's franchises in particular, generate large engagement and strong monetization. As assessed in recitals (357)-(374) and (375)-

---

<sup>546</sup> Non-Horizontal Merger Guidelines, paragraph 36.

<sup>547</sup> See for example Form CO, Annex 6.16, page 16 and Annex 6.13.

<sup>548</sup> Microsoft's internal document [...] [ID 1303-53988 or MSFT-EC-01572339].

<sup>549</sup> Ibid.

<sup>550</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, question 94.

(385) above concerning Activision Blizzard’s console games, Activision Blizzard is one of the leading developers of shooter (including battle royale) games, especially thanks to the *Call of Duty* and *Overwatch* franchises. Such franchises are available also on PC, where similar considerations apply. Games belonging to the shooter genre, and notably *Call of Duty* within it, drive significant user engagement, which is higher than in other genres, and attract a very high number of MAU. In particular, Activision Blizzard enjoys significantly high MAU and game-time compared to the franchises of other game developers and publishers within the shooter/battle royale genre, with only one comparable game franchise (*Fortnite*) which generated however less MAU and gameplay hours than Activision Blizzard’s games on console.<sup>551</sup> The picture is similar considering the shooter genre within the larger pool of PC and console games and the pool of PC games only. Activision Blizzard is first, ahead Epic Games’ *Fortnite*, in games with shooter elements both considering the larger PC and console games market ([10-20]% of MAU share in 2021, versus [10-20]%) and considering the narrower PC games market ([10-20]% in 2022, versus [10-20]% of Epic Games)<sup>552</sup>. Activision Blizzard is particularly strong also in terms of share of game time, with *Fortnite* as the only comparable game.<sup>553</sup> In addition, Activision Blizzard has a strong offering of role-playing games, with *World of Warcraft* and *Diablo* generating significant engagement and monetization.<sup>554</sup>

(540) Given the significantly large engagement that shooter and role-playing games generate, and Activision Blizzard’s games in particular within them, it is key for third-party cloud game streaming services to include such franchises in their library to remain competitive in a scenario in which such games become available on Game Pass Ultimate’s cloud game streaming feature post-Transaction. As indicated by Microsoft’s internal documents (see recital (517) above), [*business secrets from an internal document*]. Should Activision Blizzard’s games become exclusively available via Game Pass Ultimate’s cloud game streaming feature post-Transaction, alternative catalogues that do not include Activision Blizzard’s games would represent a considerably less preferable option for gamers, which would not allow cloud game streaming services to effectively compete.

(541) Third, rival providers of cloud game streaming services would not be able to build a catalogue attractive enough to react to the exclusive inclusion of Activision Blizzard’s games into Game Pass Ultimate post-Transaction. The alternative games that rival distributors of cloud game streaming services would be able to find would not be enough to replace Activision Blizzard’s games in case of a foreclosure strategy, and would in any case be significantly less preferred. In this regard, it is worth noting that rival cloud game streaming services are not vertically integrated and therefore could only rely on third-party AAA content. Popular AAA content by independent developers (especially those that do not offer cloud game streaming services, and that would be more likely to license their games to such distributors), is limited and in any case hardly comparable to Activision Blizzard’s games. Therefore, rival distributors would not be able to react to Microsoft’s foreclosure strategy by sourcing comparably attractive content that would give them the ability to effectively compete.

---

<sup>551</sup> See paragraph (380)(380) above. The Commission has received data from the Notifying Party that concern the Xbox console only.

<sup>552</sup> Notifying Party’s reply to the Commission’s RFI 23, Annex 1.2.

<sup>553</sup> Notifying Party’s reply to the Commission’s RFI 23, Annex 1.2 and 1.1.

<sup>554</sup> See recital (521)(c) above.

- (542) Fourth, as an additional point, the Commission considers that the release window of games on a cloud game streaming service is another key factor that determines the attractiveness of a catalogue of popular content. Even if rival cloud game streaming services were able to source some popular third-party AAA content, such counter-strategy would not be effective if video games are not published on their distribution channels on their launch date, but only later. As mentioned by a market participant, the release window of a video game is an important factor for the visibility of such game,<sup>555</sup> and therefore for attracting users. Microsoft has adopted a strategy whereby it releases new first-party games on Game Pass already from day one (and the same will likely happen with Activision Blizzard's games post-Transaction). However, independent developers (and Activision Blizzard pre-Transaction) normally release their new games for buy-to-play only and, possibly, only at a later stage on a cloud game streaming service, especially if the latter adopts a subscription payment model. Therefore, downstream competitors that are not vertically integrated are dependent on others as to the release date of new content. Therefore, they would have a significant disadvantage compared to Microsoft, which would own Activision Blizzard's games post-Transaction. In addition to the hurdle of finding sufficient additional AAA content from independent developers, third party cloud game streaming services would face challenges to release such content on the release date, thus effectively competing against the boosted attractiveness of Game Pass Ultimate post-Transaction.
- (543) Based on the above, the Commission considers that rival providers of cloud game streaming services would not have sufficient effective and timely counter-strategies they could deploy in the event of a foreclosure strategy.
- (544) This conclusion is not called into question by other arguments advanced by the Notifying Party. The Notifying Party submits that, first, it is not true that most cloud game streaming services are not vertically integrated. On the contrary, players such as Sony, Nintendo, EA, Tencent, Ubisoft and Amazon are both active in game publishing and in distribution via cloud game streaming. Second, the Notifying Party stresses that rival cloud game streaming services already have access to popular AAA titles. For example, NVIDIA's Ge Force Now offers EA's and Ubisoft's hit games, as well as Epic Games' *Fortnite* and other popular games by other publishers. Third, the Notifying Party argues that bring-your-own-game cloud gaming providers like NVIDIA allow gamers to link their PC digital storefront accounts to their service and start playing video games immediately, as soon as they are published on the relevant PC storefronts.<sup>556</sup>
- (545) However, the Commission maintains that, should Activision Blizzard's catalogue become exclusively available via Game Pass Ultimate's cloud game streaming feature post-Transaction, rival cloud game streaming services would not have timely and effective counter-strategies available. First, some of the players mentioned by the Notifying Party are not actually vertically integrated like Microsoft. For example, EA and Ubisoft do not offer a cloud game streaming service directly to consumers, but only as part of third-party cloud game streaming offering<sup>557</sup> (e.g. EA has its own subscription service EA Play included within the offering of Game Pass Ultimate's cloud game streaming feature).<sup>558</sup> Tencent also does not offer a cloud game

---

<sup>555</sup> Agreed minutes of the conference call of 13 May 2022 with a video game developer [ID1538].

<sup>556</sup> SO Response, paragraph 308.

<sup>557</sup> Minutes of the call with a game developer and publisher of 27 April 2022, paragraph 4.

<sup>558</sup> Form CO, Table 15.

streaming service. Second, while the Commission has acknowledged that rival cloud game streaming services would have access to alternative games, no such games would be able to represent a satisfactory alternative to Activision Blizzard's catalogue. Therefore, rival cloud game streaming services would not be able to compete effectively against Microsoft post-Transaction should such catalogue become exclusive to Game Pass Ultimate. In this regard, the Commission notes that, today, competition between cloud game streaming services has occurred without Activision Blizzard's games. Their exclusive inclusion into Game Pass Ultimate's cloud game streaming feature would represent a significant expansion of the already considerable catalogue of AAA games that Microsoft can offer at the time of the Transaction. For the reasons set out in recitals (541) and (542) above, rival cloud game streaming providers would not be able to deploy effective counter-strategies. Third, from a release-window perspective, while bring-your-own games cloud gaming services are more likely to get access to early releases than subscription-based cloud gaming services, they would still depend on third-party digital storefronts to include AAA games on the date of release. Post-Transaction, Microsoft would be able to offer Activision Blizzard's games on Game Pass Ultimate's cloud game streaming feature already on day one, whereas other cloud game streaming services would not have this opportunity. Furthermore, more generally, game publishers could still prevent their video games from being streamed, or from being streamed from day one, via bring-your-own-game cloud game streaming services through contractual provisions in their licensing agreements.

- (546) Therefore, the Commission considers that rival distributors of games via cloud game streaming services would not have effective and timely counter-strategies to react to potential foreclosure strategies.

#### 7.4.5.2.4. Incentive to foreclose

- (547) The Commission considers that the merged entity would have the incentive to engage in a foreclosure strategy by adding Activision Blizzard's console games to its own cloud game streaming service while restricting or degrading the access of competing providers of cloud game streaming services to Activision Blizzard's console and PC games. A foreclosure strategy would, on the one hand, increase the number of gamers using Xbox Cloud Gaming, as it could exclusively offer Activision Blizzard's video games, resulting in gains for the merged entity. These gains might be even more significant due to the fact that the Notifying Party currently mainly offers Xbox Cloud Gaming in a bundle with Game Pass, and increasing the attractiveness of the cloud game streaming service could increase the attractiveness of the overall bundle. This means that the merged entity could not only get customers of other cloud game streaming services to switch to their own service, but also subscribers of competing multi-game subscription services. On the other hand, the merged entity would lose potential revenues that Activision Blizzard would have obtained from licensing its games to other cloud game streaming providers. While it is challenging to quantify the gains and losses, the Commission considers that the gains for the merged entity would outweigh the potential losses, as set out below.
- (548) The Commission notes that, based on Microsoft's internal documents [*business secrets concerning business strategy*].<sup>559</sup> Already in a presentation prepared in October 2019, Microsoft considered with regard to streaming that [*business secrets*

---

<sup>559</sup> See for instance Form CO, Annex 6.13, slide 4.

*concerning business strategy*].<sup>560</sup> It explained that [*business secrets concerning business strategy*].<sup>561</sup>

- (549) The gains Microsoft would have are significant and diverse, precisely because Microsoft is active in several related markets: a foreclosure strategy would strengthen its own cloud game streaming service, as well as its own multi-game subscription service Game Pass, while at the same time gaining revenues from sales of Activision Blizzard's games. And it would defend its PC OS from competition from other providers of PC OS (see also Section 7.5.3.2.2. below).
- (550) In particular with regard to Game Pass, the Commission notes that USD [...] or [...] % of the estimated value of the Transaction to Microsoft comes from the acceleration of Game Pass subscriptions.<sup>562</sup> As submitted by the Notifying Party, the share of revenue generated by Game Pass Ultimate (i.e. the offering including cloud game streaming) out of the total revenue it generated with multi-game subscription services constantly increased between 2019 and 2021, and represented [...] of this revenue in 2021, both for PC<sup>563</sup>, and for console<sup>564</sup>. For PC, Game Pass Ultimate's share of Microsoft's worldwide revenues from multi-game subscription services grew from [20-30] % in 2019 to [70-80] % in 2021.<sup>565</sup> For console, the corresponding share grew from [5-10] % in 2019 to [50-60] % in 2021.<sup>566</sup>
- (551) The Commission notes that while Microsoft's cloud game streaming service relies on console hardware in the cloud and therefore requires console games as an input, it does not only compete with other providers of console-based cloud game streaming services, but also with PC-based cloud game streaming services that rely on PC games as an input. This is confirmed by the fact that, based on its internal documents, Microsoft considers PC-based cloud game streaming services as close competitors (e.g. [*business secrets concerning competitors*]).<sup>567</sup> Moreover, from a demand perspective, end-customers that want to stream video games have the choice between different streaming services, which they can use on the device of their choice (except for consoles), regardless of the hardware the cloud game streaming service uses in the servers. Therefore, the Commission considers that the Notifying Party has an incentive to foreclose competing cloud game streaming providers from accessing either Activision Blizzard's console or its PC games.
- (552) Based on Microsoft's stated deal rationale<sup>568</sup>, as well as internal documents, [*business secrets concerning business strategy*].<sup>569</sup> Moreover, internal documents show that [*business secrets concerning business strategy*]:
- (a) When assessing several game developers as targets for acquisitions in the past years, Microsoft constantly mentioned [*business secrets concerning business strategy*].<sup>570</sup>

---

<sup>560</sup> Form CO, Annex 6.13, slide 19.

<sup>561</sup> Form CO, Annex 6.13, slide 20.

<sup>562</sup> Form CO, paragraph 97, Table 1 and Annex 13.1.

<sup>563</sup> Form CO, Tables 71 (worldwide) and 72 (EEA-wide).

<sup>564</sup> Form CO, Tables 77 (worldwide) and 78 (EEA-wide).

<sup>565</sup> The Commission's calculation based on the data in the Form CO, Table 71.

<sup>566</sup> The Commission's calculation based on the data in the Form CO, Table 77.

<sup>567</sup> See recital 522 above.

<sup>568</sup> Form CO, paragraph 21.

<sup>569</sup> Form CO, Annex 6.13 and Annex 6.16.

<sup>570</sup> See for instance Form CO, Annex 6.31 [...] [ID30-34].

- (b) In an e-mail from [...] (Corporate Vice President of Cloud Gaming) to Phil Spencer (CEO of Gaming), [...] (Xbox Chief Financial Officer for Xbox and Microsoft Gaming and Vice President of Finance and Operations) and [...] (Corporate Vice President of Gaming Marketing) of 18 February 2022, [...] discusses [*business secrets concerning internal discussions*]. The assessment compares the capacity of console and cloud to [*business secrets concerning internal discussions*]. [...] concludes that [*business secrets concerning internal discussions*].<sup>571</sup>
- (c) The presentation for January 2022 attached to the e-mail mentioned in the previous bullet point indicates [*business secrets concerning business strategy*].<sup>572</sup>
- (d) In its internal document, Microsoft discusses [*business secrets concerning business strategy*].<sup>573</sup>
- (553) In paragraph 312 of the Notifying Party's SO Response, the Notifying Party submits that [...]. With regard to the documents above, the Notifying Party submitted that they are misinterpreted or outdated. In particular, [*business secrets concerning business strategy*].<sup>574</sup> Moreover, the Notifying Party submitted that [*business secrets concerning business strategy*].<sup>575</sup> The Commission considers that, unlike what the Notifying Party claims, the evidence demonstrates that [*business secrets concerning business strategy*]:
- (a) In a recent internal document from September 2022, Microsoft discusses [*business secrets concerning business strategy*]. It identifies [*business secrets concerning business strategy*].<sup>576</sup>
- (b) In another very recent internal document from November 2022, Microsoft still assesses [*business secrets concerning business strategy*]. It indicates that [*business secrets concerning business strategy*].<sup>577</sup>
- (554) The Notifying Party submitted that it does not have the financial incentive to pursue a foreclosure strategy in a highly uncertain and unprofitable area such as game streaming. In relation to the documents above, the Notifying Party submitted that they merely discussed several options, which Microsoft could pursue, and that its gamer-centric strategy is not predicated on withholding Activision Blizzard's content from rival cloud game streaming providers.<sup>578</sup> The Commission however considers that such internal discussions indicate that Microsoft continues to be committed to invest in a form of cloud game streaming, and that it would have to gain from offering Activision Blizzard's games exclusively on its own cloud game streaming service.
- (555) The losses Microsoft would face if it were to follow such a strategy would be limited. Activision Blizzard's console and PC games are currently not made available as part of any cloud game streaming offering. The merged entity would therefore not lose any current sales in the upstream market should it decide to make

---

<sup>571</sup> Microsoft's internal document - [...], [ID1407-91799 or MSFT-EC-00378212].

<sup>572</sup> Microsoft's internal document - [...], [ID1303-7277 or MSFT-EC-00378213].

<sup>573</sup> Microsoft's internal document - [...], [ID 1303-144 or MSFT-EC-00008441].

<sup>574</sup> Letter of Facts Response, paragraph 47.

<sup>575</sup> Letter of Facts Response, paragraph 48.

<sup>576</sup> Microsoft's reply to RFI 26 of 27 February, Annex 12.

<sup>577</sup> Microsoft's reply to RFI 26 of 27 February, Annex 13.

<sup>578</sup> Letter of Facts Response, paragraphs 46 to 50.

Activision Blizzard's console games exclusive to its downstream cloud game streaming services. However, against the counterfactual described in Section 7.4.4.2.2 above, absent the Transaction, Activision Blizzard would have likely sold more PC and console games to end-customers using the additional reach provided by one or several cloud game streaming services. The merged entity would therefore lose potential revenues from licensing fees and from a reduced number of players of the merged entity's games. While the Commission does not have data to quantify these losses, it seems plausible that they would be significantly smaller than the gains Microsoft would have from attracting more subscribers to its cloud game streaming and multi-game subscription service.

- (556) The merged entity's incentive to foreclose is further evidenced by Microsoft's past behaviour. Contrary to what the Notifying Party submitted in its Article 6(1)(c) Response, it has in the past removed first-party content from a rival cloud gaming service as a result of an acquisition.
- (a) Microsoft has [*business secrets concerning business strategy*]<sup>579</sup> in 2021. At that time, two of Bethesda's video games (Wolfenstein Young Blood and Quake 2 RTX) were available on Nvidia's cloud game streaming service GeForce Now.<sup>580</sup> In an internal e-mail of 18 March, a Microsoft employee reports [*business secrets concerning business strategy*].<sup>581</sup> The immediate reply of [...], the head of Microsoft Studios, was to instruct the employee to [...].<sup>582</sup> However, on 25 March 2021, [...] instructed another employee to "[...]"<sup>583</sup>. Indeed, shortly thereafter the Bethesda games were [...].
- (b) In an internal document of 30 March 2021, consisting of an e-mail chain between several Microsoft employees, [*business secrets concerning names of employees*].<sup>584</sup>
- (557) The Notifying Party submitted that it does not have a policy against including first-party games in rival cloud streaming services and that it had only removed games from GeForce Now for which the license expired.<sup>585</sup>
- (558) In a later submission, the Notifying Party clarified that it had removed several titles from competing cloud game streaming services in the period between [*business secrets concerning timing*].<sup>586</sup> This was mainly the case for Nvidia GeForce Now and Boosteroid, who both launched cloud game streaming services with a bring-your-own-game business model and allowed the streaming of Microsoft PC video games without having a license from Microsoft to do so. Microsoft submitted that it

---

<sup>579</sup> A video game developer and publisher owned by ZeniMax, who was acquired by Microsoft in 2021. See Commission decision of 5 March 2021 in case M.10001 – *Microsoft/ZeniMax*.

<sup>580</sup> Microsoft's internal document - [...], [ID1086-75071 or MSFT-EC-00671677].

<sup>581</sup> Ibid.

<sup>582</sup> Ibid.

<sup>583</sup> Microsoft's internal document - [...], [ID 1400-18514 or MSFT-EC-00072876].

<sup>584</sup> Microsoft's internal document - [...], [ID1304-4458 or MSFT-EC-02831603]. The confirmation appears to be the result of a conversation about the fact that [*business secrets concerning business strategy*]. The Commission notes that there appears to be a certain level of uncertainty in the market whether a licensing agreement between the publisher and the cloud game streaming provider is needed in order to stream games for which the end-customer already has a streaming license. However, the market reality is that agreements between publishers and streaming provider exist in the market today.

<sup>585</sup> SO Response, paragraph 319.

<sup>586</sup> The Notifying Party's reply to RFI 26 of 27 February 2023, question 13.



[*business secrets concerning business strategy*]. However, in the internal document quoted above, [*business secrets concerning business strategy*].<sup>587</sup>

- (559) The finding in recital (556) above is not undermined by the Notifying Party’s reply to RFI 26 of 27 February. In it, the Notifying Party explained that today, it “*offers its first-party titles to two rival cloud game streaming providers, namely Sony and, since recently NVIDIA*” and that “*a number of its games were previously available on Google Stadia until its shutdown in January 2023*”.<sup>588</sup> Recently, the Notifying Party has recently entered into licensing agreements with two further cloud game streaming providers, Boosteroid and Ubitus.<sup>589</sup> In this regard, the Commission notes that, the agreements with Nvidia, Boosteroid and Ubitus indicate the willingness of the Notifying Party to address the concerns raised by the Commission in the context of the merger review of this Transaction, rather than being an indication for the Notifying Party’s past behaviour.
- (560) In light of the above, the Commission concludes that the merged entity would have the incentive to engage in a foreclosure strategy with regard to restricting or degrading the access of competing distributors of console and PC video games that offer cloud game streaming services to Activision Blizzard’s console and PC games.

#### 7.4.5.2.5. Impact on effective competition

- (561) The Commission considers that an input foreclosure strategy targeting distributors of console or PC games via cloud game streaming services could have significant effects on competition in the downstream market for console and PC game distribution.
- (562) At the outset, the Notifying Party argued that its agreements with Nvidia, Boosteroid and Ubitus are sufficient to dismiss any concerns in cloud game streaming. This is because, taken together, the three services represent [40-50]% of the total cloud game streaming market in terms of MAU (together with the Notifying Party even [70-80]%), and they will all have access to Activision Blizzard games.<sup>590</sup> However, the Commission considers that the agreements are not relevant in the assessment of whether the Transaction will have a negative impact on effective competition in the first place, but rather whether the agreements could remove any such negative effects of the Transaction. Moreover, the agreements are conditional with regard to Activision Blizzard’s games on the closing of the Transaction. Thus, they are not yet effective at the date of this Decision. The Commission will therefore assess the impact of the three agreements in Section 8 below.
- (563) As to the effects on competition, first, cloud game streaming, while nascent, constitutes a rising trend in the industry and is likely to disrupt the device-centric approach that has characterized it.<sup>591</sup> This is because it can allow gamers to play console and PC games on any device they wish, and without incurring high costs for acquiring performant hardware. In addition, it can allow a distributor of console

---

<sup>587</sup> The Notifying Party’s internal document - [...], [ID1304-4458 or MSFT-EC-02831603].

<sup>588</sup> Microsoft’s reply to RFI 26 of 27 February 2023, question 12.

<sup>589</sup> Letter of Facts Response, paragraph 53.

<sup>590</sup> Letter of Facts Response, paragraph 56.

<sup>591</sup> Cloud gaming does not provide a different content from what is available for download. In principle, as regards PC and console games, all games available for download can be also be played via cloud game streaming without the relevant game developer having to adapt it. As regards the Xbox console, for example, Microsoft explains that there are no specific steps required to develop a “cloud-ready” game for the Xbox Series X console as compared to a “non-cloud” game. See Form CO, paragraphs 720 and 291-292.

and/or PC games to reach a much broader audience that goes beyond the device for which the games were developed.<sup>592</sup> The Notifying Party disagrees with this view, and considers that cloud gaming cannot be categorized as a rising trend. Rather, its future would be extremely uncertain. In this regard, the Notifying Party notes that only [10-20]% of Game Pass Ultimate MAU stream games from the cloud, and that the [*business secrets concerning business strategy*] of Xbox Cloud Gaming is yet to be proven. However, this appears in contrast with Microsoft's internal documents that [*business secrets concerning business strategy*].<sup>593</sup>

- (564) When discussing the role of consoles within cloud-game streaming, the Commission notes that a distinction has to be made between the streaming of console games on the one hand and the streaming of (PC or console) games to a console as end-device on the other hand. With regard to streaming games to a console, the Notifying Party submitted that PlayStation gamers can only access Sony's own cloud game streaming service, and Nintendo gamers can only access the Nintendo cloud game streaming service. Therefore, the Commission's concerns could not possibly relate to cloud game streaming accessed through consoles.<sup>594</sup> However, the Commission is assessing the streaming based on console and on PC hardware, regardless of the device to which the games are streamed. Technically, already today (PC or console) games could be streamed to and played on a console. However, console manufacturers block access to such streams in order to protect their respective own game stores and cloud game streaming services. The blocking of game streams on consoles could be subject to changes in the future, be it as a consequence of pressure from consumers or by legislative intervention. Already today the rise of cloud game streaming services can be expected to exert some competitive pressure on the distribution of games on consoles.
- (565) Second, the streaming of console games is an important part of the overall cloud game streaming services in which Microsoft has a very strong position. As laid out in recital (482) above, the streaming of console games accounted for the largest share of the total global cloud gaming, and Microsoft's Game Pass Ultimate alone represented 60% of the total revenue of the streaming of cloud games. Since console games can be streamed to end-devices other than consoles (e.g., PC or mobile devices), the streaming of console games competes with the streaming of PC games that can be accessed from the same devices. Thus, regardless of whether rival providers of cloud game streaming services stream PC or console versions of a game, their foreclosure would drive more subscribers to Game Pass Ultimate, and potentially stifle innovation from smaller entrants that would have otherwise challenged Microsoft's position. Combined with the growing importance of cloud game streaming overall, foreclosure would reduce innovation in the overall market for the distribution of PC and console games.
- (566) Third, the effects of an input foreclosure strategy would, as a result of the restricted or degraded access to Activision Blizzard's console and PC games, reduce the ability of rival cloud game streaming service providers to compete. In particular, market participants submitted that foreclosing access to Activision Blizzard's content may raise barriers to entry or expansion of rival cloud game streaming services.<sup>595</sup> In this

---

<sup>592</sup> Article 6(1)(c) Response, paragraphs 62 – 64.

<sup>593</sup> See for instance Form CO, Annex 6.13, slide 35, or Annex 6.16, page 16.

<sup>594</sup> SO Response, paragraph 231.

<sup>595</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, question 93.3.1. and 93.4.1.

regard, the Commission also notes that, besides Sony and Nintendo, other cloud game streaming services are not vertically integrated with developers and publishers of video games, and would therefore always need to rely on obtaining their input from third parties.

- (567) Fourth, while the Commission acknowledges that cloud game streaming services only represent a relatively small part of the overall market for the distribution of console and PC games today, they are considered to be an important source of innovation and are widely expected to gain in importance in the coming years.<sup>596</sup> Moreover, cloud game streaming services represent the most contestable part of the market, being the part that has seen several entries in the last 5 years.<sup>597</sup> Therefore, foreclosing competitors in this part of the overall market is likely to have a significant impact on the competition in the market for the console and PC game distribution.
- (568) One market participant submitted that “*subscription services, like cloud gaming, are relatively new to the industry, and an early advantage here could have long-term consequences for future competition. The addition of Activision Blizzard games to Xbox Cloud Gaming, and the corresponding foreclosure of other cloud gaming services from accessing those titles, or only receiving degraded access to those titles, would suppress competition for cloud gaming at a time when new entrants are seeking a critical foothold with consumers and developers.*”<sup>598</sup>
- (569) Fifth, such a foreclosure strategy could also encourage the exit of competing rival cloud game streaming service providers. The Commission notes that Google Stadia ceased its activities as of 18 January 2023.<sup>599</sup> Several market participants submitted that this was most likely the result of not having sufficient attractive content to gain and keep users.<sup>600</sup> One market participant indicated that “[*a*fter the transaction, Microsoft is highly likely to withhold Activision Blizzard games in various ways and use its first-party library to cement its leading position in this space. Sony will suffer from this, and will be unable to compete in the same manner, but will likely remain the second albeit weaker player in the market. [...] considers it possible that other cloud streaming services such as Amazon Luna will be shut down in the future such as is now happening with Google Stadia”.<sup>601</sup>
- (570) In particular, to the extent competing cloud game streaming services cannot obtain the content they may need, they would not provide a meaningful competitive constraint on Microsoft. It would therefore be under less pressure to innovate and improve its products. Since the streaming of either PC or console versions of a game can be accessed from the same end-devices, the streaming of PC games competes with the streaming of console games.

---

<sup>596</sup> Form CO, Annex 36 – Newzoo 2022 Global Games Market Report, p. 37 et seq.

<sup>597</sup> Form CO, paragraph 794.

<sup>598</sup> Reply of a market participant to Questionnaire Q1 to video games developers, publishers and distributors, question 93.3.1. and 93.4.1 [ID3329].

<sup>599</sup> Google, Message about Stadia and our long term streaming strategy, <https://blog.google/products/stadia/message-on-stadia-streaming-strategy/>, last accessed on 17 January 2023, [ID7196].

<sup>600</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, question 93.4.1.

<sup>601</sup> Reply of a market participant to Questionnaire Q1 to video games developers, publishers and distributors, question 62.2.1 [ID3329].

#### 7.4.5.2.6. Conclusion

(571) In light of the above, the Commission considers it likely that the Transaction would significantly impede effective competition in the market for the distribution of console and PC games, as a result of the merged entity foreclosing the supply of Activision Blizzard's console and PC games.

### 7.5. Conglomerate Effects

#### 7.5.1. Legal framework

(572) According to the Non-Horizontal Guidelines, in the majority of circumstances, conglomerate mergers will not lead to any competition problems.<sup>602</sup>

(573) However, foreclosure effects may arise when the combination of products in related markets may confer on the merged entity the ability and incentive to leverage a strong market position from one market to another closely related market by means of tying or bundling or other exclusionary practices. While tying and bundling have often no anticompetitive consequences, in certain circumstances such practices may lead to a reduction in actual or potential competitors' ability or incentive to compete. This may reduce the competitive pressure on the merged entity allowing it to increase prices.<sup>603</sup>

(574) In assessing the likelihood of such a scenario, the Commission examines, first, whether the merged firm would have the ability to foreclose its rivals<sup>604</sup>, second, whether it would have the economic incentive to do so<sup>605</sup> and, third, whether a foreclosure strategy would have a significant detrimental effect on competition, thus causing harm to consumers.<sup>606</sup> In practice, these factors are often examined together as they are closely intertwined.

(575) In order to be able to foreclose competitors, the merged entity must have a significant degree of market power, which does not necessarily amount to dominance, in one of the markets concerned. The effects of bundling or tying can only be expected to be substantial when at least one of the merging parties' products is viewed by many customers as particularly important and there are few relevant alternatives for that product.<sup>607</sup> Further, for foreclosure to be a potential concern, it must be the case that there is a large common pool of customers, which is more likely to be the case when the products are complementary.<sup>608</sup> Finally, bundling is less likely to lead to foreclosure if rival firms are able to deploy effective and timely counter-strategies, such as single-product companies combining their offers.<sup>609</sup>

(576) The incentive to foreclose rivals through bundling or tying depends on the degree to which this strategy is profitable.<sup>610</sup> Bundling and tying may entail losses or foregone revenues for the merged entity.<sup>611</sup> However, they may also allow the merged entity to

---

<sup>602</sup> Non-Horizontal Guidelines, paragraph 92.

<sup>603</sup> Non-Horizontal Guidelines, paragraphs 91 and 93.

<sup>604</sup> Non-Horizontal Merger Guidelines, paragraphs 95 to 104.

<sup>605</sup> Non-Horizontal Merger Guidelines, paragraphs 105 to 110.

<sup>606</sup> Non-Horizontal Merger Guidelines, paragraphs 111 to 118.

<sup>607</sup> Non-Horizontal Merger Guidelines, paragraph 99.

<sup>608</sup> Non-Horizontal Merger Guidelines, paragraph 100.

<sup>609</sup> Non-Horizontal Merger Guidelines, paragraph 103.

<sup>610</sup> Non-Horizontal Merger Guidelines, paragraph 105.

<sup>611</sup> Non-Horizontal Merger Guidelines, paragraph 106.

increase profits by gaining market power in the tied goods market, protecting market power in the tying good market, or a combination of the two.<sup>612</sup>

(577) It is only when a sufficiently large fraction of market output is affected by foreclosure resulting from the concentration that the concentration may significantly impede effective competition. If there remain effective single-product players in either market, competition is unlikely to deteriorate following a conglomerate concentration.<sup>613</sup> The effect on competition needs to be assessed in light of countervailing factors such as the presence of countervailing buyer power or the likelihood that entry would maintain effective competition in the upstream or downstream markets.<sup>614</sup>

7.5.2. *Foreclosure of rival providers of PC OS by restricting or degrading access to Activision Blizzard's native games*

(578) Microsoft offers, among other products, the Windows PC OS.

(579) As indicated in Table 7 above, Microsoft's worldwide market share in the market for the provision of PC OS was [70-80]% in 2022. As set out in the Horizontal Merger Guidelines, very large market shares, in particular above 50%, may in themselves be evidence of the existence of a dominant position.<sup>615</sup> Considering that Microsoft's market shares are well above 50%, the Commission considers this indicative of the fact that Microsoft enjoys a dominant position in the market for the provision of PC OS.<sup>616</sup>

(580) Microsoft's offering of a PC OS is relevant for PC gaming. In particular, the PC OS provides the interface between video games applications and the gaming hardware and software. When developing PC games, game developers and publishers need to write the relevant codes such that the gaming software is able to communicate with the relevant PC OS. A video game developed to communicate with, and therefore to run on the Windows OS cannot run on another PC OS, for instance MacOS. On the contrary, another version of the same game compatible with MacOS will have to be developed. Therefore, a video game can be downloaded and played only onto PCs with operating systems that support it.

(581) Today, most PC games are native Windows games, *i.e.*, games developed and designed to run on the Windows OS. This means that, currently, most PC games can be downloaded and played locally only on a Windows PC.

(582) Generally, Activision Blizzard's games make no exception in this regard. Today, most of Activision Blizzard's PC games can only be downloaded on Windows PCs.<sup>617</sup> However, Activision Blizzard makes a small number of PC games, especially older titles, available natively on MacOS.<sup>618</sup>

(583) Furthermore, Activision Blizzard's mobile games, and more specifically Android games, are generally playable on Chromebooks. This is because Google began to converge Android OS with ChromeOS, and made the Google Play Store, normally

---

<sup>612</sup> Non-Horizontal Merger Guidelines, paragraph 108.

<sup>613</sup> Non-Horizontal Merger Guidelines, paragraph 113.

<sup>614</sup> Non-Horizontal Merger Guidelines, paragraph 114.

<sup>615</sup> Horizontal Merger Guidelines, paragraph 17.

<sup>616</sup> The Commission found that Microsoft holds a dominant position in the market for personal computer operating system also in its decision in case AT.39530 – Microsoft (Tying). While such decision was adopted in 2009, Microsoft's market shares have remained very high since then.

<sup>617</sup> Form CO, paragraph 580.

<sup>618</sup> Article 6(1)(c) Response, paragraph 37.

available on Android mobile devices, also accessible via Chromebooks.<sup>619</sup> As a result, Android mobile games, and Android apps more generally, can be accessed and used on Chromebooks, including Activision Blizzard's highly popular games such as *Candy Crush*<sup>620</sup>, *Heartstone*, *Call of Duty Mobile* and *Diablo Immortal*.

- (584) Therefore, the Commission has examined whether the merged entity would have the ability, post-Transaction, to foreclose rival providers of PC OS by tying native Activision Blizzard's games to Windows, i.e. Activision Blizzard's PC and mobile games that can currently be downloaded and played locally on non-Windows PC OS. In this regard, given the popularity of Activision Blizzard's games, the Commission has assessed whether availability of their native version on a given PC OS could influence consumers' choice of PC OS. In particular, by removing Activision Blizzard's native PC and mobile games still accessible via non-Windows OS from the latter, and by making such games, in particular PC games, exclusively accessible via Windows, the merged entity could potentially foreclose rival providers of PC OS. This would occur by means of increased users' preference for the (already dominant) Windows OS, or in any case by the decrease in users' preference from other OS.

#### 7.5.2.1. The Notifying Party's views

- (585) The Notifying Party submits that the merged entity will not have the ability or the incentive to foreclose rival providers of PC OS by tying Activision Blizzard's games that can currently be downloaded and played locally on other PC OS to Windows. Moreover, the Notifying Party submits that such foreclosure strategy would have no impact on effective competition in the market for PC OS.

##### 7.5.2.1.1. Ability to foreclose

- (586) The Notifying Party submits that the merged entity would not have the ability to foreclose rival providers of PC OS by tying Activision Blizzard's native PC and mobile games to Windows.
- (587) First, the Notifying Party submits that the availability of PC games is not an important factor for competition between PC OS, and that it does not play a relevant role in determining consumers' PC purchasing decisions. On the contrary, such decisions would be determined by other factors such as price, performance, ease of use, battery life and compatibility with smartphone OS.<sup>621</sup> According to the Notifying Party, this is demonstrated by the fact, for example, that based on Windows telemetry data gaming accounts for less than [10-20]% of the time users spend on their PCs.<sup>622</sup>
- (588) Second, the Notifying Party notes that Activision Blizzard generally does not develop native PC games for non-Windows OS. In particular, Activision Blizzard does not currently make available any of its native games on ChromeOS, and exceptionally supports native MacOS versions of a limited number of games (e.g. *World of Warcraft*).<sup>623</sup> In this regard, the Notifying Party explains that Activision

---

<sup>619</sup> See Google, "The Google Play store, coming to a Chromebook near you", 2016, [here](#), [ID7225].

<sup>620</sup> In particular, *Candy Crush* is one of the top-selling mobile games, with a very high number of MAUs (between [...] approximately in each month of 2021). See Form CO, Annex 15 – [...]. See e.g. i) Statista, Leading gaming apps in the Google Play Store worldwide in September 2022, by revenue (in million USD), 2022, [here](#), [ID7220] and ii) Techradar, "Which are the top-earning mobile games?", 2022, [here](#), [ID7228].

<sup>621</sup> Article 6(1)(c) Response Article 6(1)(c) Response, paragraph 237

<sup>622</sup> Article 6(1)(c) Response, paragraph 239

<sup>623</sup> Article 6(1)(c) Response, paragraph 251 - 252

Blizzard has focused on developing its PC content for Windows only. This is because building or porting games on different PC OS is costly, and the economic return is limited, due to the low demand for gaming on non-Windows PCs and the fact that many non-Windows PCs are not well suited to support graphically intensive games.<sup>624</sup> From this perspective, the Notifying Party submits that there is no reason to believe that, absent the Transaction, Activision Blizzard would develop native ChromeOS games or expand (or in some cases, continue) development for MacOS. There would therefore be no material change to the status quo even if, post-Transaction, Microsoft were to focus exclusively on Windows versions of Activision Blizzard's games.<sup>625</sup>

- (589) Third, the Notifying Party argues that it would not have the technical ability, post-Transaction, to remove Activision Blizzard's mobile games from Chromebooks. In particular, according to the Notifying Party, Google requires that Chromebook OEMs pre-load Google Play Store, ensuring the availability of Android games on Chromebooks.<sup>626</sup> By this mechanism, according to the Notifying Party, Google requires game publishers to make Android games distributed via the Google Play Store also available on ChromeOS devices.<sup>627</sup> Therefore, the Notifying Party submits that, because of this unilateral arrangement by Google Microsoft would not be able to remove Activision Blizzard games from ChromeOS without withholding them from the Google Play Store *tout-court*.
- (590) Finally, the Notifying Party submits that Activision Blizzard's mobile titles such as *Candy Crush*, *Heartstone* or *Diablo: Immortal* do not drive PC purchasing decisions. In this regard, the Notifying Party notes that such mobile titles are widely available on Android mobile devices, which are generally cheaper than PCs.<sup>628</sup> Furthermore, the Notifying Party submits that, according to publicly available information on Google Play Store, none of Activision Blizzard's titles mentioned above are in the top 10 ranked or downloaded games on Google Play Store in any Member State.<sup>629</sup> What is more, according to the Notifying Party, while *Candy Crush* is a popular game on mobile devices, no evidence suggests that such game is popular on Chromebooks. On the contrary, *Candy Crush* is, on average across Member States, only the third largest mobile game by active users on Android devices.<sup>630</sup> Accordingly, Activision Blizzard's mobile games do not drive consumers' purchasing behaviour, either on the Play Store and, more broadly, on Chrome OS devices.
- (591) Therefore, for the reasons set out above, the Notifying Party considers that the merged entity would not have the ability to foreclose rival providers of PC OS by tying Activision Blizzard's native PC and mobile games to Windows.

#### 7.5.2.1.2. Incentive to foreclose

- (592) The Notifying Party submits that the merged entity would not have the incentive to foreclose rival providers of PC OS by tying Activision Blizzard's native PC and mobile games to Windows.

---

<sup>624</sup> Article 6(1)(c) Response, paragraph 257.

<sup>625</sup> Article 6(1)(c) Response, paragraph 260.

<sup>626</sup> Article 6(1)(c) Response, paragraph 291.

<sup>627</sup> Article 6(1)(c) Response, paragraph 294.

<sup>628</sup> Article 6(1)(c) Response, paragraph 309.

<sup>629</sup> Article 6(1)(c) Response, paragraph 310.

<sup>630</sup> Article 6(1)(c) Response, paragraph 311.

- (593) First, the Notifying Party considers that removing Activision Blizzard’ titles from non-Windows OS is irreconcilable with Microsoft’s strategy to make its content available to as many users and platforms as possible.<sup>631</sup> In addition, the Notifying Party submits that there is no evidence from any Microsoft’s internal document suggesting that the purpose of the transaction is to consolidate Window’s market power.<sup>632</sup>
- (594) Second, as regards Activision Blizzard’s native mobile games currently available on rival OS, the Notifying Party pointed out that only a small share of users ([5-10]%) played Activision Blizzard’s mobile titles via the web or PC (including Chromebooks).<sup>633</sup> Therefore, it is not credible that Microsoft would have the incentive to withhold games with such limited penetration in the hope of recouping additional revenues thanks to the Windows licensing.<sup>634</sup>
- (595) Therefore, the Notifying Party submits that it would not have the incentive to foreclose rival providers of PC OS by tying Activision Blizzard’s native PC and mobile games to Windows.

#### 7.5.2.1.3. Impact on effective competition

- (596) The Notifying Party states that a possible foreclosure strategy against other PC OS providers by tying Activision Blizzard’s native mobile and Windows games to Windows would not have any significant effect on competition.
- (597) First, the Notifying Party submits that most PCs are never used for gaming, therefore gaming is not particularly important for competition between PC OS and does not drive PC purchasing decisions.<sup>635</sup>
- (598) Second, the Notifying Party reiterates that Activision Blizzard’s PC games are not generally available on non-Windows OS, therefore a tying strategy concerning such games would not in any case reduce the ability of non-Windows OS to compete.<sup>636</sup>
- (599) Third, Activision Blizzard’s mobile games cannot be removed from Chrome OS due to Google’s the contractual arrangement whereby Android games must generally be offered on ChromeOS via the Play Store.<sup>637</sup>
- (600) Therefore, the Notifying Party considers that, should the merged entity engage in a foreclosure strategy against rival providers of PC OS by tying Activision Blizzard’s native mobile and PC games to Windows, there would be no effects on competition in the market for PC OS.

#### 7.5.2.2. The Commission’s assessment

- (601) For the purpose of the below assessment, by Activision Blizzard’s non-Windows native games the Commission refers to Activision Blizzard’s PC and mobile games that can currently be downloaded and played locally on a non-Windows PC.

---

<sup>631</sup> Article 6(1)(c) Response, paragraph 352

<sup>632</sup> Article 6(1)(c) Response, paragraph 353

<sup>633</sup> Article 6(1)(c) Response, paragraph 360. Such information refers to the month of December 2021.

<sup>634</sup> Article 6(1)(c) Response, paragraph 360.

<sup>635</sup> Article 6(1)(c) Response, paragraph 371.

<sup>636</sup> Article 6(1)(c) Response, paragraph 373.

<sup>637</sup> Article 6(1)(c) Response, paragraph 373.



#### 7.5.2.2.1. Ability to foreclose

- (602) The Commission considers that, post-Transaction, the merged entity would not have the ability to foreclose rival providers of PC OS by tying Activision Blizzard’s non-Windows native games to Windows.
- (603) In this regard, the Commission notes that the relevant Activision Blizzard’s games comprise both PC games and mobile games developed and published by Activision Blizzard that support or can otherwise be downloaded and played locally on non-Windows OS, in particular MacOS and ChromeOS.
- (604) First, as regards Activision Blizzard’s PC games available natively on non-Windows OS, the Commission notes, as also stressed by the Notifying Party, that Activision Blizzard generally does not release PC games on non-Windows OS. More specifically, Activision Blizzard does not develop native PC games for ChromeOS. Activision Blizzard only makes a small number of titles natively available on MacOS, mainly *World of Warcraft* and older titles such as *Diablo III* and *Starcraft II*.<sup>638</sup> However, more recent titles and other popular franchises, such as *Call of Duty* and *Overwatch*, were released only on Windows OS.<sup>639</sup> In particular, Activision Blizzard explained that it has chosen to focus on developing PC games only for Windows, because [*business secrets concerning business strategy*]. This is because today most PC gamers play on Windows, and non-Windows PCs are generally unsuited for running graphically-intense native games.<sup>640</sup>
- (605) Therefore, the Commission considers that, post-Transaction, the merged entity would not have a large-enough pool of native PC games, and therefore of “native” PC gamers, on non-Windows PCs to be able to foreclose rival providers of PC OS. More specifically, given Activision Blizzard’s focus on Windows PC games and the limited offering of PC native games on non-Windows PCs, only less than [0-5]% of Activision Blizzard’s PC gamers play on MacBooks.<sup>641</sup> In light of this, and pursuant to the Non-Horizontal Merger Guidelines, the Commission considers that Activision Blizzard’s native MacOS games do not correspond to a large pool of Activision Blizzard’s customers for foreclosure to be a concern.<sup>642</sup>
- (606) As explained in more details in recital (656) below, the Commission notes that the results of the market investigation indicate that gaming, intended as the availability of games and a high-quality gaming experience, is an important factor for competition between PC OS.<sup>643</sup> However, even taking this into account, as explained above, Activision Blizzard already does not generally develop PC games for non-Windows OS. Therefore, regardless of the importance of gaming and of Activision Blizzard’s games in general, the merged entity would not have the ability to implement a successful foreclosure strategy by tying Activision Blizzard’s native non-Windows PC games to Windows.

---

<sup>638</sup> Article 6(1)(c) Response, paragraph 252 - 253.

<sup>639</sup> Form CO, paragraph 580. The Commission understands that the last *Call of Duty* title made available on MacOS was *Black Ops 3* in 2015.

<sup>640</sup> Article 6(1)(c) Response, paragraph 257.

<sup>641</sup> Article 6(1)(c) Response, paragraph 252 and Figure 32.

<sup>642</sup> Non-Horizontal Merger Guidelines, paragraphs 99 and 100.

<sup>643</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, footnote 73. See also Replies to Questionnaire Q2 – Phase II questionnaire to competitors, question C.D.16, indicating that, according to a majority of market participants that expressed a view, the difference in games availability between Windows and other OS constitutes a barrier for the latter to compete.

- (607) Second, as regards Activision Blizzard’s non-Windows native mobile games, Activision Blizzard develops, among others, mobile games for the Android OS.<sup>644</sup> On Android, the vast majority of apps are distributed via the Google Play Store.<sup>645</sup> As explained by the Notifying Party and mentioned in recital (583) above, Google has increased convergence between Android OS and Chrome OS, such that Chromebook users are able to download Android apps from the Google Play Store and use them on Chromebooks, including games.<sup>646</sup> Chromebook users can thus play certain native Android games available via the Google Play Store on their Chromebooks.<sup>647</sup> As a result, today most Chromebooks can run Activision Blizzard’s mobile games<sup>648</sup>, including *Candy Crush*, *Crash Bandicoot: On the Run!*, *Heartstone*, *Call of Duty: Mobile* and *Diablo: Immortal*.<sup>649</sup>
- (608) In this regard, a market participant raised a concern that Microsoft would be able, post-Transaction, to block Activision Blizzard’s titles from being available on ChromeOS, as well as to disable certain features of such titles or to de-prioritize bug fixes for Activision Blizzard’s games on ChromeOS.<sup>650</sup> According to such concern, these titles, especially Activision Blizzard’s mobile games, are highly popular, and a possible tying strategy concerning such titles would give Microsoft the ability to protect Windows’ already strong position in the market for PC OS.<sup>651</sup>
- (609) However, the Commission notes that it is unlikely that a material number of consumers buy and choose PCs in order to play Activision Blizzard’s mobile games specifically. First, Activision Blizzard’s market shares in mobile games publishing are very low, as the mobile publishing market is very competitive and fragmented. In particular, Activision Blizzard’s market shares do not exceed [5-10]% in the EEA and [0-5]% on a worldwide basis.<sup>652</sup> Second, Activision Blizzard’s mobile games can also be played on Android mobile devices or tablets, which are generally cheaper than a PC. Furthermore, PCs do not even provide a better gaming experience on Activision Blizzard’s mobile games compared to mobile or tablet devices, since Activision Blizzard does not support Chromebook versions of its mobile games (which remain optimized for mobile devices). Therefore, it is highly implausible that the availability of such mobile games specifically plays a particular role in the choice of a PC device. Third, [...].<sup>653</sup> [...].<sup>654</sup> [...].<sup>655</sup> In light of the above, the Commission

---

<sup>644</sup> Android OS is an open-source operating system for mobile devices based on ARM-based device architecture launched by Google. See Article 6(1)(c) Response, footnote 452. See also: Android, Discover how Android connects your devices, [Android - Secure & Reliable Mobile Operating System](#), [ID7200].

<sup>645</sup> Form CO, paragraph 124.

<sup>646</sup> Article 6(1)(c) Response, paragraph 254 and footnote 449.

<sup>647</sup> Article 6(1)(c) Response, paragraph 254.

<sup>648</sup> As explained by the Notifying Party, even though its Android games are available on Chromebooks Activision Blizzard does not officially support the Android version of its mobile games on Chromebooks. This is because, despite the compatibility between Android OS and ChromeOS, officially supporting Chromebooks and optimizing Android games for Chromebooks would require additional development and quality assurance efforts. See Article 6(1)(c) Response, paragraph 255.

<sup>649</sup> The Commission understands that *Call of Duty: Mobile* and *Diablo: Immortal* are run only by a selection of ARM-based Chromebooks (and not by x86-based Chromebooks).

<sup>650</sup> EC Case M.10646: Microsoft / Activision Blizzard - Submission in response to the EC’s request for information, page 29-30. See also Reply of a market participant to the Commission’s RFI 1 of 1 July 2022, question 6.

<sup>651</sup> *Ibid.*

<sup>652</sup> Form CO, paragraph 553 and Annex 19.

<sup>653</sup> [...].

<sup>654</sup> [...].

considers it implausible that, due to the removal of Activision Blizzard's mobile games from Chromebooks, a sufficiently large proportion of Chromebook customers, would abandon Chromebooks and move to Windows.

(610) Therefore, and pursuant to the non-Horizontal Merger Guidelines<sup>656</sup>, the Commission considers that Chromebook users do not correspond to a large pool of Activision Blizzard's mobile customers. Moreover, Activision Blizzard's mobile games would not provide the merged entity with a strong position, with respect to customers of non-Windows PC devices, that the merged entity could leverage on to successfully foreclose rival providers of PC OS. In light of the above, the Commission considers it implausible that, as a result of the removal of Activision Blizzard's mobile games from other OS, especially ChromeOS, a sufficiently large proportion of non-Windows PC customers, especially Chromebook customers, would switch to Windows.

(611) For the reasons set out above, the Commission considers that, post-Transaction, the merged entity would not have the ability to foreclose rival providers of PC OS by tying Activision Blizzard's non-Windows native games to Windows.

#### 7.5.2.2.2. Incentive to foreclose

(612) Since the Commission has concluded, in Section 7.5.2.2.1 above, that the merged entity would not have the ability to foreclose rival providers of PC OS by tying Activision Blizzard's native games to Windows, the question whether Microsoft would have the incentive to engage in such a foreclosure strategy can be left open for the purpose of the present Decision.

#### 7.5.2.2.3. Impact on effective competition

(613) Since the Commission has concluded, in Section 7.5.2.2.1 above, that the merged entity would not have the ability to foreclose rival providers of PC OS by tying Activision Blizzard's native games to Windows, the question whether such a tying strategy would have a detrimental effect on competition can be left open for the purpose of the present Decision.

#### 7.5.2.3. Conclusion

(614) In light of the above, the Commission concludes that the Transaction does not result in a significant impediment of effective competition on the worldwide market for the supply of PC OS as a result of the foreclosure of rival providers of PC OS by tying Activision Blizzard's games available natively on non-Windows OS to Windows.

#### 7.5.3. *Foreclosure of rival providers of PC OS by restricting or degrading access to Activision Blizzard's content and to Microsoft's Game Pass Ultimate*

(615) Microsoft is the only player in the video gaming industry to offer a complete range of products and services that are interrelated and cover the entire video games value chain. In addition to its game development, publishing and distribution activities, Microsoft offers gaming hardware (the Xbox console), the Windows PC OS, cloud computing services via Microsoft Azure and a set of game-related software (*e.g.*, physics engines, back-end platforms and 3D optimization tools) that other developers can use to develop video games. Unlike its competitors, Microsoft does not need to rely on any external partner for the provision of gaming-related services. Microsoft

---

<sup>655</sup> [...].

<sup>656</sup> Non-Horizontal Merger Guidelines, paragraphs 99 and 100.

acknowledges [*business secrets concerning business strategy*] in its internal documents, where it states that [*business secrets concerning business strategy*].<sup>657</sup>

- (616) As mentioned in recitals (578)-(580) above, Microsoft offers, among other products, the Windows PC OS. In this regard, the Commission recalls that, with reference to PC games, the PC OS provides the interface between video games applications and the gaming hardware and software.
- (617) Furthermore, the Commission reiterates, as indicated in recital (579) above, that Microsoft enjoys a dominant position in the market for the provision of PC OS.
- (618) In Section 7.4.5 above, the Commission has assessed and reached the conclusion that the Transaction raises concerns relating to the foreclosure of rival cloud game streaming service providers on PC from accessing Activision Blizzard's games. As described in recitals (35)-(38) above, cloud game streaming is a growing industry trend that could potentially disrupt the device-based approach that has characterized the industry historically. Absent the Transaction, Activision Blizzard would likely have licensed its games to other cloud game streaming services. However, as described above, post-Transaction Game Pass Ultimate is likely to become the only cloud game streaming service offering Activision Blizzard's games. The Commission assessed whether such conduct raises concerns not only as a standalone theory of harm, but also as one of the elements of a different foreclosure strategy, explained in more details below, targeting the market for the supply of PC OS.
- (619) As mentioned in recital (581) above and explained in more detail below, today the large majority of PC games are available natively only on Windows. Likewise, many Activision Blizzard PC games can be downloaded and played locally only on Windows PCs, and not on other PC OS.<sup>658</sup>
- (620) In its investigation, the Commission has sought to assess whether gaming in general and Activision Blizzard's games in particular are important for competition between PC OS, and whether cloud game streaming services are an effective tool for bringing games to non-Windows PCs.
- (621) The Commission has then sought to assess whether, by making Activision Blizzard's games available on Microsoft's own cloud game streaming service and by not making them available on third-party cloud game streaming services, Microsoft could prevent users of a rival PC OS to play such games.
- (622) Finally, and in relation to the above, the Commission has sought to assess whether, post-Transaction, Microsoft would have increased ability and incentive to foreclose rival providers of PC OS by restricting or degrading the accessibility and the operation of Game Pass Ultimate's cloud gaming feature (strongly enhanced by Activision Blizzard's games) via rival PC OS. This could increase users' preference for Microsoft's Windows, thereby foreclosing rival providers of PC OS by reducing their ability to compete.

---

<sup>657</sup> Form CO, Annex 6.98. See also Form CO, Annex 6.13.

<sup>658</sup> As already explained in recitals (582) above, Activision Blizzard's PC games are generally developed for Windows. This means that gamers cannot download Activision Blizzard's games on non-Windows PCs. As better explained in recitals (35)-(38) above, as well as further below, cloud game streaming allows users to overcome these barriers between PC OS, as video games are not downloaded but run in the cloud and get streamed to the end user's device. End users can access cloud game streaming platforms and the related video games via a web browser.

### 7.5.3.1. The Notifying Party's view

(623) The Notifying Party submits that the merged entity will not have the ability or the incentive to foreclose rival providers of PC OS by tying Activision Blizzard's games and Game Pass Ultimate's cloud game streaming feature to Windows. Moreover, the Notifying Party submits that such foreclosure strategy would not have an impact on effective competition in the market for PC OS.

#### 7.5.3.1.1. Ability to foreclose

(624) The Notifying Party argues that the merged entity will not have the ability to foreclose rival providers of PC OS.

(625) First, the Notifying Party submits that the availability of games and the gaming experience are not an important aspect of competition between PC OS.<sup>659</sup> In this regard, the Notifying Party argues that PCs are used for a variety of purposes, most of which non-gaming related. In particular, according to the Notifying Party, most PCs are not used for gaming,<sup>660</sup> and gaming would not be a primary purchase reason for PC OS. For example, the Notifying Party submits that gaming would account for less than [10-20]% of the minutes spent on Windows on average.<sup>661</sup>

(626) Second, according to the Notifying Party, there is also low demand for cloud gaming on non-Windows PCs.<sup>662</sup> This is demonstrated, for example, by the fact that monthly average users of Xbox Cloud Gaming on MacOS and ChromeOS is [...] in number (less than [0-5]% of the worldwide installed base of ChromeOS and MacOS devices).<sup>663</sup> In addition, the Notifying Party submits that further consumer adoption of cloud game streaming is [...].<sup>664</sup>

(627) Third, the Notifying Party submits that Activision Blizzard's games specifically are not important for competition between PC OS, and are played only on a small percentage of Windows and an even smaller percentage of non-Windows PCs.<sup>665</sup> In this regard, the Notifying Party stresses that there would not be material demand for Activision Blizzard's games on non-Windows PCs. The Notifying Party points out that, even on Windows PCs, Activision Blizzard's titles such as *Call of Duty: Modern Warfare* and *World of Warcraft* accounted for a very limited proportion of total PC game time.<sup>666</sup>

(628) Fourth, the Notifying Party argues that the tying mechanism envisaged by the Commission is unclear and speculative. In this regard, the Notifying Party submits that the merged entity has no market power on the tying market, therefore it could not successfully leverage its position from such market, i.e. game publishing and cloud game streaming.<sup>667</sup> Furthermore, tying Game Pass Ultimate's cloud game

---

<sup>659</sup> Form CO, paragraph 578 and SO Response, paragraphs 356 - 359.

<sup>660</sup> SO Response, paragraphs 356 - 370. The Notifying Party submits that only [10-20]% of Windows 10 and 11 PCs played video games.

<sup>661</sup> Article 6(1)(c) Response, paragraphs 237 - 239.

<sup>662</sup> Article 6(1)(c) Response, paragraphs 271 - 278 and SO Response, paragraphs 384 - 388.

<sup>663</sup> SO Response, paragraph 385.

<sup>664</sup> SO Response, paragraphs 389 - 391.

<sup>665</sup> Article 6(1)(c) Response, paragraphs 261 - 264, and Notifying Party's reply to the Commission's RFI 23, question 16.

<sup>666</sup> SO Response, paragraph 400.

<sup>667</sup> SO Response, paragraph 347.

streaming feature to Windows is not a credible strategy, and Microsoft would not have the technical ability to do so.<sup>668</sup>

- (629) Fifth, the Notifying Party points out that rival PC OS would have counter-strategies in case of a foreclosure strategy by Microsoft. In this regard, the Notifying Party stresses that there is no scarcity of games via non-Windows PC OS especially thanks to compatibility software.<sup>669</sup> In addition, Apple and Google would have the power to retaliate against Microsoft by denying access to their mobile app stores, thus undermining the rationale of the Transaction.<sup>670</sup> According to the Notifying Party, in particular, such retaliating measure would be very detrimental for Microsoft, since Activision Blizzard today generates [40-50]% of its mobile revenues and [10-20]% of its total revenues from the Android platform only. On the contrary, Activision Blizzard's Android games account for approximately only [0-5]% of Android gaming revenues, and an even smaller proportion of the overall Android app revenues.<sup>671</sup>
- (630) Sixth, the Notifying Party argues that the Commission's assessment is based on the wrong counterfactual, in that there is no evidence that Activision Blizzard would have licensed its games to cloud game streaming service providers absent the Transaction. Even if Activision Blizzard evaluated the potential of cloud gaming, it always concluded it's not a viable option.<sup>672</sup>
- (631) Therefore, for the reasons set out above, the Notifying Party considers that it would not have the ability to foreclose rival providers of PC OS by tying Activision Blizzard's games and Game Pass Ultimate's cloud game streaming feature to Windows.

#### 7.5.3.1.2. Incentive to foreclose

- (632) The Notifying Party argues that it does not have the incentive to foreclose rival providers of PC OS by tying Activision Blizzard's games and Game Pass Ultimate's cloud game streaming functionality to Windows. On the contrary, the Notifying Party argues that it has an incentive to support a broad availability of Game Pass and Activision Blizzard games on as many devices as possible.<sup>673</sup>
- (633) First, the Notifying Party claims that tying Activision Blizzard's games and Game Pass Ultimate to Windows would be commercially irrational and inconsistent with Microsoft's broader commercial "gamer-centric" strategy that hinges upon growing Game Pass. In this regard, the Notifying Party points out that such gamer-centric and device-agnostic strategy is reflected widely in Microsoft's internal documents.<sup>674</sup> The implausibility of a tying strategy would be demonstrated also by the fact that Microsoft already has all assets that characterize the foreclosure strategy at hand (games, a PC OS, a cloud game streaming service), but it has never engaged in it. Furthermore, the Notifying Party notes that there is no proof or indication that the purpose of the transaction is to defend Windows' position as PC OS, nor that

---

<sup>668</sup> Article 6(1)(c) Response, paragraphs 222 – 231 and 322 – 328.

<sup>669</sup> Article 6(1)(c) Response, paragraphs 222 – 231 and SO Response, paragraph 377 - 380.

<sup>670</sup> Article 6(1)(c) Response, paragraphs 222 – 231 and 335 – 350.

<sup>671</sup> SO Response, paragraph 427 - 431.

<sup>672</sup> Article 6(1)(c) Response, paragraphs 313 and 377 and SO Response, paragraph 396.

<sup>673</sup> Form CO, paragraph 581.

<sup>674</sup> SO Response, paragraph 437.

Microsoft has ever planned to engage in the strategy on which the Commission's theory of harm is based.<sup>675</sup>

- (634) Second, the Notifying Party also notes that Game Pass Ultimate's cloud game streaming feature enables the streaming of video games from the cloud to PCs (running both Windows and non-Windows operating systems) via any Chromium-based internet browser.<sup>676</sup> However, a foreclosure strategy concerning Game Pass Ultimate's cloud game streaming feature vis-à-vis other PC OS would not make commercial sense, as the purpose of cloud-based streaming is to allow gamers to play the games on as many devices as possible.<sup>677</sup>
- (635) Third, the Notifying Party points out that the benefits of the tying strategy as described by the Commission are speculative and uncertain, and that the Commission's analysis of the gains and losses deriving from such tying strategy is too high level.<sup>678</sup>
- (636) Therefore, for the reasons set out above, the Notifying Party considers that it would not have the incentive to foreclose rival providers of PC OS by tying Activision Blizzard's games and Game Pass Ultimate's cloud game streaming feature to Windows.

#### 7.5.3.1.3. Impact on effective competition

- (637) The Notifying Party argues that, should Microsoft attempt to foreclose rival providers of PC OS by tying Activision Blizzard's games and Game Pass Ultimate's cloud game streaming feature to Windows, there would be no impact on effective competition.
- (638) First, the Notifying Party reiterates that Activision Blizzard's games are generally not released on non-Windows OS. As such, even if the Notifying Party would not make Activision Blizzard's games available on other OS, this would not lead to a reduction in competition as compared to pre-Transaction,<sup>679</sup> nor to any material sales uplift.<sup>680</sup>
- (639) Second, the Notifying Party also reiterates that the tying strategy described by the Commission would have no effects on competition, because PCs are mostly not bought for gaming, and because there is already sufficient availability of games on non-Windows OS especially thanks to compatibility software.<sup>681</sup> Moreover, the uptake of cloud gaming on non-Windows OS is limited, and no strong evidence suggests that this will change in the future. Therefore, a possible tying strategy concerning Activision Blizzard's games, Game Pass Ultimate's cloud game streaming feature and Windows would not raise the barriers for PC OS to compete with Windows.<sup>682</sup>
- (640) For the reasons set out above, the Notifying Party considers that, should the merged entity foreclose rival providers of PC OS by tying Activision Blizzard's games to

---

<sup>675</sup> Article 6(1)(c) Response, paragraphs 351 – 357 and paragraphs 231 – 232. See also SO Response, paragraph 434 – 439.

<sup>676</sup> Chromium is Google's open-source browser project, *i.e.*, a code base that can be used to develop browsers. Microsoft's Edge, Google's Chrome, for example, are based on Chromium technology.

<sup>677</sup> Form CO, paragraph 579.

<sup>678</sup> Article 6(1)(c) Response, paragraph 357. See also SO Response, paragraphs 442 - 445.

<sup>679</sup> Form CO, paragraph 580.

<sup>680</sup> Form CO, paragraph 578.

<sup>681</sup> Article 6(1)(c) Response, paragraphs 272, 339 and 373.

<sup>682</sup> See, *inter alia*, SO Response, paragraphs 451 - 454.

Windows via Game Pass Ultimate's cloud game streaming feature, such a strategy would not have material effects on effective competition between PC OS.

#### 7.5.3.2. The Commission's assessment

(641) For the reasons set out below, and based on the results of the market investigation, the Commission has reached the conclusion that it is likely that the merged entity would have the ability and the incentive to foreclose rival providers of PC OS by restricting or degrading access to (i) Activision Blizzard's games via rival providers of cloud game streaming services (e.g. Game Pass Ultimate would become the only cloud game streaming service offering Activision Blizzard's games) and (ii) Game Pass Ultimate via rival PC OS. Moreover, if the merged entity engaged in such a foreclosure strategy, the anticompetitive effects would be significant.

##### 7.5.3.2.1. Ability to foreclose

(642) For the reasons set out below, the Commission has reached the conclusion that Microsoft would have the ability to foreclose rival providers of PC OS by tying Activision Blizzard's games and Microsoft's distribution of games via cloud game streaming services to Windows. First, gaming in general is a relevant factor for competition between PC OS. Second, cloud game streaming services and the availability of Activision Blizzard's games via such services are important for rival PC OS to compete with Microsoft. Third, the merged entity would have the ability to restrict or degrade access to (i) Activision Blizzard's games via rival providers of cloud game streaming services and (ii) Game Pass Ultimate's cloud game streaming feature via rival PC OS. Fourth, there are no effective and timely counter-strategies that other providers of PC OS could deploy in order to react to such foreclosure strategy.

(643) The Commission considers that, in addition to a total foreclosure strategy (whereby Game Pass Ultimate would become (i) the only cloud game streaming service offering Activision Blizzard's games and (ii) exclusively accessible via Windows) there are several ways in which the merged entity could engage in partial foreclosure of rival providers of PC OS, that are close to a total foreclosure scenario (e.g. (i) by making Activision Blizzard's games available with significant delay on third-party cloud game streaming services, or (ii) by making only some of the games available via third-party cloud game streaming services, or (iii) by licensing to third-party cloud game streaming services reduced versions of Activision Blizzard's games). From this viewpoint, the arguments set out below on the Notifying Party's ability to foreclose rival providers of PC OS also apply to partial foreclosure scenarios.

##### 7.5.3.2.1.1. Gaming is an important factor for competition between PC operating systems

(644) The Commission considers that gaming in general, intended as the availability of games and the quality of the gaming experience, is an important factor for competition between PC operating systems.

(645) First, the Commission recognizes that consumers buy PCs for various purposes. However, it also considers that gaming is a relevant purpose amongst others, which can affect the choice of a non-negligible number of users. Estimates indicate that more than 1.7 billion PC customers use their PC to play video games.<sup>683</sup> PC gaming

---

<sup>683</sup> Statista, Number of PC gamers worldwide from 2008 to 2024, 2022, <https://www.statista.com/statistics/420621/number-of-pc-gamers/>, [ID7211].



is larger than console gaming, generating approximately USD 40 billion in revenues as compared to the USD 33 billion generated by console gaming.<sup>684</sup>

- (646) The Notifying Party argues that gaming is not important for competition between PC OS, pointing out that, according to Microsoft's data, only [20-30]% of PCs typically play games.<sup>685</sup> However, the Commission considers that such numbers may not be representative. As indicated by the Notifying Party, these shares are calculated [*business secrets concerning methodology*]. Therefore, they do not appear to be indicative of the number of PCs that are used to play video games, because they refer only to a subset of Windows PCs, excluding (i) PCs with other versions of Windows and (ii) Windows 11 PCs that have not opted into sending telemetry data. In addition, other Microsoft internal documents report that [*business secrets concerning methodology*].<sup>686</sup> The Notifying Party explained that the [50-60]% figure referred to in the internal document at hand is a result of human error and should be lower, i.e. between [30-40]%, and that such figures are not indicative of the importance of gaming because they also capture PC users that played PC games only once in a year.<sup>687</sup> Even if the [50-60]% figure was not correct, the Commission notes that Microsoft's internal documents show that the actual share of PC users that play games is higher than the one initially provided by the Notifying Party (i.e. [20-30]%). In any case, even roughly a quarter of all PC users, as claimed by the Notifying Party, is a very sizable share.
- (647) The Notifying Party also argues that gaming accounts for approximately [...] % of usage time on Windows PCs priced below USD [...] (again, based on Windows PCs that opted into sending telemetry data), although such share varies on the basis of the price point of PCs, reaching approximately [...] % on more performant devices.<sup>688</sup> Based on such data, which is in any case partial, gaming does not appear to represent a negligible use case for PCs, especially for higher-end PCs that meet the specifics to play AAA games (which have a relatively higher price point). In any event, as explained below, gamers appear to be an attractive user base for providers of PC OS.
- (648) Second, and in connection to this, the Commission notes that several considerations and strategies that emerge from Microsoft's internal documents indicate that gaming is an important factor for competition between OS.
- (649) As mentioned above, the Commission considers that a sizable share of PC users play PC video games. In this regard, the Commission also notes that providers of PC OS invest in the gaming capabilities of their OS, and market and advertise their products also with PC gamers as target group in mind. For example, Microsoft's internal documents reflect Microsoft's intention to [*business secrets concerning business strategy*] (emphasis contained in the document) and evaluate market opportunities vis-à-vis PC gamers against rival PC OS.<sup>689</sup> The market investigation shows that this is not only the case for Microsoft. Another provider of PC OS submitted that it is

---

<sup>684</sup> Notifying Party's presentation to the case team of 14 September 2022, slide 5. The data refer to year 2020.

<sup>685</sup> Article 6(1)(c) Response, paragraph 240.

<sup>686</sup> Microsoft's internal document - [...] [ID1304-4127 or MSFT-EC-02689163].

<sup>687</sup> Notifying Party's response to the Commission's Letter of Facts, paragraph 66.

<sup>688</sup> Article 6(1)(c) Response, paragraph 240 and Notifying Party's reply to the Commission's RFI 23, question 16.

<sup>689</sup> Microsoft's internal document - [...], [ID1303-59790 or MSFT-EC-01717792].

facing growing user demand to play games.<sup>690</sup> In addition, in another internal document Microsoft states that [*business secrets concerning business strategy*] The document continues by pointing out that Microsoft should [*business secrets concerning business strategy*].<sup>691</sup>, This evidence supports that Microsoft considers gaming as an important feature to make Windows more attractive vis-à-vis other PC OS.

- (650) Microsoft's internal documents also indicate that Microsoft invests on Windows' features aimed at supporting gaming and enhancing the gaming experience. In this regard, internal documents indicate that [*business secrets concerning business strategy*], and that [*business secrets concerning business strategy*].<sup>692</sup> In addition, Microsoft evaluates Windows' advantages against competition in terms of what Windows delivers for gamers: [*business secrets concerning business strategy*] (emphasis contained in the document). Furthermore, Microsoft stresses the opportunity to [*business secrets concerning business strategy*], and [*business secrets concerning business strategy*].<sup>693</sup>
- (651) Internal documents also indicate explicitly that Microsoft considers gaming to be an element of competition against other PC OS. This appears from the fact, for example, that, as emerges from statements by the CEO of Microsoft Gaming, Microsoft [*business secrets concerning business strategy*].<sup>694</sup> Moreover, it is also stated that [*business secrets concerning business strategy*].<sup>695</sup>
- (652) In addition, Microsoft's internal documents clearly show that [*business secrets concerning business strategy*]. According to Microsoft's internal analysis, gaming is a [*business secrets concerning business strategy*]. Other internal documents also specify that [*business secrets concerning business strategy*].<sup>696</sup> <sup>697</sup> The CEO of Microsoft Gaming also stressed [*business secrets concerning business strategy*].<sup>698</sup> According to such documents [*business secrets concerning business strategy*].<sup>699</sup>
- (653) In particular, the document [*business secrets from an internal document*]<sup>700</sup> appears indicative of Microsoft's conclusion that [*business secrets concerning business strategy*].
- (654) The Notifying Party disagrees that the abovementioned internal documents support the finding that gaming drives competition between PC OS, and that they constitute a solid basis for the Commission's conclusions. In particular, the Notifying Party argues that [*business secrets concerning business strategy*].<sup>701</sup> Nothing in these documents would indicate that gaming is important for a sufficiently large portion of

---

<sup>690</sup> EC Case M.10646: Microsoft / Activision Blizzard - Submission in response to the EC's request for information, page 29 [ID3321].

<sup>691</sup> Microsoft's internal document - [...], [ID1303-58736 or MSFT-EC-01689697].

<sup>692</sup> Form CO, Annex 6.98 - [...].

<sup>693</sup> Microsoft's internal document - [...], [ID1303-59790 or MSFT-EC-01717792].

<sup>694</sup> Microsoft's internal document - [...], [ID1087-92676 or MSFT-EC-0161973].

<sup>695</sup> Microsoft's internal document - [...], [ID1087-92676 or MSFT-EC-01619713].

<sup>696</sup> Microsoft's internal document - [...], [ID1433-53874 or MSFT-EC-01272247]. See asp Microsoft's internal document - [...], [ID1400-56094 or MSFT-EC-00225775], where it is reported, concerning gaming, that Microsoft should [...].

<sup>697</sup> Microsoft's internal document - [...], [ID1407-92248 or MSFT-EC-00379377].

<sup>698</sup> Microsoft's internal document - [...], [ID1087-5508 or MSFT-EC-00822985].

<sup>699</sup> Microsoft's internal document - [...], [ID1088-34153 or MSFT-EC-01900302].

<sup>700</sup> Microsoft's internal document - [...], [ID1407-92248 or MSFT-EC-00379377].

<sup>701</sup> Similar considerations are adduced also regarding Microsoft's internal document - [...][ID1400-56094 or MSFT-EC-00225775].

customers for a tying strategy to make sense.<sup>702</sup> Moreover, documents referring to the objective to [...], according to the Notifying Party, cover many other goals, unrelated to gaming, to make Windows the best OS for consumers.<sup>703</sup> Furthermore, as regards documents referring to [*business secrets concerning business strategy*]<sup>704</sup>, the Notifying Party has explained that the [*business secrets concerning business strategy*], and this would be demonstrated by the fact that the [*business secrets concerning business strategy*].<sup>705</sup> Finally, the Notifying Party points to internal documents that, in its opinion, point to the opposite conclusion that Microsoft [*business secrets concerning business strategy*].<sup>706</sup>

- (655) The Commission maintains that the documents referred to above indicate that Microsoft itself considers gaming important for competition between PC OS. As already mentioned, the Commission acknowledges that PCs are used for a variety of purposes, and that therefore the features of a PC OS cover a variety of uses for which they have to be optimized. However, this does not exclude that gaming is an important parameter for competition. The documents referred to clearly indicate [*business secrets concerning business strategy*]. Given the large quantity of PC gamers<sup>707</sup>, the Commission considers it credible that gaming has an impact on PC users' choice to such an extent to influence competition between PC OS. Furthermore, with regard to compatibility layers, the Commission does not consider it plausible to conclude that [*business secrets concerning business strategy*].
- (656) Third, the majority of respondents to the Commission's market investigation that expressed a view on this subject confirmed that gaming (*i.e.*, the availability of games and the quality of the gaming experience) is an important factor for competition between PC OS.<sup>708</sup> One provider of PC OS submitted that it "*views the availability of high quality games [...] as an important component in its ability to compete with other operating systems...*", whereas another provider indicated that "*The availability of a large number and wide variety of popular games [...] is extremely important when competing in PC OS*".<sup>709</sup>
- (657) For the reasons set out above, the Commission considers that gaming is a relevant factor for competition between PC OS.

#### 7.5.3.2.1.2. Cloud game streaming services and the availability of Activision Blizzard's games via such services are important for rival PC OS to compete with Microsoft's Windows

- (658) The Commission stresses that, today, Activision Blizzard's games are generally not available natively on non-Windows OS, and cloud game streaming services would have likely made these games available across PC OS absent the Transaction. The

---

<sup>702</sup> Reply to the Letter of Facts, paragraph 69.

<sup>703</sup> *Ibid.*

<sup>704</sup> Microsoft's internal document - [...], [ID1087-92676 or MSFT-EC-01619713].

<sup>705</sup> Reply to the Letter of Facts, paragraph 70.

<sup>706</sup> Reply to the Letter of Facts, paragraph 71.

<sup>707</sup> As mentioned above, approximately PC gamers are estimated to be 1.7 billion: Statista, Number of PD gamers worldwide from 2008 to 2024, 2022, <https://www.statista.com/statistics/420621/number-of-pc-gamers/>, [ID7221].

<sup>708</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 74.

<sup>709</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 74.1 [ID3329].

Commission considers that cloud game streaming services,<sup>710</sup> and the availability of Activision Blizzard’s games through them, are important for rival PC OS to compete with Windows in the future. This includes access to Game Pass Ultimate, where Activision Blizzard’s games will likely be included post-Transaction. In this regard, the Notifying Party has indicated that [*business secrets concerning business strategy*].<sup>711</sup> However, the Commission notes that announcements have been made that future games of Bethesda, owned by Microsoft since the recent acquisition of ZeniMax, will become exclusive to Game Pass.<sup>712</sup> Therefore, the Commission considers this a probable outcome also for Activision Blizzard’s games, in particular when considering the Transaction’s rationale to grow Game Pass.<sup>713</sup> Therefore, for the purposes of this Decision, the Commission has carried out the below analysis assuming that, post-Transaction, Game Pass Ultimate will become the only cloud game streaming service offering Activision Blizzard’s games for streaming. As explained in more detail below, should Game Pass Ultimate become exclusively accessible via Windows in this scenario, the ability of non-Windows OS to compete with Windows would decrease. This would be the case, first of all compared to the counterfactual whereby Activision Blizzard would have likely started to distribute its games via cloud game streaming services absent the Transaction, but also compared to the pre-Transaction *status quo*, in which no Activision Blizzard’s games are available via cloud game streaming.<sup>714</sup> However, the Commission notes that Microsoft could achieve the same effect of foreclosing rival PC OS by not making Activision Blizzard’s games available to any cloud game streaming service, including Game Pass, namely by preventing the counterfactual from happening.

- (659) As a preliminary point, as already explained, today most PC games are native Windows games, *i.e.*, games developed and designed to run on the Windows OS. In particular, a video game can be downloaded only in PCs with operating systems that support it. This means that, today, most PC games can be downloaded and played on a Windows PC, and only a very small number of PC games support other operating systems.<sup>715</sup> <sup>716</sup> In this regard, the majority of respondents to the Commission’s

---

<sup>710</sup> In addition to Microsoft’s Game Pass Ultimate, other cloud game streaming services include the top tier of Sony’s PlayStation Plus subscription service, Nvidia’s GeForce Now and smaller players such as Blacknut and Shadow.

<sup>711</sup> The Notifying Party indicated that [*business secrets concerning business strategy*]. Microsoft has not yet [...]. The Notifying Party explains that any future decision in this regard remains subject to [*business secrets concerning business strategy*].

<sup>712</sup> This was also announced by Phil Spencer, CEO of Microsoft Gaming: Eurogamer, “Phil Spencer says future Bethesda games will be exclusive to “platforms where Game Pass exists”, 2021, <https://www.eurogamer.net/phil-spencer-says-future-bethesda-games-will-be-exclusive-to-platforms-where-game-pass-exists>, [ID7215].

<sup>713</sup> As will explained in more detail below, the Commission considers that the growth of Game Pass is an objective that Microsoft may achieve regardless of whether Game Pass Ultimate will remain accessible via non-Windows PC OS.

<sup>714</sup> The Commission considers that the foreclosure strategy envisaged in this Section would lessen other PC OS’ ability to compete also compared to the status quo. This is because, given the importance of Activision Blizzard’s games via cloud for competition between PC OS, as explained further below, their exclusive availability via cloud on Windows would give Windows a significant advantage also compared to a situation in which Activision Blizzard’s games are not available via cloud at all.

<sup>715</sup> Data from March 2023 show that 97.75% of all games played on the Steam platform are played on Windows OS (see Steam Hardware & Software Survey: March 2023, <https://store.steampowered.com/hwsurvey>, [ID7222]). See also Form CO, paragraph 195.

<sup>716</sup> As explained by the Notifying Party, the decision to create and support a game on a non-Windows OS is generally a matter of balancing the benefits of doing so (e.g. the size of the additional customer base and the value to consumers) versus the costs and difficulty of creating a native game specifically to run

market investigation that expressed a view indicated that there is a significant difference between Windows and other PC OS in terms of availability of native PC games, including native AAA games.<sup>717</sup>

- (660) Activision Blizzard’s games make no exception in this regard. Today, Activision Blizzard’s PC games can only be downloaded on Windows PCs.<sup>718</sup> As already explained in recital (604) above, the Notifying Party confirmed that Activision Blizzard has chosen to focus on developing PC games for Windows because developing native games for other PC OS generates a limited return on investment.<sup>719</sup> This reflects the limited share of the market for PC OS that non-Windows OS represent as compared to Windows.
- (661) As assessed in Section 7.5.3.2.1.1 above, gaming is an important element for competition between PC OS. As mentioned above, a provider of PC OS confirmed that “*The availability of a large number and wide variety of popular games [...] is extremely important when competing in PC OS*”, and that “*The ability to access popular games is a deciding factor for PC purchases, and supporting gaming functionality is necessary to compete with Windows’ strong position*”.<sup>720</sup> Accordingly, the Commission considers that the gap in games availability between PC OS constitutes a barrier for non-Windows OS to effectively compete with Microsoft.
- (662) This is also indicated by the majority of the respondents to the market investigation that expressed a view on this subject, which submitted that the difference between Windows and non-Windows OS in terms of availability of native PC games is indeed a barrier for non-Windows OS to expand.<sup>721</sup> In this regard, the Commission acknowledges that PCs are used for a variety of purposes and that non-Windows PCs have gained moderate market shares focusing on use cases other than gaming. However, in order for such OS to expand and be able to exert a stronger competitive pressure on Windows, the dominant OS, it would be key to cater for a larger set of use cases, thereby matching those for which Windows is largely used, including gaming. As mentioned already, absent the Transaction such barriers for non-Windows OS to expand would have likely been lowered thanks to Activision Blizzard’s games being available via cloud game streaming services on other OS. The Transaction, however, would prevent this scenario from materializing. In particular, by means of the tying conduct described in Section 7.5.3.2.1.3 below, Microsoft would be able to maintain such barriers that exist today but that would likely be lowered absent the Transaction, thereby protecting Windows’ position in the market for PC OS.
- (663) While the present assessment relates to PC OS, its conclusions would not change if one were to also take server OS into account. Games may in particular run on a server OS when a cloud game streaming provider streams a game. The Commission

---

on a non-Windows OS. Developing and supporting a native non-Windows game requires additional time and resources from the development team, both to design and test the game, and to keep it updated and address issues or bugs that arise. See Form CO, footnote 959.

<sup>717</sup> Replies to Questionnaire Q2 – Phase II questionnaire to competitors, questions C.D.14 and C.D.15.

<sup>718</sup> Form CO, paragraph 580.

<sup>719</sup> Article 6(1)(c) Response, paragraph 256.

<sup>720</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 74.1 [ID3329]. See also EC Case M.10646: Microsoft / Activision Blizzard - Submission in response to the EC’s request for information, page 5 [ID3321].

<sup>721</sup> Replies to Questionnaire Q2 – Phase II questionnaire to competitors, question C.D.16.

notes that in general the current situation described above regarding the availability of native PC games on consumer PC OS applies also to the availability of native PC games that can run on server operating systems. Thus, the games available for being deployed in the servers for the provision of cloud game streaming services using a specific server OS are more or less the same games available to be played individually on the PC version of such OS. The fact that today most native PC games are offered on Windows PCs results in the fact that, if a cloud game streaming service wishes to offer a large variety of PC games, it needs to use the Windows server OS in the servers where the games run. If a cloud game streaming service wishes to use another OS (e.g. Linux) in its servers, games need to be ported to such OS and the provider would face the same scarcity of compatible PC games that non-Windows PCs face. As mentioned above, Google Stadia was based on the Linux OS and ceased its activities as of 18 January 2023.<sup>722</sup> Several market participants submitted that this was most likely the result of not having sufficient attractive content to gain and keep users.<sup>723</sup>

- (664) The Notifying Party disagrees that games on non-Windows OS are scarce. On the contrary, the Notifying Party argues that the Google Play Store makes hundreds of thousands of games available on Chromebooks.<sup>724</sup> The Notifying Party also submits that the Steam digital storefront makes thousands of games available on non-Windows OS, especially thanks to compatibility software. In particular, Steam has recently launched a partnership with Google to bring Steam games to ChromeOS thanks to such software.<sup>725</sup>
- (665) However, the elements adduced by the Notifying Party do not reflect the respective position of the different PC OS as gaming platforms. First, the Commission notes that games made available through the Google Play Store are mobile games, that belong to a separate market from PC and console games (as assessed in recitals (49)-(61) above) and that are not comparable with complex AAA PC games on account of many different factors (complexity and duration of game-play, graphics, storyline etc.). For this reason, as explained in recital (609) above, mobile games specifically don't drive demand for a specific PC OS, contrarily to the availability of PC games. Second, the Commission notes that data provided by Steam show that more than 95% of games on Steam are played on Windows PCs.<sup>726</sup> In this regard, the Notifying Party argues that the share of games *playable* on non-Windows OS matters more.<sup>727</sup> However, games playable on non-Windows OS exclude many popular AAA PC games, as also demonstrated by the fact that Activision Blizzard, like other major publishers, focuses on the Windows OS. Moreover, as also indicated by the Notifying Party, non-Windows PCs, especially Chromebooks, generally do not support complex AAA games such as *Call of Duty*, that attract a significant number of gamers. Cloud game streaming would allow such games to be played on non-Windows PCs such as Chromebooks, that would normally not support them.

---

<sup>722</sup> Google, Message about Stadia and our long term streaming strategy, 2022, <https://blog.google/products/stadia/message-on-stadia-streaming-strategy/> (last accessed on 17 January 2023), [ID7196].

<sup>723</sup> Replies to Questionnaire Q1 to video games developers, publishers and distributors, question 93.4.1.

<sup>724</sup> SO Response, paragraph 379.

<sup>725</sup> *Ibid.* and Article 6(1)(c) Response, paragraph 272.

<sup>726</sup> Data from March 2023 show that 97.75% of all games played on the Steam platform are played on Windows OS (see Steam Hardware & Software Survey: March 2023, <https://store.steampowered.com/hwsurvey>, [ID7222]). See also Form CO, paragraph 195.

<sup>727</sup> SO Response, paragraph 380.

Furthermore, as explained in more detail in recitals (704)-(705) below, compatibility layers do not seem to be an effective tool for delivering high-quality gaming on non-Windows OS. In light of this, the Commission considers that the fact that 95% of PC games are played on Windows is indicative of the scarcity of games, and in particular high-quality games and gaming experience, on non-Windows OS. Therefore, availability of games through cloud game streaming services would likely be more effective in bringing more AAA Windows games (such as *Call of Duty*) to non-Windows PCs, thereby effectively bridging the gap in games availability between PC OS and lowering the barriers for non-Windows OS to increase their competitive pressure on Windows.

- (666) Against this background, the Commission considers that cloud game streaming is important for competition between PC OS.
- (667) First, as mentioned also in recitals (35)-(38), in general cloud game streaming services allow gamers to play video games on the devices they want without downloading them. Video games run remotely in a server machine, where the specifics of a given game are met. More specifically, a gaming console or a PC (like those that gamers would normally use to play) is reproduced in a remote server. The video game runs in such remote device, which has to support the specifics of the game.<sup>728</sup> The game is then streamed over the internet from the cloud to the gamers' end devices of their choice. Generally, with cloud gaming, the specifics of the device where the end user actually plays are no longer relevant for the gaming experience and its quality. This includes not only specifics related to graphics and processing power (e.g., the type of GPU and CPU that the device has), but also specifics regarding the operating system that the game supports. In practice, this means that gamers can access a cloud game streaming service and play games on non-Windows PCs even though such games would normally be supported only by Windows. In this regard, all respondents to the market investigation that expressed a view on this subject indicated that cloud game streaming services are, or will be in the near to medium term, an effective tool to bring more PC games to non-Windows OS.<sup>729</sup>
- (668) The Notifying Party contests the importance of cloud gaming on non-Windows PCs and argues that demand for cloud game streaming on such PCs is limited. In particular, the Notifying Party shows data related to the unique users and game play hours of Xbox Cloud Gaming on ChromeOS and MacOS devices (less than [0-5]% of the total installed base of MacOS and ChromeOS devices have used Xbox Cloud Gaming), as well as data related to the [...] additional Game Pass Ultimate users gained when Fortnite was included in the Xbox Cloud Gaming offering.<sup>730</sup> In this regard, however, the Commission stresses that cloud game streaming is currently a nascent distribution model which is expected to grow significantly, in parallel to the development of the relevant technology and of users' familiarity with it (see Section 7.4.5.2.1). Furthermore, the Commission notes that Fortnite's hardware requirements are lower than the requirements, for instance, of Call of Duty. Fortnite can already be played on many devices, including low-performant PCs, tablets and mobile phones,

---

<sup>728</sup> For example, in order to offer PC games that require Windows, a provider of cloud game streaming services needs to reproduce a Windows PC in a server. For this purpose, it has to license the Windows server OS from Microsoft. Once a given game runs in the server machine with the Windows OS, it can be streamed to an end device, where gamers actually play, regardless of the specifics (and the OS) of such end device.

<sup>729</sup> Replies to Questionnaire Q2 – Phase II questionnaire to competitors, question C.D.20.

<sup>730</sup> Article 6(1)(c) Response, paragraphs 273 – 274 and SO Response, paragraphs 384 – 388.

therefore users do not need to turn to the cloud to be able to play it. On the contrary, a game such as Call of Duty, currently playable on a more limited and powerful set of PC devices, would likely have a significant impact on the attractiveness of cloud game streaming services offering it. Therefore, the fact that Fortnite [...] to Game Pass Ultimate's cloud game streaming feature is not indicative of the future uptake of cloud gaming.

- (669) Second, as explained in recitals (35)-(38) above, cloud game streaming is likely to disrupt the device-centric approach that has historically characterized the gaming industry.<sup>731</sup> The Notifying Party disagrees with this view, and considers that cloud gaming cannot be categorized as a rising trend. Rather, its future would be extremely uncertain.<sup>732</sup> In this regard, the Notifying Party notes that only [10-20]% of Game Pass Ultimate MAU stream games from the cloud, and [*business secrets concerning business strategy*] Xbox Cloud Gaming is yet to be proven. The Notifying Party also submits that, for this reason, [*business secrets concerning business strategy*] and that other cloud gaming services such as Google Stadia have been shut down.<sup>733</sup>
- (670) However, as also assessed in recital (560), this appears in contrast with Microsoft's internal documents that show [*business secrets concerning business strategy*].<sup>734</sup> In addition, rival providers of PC OS are investing in cloud game streaming capabilities of their respective PCs to ensure a wider accessibility to PC games.<sup>735</sup> Furthermore, the results of the market investigation indicate that, according to the majority of respondents that provided a view on this subject, users' demand for cloud game streaming services on PCs will increase in the coming years, including on low-end PCs that would not normally support AAA games.<sup>736</sup>
- (671) Regarding Activision Blizzard's games specifically, as explained in more details in Section 7.4.5.2.2 above, the Commission considers it likely that, absent the Transaction, Activision Blizzard would have made them available on other PC OS via cloud game streaming services. In this perspective, the Commission considers that the availability of Activision Blizzard's popular games via cloud game streaming services in particular would increase the ability for rival PC OS to compete with Windows.
- (672) First, as also stressed by a competing provider of such services, a key remaining barrier to a competitive market for cloud game streaming services is access to popular content.<sup>737</sup> In this regard, the Commission notes that Activision Blizzard is currently an independent developer that offers some of the most popular video games in the industry. Activision Blizzard has been traditionally reluctant to publish its

---

<sup>731</sup> Cloud gaming does not provide a different content from what is available for download. In principle, as regards PC and console games, all games available for download can be also be played via cloud game streaming without the relevant game developer having to adapt it. As regards the Xbox console, for example, Microsoft explains that there are no specific steps required to develop a "cloud-ready" game for the Xbox Series X console as compared to a "non-cloud" game. See Form CO, paragraphs 720 and 291-292.

<sup>732</sup> Article 6(1)(c) Response, paragraphs 276 – 277.

<sup>733</sup> SO Response, paragraph 390.

<sup>734</sup> See for example Form CO, Annex 6.16, page 16 and Annex 6.13, slide 35.

<sup>735</sup> See Ultimate Cloud Gaming machines, disguised as Chromebooks, <https://www.google.com/chromebook/discover/gaming/> [ID7206].

<sup>736</sup> Replies to Questionnaire Q2 – Phase II questionnaire to competitors, questions C.D.3. and C.D.4.

<sup>737</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, reply to question 29.1 [ID1446]



games on cloud game streaming services<sup>738</sup>, [*business secrets concerning business strategy*]. Nonetheless, as mentioned in Section 7.4.5.2.2, the Commission preliminarily considers that, absent the Transaction, Activision Blizzard would have likely made its games available via cloud game streaming services in the future, given the expected growth of cloud gaming and the improvement of its technology and the necessary infrastructure

- (673) Second, as assessed in Section 7.4.5.2.3.1 above, Activision Blizzard's games include highly popular franchises, which constitute an important input. Their importance would be particularly significant also for distributors of games via cloud game streaming.<sup>739</sup> Their addition to cloud game streaming services would enhance their attractiveness and would improve the availability of high-quality games on non-Windows PCs.
- (674) In this regard, the majority of respondents to the market investigation indicated that the availability of Activision Blizzard's games would impact significantly or very significantly competition between cloud game streaming services, and their availability via streaming only on one PC OS would have a degree of impact on users' preference for such OS.<sup>740</sup> In particular, *Call of Duty* is a high-profile franchise that drives significant consumer loyalty and engagement, with no or few rivals in terms of quality, popularity, longevity, commercial success and continuous investment in development. As mentioned in recitals (359)-(374) above, *Call of Duty* is widely regarded as one of or even the most successful franchise in the video gaming industry, and among a small group of AAA game franchises consistently generating significant revenues and user engagement every year since its release. This holds true also on PCs: in 2021, 4 Activision Blizzard's games ranked among the top-20 PC games per MAUs, including three *Call of Duty* titles.<sup>741</sup> Other Activision Blizzard franchises popular on PCs include *Overwatch* and *World of Warcraft*, which also ranked among the top-20 PC games in 2020 and 2021. In relation to this, it is worth noting that Microsoft franchises also appear in these rankings, in particular *Minecraft* which ranked as the No 1 PC game per MAUs in 2020, 2021 and the first half of 2022.<sup>742</sup> Therefore, Activision Blizzard's games would add up to a first-party catalogue on Game Pass Ultimate's cloud game streaming feature that is already successful.
- (675) Third, certain Microsoft internal document also indicate that [...]. In particular, during internal exchanges following the announcement of the transaction, a Microsoft executive states that [*business secrets concerning business strategy*].<sup>743</sup> Moreover, as mentioned already in recital (649) above, in another internal document Microsoft has assessed that [*business secrets concerning business strategy*], and allow Windows to [*business secrets concerning business strategy*].<sup>744</sup> The Notifying Party argues that the former document is not indicative of Activision Blizzard's games importance for Windows, since [*business secrets concerning business*

---

<sup>738</sup> Form CO, paragraphs 239 – 240.

<sup>739</sup> Most of Activision Blizzard's franchises have the corresponding PC version in addition to the console version. In any case, cloud game streaming services can run both PC and console games on the cloud (Game Pass Ultimate, for example, streams Xbox games to PCs/mobile devices).

<sup>740</sup> See Replies to Questionnaire Q2 – Phase II questionnaire to competitors, questions C.C.C.16 and C.D.23.

<sup>741</sup> Form CO, Annex 24 – Top 20 Titles by MAU.

<sup>742</sup> *Ibid.*

<sup>743</sup> Microsoft's internal document - [...], [ID1087-69773 or MSFT-EC-01446942].

<sup>744</sup> Microsoft's internal document - [...], [ID1433-53874 or MSFT-EC-01272247].

*strategy*]. However, the Commission considers that such reaction provides a clear indication that Activision Blizzard's games are perceived as particularly powerful in terms of user attraction, not only to Microsoft's game distribution channels but also to Microsoft's PC OS. Indeed, the document at hand clearly shows that these games [*business secrets concerning business strategy*].

- (676) In light of the above, the Commission considers that the availability of Activision Blizzard's games on cloud game streaming services in general, accessible via rival PC OS, would allow such PC OS to significantly reduce the relevant scarcity of gaming content that currently characterizes them as compared to Windows,<sup>745</sup> and give them the ability to expand. The benefits of this scenario for non-Windows OS are particularly relevant considering that, as described by the Notifying Party, it would be inconvenient for Activision Blizzard to develop native games for non-Windows OS, in particular since PCs with such OS, especially Chromebooks, would be underpowered to support Activision Blizzard's games natively.<sup>746</sup>
- (677) The Notifying Party argues that there is no evidence of material demand to play Activision Blizzard's games, including *Call of Duty*, on non-Windows OS (especially Chromebooks). According to the Notifying Party, the percentage of gaming time devoted to *Call of Duty* and other Activision Blizzard's franchises is very low especially for Windows PCs which technical specifications and prices comparable to those of Chromebooks.<sup>747</sup> However, the Notifying Party seems to refer to native gaming on categories of PCs that, as acknowledged by the Notifying Party itself, generally do not meet the specifics for downloading and playing Activision Blizzard's AAA games locally. Such data provided by the Notifying Party does not show that, were these games available via cloud game streaming services, owners of non-performant PCs would not play them once the technical specifications of such devices no longer matter.
- (678) Furthermore, the Notifying Party claims that the fact that four Activision Blizzard games are in the top-20 PC games by MAUs is not pertinent to measure the actual importance of Activision Blizzard games on PC, because game time is a more accurate metric for this purpose. According to the Notifying Party, Activision Blizzard's games account for a very limited share of game time on PC.<sup>748</sup> In this regard, the Notifying Party submits that only one *Call of Duty* title (*Call of Duty: Modern Warfare*) was in the top-20 in terms of game time in 2021, accounting for only [5-10]% of total PC game time. Other titles in the top-20 (*World of Warcraft* and *World of Warcraft Classic*) represent only [0-5]% and [0-5]% of total game time in 2021. Moreover, concerning the ranking of games on Steam by number of users, the Notifying Party reported data according to which *Call of Duty: Modern Warfare II* ranks below other titles with shooter elements on Steam.<sup>749</sup> However, the Commission disagrees with this approach and notes that MAUs are an important metric to reflect the attractiveness of a game, since they indicate how many users *chose* to play the video game at hand on a monthly basis and paid for it on the relevant storefront where it is published. Should Activision Blizzard's games become

---

<sup>745</sup> See also recital 665 above.

<sup>746</sup> Article 6(1)(c) Response, paragraphs 256 – 259.

<sup>747</sup> Article 6(1)(c) Response, paragraph 261.

<sup>748</sup> SO Response, paragraph 400.

<sup>749</sup> SO Response, paragraph 402. Figure 32 in paragraph 402 is a screenshot taken on February 6, 2023. It shows the most played games on Steam by concurrent number of gamers, peak number of gamers within a day (i.e. 6 February 2023), and all-time peak gamers since the game release.

available via cloud game streaming services, they would be capable of attracting gamers to such distribution channels regardless of the OS that gamers use. Furthermore, data related to *Modern Warfare II*'s success on Steam since its day of release does not take into account that this game was published on Steam only in October 2022, whereas other video games in the ranking submitted by the Notifying Party have been on Steam for a significantly longer amount of time. Notwithstanding this, *Modern Warfare II* has managed to appear already among the most-played games by number of users on Steam in just a few months.<sup>750</sup>

- (679) The Commission reiterates that, post-Transaction, Activision Blizzard's games will likely be included in Game Pass Ultimate only, as opposed to (and to the exclusion of) other providers of cloud game streaming, enhancing the importance of Game Pass Ultimate significantly also vis-à-vis non-Windows OS.
- (680) Microsoft has been the first company to heavily invest in cloud gaming as part of its gamer-centric and device-agnostic vision and business models.<sup>751</sup> The launch and growth of Game Pass, including its top-tier Game Pass Ultimate that offers a cloud game streaming functionality, is a building block of such commercial strategy. With Game Pass Ultimate, which accounts for nearly [70-80]% of the current [...] million Game Pass subscribers<sup>752</sup>, Microsoft may have a [...] which Microsoft discusses in its internal documents.<sup>753</sup>
- (681) Through the direct acquisition of Activision Blizzard's games, which follows the acquisition of ZeniMax's games, Microsoft is securing very popular content, such as *Call of Duty*, for the Game Pass library, including Game Pass Ultimate's cloud game streaming feature, with the aim of boosting its growth.
- (682) For the reasons set out above, the Commission considers that access to cloud game streaming services, and in particular to Microsoft's Game Pass Ultimate strongly enhanced by Activision Blizzard's games post-Transaction, will be important for providers of rival PC OS to expand and compete vigorously with Windows.

7.5.3.2.1.3. The merged entity would have the ability to tie Activision Blizzard's games to Windows.

- (683) The Commission considers that the merged entity would have the ability to foreclose rival providers of PC OS by preventing Activision Blizzard's games from becoming available on such OS via cloud game streaming. The merged entity would have the ability to do so by restricting or degrading access to (i) Activision Blizzard's games via rival providers of cloud game streaming services; and (ii) Game Pass Ultimate's cloud game streaming feature via rival PC OS.
- (684) Concerning the first point, as assessed in detail in Section 7.4.5.2.3.3 above, the Commission considers that, post-Transaction, Microsoft would obtain the ability to restrict or degrade access to Activision Blizzard's games via rival providers of cloud game streaming services (*i.e.*, Game Pass Ultimate would become the only cloud game streaming service offering Activision Blizzard's games). In this regard, as explained in footnote 711 above, [*business secrets concerning business strategy*].<sup>754</sup> This compares to a counterfactual in which, absent the Transaction, Activision

---

<sup>750</sup> SO Response, Figure 32.

<sup>751</sup> Form CO, sub-section 3.2.1.

<sup>752</sup> Form CO, paragraph 80 and footnote 432.

<sup>753</sup> Form CO, Annex 6.13 – [...].

<sup>754</sup> Article 6(1)(c) Response, paragraph 235.

Blizzard would likely have started licensing its games to several providers of cloud game streaming services.<sup>755</sup>

- (685) Concerning the second point, and in conjunction with the first point above, the Transaction is likely to increase Microsoft's ability to foreclose rival PC OS by technically tying Game Pass Ultimate, strongly enhanced by Activision Blizzard's games post-Transaction, to Windows.
- (686) The Notifying Party argues that the Transaction does not bring about any specific change in Microsoft's ability to pursue the tying strategy described by the Commission. In this regard, it is noted that any technical integration of Game Pass Ultimate to Windows can already be implemented pre-Transaction, and Activision Blizzard's games do not change the ability to tie.<sup>756</sup>
- (687) The Commission acknowledges that Microsoft would already have the technical ability to restrict or degrade the availability of Game Pass Ultimate via rival PC OS. However, the Commission considers that, post-Transaction, an exclusivity strategy regarding Activision Blizzard's games and Microsoft's cloud game streaming service, described in Section 7.4.5 with a focus on its ability to foreclose third-party cloud gaming providers, would also increase Microsoft's ability to foreclose rival PC OS, should Game Pass Ultimate's cloud game streaming feature be tied to Windows. The Commission considers it already indicative, as explained in Section 7.5.3.2.1.1 above, that Microsoft's internal documents indicate that [*business secrets concerning business strategy*].<sup>757</sup> Post-Transaction, Activision Blizzard's games would enhance the attractiveness of Game Pass Ultimate considerably (see recital (681) above), with the consequence that the described tying strategy would even further increase users' preference for Windows.
- (688) In this regard, the Notifying Party stresses that the tying mechanism proposed by the Commission is unclear, in that the requirements for a tying mechanism are not met, and suggests that the link between Activision Blizzard's games, Game Pass Ultimate and Windows would rather consist of a series of vertical relationships. The Notifying Party also argues that the Commission's claims are speculative and that in any case the merged entity would have no ability to foreclose, since it has no strong market position in the tying markets that it can leverage on.<sup>758</sup>
- (689) As regards the tying mechanism, the Commission first considers that it would be wrong to qualify the links between video games and cloud game streaming services on the one hand, and PC OS on the other, as vertical relationships. Neither video games nor game distribution appear to be in an upstream relationship with PC OS, in the sense that a PC OS provider uses games or cloud game streaming services "as an input in its own production, which it then sells on to its customers".<sup>759</sup> On the contrary, their relationship appears more as a complementary one, in that a PC OS constitutes a platform for gaming, that gamers may select also on the basis of which video games they can play on that platform, via the relevant game distribution channels that the platform supports.

---

<sup>755</sup> Article 6(1)(c) Response, paragraph 235.

<sup>756</sup> Article 6(1)(c) Response, paragraph 235.

<sup>757</sup> For example, Microsoft states in internal documents that [*business secrets concerning business strategy*]. See Microsoft's internal document - [...], [ID1088-34153 or MSFT-EC-01900302].

<sup>758</sup> Article 6(1)(c) Response, paragraphs 222 – 230.

<sup>759</sup> Non-Horizontal Merger Guidelines, footnote 4.

- (690) The Commission considers, on the basis of the evidence it gathered during the course of its investigation, that the merged entity would have the ability to leverage a strong market position, conferred post-Transaction by the exclusive availability of Activision Blizzard’s games and an enhanced Game Pass Ultimate in the growing cloud gaming segment, to protect and reinforce the position of Windows.
- (691) First, the Commission recalls, as explained in Section 7.4.5.2.2 above, that it considers it likely, as the relevant counterfactual, that absent the Transaction Activision Blizzard would have started to license its games to cloud game streaming services. This would have made Activision Blizzard’s games available on non-Windows OS, lowering their barriers to compete with Windows. Post-Transaction, Microsoft would likely prevent such games from being available on rival PC OS and, instead, leverage on them to boost Game Pass Ultimate and the Windows OS.<sup>760</sup> As will be assessed in more detail in Section 7.5.3.2.2 below, the Commission considers that Microsoft will also have the incentive to engage in such strategy. As explained below, achieving the growth of Game Pass, including Game Pass Ultimate, would not necessarily require keeping Game Pass Ultimate available on all OS. On the contrary, such achievement could be linked to the further objective of protecting Windows and the revenues that Microsoft gains from its dominant position in the market for PC OS.
- (692) Second, the Commission notes that market participants raised concerns that, post-Transaction, Microsoft could offer Activision Blizzard’s games for streaming via Game Pass Ultimate on an exclusive basis, withholding them from other cloud game streaming services. Further, Microsoft could tie Game Pass into Windows through forms of technical integration.<sup>761</sup> According to such complaints, this would prevent rival cloud game streaming services from making Activision Blizzard’s games available not only on Windows, but also on rival PC OS. In this regard, a provider of PC OS expressed concerns that, post-Transaction, Microsoft could boost the success of Game Pass by attracting Activision Blizzard’s community (consisting of as many as 400 million users approximately) to it and prevent Activision Blizzard’s games from becoming available on other OS via the internet, thereby lowering the rival’s ability to compete. It was also pointed out that, absent the Transaction, there would have been expectations that Activision Blizzard would have distributed its games to other cloud gaming services.<sup>762</sup>
- (693) The Commission has analyzed these aspects during its investigation. According to the Commission’s investigation, Microsoft would actually have the technical ability to block or degrade the operation of Game Pass Ultimate’s cloud game streaming feature on a given browser accessed via a third-party PC OS, while maintaining it operational on the same browser accessed via Windows. When a user enters an URL into the address bar of their browser (e.g. Game Pass Ultimate’s URL), the request self-reports information about the user’s OS and browser that are being used (via the so-called “user-agent string”). While, as the Commission understands, this information can be normally relied on to optimize the cloud game streaming feature for the OS that is being used, it can also be used to degrade the version of the cloud game streaming service made available to a non-Windows user, or to simply block

---

<sup>760</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, reply to question 94 and 88.1 (ID: 3329) [ID1446].

<sup>761</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, reply to question 94 and 88.1 (ID: 3329) [ID1446].

<sup>762</sup> Minutes of the calls of 4 May and 8 June 2022 with a provider of PC OS [IDs 3359 and 3360].

the request. In this regard, Microsoft is technically able to detect which OS the browser is running on, and can deny the request to access Game Pass Ultimate, or disable features of Game Pass Ultimate for that specific user. This has been explained in detail by a market participant, but also confirmed by the Notifying Party itself.<sup>763</sup> Almost all respondents to the market investigation that provided a view also indicated that Microsoft would have the technical ability to prevent Game Pass Ultimate's cloud game streaming functionality from running via other PC OS, while maintaining it fully functional and accessible via Windows.<sup>764</sup>

- (694) The Notifying Party confirmed that Microsoft could, theoretically and from a technical perspective, deny a request to access Game Pass Ultimate's cloud game streaming functionality via a non-Windows OS. However, the Notifying Party stresses that this would not be a credible tying strategy. First, browsers could technically hide the information reported by the user-agent string (e.g. the browser Brave does so), therefore, according to the Notifying Party, ChromeOS and MacOS could in theory adopt this strategy to hide that requests are coming from such PC OS. However, the Commission notes that the browser and OS-related information in the user-agent string is also useful to enhance features of the relevant website/functionality based on the relevant browser and OS being used. Therefore this counter-strategy would not be credible as it could be linked to a loss of quality resulting from the absence of optimization specifications. In addition, today only browsers with limited adoption that differentiate themselves on privacy grounds, such as Brave, chose to hide the user-agent string information. Second, the Notifying Party argues that, since Game Pass Ultimate's cloud game streaming service runs on browsers based on Google's Chromium engine (in addition to Safari), Microsoft is dependent on Google for the functioning of such service on browsers such as Chrome and Edge.<sup>765</sup> Therefore, Microsoft could not reduce Game Pass Ultimate's functionality on a Chromium-based browser on a competing PC OS without damaging its cloud-game streaming functionality on Windows at the same time, because the Chromium engine is the same across browsers.<sup>766</sup> However, the Notifying Party appears to refer to a scenario in which Microsoft would not block requests to access Game Pass Ultimate from rival OS, but would ship a better version of Game Pass Ultimate to Windows users by enhancing the Chromium browser's features on Windows but not on OS\*. However, this scenario is not the one that the Commission has envisaged above, which consists of blocking requests to access Game Pass Ultimate's cloud game streaming functionalities exploiting information provided by the user-agent string. While Microsoft may not be able to intervene in the features of the Chromium engine, there are other ways in which it can restrict compatibility of Game Pass Ultimate on rival OS, as described above. The Commission maintains, as mentioned above and as confirmed by the Notifying Party, that Microsoft would have the ability to engage in such behavior, thereby denying access to Game Pass Ultimate to gamers that use non-Windows OS.
- (695) In this regard, a provider of PC OS pointed out that Microsoft has already engaged in conducts aimed at disincentivising the use Game Pass Ultimate via non-Windows

---

<sup>763</sup> See the Notifying Party's response to the Commission's RFI 23, question 18 and SO Response, paragraph 415. See also the Response to the Commission's RFI 3 to a competing provider of PC OS, question 13.

<sup>764</sup> Replies to Questionnaire Q2 – Phase II questionnaire to competitors, question C.D.21.

<sup>765</sup> Article 6(1)(c) Response, paragraphs 322 – 328.

<sup>766</sup> SO Response, paragraph 417.

\* Should read: 'such rival OS'.

OS. In particular, it was noted that a user of Game Pass Ultimate from one non-Windows OS used to receive a warning message that he/she may experience gameplay issues. The Notifying Party pointed out, in this regard, that if users ignored this warning and clicked through, Xbox Cloud Gaming would work normally without technical compatibility issues.<sup>767</sup> The Notifying Party explained that the pop-up message at hand was due to the fact that Xbox Cloud Gaming is still a beta product, and displaying a warning message is common practice for software products in active development when accessed from platforms that may be unsupported, out of practical concerns for the user experience.<sup>768</sup> However, as reiterated also below, the Commission considers this indicative of the fact that Microsoft would have the ability to implement measures that would in any case result in gamers being discouraged to use Game Pass Ultimate from other PC OS or third-party browsers (thanks to the user-agent string). Post-Transaction, since Game Pass Ultimate will be significantly enhanced by Activision Blizzard's games, Microsoft may have greater incentive to engage in such behaviour. Moreover, according to a market participant, this would also be indicative that Microsoft would have the incentive to prioritize Windows as a platform for cloud gaming as compared to other OS.<sup>769</sup>

- (696) Third, the Commission reiterates that the overall results of the preliminary market investigation indicate that Microsoft would have increased ability to foreclose rival providers of PC OS should it restrict or degrade access to Game Pass Ultimate, strongly enhanced by Activision Blizzard's games, via rival PC OS. The majority of respondents that expressed a view on this subject raised concerns that, should Game Pass Ultimate become the only subscription service offering Activision Blizzard's games on PC post-Transaction, Microsoft's position in the market for PC OS would be reinforced.<sup>770</sup> This would also result, *a fortiori*, from the degradation of Game Pass Ultimate on non-Windows OS post-Transaction. In particular, one market respondent stated that "*This would be hugely detrimental as consumers would switch to Microsoft Windows, the only OS which offers Game Pass. This would solidify Microsoft's position as the dominant provider of PC OS to the detriment of challengers*".<sup>771</sup>
- (697) The Notifying Party submits that it is not credible that gamers would switch OS to access Game Pass Ultimate's cloud game streaming feature. The Notifying Party considers that, should Game Pass Ultimate be a "must-have" app, Google would not be restricting its functionality on Google's Play Store.<sup>772</sup>
- (698) The Commission investigated these aspects in its in-depth investigation.<sup>773</sup> First, the Commission notes that one key rationale of the Transaction is to grow Game Pass by adding Activision Blizzard's games to Game Pass' library. As described in Section 7.4.5.2.3.1 above, Activision Blizzard's games include highly popular franchises, that would significantly boost the attractiveness of cloud game streaming services (i.e. likely only Game Pass Ultimate post-Transaction). Second, the majority of respondents that provided a view indicated that, should Activision Blizzard's games

---

<sup>767</sup> SO Response, paragraph 422.

<sup>768</sup> SO Response, paragraph 423.

<sup>769</sup> Minutes of the calls of 8 June 2022 with a provider of PC OS [ID3360]

<sup>770</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, replies to question 78.

<sup>771</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, replies to question 78.1 [ID3329].

<sup>772</sup> Article 6(1)(c) Response, paragraph 322.

<sup>773</sup> Questionnaire Q2 – Phase II questionnaire to competitors, question C.D.23.

become available for streaming only on PCs with the Windows OS, this would increase, at least moderately, users' preference for Windows, or in any case discourage users to acquire PCs with other OS.<sup>774</sup> Third, the Commission notes that Microsoft already holds a dominant position in the market for PC OS. An even moderate increase in users' preference for Windows would further raise the barriers for rival PC OS to expand. Considering that such barriers, as explained above, appear to be already significant, a tying strategy with regard to Activision Blizzard's games and Game Pass Ultimate to Windows would confer Microsoft the increased ability, post-Transaction, to foreclose rival providers of PC OS.

- (699) In light of the above, and in view of the importance of (i) gaming in general and (ii) Activision Blizzard's games via cloud game streaming services in particular for competition between PC OS, the Commission considers that, post-Transaction, Microsoft will have increased ability to foreclose rival PC OS by restricting or degrading access to (i) Activision Blizzard's games via rival providers of cloud game streaming services; and (ii) Game Pass Ultimate via rival PC OS.
- (700) The Commission considers that the above is sufficient to reach the conclusion that Microsoft would have the ability to foreclose rival providers of PC OS. However, as an additional element, the Commission considers that Microsoft also holds strong positions in other markets that are related to gaming, especially cloud computing services via Microsoft Azure. This presence may be used to enhance Microsoft's ability to successfully tie its products and services in the gaming industry and leverage on them to increase the foreclosure effects.<sup>775</sup>

#### 7.5.3.2.1.4. Lack of effective and timely counter-strategies

- (701) The Commission considers that, in case of a foreclosure strategy by Microsoft, rival providers of PC OS would not have timely and effective counter-strategies.
- (702) First, as regards native PC games, non-Windows PC OS would not be able to obtain additional native games in a timely manner. As assessed in recitals (659)-(662) above, PC OS cannot currently match the variety of games, especially AAA PC games, available on Windows. As also pointed out by the Notifying Party in the case of Activision Blizzard, most game developers do not develop their games to run on non-Windows PCs, given the costs and the limited return on investment associated to the design and the porting of games to non-Windows OS.<sup>776</sup> The Commission considers that Game developers will most likely maintain their incentive to develop games for Windows in the foreseeable future, given that currently most PC gamers play video games on Windows PCs.<sup>777</sup> The Notifying Party also confirmed that Activision Blizzard would not have switched to developing games for non-Windows PCs absent the Transactions.<sup>778</sup>
- (703) The Notifying Party disagrees that rival PC OS would not have effective counter strategies, arguing that there is actually no scarcity of games on non-Windows OS.<sup>779</sup>

---

<sup>774</sup> Replies to Questionnaire Q2 – Phase II questionnaire to competitors, question C.D.23.

<sup>775</sup> See, for example, Microsoft's internal document - [...], [ID 1303-69065 or MSFT-EC-01947123]. See also Form CO, Annex 6.13 – [...] and replies to Questionnaire Q1 to video game developers, publishers and distributors, replies to question 89.

<sup>776</sup> Article 6(1)(c) Response, paragraph 131.

<sup>777</sup> As mentioned, in March 2023 97.75% of all games played on the Steam platform are played on Windows OS (see Steam Hardware & Software Survey: March 2023, at <https://store.steampowered.com/hwsurvey>, [ID2227])

<sup>778</sup> Article 6(1)(c) Response, paragraph 260.

<sup>779</sup> Article 6(1)(c) Response, paragraphs 265 – 270, 272 and 339.



The Notifying Party primarily considers that gamers can play Windows games on non-Windows PCs thanks to compatibility software. In this regard, software such as WINE enables MacOS users to run Windows games, and Valve uses Proton to allow users to play Windows games on its Steam Deck console, which adopts a Linux-based OS. Moreover, Valve is working with Google on a partnership to make Steam available on ChromeOS.<sup>780</sup>

- (704) However, the Commission considers that, while compatibility layers can indeed be a tool for bringing more PC games on non-Windows OS, as also pointed out by respondents to the market investigation<sup>781</sup>, they are subject to certain limitations and, in any case, do not constitute an effective instrument to effectively bridge the gap in games availability between Windows and non-Windows PCs. Furthermore, and in connection to this, compatibility layers do not seem to have an impact on the uptake of gaming on non-Windows OS.
- (705) Indeed, notwithstanding compatibility layers, as already mentioned above, more than 95% of games on Steam are played on Windows PCs, indicating that Windows is still by far the most used PC OS for native gaming.<sup>782</sup> Moreover, several market participants pointed out that, while compatibility layers are becoming increasingly capable of providing a native gaming experience, they are still subject to technical limitations, including in terms of performance and audio-visual quality. Furthermore, some market participants pointed out that a significant number of games are unplayable via compatibility layers, mainly due to the implementation of anti-cheat solutions.<sup>783</sup> A market participant also pointed out that adding a compatibility layer can decrease the performance of the system by adding further complexity, sometimes significantly degrading game play.<sup>784</sup> Furthermore, and in any case, compatibility software does not appear to be a solution for bringing some of the Activision Blizzard's most important titles to non-Windows OS. *Call of Duty* titles, for example, do not work due to technical reasons due, also in this case, to anti-cheat software.<sup>785</sup> In this regard, a provider of PC OS submitted that certain games, especially recent AAA games, can only be played on non-Windows OS via cloud gaming.<sup>786</sup>
- (706) Second, the Commission considers that it would not be an effective counter-strategy for non-Windows OS to recourse to alternative cloud gaming services, which, post-Transaction, could not successfully compete against Game Pass Ultimate. As assessed in Section 7.4.5.2.3.1 above, firstly, access to a large catalogue of popular content is key for the ability of cloud-game streaming services to compete. However, third-party cloud game streaming services are generally not vertically integrated, and access to independent AAA content is limited. Secondly, third-party cloud game streaming services would likely face challenges to release such independent content on the release date (should they get access to it). Thirdly, Activision Blizzard is one

---

<sup>780</sup> See “*Steamworks development – Steam on ChromeOS Alpha*” (link [here](#)), [ID7257]

<sup>781</sup> Replies to Questionnaire Q2 – Phase II questionnaire to competitors, question C.D.19.

<sup>782</sup> Data from September 2023 show that 97.75% of all games played on the Steam platform are played on Windows OS (see Steam Hardware & Software Survey: March 2023, at <https://store.steampowered.com/hwsurvey>, [ID7222]). See also Form CO, paragraph 195.

<sup>783</sup> Replies to Questionnaire Q2 – Phase II questionnaire to competitors, question C.D.7.

<sup>784</sup> Replies to Questionnaire Q2 – Phase II questionnaire to competitors, question C.D.7 [ID3128].

<sup>785</sup> Response to the Commission's RFI 3 to a competing provider of PC OS, question 12 [ID3330], and Notifying Party's response to the Commission's RFI 23, question 17. See also Replies to Questionnaire Q2 – Phase II questionnaire to competitors, question C.D.10.

<sup>786</sup> Minutes of the calls of 8 June 2022 with a provider of PC OS [ID3360].

of the leading developers of shooter (including battle royale) games, especially *Call of Duty* and *Overwatch*, and games belonging to these genres drive significant user engagement. Activision Blizzard's games enjoy high MAUs and game-time, unmatched by most of the other franchises. Therefore, it is key for cloud game streaming services to include such franchises in their library in order to become attractive vis-à-vis a large and engaged user base. For this reason, compared to the counterfactual whereby Activision Blizzard's games would have been available for streaming on non-Windows OS, the availability of alternative cloud gaming services would not represent an effective counter-strategy for non-Windows OS should Microsoft engage in the tying strategy at hand.

- (707) The Notifying Party also pointed out that, to counterbalance a potential foreclosure strategy by Microsoft, Apple and Google would have the ability to retaliate strongly against Microsoft by denying access to their mobile app stores.<sup>787</sup> According to the Notifying Party, Google could remove the Game Pass Ultimate app from its Android devices, and both Google and Apple could remove native Activision Blizzard mobile games (e.g. *Candy Crush*) from their respective app stores, which are the main platforms for downloading mobile games. The Notifying Party argues that this would be very detrimental for Activision Blizzard's business: Activision Blizzard generated USD 3 billion in revenues from the Android platform, accounting for [40-50]% of Activision Blizzard's mobile revenues and [10-20]% of its total revenues. Similarly, revenues from Apple's mobile devices account for [50-60]% of Activision Blizzard's total mobile gaming revenues and [10-20]% of its total revenues. On the contrary, such counter strategy would not affect Google's and Apple's mobile distribution business, as, for example, Activision Blizzard's games on Android devices accounted only for approximately [0-5]% of Android gaming revenues from 2019 to 2021.<sup>788</sup> According to the Notifying Party, this possible retaliating measure would undermine Microsoft's strategy to expand its mobile gaming business (one of the rationales of the Transaction).<sup>789</sup>
- (708) However, the Commission considers that the risk of retaliation by Google and Apple is likely to be limited. First, the Commission notes that Activision Blizzard's mobile games are among the top mobile gaming apps available on Google's Play Store and Apple's App Store. In particular, *Candy Crush* is one of the top-selling mobile games<sup>790</sup>, with a very high number of MAUs (between [...] million approximately in 2021).<sup>791</sup> In this regard, the Commission notes that between 2019 and 2021, the number of gaming apps on the Google Play Store went approximately from almost 350 000 to almost 600 000.<sup>792</sup> The fact that one single game, as submitted by the Notifying Party, accounted for [0-5]% of all the revenues from Android games shows how significant in terms of user demand and monetization that game is. Moreover,

---

<sup>787</sup> Article 6(1)(c) Response, paragraphs 341 – 350.

<sup>788</sup> SO Response, paragraph 430.

<sup>789</sup> Article 6(1)(c) Response, paragraphs 341 – 350.

<sup>790</sup> In September 2022, *Candy Crush Saga* was the top-grossing gaming app in the Google Play Store in the United States. See (i) Statista, Leading gaming apps in the Google Play Store worldwide in September 2022, by revenue (in million USD), 2022, <https://www.statista.com/statistics/690180/leading-mobile-games-google-play-usa-revenue/> [ID7220], (ii) Techradar, “Which are the top-earning mobile games?”, 2022, <https://www.techradar.com/news/which-are-the-top-earning-mobile-games> [ID7228], and (iii) Top Charts, <https://app.sensortower.com/top-charts?category=6014&country=US&device=iphone&os=ios>, [ID7226].

<sup>791</sup> Form CO, Annex 15 – MAU data for Activision Blizzard games.

<sup>792</sup> Statista, Number of available gaming apps in the Google Play Store from 1<sup>st</sup> quarter 2015 to 3<sup>rd</sup> quarter 2022, [here](#), [ID7213].

Microsoft's Minecraft is also a very popular app. The Commission considers it implausible that Google and Apple would restrict the distribution of such highly demanded apps via their respective stores. This strategy would indeed likely be detrimental for the attractiveness of their platforms, as well as for the significant revenues that they would forego. Second, the Commission considers such retaliation an unlikely response to a foreclosure strategy that affects PC OS rather than Google's and Apple's mobile gaming business. In this regard, Microsoft's possible foreclosure strategy would consist of continuing to withhold content which is currently unavailable on rival PC OS, but that would have likely become available absent the Transaction. Differently, the retaliation strategy described by the Notifying Party would consist of Google and Apple removing popular content from their mobile app stores, where such content is currently available. Such retaliating measures would be disproportionate and they would be perceived as more aggressive compared to the mere withholding of Activision Blizzard's games from other PC OS where such games are in any event not presently available, thereby also entailing the risk of triggering a retaliation war that would eventually be detrimental for all parties involved, including for Google and Apple.

- (709) For the reasons set out above, the Commission has reached the conclusion that, post-Transaction, Microsoft will have the ability to foreclose rival providers of PC OS by restricting or degrading access to (i) Activision Blizzard's games via rival providers of cloud game streaming services and (ii) Game Pass Ultimate via rival PC OS.

#### 7.5.3.2.2. Incentive to foreclose

- (710) The Commission has reached the conclusion that Microsoft would likely have the incentive to foreclose rival providers of PC OS by preventing Activision Blizzard's games from becoming available on such OS via cloud game streaming. In particular, the merged entity would likely have the incentive to restrict or degrade access to (i) Activision Blizzard's games via rival providers of cloud game streaming services; and (ii) Game Pass Ultimate's cloud game streaming feature via rival PC OS.
- (711) The Commission considers that, in addition to a total foreclosure strategy (whereby Game Pass Ultimate would become (i) the only cloud game streaming service offering Activision Blizzard's games and (ii) exclusively accessible via Windows) there are several ways in which the merged entity could engage in partial foreclosure of rival providers of PC OS, that are close to a total foreclosure scenario (e.g. (i) by making Activision Blizzard's games available with significant delay on third-party cloud game streaming services, or (ii) by making only some of the games available via third-party cloud gam streaming services, or (iii) by licensing to third-party cloud game streaming services reduced versions of Activision Blizzard's games). From this viewpoint, the arguments set out below on the Notifying Party's incentive to foreclose rival providers of PC OS also apply to partial foreclosure scenarios.
- (712) The Commission has considered the possible gains and losses of preventing Activision Blizzard's games from being available via third-party cloud game streaming services and making Game Pass Ultimate's cloud game streaming feature available only via Windows.
- (713) On the one hand, should Microsoft engage in such tying strategy, it would lose: (i) revenues from the distribution of Activision Blizzard's games via third-party cloud game streaming services in the future; and (ii) revenues from the distribution of PC games via Game Pass Ultimate on non-Windows PC.

- (714) On the other hand, with such a tying strategy, Microsoft would gain by protecting Windows' position in the market for PC OS, obtaining additional Windows users who are interested in video games but were evaluating non-Windows PCs, or discouraging current users from switching. Such gains would go beyond Microsoft's increased revenues from the distribution of video games on Windows, and include revenues from the Windows licensing fees, both for laptops/desktops and for servers, as well as licensing revenues from Windows-related products (e.g. the Office 365 suite).
- (715) The Notifying Party submits that the merged entity would not have the incentive to foreclose rival providers of PC OS.<sup>793</sup> First, the Notifying Party argues that the theory of harm described by the Commission is commercially irrational and inconsistent with Microsoft's broader "gamer-centric" strategy, *i.e.*, to make games, including Activision Blizzard's games post-Transaction, available to as many users as possible on their preferred platform.<sup>794</sup> The Notifying Party stresses that such strategy, and the related incentive to distribute Game Pass Ultimate as broadly as possible, is clearly reflected in Microsoft's internal documents, and that the Commission has not properly taken it into account.<sup>795</sup> Moreover, there is no evidence that the Transaction is intended to reinforce Windows. Second, the Notifying Party argues that, in a scenario in which cloud gaming grows, Microsoft would have the incentive to distribute Activision Blizzard's games and Game Pass Ultimate as widely as possible not to leave this segment to its rivals.<sup>796</sup> Third, the Notifying Party argues that the consideration of the costs and benefits of a tying strategy put forward by the Commission is too high level, and that the benefits of the tying strategy described by the Commission are uncertain and speculative.<sup>797</sup> Fourth, the Notifying Party reiterates that the Commission fails to consider the risk of retaliation by Apple and Google.<sup>798</sup>
- (716) However, the Commission maintains that the Notifying Party likely has the incentive to foreclose rival providers of PC OS. Due to the dynamic and forward-looking nature of the assessment, the Commission cannot do a precise quantitative assessment of the losses and gains resulting from a tying strategy of Activision Blizzard's games and Game Pass Ultimate to Windows. However, the Commission considers it likely that the benefits of such tying strategy for Windows would offset the losses. In this regard, as explained below, the Commission notes that [*business secrets concerning business strategy*].<sup>799</sup>
- (717) First, as referred to in recital (576) above, Microsoft holds a dominant position in the market for PC OS, with a market share of [70-80]% on a worldwide basis. This means that the large majority of PCs have Windows. As mentioned above, Microsoft accrues significant revenues especially from the licensing of Windows to PC manufacturers and server users/cloud service providers. The tying of Activision Blizzard's games and Game Pass Ultimate's cloud game streaming feature to Windows would contribute to protecting and increasing Microsoft's revenues from Windows.

---

<sup>793</sup> Form CO, paragraph 579.

<sup>794</sup> Article 6(1)(c) Response, paragraph 354.

<sup>795</sup> SO Response, paragraphs 435 – 437.

<sup>796</sup> Article 6(1)(c) Response, paragraph 356.

<sup>797</sup> SO Response, paragraphs 442 – 445.

<sup>798</sup> SO Response, paragraphs 446 – 447.

<sup>799</sup> Microsoft states in internal documents that [...], [ID1088-34153 or MSFT-EC-01900302].

- (718) Microsoft offers Windows via two types of licenses, Windows Client (for PCs) and Windows Server (for servers). All PC manufacturers that work with Microsoft pay for the Windows Client license, and all cloud service providers that want to use Windows as a server OS (for example to offer Microsoft’s very popular M365 productivity software) pay for the Windows Server license. For example, his\* applies to cloud game streaming service providers: as most games are designed for Windows, third-party providers of cloud game streaming services that want to offer PC games generally license the Windows Server OS for running Windows PC games on the cloud.<sup>800</sup>
- (719) Second, the fact that protecting Windows is not an explicit objective of the Transaction (at least to the Commission’s knowledge to date) does not exclude that Microsoft may pursue several strategies, especially if they are interconnected to each other. The Transaction is closely linked to Microsoft’s investment in its “gamer-centric” strategy, having cloud as one of its centrepieces.<sup>801</sup> This is consistent with the fact that one of the main strategic rationales behind the Transaction is the growth of Game Pass, which includes a cloud game streaming feature in its top tier. However, Microsoft’s “gamer-centric” strategy stresses that games would be playable across different devices (e.g. console, PC mobile, tablets), thereby blurring the boundaries between them, rather than across different PC OS within PCs. Therefore, this gamer-centric strategy may not necessarily require that Game Pass Ultimate’s cloud game streaming feature be made available via all PC OS. On the contrary, such objective may also be achieved by attracting more subscribers to Game Pass privileging Windows as the relevant PC platform, thereby pursuing both the positioning of Game Pass Ultimate as a leader in cloud gaming, and the protection/enhancement of Windows as a leading PC environment for gaming.<sup>802</sup> In particular, given the interconnected nature of Microsoft’s services relevant to gaming, pursuing the growth of Game Pass as an objective of the Transaction is suitable to bring about benefits for Microsoft on a number of fronts, including on Microsoft’s position in the market for PC OS. Therefore, the Commission considers that tying Activision Blizzard’s games to Windows via Game Pass Ultimate’s cloud game streaming feature would not necessarily impair Microsoft’s broader commercial strategy. In a tying scenario, the Commission considers that Microsoft may still benefit from positioning itself as the best player in the growing cloud gaming segment, both in terms of cloud game streaming offering and in terms of PC OS as a platform for gaming, thus attracting additional users to both channels.
- (720) In this regard, the Commission notes that Microsoft’s internal documents [*business secrets concerning business strategy*], capable of driving [*business secrets concerning business strategy*].<sup>803</sup> Microsoft refers, among other things, to the opportunity to [*business secrets concerning business strategy*] in the market or PC

---

\* Should read: ‘this’.

<sup>800</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, reply to question 2.2.1 and 30.1 [ID1446].

<sup>801</sup> Microsoft refers to “content, community and cloud” as the main pillars of its gaming strategy. See for example Form CO, Annex 6.13.

<sup>802</sup> As mentioned also in paragraph (445), a provider of PC OS pointed out that Microsoft may have higher returns, in the longer term, by protecting its revenues from Windows, even if this entails partially limiting the distribution of Activision Blizzard’s games (via cloud). See minutes of the calls of 8 June 2022 with a provider of PC OS [ID3360].

<sup>803</sup> For example, Microsoft states in internal documents that [...], [ID1088-34153 or MSFT-EC-01900302].

OS, and that [*business secrets concerning business strategy*].<sup>804</sup> As already mentioned above, the Commission considers this indicative of the fact that Microsoft would in general have the incentive to link Game Pass to Windows as a strategy to improve or protect the market position of the latter. The Commission considers that the Transaction would increase significantly Microsoft's incentive to engage in such strategy, in light of the considerable increase in visibility of Game Pass, including Game Pass Ultimate, thanks to Activision Blizzard's games. Therefore, the Commission considers that the Transaction may help Microsoft protect the position of Windows' position in the market for PC OS, which is being challenged by Apple and Google.<sup>805</sup>

- (721) Furthermore, the Commission reiterates that, during its market investigation, one market participant stressed that "*Microsoft would gain far more by keeping users on Windows, so that OEMs continue to pay for Windows licences and users continue to purchase games and other software from Windows platforms over extended periods of time. Windows is the cornerstone of Microsoft's ecosystem, so it would be heavily incentivised to use ABK's massively popular titles to protect its PC OS position from its top rival*".<sup>806</sup>
- (722) Third, as mentioned above, by withholding Activision Blizzard's games from third-party cloud game streaming services, Microsoft would forego revenues from the distribution of such games. In addition, by tying Game Pass Ultimate (strongly enhanced by Activision Blizzard's games) to Windows, Microsoft would forego revenues from the distribution of Game Pass Ultimate on non-Windows PCs. However such losses are not likely to be significant compared to the gains described above. While the Commission considers that the uptake of cloud gaming will increase in the future, the relevant foregone revenues from the distribution of Activision Blizzard's games via third-party cloud game streaming services would amount to only a fraction of the revenues from the distribution of Activision Blizzard's games via the cloud (given that distribution via the cloud also includes distribution via Game Pass Ultimate's cloud game streaming feature)<sup>807</sup>, which in turn are only a fraction of the overall revenues that Microsoft can expect to obtain from the overall distribution of Activision Blizzard's games on PC, console and mobile.<sup>808</sup> The same applies to revenues that Microsoft will obtain from potential users of Game Pass Ultimate's cloud game streaming service from on non-Windows OS. While the Commission considers that the number of such users would increase

---

<sup>804</sup> Microsoft's internal document - [...], [ID1433-53874 or MSFT-EC-01272247].

<sup>805</sup> Microsoft's market shares in the market for PC OS have been slightly but constantly decreasing in the past few years. See Form CO, Annex 73.

<sup>806</sup> EC Case M.10646: Microsoft / Activision Blizzard - Submission in response to the EC's request for information, page 30 [ID3321]. See also Replies to Questionnaire Q1 to video game developers, publishers and distributors, questions 80 and 80.1 [e.g. ID3329].

<sup>807</sup> The Notifying Party indicated that, although it has not taken a final decision yet, it is possible that Microsoft may differentiate Game Pass by including Activision Blizzard's games in it, whilst not making the titles available in the same manner on other subscription services (Form Co, paragraph 669). Therefore, even if Microsoft were to distribute Activision Blizzard's games via third-party cloud games streaming services, Game Pass Ultimate would likely still attract more gamers interested in Activision Blizzard's games compared to third-party rivals. Therefore, a tying strategy by Microsoft would still allow it to gain revenues from the distribution of Activision Blizzard's games via the cloud, i.e. via Game Pass Ultimate, while foregoing only the fraction that would have been attributed to third-party rivals.

<sup>808</sup> Currently, approximately [...] of Activision Blizzard's revenues derive from console games and from mobile games, which will continue to run natively on mobile devices and on (at least) the Xbox console. See Form CO, Annex 39.

should Game Pass Ultimate, strongly enhanced by Activision Blizzard's games, be available on all PC OS, the foregone revenues will likely be a fraction of the revenues Microsoft will obtain from Game Pass Ultimate's users on Windows, where Game Pass Ultimate will likely grow in any case post-Transaction.

- (723) In this regard, the Commission considers that the value to Microsoft of a Windows user, that switches to Windows or that decides to remain on Windows to stream Activision Blizzard's games<sup>809</sup>, is likely to be significantly higher than the value to Microsoft (post-Transaction) of a non-Windows user that streams Activision Blizzard's games on a non-Windows OS. The Notifying Party has submitted data about the average lifetime value ("LTV") of a new Windows user, which amounts to USD [...] for the [...] years following the purchase of a Windows PC.<sup>810</sup> Microsoft would likely have the incentive to protect such value, which is particularly significant also in light of the number of users currently using Windows.<sup>811</sup> Such value has potential to decrease in the medium to long term should Windows users increasingly switch to other PC OS, and Microsoft would have the incentive to avoid such trend. Moreover, thanks to a possible foreclosure strategy and the attractiveness of Activision Blizzard's games via cloud, such LTV is likely to increase also thanks to gaming-related expenses, which currently accounts for [...] % of the abovementioned LTV.<sup>812</sup> Indeed, the Transaction would bring about an increased propensity by users to spend on gaming content and to engage more with Microsoft's gaming channels thanks to Activision Blizzard's games on Game Pass. Considering that, as argued above, Microsoft could well pursue the objective of growing Game Pass Ultimate privileging Windows, the Commission considers that the medium to long-term benefits of a foreclosure strategy would offset the foregone revenues from increased sales of Activision Blizzard's games on non-Windows OS.
- (724) For the reasons set out above, the Commission considers that the critical switching rate that would make it profitable for Microsoft to withhold (i) Activision Blizzard's games from rival cloud streaming services and (ii) Game Pass Ultimate's cloud game streaming feature from rival PC OS is likely to be low. In turn, this would likely make it profitable for Microsoft to engage in such tying strategy.
- (725) From this perspective, a provider of PC OS indicated that, even if it would appear to be in Microsoft's interest to make Activision Blizzard's games available on as many platforms as possible, Microsoft would actually consider it a higher priority to

---

<sup>809</sup> Based on data provided by the Notifying Party, approximately [...] % of users of Windows PCs in the two highest deciles of PC price (i.e. PCs in the highest price ranges, which have high hardware specs optimized to play AAA games) played Activision Blizzard's games in October 2022 (See Notifying Party's reply to the Commission's RFI 23, question 16). However, the Commission considers that the pool of Windows Users that would remain/switch to Windows to stream Activision Blizzard's games is higher. Indeed, many new casual and non-gamers are expected to discover gaming through cloud game streaming services thanks to the possibility to play on non-performant and cheaper devices. Therefore, the Commission considers that the percentage of users that would start playing Activision Blizzard's games via the cloud (i.e. via Game Pass Ultimate on Windows in a foreclosure scenario) is higher, because Activision Blizzard's games would attract more gamers than today if they are available on low-performance hardware via cloud game streaming services.

<sup>810</sup> The Notifying Party's reply to RFI 26, question 16.

<sup>811</sup> In 2022, Microsoft made approximately USD [...] in revenues from the Windows client license only. See Notifying Party's reply to the Commission's RFI 26, question 16.

<sup>812</sup> Notifying Party's reply to the Commission's RFI 26, question 16.

maintain its market share in the market for PC OS, a strategy which would have higher economic returns in the long run.<sup>813</sup>

- (726) Therefore, the Commission has reached the conclusion that Microsoft will likely have the incentive to foreclose rival PC OS by restricting or degrading access to (i) Activision Blizzard's games via rival providers of cloud game streaming services; and (ii) Game Pass Ultimate's cloud game streaming feature via rival PC OS.

#### 7.5.3.2.3. Impact on effective competition

- (727) For the reasons set out below, the Commission has reached the conclusion that a foreclosure strategy against Microsoft's rival providers of PC OS is likely to have a significant impact on effective competition, by reducing the ability of non-Windows OS to compete.
- (728) In line with what already stated above<sup>814</sup>, the Commission reiterates that, in addition to a total foreclosure strategy (whereby Game Pass Ultimate would become (i) the only cloud game streaming service offering Activision Blizzard's games and (ii) exclusively accessible via Windows) there are several ways in which the merged entity could engage in partial foreclosure of rival providers of PC OS, that are close to a total foreclosure scenario (e.g. (i) by making Activision Blizzard's games available with significant delay on third-party cloud game streaming services, or (ii) by making only some of the games available via third-party cloud gam streaming services, or (iii) by licensing to third-party cloud game streaming services reduced versions of Activision Blizzard's games). From this viewpoint, the Commission considers the arguments set out below on the effects on competition of a total foreclosure strategy also apply to partial foreclosure scenarios.
- (729) The Commission has found that, first, Microsoft is dominant in the market for the supply of PC OS. Second, a foreclosure strategy by Microsoft would increase users' preference for Windows, thereby increasing the barriers for other PC OS to compete. Therefore, rival providers of PC OS would be hampered in their ability to expand and compete effectively against Windows.
- (730) As assessed in Section 7.5.3.2.1.3 above, the merged entity would have the ability to restrict or degrade the availability of Activision Blizzard's games via rival cloud game streaming services and the accessibility of Game Pass Ultimate's cloud game streaming feature (strongly enhanced by Activision Blizzard's games) via rival PC OS. This would prevent, Activision Blizzard's games from being available on rival PC OS, contrarily to what would have likely happened absent the Transaction. The Commission considers that such a tying strategy would boost users' preference for Windows and increase the barriers that rival PC OS face to expand and compete robustly with Windows.

#### 7.5.3.2.3.1. Microsoft is dominant in the market for PC OS

- (731) As indicated in Table 7 above, Microsoft's market shares in the market for the supply of PC OS is [70-80]% in 2022 and [70-80]% in 2021 (worldwide). Microsoft's main competitors, i.e. MacOS and ChromeOS, lag significantly behind, with market shares of [10-20]% and [0-5]% respectively in 2022, and of [10-20]% and [0-5]%

---

<sup>813</sup> Minutes of the calls of 8 June 2022 with a provider of PC OS [ID3360].

<sup>814</sup> Recital (643).



respectively in 2021.<sup>815</sup> These market shares clearly indicated that Windows is the most adopted PC OS by far as compared to its rivals.

- (732) As set out in the Horizontal Merger Guidelines, very large market shares, in particular above 50%, may in themselves be evidence of the existence of a dominant position.<sup>816</sup> As already mentioned in recital (579) above, considering that Microsoft's market shares are well above 50%, the Commission considers this indicative of the fact that Microsoft enjoys a dominant position in the market for the provision of PC OS.<sup>817</sup>
- (733) Furthermore, the Commission notes that the market for PC OS is concentrated, with only two main alternative PC OS in addition to Windows, i.e. MacOS (Apple) and ChromeOS (Google), that act as the main competitive constraints. While Linux is also another technology present on the market, it refers to an open-source computer program on which a family of different PC OS are based. Therefore, Linux cannot be considered as a single provider of PC OS as Apple and Google. In any case, Linux' market share is below [0-5]% in both 2022 and 2021.<sup>818</sup>
- (734) Therefore, for the reasons set out above, the Commission concludes, for the purpose of this Decision, that Microsoft holds a dominant position in the market for the supply of PC OS.

7.5.3.2.3.2. The ability of rival providers of PC OS to compete effectively with Windows would be hampered

- (735) For the reasons set out below, the Commission considers that, should Microsoft restrict or degrade the availability of (i) Activision Blizzard's games via third-party cloud game streaming services and (ii) Game Pass Ultimate's cloud game streaming feature via rival PC OS, users' preference for Windows would increase. This would, in turn, represent an increase in barriers for non-Windows PC OS to compete effectively, compared to a scenario in which, absent the Transaction, such barriers would instead be lowered.
- (736) In light of Microsoft's dominant position in the market for the supply of PC OS, the Commission considers that even a moderate increase of barriers for rival PC OS to compete effectively would have a detrimental impact on effective competition on the market.
- (737) First, as assessed in Section 7.5.3.2.1.2 before, cloud game streaming services and the availability of Activision Blizzard's games via such services will be important for non-Windows PC OS to compete robustly with Windows. Furthermore, as explained in Section 7.4.5.2.2 above, absent the Transaction Activision Blizzard would have likely licensed its games to cloud game streaming services. In light of this, the Commission considers that, absent the Transaction, rival providers of PC OS would have been able to increase the competitive pressure on Windows. This is because PC users interested in gaming would have had increased choice of PC OS with

---

<sup>815</sup> The remaining market shares are represented by Linux, referring to a family of PC OS based on the Linux open-source operating system kernel, with a market share of [0-5]% in 2021 and [0-5]% in 2020. The rest of the market shares are represented by other smaller operators ([0-5]% in 2021 and [0-5]% in 2020).

<sup>816</sup> Horizontal Merger Guidelines, paragraph 17.

<sup>817</sup> The Commission found that Microsoft holds a dominant position in the market for personal computer operating system also in its decision in case AT.39530 – Microsoft (Tying). While such decision was adopted in 2009, Microsoft's market shares have remained very high since then.

<sup>818</sup> See footnote 815 above.

availability of Activision Blizzard's games. Thanks to cloud game streaming services, PC users would also have had increased choice of cheaper hardware to play such games, which are normally not supported in native format by lower-end PCs.<sup>819</sup> In this regard, the Commission notes that all respondents to the Commission's market investigation that expressed a view indicated that, should the combined Activision Blizzard portfolio become available on non-Windows OS, there would be a degree of impact on competition between these OS and Windows.<sup>820</sup>

- (738) Second, a possible tying strategy concerning Activision Blizzard's games and Windows via Game Pass Ultimate's cloud game streaming service would prevent the above scenario, and drive more users (or in any case retain users) to Windows instead. According to Microsoft's internal documents, [*business secrets concerning business strategy*]. In this regard, Microsoft internal documents clearly indicate that Game Pass [*business secrets concerning business strategy*]. For example, Microsoft discusses, among other things, that [*business secrets concerning business strategy*]"'. Furthermore, Microsoft mentions the opportunity to [*business secrets concerning business strategy*].<sup>821</sup> Post-Transaction, Game Pass Ultimate will likely be significantly enhanced by Activision Blizzard's games, therefore its benefits to Windows' growth will likely be [*business secrets concerning business strategy*] internal documents referred to above.<sup>822</sup> In this regard, the majority of respondents to the market investigation that expressed a view indicated that, should Activision Blizzard's games become available for streaming exclusively via Windows, this would increase, at least moderately, users' preference for Windows.<sup>823</sup>
- (739) The Notifying Party stresses that the Transaction would not have negative effects on competition between PC OS. In particular, the Transaction would not result in any increase in barriers for rival PC OS to compete with Windows, and there is no evidence of the contrary.<sup>824</sup> In support of this, the Notifying Party reiterates that (i) most PCs are not used for gaming, that (ii) there is sufficient availability of games via non-Windows OS, that (iii) the uptake of cloud game streaming on non-Windows PCs is limited and that (iv) the Commission's market investigation shows that competitors, except for one complainant, do not see the Transaction as threatening competition in the PC OS market.<sup>825</sup> In addition, pre-Transaction Activision Blizzard's games are generally not available on non-Windows OS, therefore the Transaction would not bring about any relevant changes vis-à-vis rival PC OS.<sup>826</sup>
- (740) However, the Commission concludes that, should the merged entity tie Activision Blizzard's games to Windows via Microsoft's cloud game streaming service, the increased preference for Windows it would generate would have significant effects on competition in the market for PC OS.
- (741) First, the Commission reiterates the results of the market investigation, which indicated that, should Game Pass Ultimate become the only cloud-game streaming

---

<sup>819</sup> As explained by the Notifying Party, Chromebooks, which are generally cheaper than Windows PCs, normally do not meet the minimum requirements for Call of Duty. See Article 6(1)(c) Response, paragraph 259.

<sup>820</sup> Replies to Questionnaire Q2 – Phase II questionnaire to competitors, question C.D.17.

<sup>821</sup> Microsoft's internal document - [...], [ID1303-58736 or MSFT-EC-00379377].

<sup>822</sup> Microsoft's internal document - [...], [ID1088-34153 or MSFT-EC-01900302].

<sup>823</sup> Replies to Questionnaire Q2 – Phase II questionnaire to competitors, question C.D. 23.

<sup>824</sup> SO Response, paragraph 451.

<sup>825</sup> SO Response, paragraph 452.

<sup>826</sup> Article 6(1)(c) Response, paragraphs 369 – 373.

service offering Activision Blizzard's games, such exclusivity strategy will strengthen the position of Microsoft in the market for PC OS.<sup>827</sup> In this regard, a concern was raised by one provider of PC OS that a foreclosure strategy regarding Activision Blizzard's games and Game Pass would be "*hugely detrimental as consumers would switch to Microsoft Windows, the only OS which offers Game Pass. This would solidify Microsoft's position as the dominant provider of PC OS to the detriment of challengers*".<sup>828</sup> Second, all respondents to the market investigation that expressed a view indicated that, if the combined Activision Blizzard portfolio were to become available on non-Windows PC OSs, there would be a degree of impact on competition between Windows and other PC. One market participant complained that such impact would be very significant, because "*Ensuring the ability for users of non-Windows OS's to access Activision Blizzard's popular, must-have catalog of titles would allow those OS to meaningfully compete for people who game on PCs, which constitutes a key use case on PC devices.*"<sup>829</sup> Another market participant submitted that "*If Activision-Blizzard games were easily available on non-Windows devices, then it would reduce the compatibility barriers for consumers to choose non-Windows devices like Mac, Chromebook, Linux*".<sup>830</sup>

- (742) Furthermore, as already mentioned, the majority of respondents to the market investigation that provided a view submitted that, should Activision Blizzard's games become available for streaming only on PCs with the Windows OS, this would, at least moderately, increase users' preference for Windows PCs.<sup>831</sup> The Commission notes that this seems to be in line with Microsoft's considerations that emerge from the internal documents mentioned in recital (675) above. The Commission further notes that such increase in users' preference would not occur on a merit basis, but rather due to a tying strategy of an asset, namely Activision Blizzard's games, that would have been available more broadly absent the Transaction.
- (743) Second, a foreclosure strategy against rival providers of PC OS will have an impact on effective competition in the market for PC OS also in view of the fact that the only competitive pressure to Microsoft's Windows is exercised by a few players, especially Google and Apple, the role of which is important also in terms of innovation. For example, ChromeOS has challenged Windows in particular when it comes to cheap devices optimised for light usage and education. In response, Microsoft seems to be making efforts to compete in the lower-end of the market.<sup>832</sup>
- (744) Third, as mentioned in recital (579) above, Microsoft holds a dominant position in the market for the supply of PC OS. In light of this, and considering the concentrated nature of the market with a limited number of much smaller competitors, the Commission considers that even a limited increase in the barriers for non-Windows PC OS to compete with Windows would have significant effects on competition on the market. The increased users' preference for Windows generated by the tying strategy described above would have the effect to impair the ability of rival PC OS to expand and increase their competitive pressure on Microsoft. Therefore, the

---

<sup>827</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 88.

<sup>828</sup> Replies to Questionnaire Q1 to video game developers, publishers and distributors, question 78.1.

<sup>829</sup> Replies to Questionnaire Q2 – Phase II questionnaire to competitors, questions C.D.17 and 18 [ID 3323].

<sup>830</sup> *Ibid.* [ID3128].

<sup>831</sup> Replies to Questionnaire Q2 – Phase II questionnaire to competitors, question 23.

<sup>832</sup> See for example: Android Authority, "What is Windows 11SE? Microsoft's Chrome OS competitor explained", 2021, <https://www.androidauthority.com/windows-11-se-3063476/>, [ID7227].

Commission considers that the tying strategy at hand would give rise to a significant impediment to effective competition in the market for PC OS.

- (745) The Commission considers that the above is sufficient conclude that a foreclosure strategy vis-à-vis non-Windows OS will likely have a significant impact on competition. However, as an additional element, and as already mentioned above, the Commission considers that Microsoft also holds strong positions in other markets that are related to gaming, especially cloud computing services via Microsoft Azure. The Commission considers that this presence may be used to further increase the foreclosure effect of a tying strategy regarding Activision Blizzard's games and Microsoft's cloud game streaming service to Windows.
- (746) Therefore, for the reasons set out above, the Commission considers it likely that a foreclosure strategy against Microsoft's rival providers of PC OS by restricting or degrading access to (i) Activision Blizzard's games via rival providers of cloud game streaming services; and (ii) Game Pass Ultimate via rival PC OS would have significant effects on competition on the market for the supply of PC OS.

#### 7.5.3.2.4. Conclusion

- (747) For the reasons set out above, the Commission considers that the Transaction results in a significant impediment to effective competition on the market for the supply of PC OS, as a result of the tying of Activision Blizzard's games and of Microsoft's distribution of games via cloud game streaming services to the Windows OS.

## 8. COMMITMENTS

### 8.1. Introduction

- (748) In order to remove the competition concerns arising from the Transaction described in Section 7, the Notifying Party submitted commitments pursuant to Article 8(2) and 10(2) of the Merger Regulation on 16 March 2023 (the "Initial Commitments"), consisting of two elements: the "Consumer License Commitment" and the "Streaming Provider License Commitment".
- (749) In parallel, the Notifying Party informed the Commission that it had entered into licensing agreements with Nvidia on 20 February 2023, Boosteroid on 9 March 2023 and Ubitus on 11 March 2023.

On 17 March 2023, the Commission launched a market test of the Initial Commitments (the "First Market Test"), seeking responses from the market participants, including cloud game streaming providers, game developers and game publishers, as well as competing providers of PC OS in the affected markets. The Commission informed the Notifying Party of the results of the First Market Test on 28 March 2023.

Based on the Commission's feedback, the Notifying Party submitted a revised set of commitments on 4 April 2023 (the "Revised Commitments").

On 4 April 2023, the Commission launched a market test of the Revised Commitments (the "Second Market Test"), seeking feedback from market participants on the amendments of the Initial Commitments. The Commission informed the Notifying Party of the results of the Second Market Test on 14 April 2023.

- (750) Based on the Commission's additional feedback, the Notifying Party submitted the final set of commitments on 20 April 2023 (the "Final Commitments"). These Final Commitments are annexed to this Decision and form an integral part thereof.

## 8.2. Analytical Framework

- (751) Where the Commission considers that a concentration raises competition concerns, the parties may seek to modify the concentration in order to resolve such competition concerns and thereby gain clearance of their merger.<sup>833</sup>
- (752) Under the Merger Regulation, the Commission only has the power to accept commitments that are deemed capable of rendering the concentration compatible with the internal market. The commitments must eliminate the competition concerns entirely and must be comprehensive and effective from all points of view.<sup>834</sup> The commitments must also be proportionate to the competition concerns identified.<sup>835</sup> Furthermore, the commitments must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled.<sup>836</sup>
- (753) In assessing whether the proposed commitments will likely eliminate the competition concerns identified, the Commission considers all relevant factors including inter alia the type, scale and scope of the proposed commitments, assessed by reference to the structure and particular characteristics of the market in which the competition concerns arise, including the position of the parties and other participants on the market.<sup>837</sup>
- (754) When assessing the commitments proposed by the merging parties, the Commission has the legal duty to ensure that such commitments are effective. In order for the commitments to remove the competition concerns entirely and be comprehensive and effective, there has to be an effective implementation and ability to monitor the commitments. Whereas divestitures once implemented do not require any further monitoring measures, other types of commitments require effective monitoring mechanisms in order to ensure that their effect is not reduced or even eliminated by the parties. Otherwise such commitments would have to be considered as mere declarations of intentions by the parties and would not amount to any binding obligations as, due to the lack of effective monitoring mechanisms, any breach of them could not result in the revocation of the decision in accordance with the provisions of the Merger Regulation.<sup>838</sup>
- (755) Where the parties submit remedies proposals that are so extensive and complex that it is not possible for the Commission to determine with the requisite degree of certainty, at the time of its decision, that they will be fully implemented and that they are likely to maintain effective competition in the market, an authorisation decision cannot be granted. The Commission may reject such remedies in particular on the grounds that the implementation of the remedies cannot be effectively monitored and that the lack of effective monitoring diminishes, or even eliminates, the effect of the commitments proposed.<sup>839</sup>
- (756) While divestiture commitments may be the best means of resolving problems resulting from horizontal, vertical or conglomerate concerns, other structural

---

<sup>833</sup> Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the "Remedies Notice"), OJ 2008/C 267/01, paragraph 5.

<sup>834</sup> Remedies Notice, paragraph 9.

<sup>835</sup> Merger Regulation, recital 30.

<sup>836</sup> Remedies Notice, paragraph 9.

<sup>837</sup> Remedies Notice, paragraph 12.

<sup>838</sup> Remedies Notice, paragraph 13.

<sup>839</sup> Remedies Notice, paragraph 14.

commitments may be suitable to resolve all types of concerns if those remedies are equivalent to divestitures in their effects,<sup>840</sup> such as access remedies foreseeing the granting of access to key infrastructure, key technology, or essential inputs, and which are normally granted on a non-discriminatory and transparent basis.<sup>841</sup> Such access commitments may be submitted in order to ensure that competition is not significantly impeded as a result of foreclosure and/or in order to facilitate market entry by competitors.<sup>842</sup> Where applicable, it has to be further ensured that the terms and conditions, including the pricing, under which the access is granted (e.g., via a licence) do not impede the effective implementation of such a remedy. However, the Commission will only accept such access commitments if it can be concluded that these commitments will be effective and competitors will likely use them so that foreclosure concerns will be eliminated.<sup>843</sup>

(757) Access commitments are often complex in nature and necessarily include general terms for determining the terms and conditions under which access is granted. In order to render them effective, those commitments have to contain the procedural requirements necessary for monitoring them, which normally has to be done by the market participants themselves, i.e., by those undertakings wishing to benefit from the commitments. Measures allowing third parties themselves to enforce the commitments may in particular involve access to a fast dispute resolution mechanism via arbitration proceedings (together with trustees). If the Commission can conclude that the mechanisms foreseen in the commitments will allow the market participants themselves to effectively enforce them in a timely manner, no permanent monitoring of the commitments by the Commission may be required. However, the Commission will only be able to accept such commitments where the complexity does not lead to a risk of their effectiveness from the outset and where the monitoring devices proposed ensure that those commitments will be effectively implemented and the enforcement mechanism will lead to timely results.<sup>844</sup>

(758) It is against this background that the Commission reviews the proposed commitments in this case.

### **8.3. The Initial Commitments**

#### *8.3.1. Description of the Initial Commitments*

(759) The Initial Commitments comprise two main elements: (i) a consumer license commitment; and (ii) a streaming provider license commitment.

##### 8.3.1.1. The Consumer License Commitment

(760) By the consumer license commitment, Microsoft committed to grant consumers<sup>845</sup> the right to stream Eligible Games<sup>846</sup> from the closing date for a period of 10 years,

---

<sup>840</sup> Remedies Notice, paragraph 17.

<sup>841</sup> Remedies Notice, paragraph 62.

<sup>842</sup> Remedies Notice, paragraphs 63-64.

<sup>843</sup> Remedies Notice, paragraphs 64-65.

<sup>844</sup> Remedies Notice, paragraphs 66.

<sup>845</sup> Defined as “consumers based in the EEA who are licensed to play Eligible Games for their personal use pursuant to the Consumer License [...]”.

<sup>846</sup> Defined as “all current and future PC franchises, titles in these PC franchises, and any other PC games that (i) have been developed in the past or will be developed in the future, either in part or in full, by any of the Activision Blizzard Studios (as listed in Annex 1 [of the Initial Commitments]); or (ii) are based, either in part or in full, on IP rights of any PC franchises, titles in these PC franchises, and any other PC games that Activision Blizzard Studios have developed in the past or will develop in the future”.

by amending its end-user license agreements (“Consumer License”) in accordance with Annex 3 of the Initial Commitments<sup>847</sup>. Consumers would be granted this right regardless of whether the Eligible Game was obtained by the consumer prior to or after the closing date.

#### 8.3.1.2. The Streaming Provider License Commitment

- (761) By the streaming provider license commitment, Microsoft committed for a period of 10 years from the closing date to grant a royalty-free license to stream Eligible Games to Eligible Streaming Services<sup>848</sup> in accordance with the terms in Annex 4 of the Initial Commitments<sup>849</sup> (each a “Streaming Provider Licence”).
- (762) Microsoft committed to grant Streaming Provider Licenses regardless of whether Microsoft currently streams or will in the future stream Eligible Games on its own cloud game streaming service. New releases, including publicly available beta versions and early access releases, would be accessible for streaming from the release of the game on a Microsoft Game Store<sup>850</sup> or any other Authorized Game Store<sup>851</sup>, whichever date is the earliest.
- (763) In addition, Microsoft has entered into agreements with three cloud game streaming providers, namely NVIDIA, Boosteroid and Ubitus. These agreements include, for a period of 10 years from the closing date, a royalty-free, worldwide license to stream Eligible Games. As part of the Initial Commitments, Microsoft commits to grant these licenses under the terms as set out in annexes to the Initial Commitments. The Commission notes that the terms of the agreements with Nvidia, Boosteroid and Ubitus are very close to the terms of the Streaming Provider License under Annex 4 of the Initial Commitments. In addition, only certain terms of the agreements, namely those listed in Annexes 5, 6 and 7 of the Initial Commitments, are covered by the commitments.
- (764) Licenses granted under the Streaming Provider License commitment would be available on Microsoft’s website and subject to the following terms:
- (a) Unless otherwise agreed with Authorized Game Stores, Microsoft may retain all revenue from game sales, in-app purchases and any other future game-

---

<sup>847</sup> According to Annex 3 of the Initial Commitments, Microsoft will include in its End User License Agreement (EULA), and publish on its website, the following Consumer License: “As an integral part of its End User License Agreement (EULA), Microsoft agrees to allow Consumers to play, solely for their personal use, Eligible Games on a Streaming Service on any device that they own, as defined in and pursuant to the Commitments entered into by Microsoft and made legally binding by the European Commission in its decision under Article 8(2) of Regulation (EC) 139/2004 in case M.10646 – Microsoft/Activision Blizzard”.

<sup>848</sup> Defined as “a Streaming Service which currently provides or intends to provide cloud game streaming services to Consumers and either: (i) is permitted by an Authorized Game Store to provide access to Eligible Games; or (ii) offers access to Eligible Games through applications which do not require integration with an Authorized Game Store”.

<sup>849</sup> According to Annex 4 of the Initial Commitments, Microsoft will publish on its website the following Streaming Provider License: “Microsoft licenses its rights under a non-exclusive, non-transferable, non-sublicensable license to Eligible Streaming Services to stream Eligible Games for the sole benefit of Consumers in accordance with the Consumer License, as defined in and pursuant to the Commitments entered into by Microsoft and made legally binding by the European Commission in its decision under Article 8(2) of Regulation (EC) 139/2004 in case M.10646 – Microsoft/Activision Blizzard”.

<sup>850</sup> Defined as “Battle.net or a successor digital PC game store owned by Microsoft which distributes Eligible Games after the Closing Date”.

<sup>851</sup> Defined as “the Microsoft Game Store or a third-party digital PC game store on which Microsoft distributes Eligible Games after the Closing Date”.

related transactional revenue generated from Eligible Games on Eligible Streaming Services.

- (b) Eligible Streaming Services will be responsible for: (i) securing any third-party public performance, communication to the public or other rights that are not owned by Microsoft to the extent necessary to support the Eligible Streaming Service; (ii) adapting their services, to the extent necessary in reaction to third-party rights mentioned under (i), to allow Consumers to stream Eligible Games; and (iii) compliance with relevant laws, including the Digital Services Act<sup>852</sup>, the GDPR<sup>853</sup>, the ePrivacy Directive<sup>854</sup>, and privacy standards.

#### 8.3.1.3. Monitoring Trustee and Dispute Resolution

- (765) The Initial Commitments also provide that the Monitoring Trustee must be appointed before the Notifying Party can close the Transaction. The Monitoring Trustee may in turn appoint an IT expert, or any advisors for corporate finance or legal advices, to assist in the performance of his or her duties and obligations.
- (766) A Fast Track Dispute Resolution was included, and would apply in cases where an Eligible Streaming Service (including Nvidia, Boosteroid and Ubitus), showing a sufficient legitimate interest, claims that Microsoft is failing to comply with its obligations arising from the Commitments.
- (767) The Initial Commitments would remain in effect for ten years from the closing date of the Transaction.

#### 8.3.2. Results of the First Market Test

- (768) The Commission initiated a market test of the Initial Commitments on 17 March 2023 and received responses from, amongst others, cloud game streaming providers, game developers and game publishers, as well as competing providers of PC OS.
- (769) The majority of respondents that expressed a view on this question considered that the provisions of the Initial Commitments are sufficiently clear and capable of being implemented swiftly.<sup>855</sup>

##### 8.3.2.1. The Overall Scope of the Initial Commitments

- (770) With regard to the overall scope of the Commitments, and in particular the definition of Eligible Games, about half of the respondents submitted that the scope was too narrow. Several markets participants pointed out that console games should be included under the licenses. In addition, one market participant argued that additional features like downloadable content, expansions and patches should be included as

---

<sup>852</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (OJ L 277, 27.10.2022, p. 1–102).

<sup>853</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation or “GDPR”) (OJ L 119, 4.5.2016, p. 1).

<sup>854</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications or “ePrivacy Directive”) (OJ L 201, 31.7.2002, p. 37).

<sup>855</sup> Replies to Questionnaire 02\_Competers – Commitments, question E.3.



well.<sup>856</sup> Individual respondents suggested that the definition should also include mobile games.<sup>857</sup>

- (771) A majority of respondents that expressed a view considered that the definition of Eligible Games with regard to new releases was adequate because it covered all relevant versions of a game<sup>858</sup>, at the relevant release date<sup>859</sup> and therefore enabled a provider of cloud game streaming services to effectively compete in the market for the distribution of PC video games.
- (772) However, some respondents raised various issues regarding the definition of Eligible Games. For instance, one respondent submitted that the current definition of Eligible Games does not “*make clear that ‘new releases’ cover all ‘relevant versions’ of a game, including parity across downloadable content, game content updates, patches, additional modes, multiplayer features, and any other future features that may emerge during the term of the Proposed Commitments and which gamers often consider important*”.<sup>860</sup> In addition, the same respondent submitted that, there were several ways in which Microsoft could circumvent access to “publicly available beta versions” and “early access releases”, such as “*describ[ing] a release as a “limited beta” and impos[ing] artificial limits to avoid it being treated as ‘public’ test*” or using other terminology to circumvent its obligations.<sup>861</sup> Another respondent submitted that “[*t]here is nothing in the Commitments that precludes Microsoft from (i) engaging in partial foreclosure in relation to the these titles/franchises/versions or (ii) releasing new titles/franchises/versions on multi-game subscription services and consoles (which Microsoft could then incorporate into its own console-based cloud game streaming service while foreclosing access to competitors)*”.<sup>862</sup>
- (773) One market participant submitted that the commitments are inadequate because “*they would ensure that Microsoft would be the only cloud streaming service able to sell irreplaceable Activision content*”, i.e. the commitments would not oblige Microsoft to allow competing cloud game streaming providers to sell Activision content.<sup>863</sup> It further argued that “*no other company has the right to sell Activision content unless they conclude a separate PC [game] distribution agreement with Microsoft*” while the commitments “*do not require Microsoft to enter into any such agreement, still less one on fair, reasonable, and non-discriminatory terms*”.<sup>864</sup>
- (774) In addition, another market participant pointed out that Microsoft would be the only cloud game streaming provider “*without having the significant cost of the Windows license fees*”.<sup>865</sup>

---

<sup>856</sup> Replies to Questionnaire 02\_Competitors – Commitments, questions D.A.1 and D.A.2.

<sup>857</sup> Replies to Questionnaire 02\_Competitors – Commitments, question D.A.2.

<sup>858</sup> Replies to Questionnaire 02\_Competitors – Commitments, question D.A.5.

<sup>859</sup> Replies to Questionnaire 02\_Competitors – Commitments, question D.A.7.

<sup>860</sup> A market participant’s reply to Questionnaire 02\_Competitors – Commitments, question D.A.6 [ID6670].

<sup>861</sup> A market participant’s reply to Questionnaire 02\_Competitors – Commitments, question D.A.8 [ID6670].

<sup>862</sup> Another market participant’s reply to Questionnaire 02\_Competitors – Commitments, question D.A.6 [ID6590].

<sup>863</sup> Observations on Microsoft’s Commitments Proposal dated 27 March 2023, paragraph 2 [ID6492].

<sup>864</sup> Observations on Microsoft’s Commitments Proposal dated 27 March 2023, paragraph 3, third bullet point [ID6492].

<sup>865</sup> A market participant’s reply to Questionnaire 02\_Competitors – Commitments, question D.A.2 [ID6670].

- (775) The majority of respondents that expressed a view consider that the Proposed Commitments will ensure that Activision Blizzard games will be available for streaming on PC OS that compete with Windows OS (e.g., MacOS and ChromeOS).<sup>866</sup> However, certain market participants considered that the Proposed Commitments would not guarantee the availability of Activision Blizzard games on rival PC OSs.
- (776) For example, one market participants raised concerns that the definition of “Microsoft Game Store” does not include Microsoft Store but only Battle.net, which would enable Microsoft to “*circumvent the Proposed Commitments by releasing publicly available versions of Eligible Games only in the Microsoft Store (or other Microsoft distribution channels) while withholding it from Battle.net.*”. According to the market participant, “*This would exclude ABK games from cloud game streaming services, and in turn keep them from rival PC OSs. This would simply strengthen Windows’ dominant position.*”<sup>867</sup>
- (777) The same market participant also raised concerns about the remedy proposal relating to the PC OS used by cloud game streaming services. According to this market participant the remedy would “*cement Windows as the dominant PC gaming OS by limiting ABK games to Eligible Streaming Services with bring-your-own-game (‘BYOG’) platform that support Windows PC game stores*”. Therefore, in turn, “*developers would now be forever locked into writing their games for Windows as opposed to alternative PC OSs*”.<sup>868</sup>
- (778) Another market participant considered that the Proposed Commitments would “*not meaningfully allow Activision [Blizzard’s] games to be available for streaming on PC OS that compete with Windows*” because “*the rival OS suppliers (e.g. Google or Apple) would not be allowed to access or distribute Activision games*”.<sup>869</sup>

#### 8.3.2.2. The Consumer License Commitment

- (779) The market test triggered positive comments on the Consumer License Commitment in general, with some observations aimed at improving the definitions and the overall functioning of the commitment.
- (780) A slight majority of respondent that expressed a view considered that the Consumer License includes all the necessary elements to enable a provider of cloud game streaming services to stream the Eligible Games effectively during the term of the Commitments.<sup>870</sup>
- (781) Certain respondents submitted that the license should be extended to cover any cloud game streaming service, not just Eligible Streaming Services.<sup>871</sup> A respondent explained that “*[t]he Proposed Commitments only grant licenses to consumers to play PC games for which they have already acquired a license, as set out in the definition of Streaming Services. The proposed Consumer License Commitment appears to only include Streaming Services that offer a BYOG model based on Windows PC game stores. This limitation would exclude other models that are not*

<sup>866</sup> Replies to Questionnaire 02\_Competers – Commitments, question D.D.1.

<sup>867</sup> Replies to Questionnaire 02\_Competers – Commitments, questions D.D.2 and D.C.11.

<sup>868</sup> A market participant’s reply to Questionnaire 02\_Competers – Commitments, question D.A.2 [ID6670].

<sup>869</sup> A market participant’s reply to Questionnaire 02\_Competers – Commitments, question D.D.2 [ID6590].

<sup>870</sup> Replies to Questionnaire 02\_Competers – Commitments, questions D.B.3 and D.B.4.

<sup>871</sup> Replies to Questionnaire 02\_Competers – Commitments, question D.B.2.

*dependent on Windows PC Stores such as subscription-based, buy-to-play (B2P), free-to-play (F2P), hybrid service, or any non-Windows cloud game streaming platform. Preventing consumers from streaming the Eligible Games on other types of cloud game streaming services will imperil non-BYOG cloud game streaming services, forcing all Microsoft rivals to operate a BYOG model reliant on Microsoft's Windows OS.*"<sup>872</sup>

- (782) Finally, the majority of respondents that expressed a view confirmed that the 10 years duration was sufficient.<sup>873</sup> However, a few respondents flagged that the period might be too short for “*games to develop comparable audiences and importance to ABK's [i.e., Activision Blizzard King's] top games*” and for cloud game streaming providers to establish themselves as credible alternatives.<sup>874</sup>

### 8.3.2.3. The Streaming Provider License Commitment

- (783) To recall, in the Initial Commitments, the Streaming Provider License Commitment referred to Eligible Streaming Services, which in turn were defined as “*a Streaming Service which currently provides or intends to provide cloud game streaming services to Consumers and either: (i) is permitted by an Authorized Game Store to provide access to Eligible Games; or (ii) offers access to Eligible Games through applications which do not require integration with an Authorized Game Store*”.<sup>875</sup> The Authorized Game Store was defined as “*the Microsoft Game Store or a third-party digital PC game store on which Microsoft distributes Eligible Games after the Closing Date*”.<sup>876</sup>
- (784) Market participants submitted mixed replies as to whether the Streaming Provider License Commitment includes all the necessary elements for a provider of cloud game streaming services to effectively compete in the market for the distribution of PC video games on a lasting basis.<sup>877</sup>
- (785) With regard to the first alternative to qualify as an Eligible Streaming Service and in particular the definition of an “Authorized Game Store”, the majority of respondents that expressed a view consider that the definition ensures sufficient access to Eligible Games.<sup>878</sup> However, the first alternative was criticized by a few market participants for not including an obligation of Microsoft to grant such permission to third-party digital PC stores (as it would comply with the commitment if the games were only distributed on the Microsoft Game Store).<sup>879</sup> A market participant also pointed to the possibility that Microsoft circumvents the commitment by deciding “*not to distribute their games on Gamestore (e.g. just to keep them for the Gamepass)*”.<sup>880</sup>
- (786) In addition, respondents provided mixed replies as to whether the second alternative of the definition of Eligible Streaming Provider (that requires access to Eligible Games through applications which do not require integration with an Authorized Game Store), is sufficiently clear and covers all relevant ways in which Streaming

---

<sup>872</sup> A market participant's reply to Questionnaire 02\_Competitors – Commitments, question D.B.2 [ID6670].

<sup>873</sup> Replies to Questionnaire 02\_Competitors – Commitments, questions D.B.5 and D.B.6.

<sup>874</sup> Replies to Questionnaire 02\_Competitors – Commitments, question D.B.6.

<sup>875</sup> See the Initial Commitments submitted on 16 March 2023.

<sup>876</sup> Ibid.

<sup>877</sup> Replies to Questionnaire 02\_Competitors – Commitments, questions D.C.10 and D.C.11.

<sup>878</sup> Replies to Questionnaire 02\_Competitors – Commitments, question D.C.1.

<sup>879</sup> Replies to Questionnaire 02\_Competitors – Commitments, question D.C.2.

<sup>880</sup> A market participant's reply to Questionnaire 02\_Competitors – Commitments, question D.C.2 [ID6602].

Providers could verify that a user has purchased a game she or he wants to stream.<sup>881</sup> A slight majority of respondents that expressed a view submitted that the second alternative was sufficiently clear. However several market participants pointed to the vague wording of the commitment, that it “*do[es] not provide a comprehensive list of applications that do not require integration to an Authorized Game store*”<sup>882</sup> and that it was unclear whether this is a “*standalone application or the videogame itself. In addition, since the behavior of the application is not described, it is not clear if verification methods like license key verification or detection of an original physical media (like CD, DVD or Blu-ray discs) are also included*”<sup>883</sup>.

- (787) Furthermore, a few market participants pointed out that the licenses are limited to games purchased at Authorized Game Stores. If gamers were authorized to play the game without purchasing it, for instance by subscribing to a multi-game subscription service, this would neither be covered by the license to consumers, nor the license to cloud game streaming providers.<sup>884</sup>
- (788) With regard to the definition of an “Eligible Streaming Service”, the majority of respondents that expressed a view submitted that the definition should include the streaming of console games (as for the Consumer License Commitment).<sup>885</sup> At the time of the Decision, Microsoft and Sony are the only two companies providing console-based cloud game streaming services, and respondents provided mixed replies to the question whether console-based cloud game streaming services would emerge in the next 10 years.<sup>886</sup> However, they submitted that including console games would render the commitments more future-proof.<sup>887</sup>
- (789) Based on the proposed terms of the Streaming Provider License Commitment, the revenue split between the Notifying Party and Eligible Streaming Services entailed that, unless otherwise agreed with Authorized Game Stores, Microsoft may retain all revenue from game sales, in-app purchases and any other future game-related transactional revenue generated from Eligible Games on Eligible Streaming Services (see recital (764)(a) above). The majority of market participants that expressed a view considered that this revenue split was not appropriate.<sup>888</sup> In particular, several respondents submitted that the Notifying Party would “*retain all revenues from game sales, in-app purchases and any other future game-related transactional revenue generated from Eligible Games*” and that cloud game streaming providers would not be able to recoup the costs of streaming the games.<sup>889</sup>
- (790) With regard to the term making “[*business secrets concerning the market test questionnaire*]”, the majority of respondents that expressed a view considered the terms appropriate to enable a provider of cloud game streaming services to effectively compete in the market for the distribution of video games on PC.<sup>890</sup> However, one market participant considered that the Proposed Commitment “*lacks*

---

<sup>881</sup> Replies to Questionnaire 02\_Competitors – Commitments, question D.C.3.

<sup>882</sup> A market participant’s reply to Questionnaire 02\_Competitors – Commitments, question D.C.4 [ID6590].

<sup>883</sup> Another market participant’s reply to Questionnaire 02\_Competitors – Commitments, question D.C.4 [ID6560].

<sup>884</sup> Replies to Questionnaire 02\_Competitors – Commitments, question D.C.4.

<sup>885</sup> Replies to Questionnaire 02\_Competitors – Commitments, question D.C.7.

<sup>886</sup> Replies to Questionnaire 02\_Competitors – Commitments, questions D.C.5 and D.C.6.

<sup>887</sup> Replies to Questionnaire 02\_Competitors – Commitments, question D.C.9.

<sup>888</sup> Replies to Questionnaire 02\_Competitors – Commitments, question D.C.14.

<sup>889</sup> Replies to Questionnaire 02\_Competitors – Commitments, questions D.C.13 and D.C.15.

<sup>890</sup> Replies to Questionnaire 02\_Competitors – Commitments, question D.C.16.

*certain crucial elements necessary to enable a cloud game streaming services provider to compete effectively in the market for the distribution of video games on PC on a lasting basis*". According to that market participant, the Proposed Commitments should set out the same terms and conditions for Eligible Streaming Services as those included in Microsoft's agreements with Nvidia, Boosteroid, and Ubitus, "*as any discrepancies would impair the effective competition in the common market*".<sup>891</sup>

- (791) With regard to the agreements that the Notifying Party concluded with Nvidia, Boosteroid and Ubitus, the majority of respondents that expressed a view considered that the Commitments would enable Nvidia, Boosteroid and Ubitus to effectively compete in the market for the distribution of video games on PC on a lasting basis.<sup>892</sup>
- (792) Finally, the majority of respondents considered that the 10-years duration of the Streaming Provider License Commitment was sufficiently long.<sup>893</sup>
- (793) Despite the above mentioned shortcomings, the majority of cloud game streaming providers that expressed a view submitted that they believed they could effectively run the Eligible Games on their cloud game streaming service on the basis of the Proposed Commitments.<sup>894</sup> They also confirmed that should the Proposed Commitments become final, they would be interested in receiving a license from Microsoft.<sup>895</sup>

#### 8.3.2.4. Monitoring Trustee and Dispute Resolution

- (794) The majority of market participants considered that the clauses on monitoring and arbitration were sufficiently clear.<sup>896</sup> However, one respondent submitted that the Fast-Track Dispute Resolution provisions failed to provide swift redress, as the whole procedure can last up to a year.<sup>897</sup> Another respondent submitted that the definition of "requesting parties" should also include suppliers of PC OS.<sup>898</sup> Moreover, the same respondent suggested that the arbitration should not be only in the US, but also provided in the EEA upon request of the requesting party.<sup>899</sup>
- (795) Several respondents submitted that the Commitments should include an anti-circumvention clause. A respondent submitted that such a clause "*will also need to include refraining from implementing any technical or contractual measure in exercise of Microsoft Intellectual Property Rights preventing or limiting the exercise of the right of the consumer to use any Eligible Game, including under the EULA*".<sup>900</sup>

#### 8.3.3. The Commission's Assessment of the Initial Commitments

- (796) At the outset, the Commission recalls that to be acceptable, the proposed commitments must be capable of rendering a concentration compatible with the internal market by preventing a significant impediment to effective competition in all relevant markets in which competition concerns were identified. In this case, the

---

<sup>891</sup> A market participant's reply to Questionnaire 02\_Competitors – Commitments, question D.C.11 [ID6670].

<sup>892</sup> Replies to Questionnaire 02\_Competitors – Commitments, question D.C.12.

<sup>893</sup> Replies to Questionnaire 02\_Competitors – Commitments, questions D.C.20 and D.C.21.

<sup>894</sup> Replies to Questionnaire 02\_Competitors – Commitments, question D.C.A.1.

<sup>895</sup> Replies to Questionnaire 02\_Competitors – Commitments, question D.C.A.3.

<sup>896</sup> Replies to Questionnaire 02\_Competitors – Commitments, question D.E.1.

<sup>897</sup> Replies to Questionnaire 02\_Competitors – Commitments, question D.E.2.

<sup>898</sup> Replies to Questionnaire 02\_Competitors – Commitments, question D.E.2.

<sup>899</sup> Replies to Questionnaire 02\_Competitors – Commitments, question D.E.2.

<sup>900</sup> A market participant's reply to Questionnaire 02\_Competitors – Commitments, question E.8 [ID6670].

commitments needed to eliminate the competition concerns identified by the Commission with respect to: (i) the at least EEA-wide distribution of console and PC video games via cloud game streaming services; and (ii) the worldwide supply of PC OS.

- (797) In accordance with the principles of the Merger Regulation on the acceptability of commitments, the Commission has assessed whether the Initial Commitments:
- (a) are suitable and sufficient to eliminate the competition concerns; and
  - (b) are capable of being implemented effectively in a timely manner.
- (798) Against this background, the Commission concluded that, despite a number of positive elements, the Initial Commitments fell short of completely removing the Commission's competition concerns as set out in this Decision.

#### 8.3.3.1. Shortcomings of the Initial Commitments

- (799) The Commission considers that the market participants have flagged a number of important elements that could undermine the suitability and effectiveness of the Initial Commitments.
- (800) First, the Commission considers that the definition of Eligible Streaming Services is not sufficiently clear and entails a risk of circumvention. The definition contains two alternatives. Whether the first is fulfilled depends on an "Authorized Store", which is defined as either the Microsoft Game Store or an authorized third-party store. Thus, in order to qualify as an Eligible Streaming Service under the first alternative, a streaming provider either depends on the willingness of Microsoft to grant access to its own store or on third parties to do the same. Many of the Activision Blizzard games, however, have not been sold on third-party PC stores pre-Transaction. Thus, if Microsoft would refuse access to the Microsoft Game Store, even if third party game stores would give access to their stores to cloud-game streaming providers, players that have purchased games on Battle.net would still not be able to stream their games. Therefore, absent an obligation for the Notifying Party to allow streaming providers to link user accounts with Battle.net under certain conditions, the first alternative is not suitable to ensure that cloud game streaming providers can qualify as Eligible Streaming Service.
- (801) The second alternative is vague. The Commission considers that the market participants who did so are right to point out that it is not clear under which conditions a streaming provider can qualify as Eligible Streaming Service under the second alternative. In particular since the first alternative is not suitable to ensure that Activision Blizzard games can be streamed, this lack of clarity about the scope of the second alternative is a significant shortcoming because the second alternative is the only one that potentially would not depend on Microsoft's cooperation.
- (802) Second, market participants have rightfully pointed out that the Commission has raised concerns for PC and console games where the Initial Commitments only foresee licenses for PC games. Even though the cloud game streaming of console games by third-parties might currently not exist, console manufacturers have their own cloud game streaming services and are amongst the most successful cloud game streaming providers. As discussed above, cloud game streaming could blur the distinctions between PC and console games since both can be played on the same end-devices when streamed. Therefore, excluding potential console-based cloud game streaming providers – and the console games that have and will be purchased in their stores – significantly limits the scope of the licenses.

- (803) Third, the scope of the Consumer License is too limited with regard to games that consumers are allowed to stream. Even though today the vast majority of games are purchased individually, multi-game subscription services are becoming more popular. The more popular multi-game subscription services become, the less effective a remedy would be that only includes purchased games. If Activision Blizzard games would only be available on Microsoft's multi-game subscription service Game Pass, and gamers would not have the right to stream games included in Game Pass on a rival cloud game streaming service, this may lead to gamers not being able to stream Activision Blizzard games on rival cloud game streaming services and hence affect competition.
- (804) Fourth, similarly to the previous point but with regard to different business models streaming providers might pursue, the Commission considers that the scope of the Streaming Provider License Commitment should be extended to allow streaming providers that are licensed by the Notifying Party to offer Activision Blizzard games for purchase or as part of a multi-game subscription service to also stream these games under the commitments. On a related point, market participants have rightfully pointed out that the provision about revenue sharing could be misunderstood as stating that any revenue achieved by the cloud game streaming providers would go to Microsoft. This is in particular relevant for providers that do not only stream games, but also sell games in their stores or operate a multi-game subscription service.
- (805) Fifth, the Commission considers that since the streaming rights are based on the license for the actual game that has been purchased, there would not be much room to deteriorate the availability of the same game with the same features for cloud game streaming providers. However, since this is an important point for the effectiveness of the proposed commitments, the Commission considers that the commitments should clarify explicitly that the content and features of the games available for streaming will be the same as those available for download.
- (806) Sixth, with regard to the fast-track dispute resolution mechanism, the Commission considers that the fast-track arbitration procedure under the Initial Commitments should take place within the EEA, and not only in the US as foreseen by the Initial Commitments.

#### 8.3.3.2. Other concerns raised by market participants

- (807) The Commission considers that some concerns voiced in the First Market Test go beyond what is needed to eliminate the competition concerns identified by the Commission. This includes in particular the position that Microsoft should be obliged to allow the at least EEA-wide distribution of Activision Blizzard's games via cloud game streaming services and the inclusion of Activision Blizzard's games in combined multi-game subscription/cloud game streaming offers. The same applies to the concerns voiced about not making Game Pass available on other PC OS, degrading PC versions in general compared to Xbox versions, the impact of the remedy on the availability of games for non-Windows PC OS and about the license fees for the Windows PC OS payable by cloud game streaming providers.

##### 8.3.3.2.1. Distribution of Activision Blizzard games

- (808) As the licenses only apply to games that a consumer has purchased, a few respondents have voiced concerns that the remedy would not ensure the availability of Activision Blizzard games for purchase in the first place. This concerns has in particular been voiced for specific console versions of Activision Blizzard games.

The argument has been made that in order to ensure that these games can be streamed, Microsoft should be obliged to allow third-parties to sell these games. In addition, the same market participant has argued that Microsoft should also be obliged to ensure that the games that are being made available for purchase have the same quality, the same content and come with a technical parity obligation.<sup>901</sup>

- (809) The Commission considers that such obligation is not necessary to address the Commission's competition concerns. This will be explained for console games on the one hand and for PC games on the other hand. For console games, Section 7.4.3 contains a detailed assessment of whether Microsoft could foreclose rival distributors of console games. The Commission considered that Microsoft would not have the ability to foreclose due to possible counter-strategies of Sony, that Microsoft would not have incentive to foreclose rival distributors of console games, and that a foreclosure strategy would not result in a significant impediment to effective competition.
- (810) The conduct assessed by the Commission in Section 7.4.3 is exactly the same as now alleged by the market participant in the context of the remedy assessment: by not making its games available on a rival console platform, Microsoft could prevent the cloud-game streaming of Activision Blizzard games since both licenses under the commitments require a customer to be able to purchase the respective game in the first place.
- (811) For the same reasons that led the Commission to conclude that there would be no concerns in the overall market for the distribution of console games, the Commission finds that such potential behaviour of Microsoft would not put the effectiveness of the remedy proposal into question. First, as discussed in Section 7.4.3, Sony would be able to take measures that counter the effect of any such steps by Microsoft. In addition, Microsoft would sacrifice very significant revenues from not selling Activision Blizzard Games on PlayStation that will not be off-set by the gains of such strategy. Further, when considering the remedy, it needs to be taken into account that at the time of the Decision, no player of Activision Blizzard console games is able to stream the games. This would change if the Commitments would cover streaming rights for console games, as suggested in recital (802) above.
- (812) The same reasoning applies for a partial deterioration of the games available on other platforms. As discussed in Section 7.4.3, the Commission has no concerns about such a partial foreclosure. This assessment has been based on the impact for the overall market for game distribution on consoles. It does not change when taking only the cloud game streaming part of such market into account, which only accounts for a very small fraction of the overall market.
- (813) Similar considerations apply for cloud game streaming on PCs. Even though the Commission did not assess a potential foreclosure of PC games because of the limited combined market shares of Microsoft and Activision Blizzard on the distribution market, the Commission considers that it is highly unlikely that Microsoft would not sell PC games anymore in order to prevent them from being streamed. As regards the hypothetical scenario in which Microsoft could try to prevent the cloud game streaming of Activision Blizzard games by not making them available for purchase but only offer them as part of Game Pass, its multi-game subscription service, the Commission notes that it agrees that games available as part of a multi-

---

<sup>901</sup> Observations on Microsoft's Commitments Proposal, dated 27 March 2023, paragraph 3, third and fourth bullet point [ID6492].



game subscription service should be included in the licenses under the commitments.<sup>902</sup>

(814) For these reasons, the Commission concludes that the proposed remedies do not need to oblige Microsoft to make its console and PC games available to rival distributors of console or PC games or to commit to additional parity obligations.

8.3.3.2.2. No obligation to make games available as part of a multi-game subscription service

(815) As regards complaints that the remedies do not include an obligation of Microsoft to allow Activision Blizzard games to be included in combined multi-game subscription/cloud game streaming services, the Commission only has competition concerns for cloud-game streaming services. The fact that a service provider may combine different components does not mean that all such potential components need to be addressed by the remedy as long as the remedy is sufficient to address the competition concerns in the market that gives rise to these concerns.

(816) This is not to say that under certain circumstances, remedies do not need to include elements for which no competition concern have been raised. This can be the case, for example, to ensure the viability of a divestiture business. The present situation, however, is different: to address foreclosure concerns, Microsoft offers to make the potentially foreclosed assets available under a royalty-free license to a broad range of companies. The viability of the business models of these companies is not a question for the commitments as long as it is not deteriorated by the commitments.<sup>903</sup>

(817) In this regard, the Commission notes, first, that if Activision Blizzard's games are not and were not expected to be made available for multi-game subscription services, this applies equally to multi-game subscription services that also offer cloud-game streaming – that hence are unable to stream games accessed on the basis of multi-game subscription services. This is different for cloud-game streaming services with other business models, as the Commission found that Activision Blizzard would have made its games available for cloud-game streaming services with a BYOG, buy-to-play or free-to-play business model (see Section 7.4.5.2.2).

(818) In the context of the remedies, these different findings whether Activision Blizzard would have made its games available for cloud game streaming or whether it would have made its games available to be included in multi-game subscription services are relevant as well. Following the transaction, Microsoft will be able to include Activision Blizzard games in its own multi-game subscription service Game Pass and in Game Pass Ultimate that includes cloud-game streaming services. This, however, is not an anti-competitive effect of the merger. The concern identified in Section 7, which is addressed by the proposed commitments, is that, if Microsoft would be the only cloud game streaming provider able to stream Activision Blizzard games, it would foreclose competing distributors of console and PC video games that offer cloud game streaming services by restricting their access to Activision Blizzard's PC and console games.

(819) Moreover, the Commission notes that the commitments allow companies that offer combined multi-game subscription/cloud game streaming services to stream Activision Blizzard games. A cloud game streaming provider that combines multi-game subscription with cloud-game streaming services could, for example, offer its

---

<sup>902</sup> See recital (803).

<sup>903</sup> Concerns relating to the revenue split under the commitments have been discussed in recital (804).

subscribers to also stream Activision Blizzard games if they have purchased the respective titles separately.

- (820) Finally, as set out in recital (803) above, the Commission agrees with concerns voiced during the market test that the license requires consumers to purchase a game in order to stream it. Under a hypothetical scenario in which multi-game subscription services would become significantly more important and a large number of consumers would opt to subscribe to such services rather than purchasing games, the licenses under the Initial Commitments would be less effective to address the Commission's concerns.
- (821) For the reasons set out in the previous recitals, the Commission considers that, the commitments do not need to entail an obligation to include Activision Blizzard's games in multi-game subscription services in order to address the Commission's competition concerns. However, inasmuch as Eligible Games are included in multi-game subscription services that allow for streaming, including Microsoft's own multi-games subscription service, they should be made available for streaming by rival cloud game streaming services under the commitments.

#### 8.3.3.2.3. No obligation to make Game Pass available on other PC OS

- (822) One market participant claimed that Microsoft should be obliged to make its own cloud game streaming service Game Pass Ultimate available on non-Windows PC OS like ChromeOS or MacOS. Otherwise, the remedy would not address the Commission concerns relating to the conglomerate effects of the Transaction resulting from the relationship between Activision Blizzard games and Microsoft's Windows.
- (823) The Commission considers that making Game Pass Ultimate available on other PC OS is not necessary to address the concerns expressed in Section 7.5.3. As set out in that section, the Commission is concerned that Microsoft could not make Activision Blizzard games available on other PC OS. Since the Commission had no concerns for making these games natively available (see Section 7.5.2), the Commission's concerns only related to cloud game streaming – either by third parties or by Microsoft (at the time of the Decision as part of Game Pass). As described in Section 7.5.3, keeping Activision Blizzard's games from such other PC OS could further strengthen Microsoft's position in PC OS.
- (824) However, the fact that the Commission described two ways in which consumers could access the games via cloud game streaming on rival PC OS (either via third-party providers or via Microsoft's Game Pass Ultimate), does not imply that both ways need to be subject to commitments in order to dispel the competition concerns.
- (825) If the proposed licenses ensure that rival cloud game streaming services will have access to Eligible Games, they equally ensure that Eligible Games will be made available on other PC OS. Cloud game streaming providers will have an incentive to reach all potential customers. By empowering them to stream the Activision Blizzard games, it can be assumed that some cloud game streaming providers will offer their services on other PC OS.
- (826) Even though it might remain more attractive for some consumers to subscribe to Game Pass instead of using third-party cloud game streaming providers, if they were to offer Activision Blizzard games, the negative impact on competition by the conglomerate concerns would not materialise if, at the same time, the Activision Blizzard games can be accessed through other cloud game streaming services. As

soon as this is the case, Microsoft does not need submit remedies that are necessary to address the Commission's concerns.

#### 8.3.3.2.4. No obligation to make games available on non-Windows PC OS

- (827) The same market participant also criticised the Initial Remedies for not including an obligation to make Activision Blizzard games natively available on non-Windows PC OS. The Commission agrees that if several versions of PC games are available for download, all of them should be made available for streaming. However, as set out in Section 7.5.2, the Commission has no competition concerns about Microsoft deciding not to make Activision Blizzard games natively available on non-Windows PC OS..
- (828) For the same reason, the Commission does not consider it necessary for Microsoft to commit to porting Windows games to non-Windows PC OSs. The concerns Microsoft has to address with the remedies are limited to making games available via cloud game streaming services.

#### 8.3.3.2.5. Risk of degrading Activision Blizzard games on PC

- (829) One market participant voiced concerns that Microsoft might have an incentive to degrade PC versions of Activision Blizzard games in order to be able to offer a better gaming experience on its own cloud game streaming services, which is based on Xbox versions of games, compared to cloud game streaming providers that stream PC versions. The market participant argues that therefore Microsoft should be obliged to provide its own cloud game streaming service on rival PC OS.
- (830) At the outset, the Commission notes that not including console versions of games into the Consumer License and the Streaming Provider License is a shortcoming of the commitments that needs to be addressed. However, the Commission does not see a risk that Microsoft would have an incentive to degrade PC versions of games in order to offer a better cloud game streaming experience with its own streaming service. If Microsoft were to pursue such strategy, it would deteriorate the gaming experience for all PC players, regardless of whether they intend to download or stream the game. Thereby, Microsoft would make Activision Blizzard games less attractive for all consumers that play on a PC platform. This would likely lead to less sales of PC games and a potential reputational damage with PC players. In addition, Microsoft would make its own PC OS Windows, which is used by most PC gamers, less attractive.
- (831) The benefits of such strategies, on the other hand, would be limited. Microsoft's own streaming service might become more attractive to users interested in streaming Activision Blizzard games. Given that cloud game streaming represents only a very limited percentage of the overall gaming market, this effect would likely be small compared to the disadvantages for all PC players.
- (832) For these reasons, the Commission does not consider that Microsoft needs to commit not to deteriorate PC games in order to address the competition concerns raised by the transaction.

#### 8.3.3.2.6. Availability of Activision Blizzard games on non-Windows PC OS used by cloud-game streaming providers

- (833) One market participant complained that by allowing only the existing versions of Activision Blizzard games to be streamed, this would in practice result in only Windows versions becoming available. This would in turn "cement" Windows'

position as dominant PC gaming OS which would leave also cloud game streaming providers no choice but to pick Windows for their servers.

- (834) In this regard, the Commission notes that the competition concerns resulting from the merger do not relate to the supply of server OS. Therefore, the commitments submitted by the Notifying Party do not need to address the availability of Activision Blizzard games on non-Windows OS used by cloud game streaming providers in their servers.
- (835) As set out in recitals 601 and 699 above, the Commission notes that already pre-Transaction, Activision Blizzard did not develop new versions of its PC games for non-Windows PC OS and there is no indication that this would have changed absent the Transaction. Moreover, this was not only the case for Activision Blizzard games, but also for most developers of PC games.
- (836) On the other hand, pre-Transaction, the majority of PC-based cloud game streaming services run on Windows PC OS, including Nvidia's GeForce NOW and Amazon's Luna.<sup>904</sup>
- (837) The Commission considers that neither the Transaction, nor the proposed Commitments would change this pre-existing situation.

#### 8.3.3.2.7. Fees for Windows server OS

- (838) A few market participants have complained about the fees payable by cloud game streaming providers for the Windows OS on their servers. These concerns are, however, not merger specific. Even before the transaction and without the licenses under the Initial Commitments, cloud game streaming providers have to license Windows for their servers if they want to stream Windows games. They can opt to use another PC OS but will then not be able to stream all games that are available for Windows.

#### 8.3.3.3. Overall Assessment of the Initial Commitments

- (839) In light of the above considerations, the Commission considers that by offering a Consumer License and a Streaming Provider License, the commitments proposed by the Notifying Party seem capable of addressing the Commission's competition concerns. Even despite the criticism about the Initial Commitments, the market test resulted in on average positive feedback to questions asking whether overall, the Initial Commitments could address the identified competition concerns in the market for the distribution of PC video games and to the same questions for competition concerns in PC OS. In particular, the Commission notes that while several observations have been made about the scope of the commitments or potential circumvention risks, only very few market participants have raised fundamental concerns, that the Commission does not share for the reasons discussed in the previous Section 8.3.3.2.
- (840) Furthermore, the agreements already entered into by Microsoft after negotiations with cloud game streaming providers mirror the key elements of the Streaming

---

<sup>904</sup> See: The Verge, "Amazon's Luna game streaming services is powered by Windows and Nvidia GPUs", 2020, <https://www.theverge.com/2020/9/25/21455610/amazon-luna-game-streaming-windows-nvidia-gpu-servers> (last accessed 23 April 2023), [ID7199]: "*Amazon's new Luna cloud gaming platform is powered by Windows servers and Nvidia GPUs. Luna supports more than 100 games thanks to this Windows support, allowing developers to quickly move their existing Windows games over to an AWS instance and provide cloud streaming access to subscribers. This backend Windows support also allows publishers like Ubisoft to host their own digital services (Uplay) on Amazon's Luna platform.*"

Provider License available to all other providers of cloud game streaming services. This shows that the terms of the license correspond to market conditions and can be applied to other providers without giving rise to significant implementation risks.

- (841) However, due to a number of shortcomings relating to various definitions used in the Initial Commitments and regarding the lack of clarity on crucial elements of the proposed commitments, the Commission considers that the Initial Commitments are insufficient to address the competition concerns outlined in Section 7, as they are not comprehensive and effective from all points of view.

#### **8.4. The Revised Commitments**

##### *8.4.1. Description of the Revised Commitments*

- (842) In order to address the concerns expressed by the Commission based on the replies of market participants to the First Market Test, the Notifying Party submitted Revised Commitments on 3 April 2023.

- (843) With regard to the overall scope of the commitments, the Revised Commitments contained notably the following changes:

- (a) The definitions of an Authorized Game Store and of Eligible Games are extended to also cover console games.
- (b) In addition, the definition of Eligible Games clarifies that in case there are different versions of a PC game for different operating systems, each of these versions are Eligible Games. The definition of Eligible Games further includes all additional content that is made available for Eligible Games, such as add-ons, download content or in-game purchases.
- (c) The definition of a Streaming Service was expanded to cover a cloud game streaming service that allows Consumers to play, from the service provider's cloud-based servers, PC or console games for which the Consumers have already obtained a license for download of the game (including through either buy-to-play, free-to-play, or subscription).

- (844) With regard to the Consumer License Commitment, it was expanded to Consumers *“that have a license for download of the game (including through either buy-to-play, free-to-play, or subscription)”*.

- (845) The Streaming License Commitment was modified as follows:

- (a) The Notifying Party commits itself to ensuring *“that the Microsoft Game Store will permit a Streaming Service to provide access to PC versions of Eligible Games and, with consumer consent, provide access to Entitlement Data through a standard interface. This obligation is limited to Streaming Services that are already licensed to provide cloud game streaming by at least one Major Game Publisher”*. This additional commitments introduced two new defined terms: “Entitlement Data” is defined as the list of games for which a consumer has obtained a license on the Microsoft Game Store and “Major Game Publisher” is defined as Tencent, Valve Corporation, Nexon, NetEase, EA, SmileGate Embracer (THQ) - Perfect World, Roblox Corporation, Take Two, Epic Games and Ubisoft. In this context, the definition of an Eligible Streaming Service was also clarified to include under the first alternative Streaming Services that are granted access in accordance with this new paragraph.

- (b) With regard to the definition of Major Game Publishers, the Revised Commitments also include a review clause allowing the Commission to amend and/or expand the definition of Major Game Publisher by replacing individual publishers with other companies and/or by adding new companies to the list of Major Game Publishers, in the event that the market structure with respect to game publishers changes during the term of the Commitments.
  - (c) The date of release was clarified to cover Eligible Games for streaming from the “availability of the respective game” on a Microsoft Game Store or any other Authorized Game Store, whichever date is the earliest.
  - (d) The revenue split between Microsoft and the Eligible Streaming Services (i.e. the royalty-free license), was clarified to refer to the streaming of Eligible Games and not to impact the allocation of revenue in case Eligible Streaming Services also offer Eligible Games for purchase, or as part of a multi-game subscription service under a respective agreement with Microsoft.
  - (e) With regard to third-party IP rights, the revised Streaming Provider License Commitment clarified the extent of the responsibilities of the Eligible Streaming Services for securing such rights. Moreover, it clarified that *“Microsoft will not invoke the existence of any third-party public performance or similar licenses that are not owned by Microsoft, if any, as a reason for seeking to invalidate the Streaming Provider License”*. This clarification is also mirrored in the obligations of the Notifying Party towards the Monitoring Trustee. The Revised Commitments state in this regard that if the Monitoring Trustee, acting reasonably, suspects that Microsoft is using such third-party rights to circumvent the application of the Commitments, Microsoft shall bear the burden of proof to demonstrate that Microsoft is acting in good faith and without intention to frustrate the application of the Commitments.
- (846) Finally, with regard to the arbitration procedure, the Revised Commitments were modified to allow arbitration to take place, at the choice of the cloud game streaming provider requesting it, in Brussels, Belgium, or London, UK, in addition to New York, US.

#### 8.4.2. *Results of the Second Market Test*

- (847) The Commission launched a market test of the Revised Commitments on 4 April 2023 and received responses from the large majority of market participants that had replied to the First Market Test.
- (848) Overall, the feedback regarding the changes in the commitments was positive. Many respondents acknowledged the improvements over the Initial Commitments in the First Market Test. The majority of respondents that expressed a view consider that the Proposed Commitments:
- (a) taken together, include all the necessary elements for a provider of cloud game streaming services to effectively compete in the market for the distribution of console and PC video games on a lasting basis;<sup>905</sup>
  - (b) will address the identified competition concerns in the market for the supply of PC OS and will ensure that the conditions of competition in this market are at least as competitive as before the Transaction;<sup>906</sup> and

---

<sup>905</sup> Replies to Questionnaire 03\_Market test revised Commitments, question E.1.

<sup>906</sup> Replies to Questionnaire 03\_Market test revised Commitments, question E.11.

- (c) are sufficiently clear and capable of being implemented swiftly.<sup>907</sup>
- (849) However, several market participants have signalled the need to still further clarify some formulations in the Commitments, as set out below.
- (850) Regarding the definition of Eligible Games, the majority of respondents that expressed a view on this question submitted that the revised scope of the definition is sufficient to ensure that all games that have been developed by Activision Blizzard in the past and would have been developed by Activision Blizzard absent the Transaction in the future are included.<sup>908</sup> The latter is particularly important to ensure that Microsoft will not be able to circumvent the commitments by moving games and/or development teams from Activision Blizzard studios to other studios controlled by Microsoft that are not subject to the commitments. However, one market participant criticized that the Commitments do not oblige Microsoft to allow for the distribution of console games, but only grants a license to stream games that are already available for distribution.<sup>909</sup> The majority of respondents that expressed a view also considered that the revised definition (which further clarifies that it includes potential different versions of PC games for different OS as well as all additional content of Eligible Games, such as add-ons, download content or in-game purchases) is sufficiently broad to enable a provider of cloud game streaming services to effectively compete in the market for the distribution of video games on PC or console.<sup>910</sup> One market participant submitted that the titles included appear to be comprehensive, and that the revised commitments address some concerns related to content parity and release parity across PC OS. However, the respondent was still concerned about other elements of parity (such as price, bug fixes, quality of content, latency) and therefore proposed to include broader parity language.<sup>911</sup>
- (851) Regarding the definition of an Authorised Game Store, some market participants submitted that while the license now covers also games available via a multi-game subscription service, the definition of Authorised Game Store is still limited to a store that sells Eligible Games.<sup>912</sup>
- (852) Furthermore, several market participants pointed out that the definition of Microsoft Game Store should not only include Battle.net and any successor store but also any other digital PC game store owned by Microsoft and in particular the current Microsoft Store. In this regard, one market participant argued that without such an amendment, Microsoft could shift Activision Blizzard games from Battle.net to the Microsoft Store without closing Battle.net. If that were to be the case, it would be unclear under the definition of Microsoft Game Store whether the Microsoft Store would be a successor to Battle.net.<sup>913</sup>
- (853) With regard to the Consumer License Commitment, the majority of respondents that expressed a view on this question considered that the revised Consumer License Commitment will enable Consumers to play Eligible Games they own (either buy-to-

---

<sup>907</sup> Replies to Questionnaire 03\_Market test revised Commitments, question E.3.

<sup>908</sup> Replies to Questionnaire 03\_Market test revised Commitments, question D.A.1.

<sup>909</sup> Observations on Microsoft's revised cloud gaming commitments of 11 April 2023, paragraph 2 [ID7042].

<sup>910</sup> Replies to Questionnaire 03\_Market test revised Commitments, question D.A.3.

<sup>911</sup> A market participant's reply to Questionnaire 03\_Market test revised Commitments, question D.A.4 [ID7096].

<sup>912</sup> Replies to Questionnaire 03\_Market test revised Commitments, question D.A.4.

<sup>913</sup> A market participant's reply to Questionnaire 03\_Market test revised Commitments, question D.C.2 [ID7096].

play or free-to-play) or are entitled to access (i.e., via a subscription service) on a Streaming Service of their choice.<sup>914</sup>

- (854) Asked about the Streaming Provider License Commitment, a majority of respondents that expressed a view on this question submitted that the obligation of Microsoft to grant access to the Microsoft Game Store will allow interested Streaming Providers to qualify as an “Authorized Game Store” under the first alternative of the definition of an Eligible Streaming Provider.<sup>915</sup> However, some market participants suggested that, in the same way as Microsoft commits to pass-on information about game data on Battle.net, it should do the same about Game Pass, allowing third-party cloud game streaming providers to verify whether players have subscribed to Game Pass and have a license to stream Activision Blizzard games included in all the Notifying Party’s multi-game subscription service.<sup>916</sup>
- (855) Concerning the list of Major Game Publishers, several market participants considered the list to be too restrictive. They suggested that the list should be expanded to include more publishers, such as Square Enix, Bandai Namco, Sony and Nintendo. In addition, one market participant pointed out that under the current wording of the new obligation to give access to Entitlement Data, it is not clear whether the Streaming Providers should be licensed by a Major Game Publisher at the time they seek access to the Microsoft Game Store or whether they need to be licensed already at the time of the Decision.<sup>917</sup>
- (856) Furthermore, the definition of Eligible Streaming Service has been criticised as being unclear about whether a Streaming Service can qualify as an Eligible Streaming Service when it has a business model other than the bring-your-own-game business model, e.g., a subscription-based business model, hybrid business model or any other business model. According to this market participant, all streaming providers should be able to qualify as Eligible Streaming Service as long as they offer the streaming of Eligible Games under the Consumer License.<sup>918</sup>
- (857) In addition, market participants raised some smaller clarification points. One respondent, for example, submitted that, in order to precisely define the scope of the Revised Commitments, the mentioning of “download” should be deleted in the definition of Streaming Service and in paragraph 2 of the Revised Commitments.<sup>919</sup>
- (858) Another market participant pointed out that it currently uses access via a public application programming interface (“API”) to check whether a consumer has acquired a license for a game. The market participant argued that the second alternative of the definition of an Eligible Streaming Service is too vague to ensure that such approach will fall under the definition.<sup>920</sup>
- (859) One market participant repeated the arguments already made during the First Market Test that Microsoft should be obliged to distribute games to console distributors and

---

<sup>914</sup> Replies to Questionnaire 03\_Market test revised Commitments, question D.B.1.

<sup>915</sup> Replies to Questionnaire 03\_Market test revised Commitments, question D.C.1.

<sup>916</sup> Replies to Questionnaire 03\_Market test revised Commitments, question D.C.2.

<sup>917</sup> Replies to Questionnaire 03\_Market test revised Commitments, questions D.C.3 and D.C.4.

<sup>918</sup> Replies to Questionnaire 03\_Market test revised Commitments, question D.B.2.

<sup>919</sup> A market participant’s reply to Questionnaire 03\_Market test revised Commitments, questions D.B.2 and E.6 [ID6979].

<sup>920</sup> A market participant’s reply to Questionnaire 03\_Market test revised Commitments, question D.C.3 [ID6912].



that there should be a parity obligation when comparing different console versions.<sup>921</sup> Another market participant also reiterated its previous argument that Microsoft should be obliged to make its own streaming services available on non-Windows PC OS and that there should be a parity obligation between Microsoft's own streaming service and third-party streaming services.<sup>922</sup>

#### 8.4.3. *The Commission's assessment of the Revised Commitments*

(860) The Commission considers that the Revised Commitments address several of the issues that have been criticized in the First Market Test. However, taking the feedback during the Second Market Test into account, the Commission considers that there are additional elements that require further clarifications in order to prevent a circumvention of the commitments and ensure that they are future-proof.

##### 8.4.3.1. Shortcomings of the Revised Commitments

(861) First, the definition of Microsoft Game Store as Battle.net or any successor store could give rise to a circumvention risk should Microsoft decide to shift games from Battle.net to another store without discontinuing Battle.net. Even though in such case the other store might have been considered a (partial) successor of Battle.net, the Revised Commitments contain a significant element of uncertainty in a definition that is central to the effectiveness of the commitments. Therefore, the Commission considers that the limitation of the definition of Microsoft Game Store to Battle.net is a shortcoming that could undermine the remedy implementation in the future.

(862) Second, the Commission notes that the sharing of Entitlement Data that has been introduced in the Revised Commitments is limited to games purchased on the Microsoft Game Store, but does not extend to games accessed via its multi-game subscription service Game Pass. Since the Commission does not consider it likely that Microsoft would decide to stop selling games on a pay-to-play basis and make them only available as part of a multi-game subscription model, this limitation of Entitlement Data does not seem to create a risk of circumvention of the commitments. Based on the evidence it gathered in its market investigation, the Commission considers that Microsoft will likely continue to offer Activision Blizzard titles for buy-to-play, in addition to including them in its multi-game subscription service Game Pass.<sup>923</sup> However, in a hypothetical scenario in which multi-game subscription services and in particular Game Pass become more relevant in the future, the obligation to share Entitlement Data as envisaged under the Revised Commitments would become less effective. As Microsoft is not obliged under the Revised Commitments to make its games available for distribution by third parties, it is important that Microsoft has an obligation to share Entitlement Data also as regards games accessed via its multi-game subscription service Game Pass in order to allow for the streaming of Eligible Games. Limiting the Entitlement Data to games purchased on the Microsoft Games Store therefore risks undermining the effectiveness of the commitments.

---

<sup>921</sup> Observations on Microsoft's revised cloud gaming commitments of 11 April 2023, paragraph 2 [ID7042].

<sup>922</sup> A market participant's reply to Questionnaire 03\_Market test revised Commitments, question D.B.2 [ID7096].

<sup>923</sup> Form CO, Annex 6.2 - "Project Denali: Activision Blizzard", January 2022, slide 7 and Annex 6.3 - "Project Denali: Activision Blizzard", January 16, 2022, slide 19 states that "Continue developing all acquired games and franchises, and continue selling on all relevant platforms (e.g., Android, iOS, PlayStation, Steam, Switch, Windows, Xbox, etc.)".

- (863) Third, market participants are right to point out that the definition of Authorised Game Store should expressly include the distribution of Eligible Games via multi-game subscription services. The Commission does not consider it necessary that Microsoft starts licensing Activision Blizzard games to rival multi-game subscription services in order to address the competition concerns identified by the Commission (see Section 7.4.4 above). However, should Microsoft decide to do so following its own business decisions, there might be doubts regarding whether such third-party PC or console game store would have to sell Eligible Games to qualify as an Authorized Game Store, or whether it could qualify as an Authorized Game Store as long as it distributes Eligible Games via a multi-game subscription service. As it is important for the implementation of the remedy that cloud game streaming providers can qualify as Eligible Streaming Service regardless of their business model, this limitation of the definition of an Authorized Game Store impedes the effectiveness of the proposed remedies.
- (864) Fourth, the Commission notes that the Notifying Party has committed to share Entitlement Data only under the requirement that the respective Eligible Streaming Service is licensed to provide cloud game streaming by another established publisher. While this requirement might make entry for new companies more difficult, the Commission acknowledges that such requirement might prevent potential scam sites from using the popularity of Activision Blizzard games from gathering information about their visitors. Also when taking the situation absent the merger into account, even though the Commission concluded that Activision Blizzard would have made its games available for cloud game streaming, it would have been unlikely that Activision Blizzard would have been the first game developer to allow new streaming services to stream their games. Therefore, considering that other game developers have an interest to cooperate with streaming services, the Commission takes the view that the requirement that Eligible Streaming Service must be allowed to stream a game of at least one Major Game Publisher does not undermine the effectiveness of the Revised Commitments.
- (865) However, as pointed out by several market participants, the list of Major Game Publishers seems rather short and arbitrary. In particular when taking into account that a few of these game developers already have an own store and or an own multi-game subscription service, some of them might consider offering an own cloud game streaming service as well. If that were to be the case, these developers might not have an interest anymore to allow third-parties to stream their games as well. In addition, limiting the list of Major Game Publishers to just a few companies is not necessary to ensure that the commitments are not being misused by companies that offer streaming services only to gather data about their users. Even though the Revised Commitments contain a clause that would allow the Commission to amend the list of Major Game Publishers, the Commission considers that such amendment is less effective than starting with broader list of Major Game Publishers in the first place.
- (866) In addition, in order to avoid disputes about the interpretation of the commitments during their implementation, the Commission considers that a market participant was right to point out that streaming providers should be licensed by a Major Game Publisher at the time they seek access to the Microsoft Game Store and not already at the time of the decision. This clarification would ensure that even cloud game streaming services that are not yet licensed by a major Game Publisher at the time of the Decision or do not even exist at the time of the Decision could qualify to become an Eligible Streaming Service at a later stage during the term of the commitments.

- (867) Fifth, to avoid that the definition of a term that is very central to the commitments lacks clarity or could be misunderstood at a later point in time, the Commission notes that the definition of an Eligible Streaming Service is not sufficiently clear about the extent to which it covers different business models. As already mentioned, the Commission takes the view that in order to ensure that the commitments are future-proof, a company should be able to qualify as Eligible Streaming Service regardless of whether it has a bring-your-own-game business model, subscription-based business model, hybrid business model or any other business model as long as it offers the streaming of Eligible Games under the Consumer License. The definition of Eligible Streaming Service is not entirely clear in this regard.
- (868) Finally, in light of the explanations provided by one market participant, the Commission considers that the second alternative of the definition of Eligible Streaming Service is not sufficiently clear about whether access via APIs can fall under this definition. To the extent APIs are currently available and can be used for the purposes of verifying whether a consumer is entitled to stream a game, the commitments should ensure that a company using such access qualifies as an Eligible Streaming Provider.
- (869) In addition, in order to ensure that the situation in particular for cloud game streaming providers that do not have access to an Authorized Store and do not want to use the access provided to the Microsoft Game Store under the Revised Commitments does not deteriorate following the Closing of the Transaction, the Commission considers it a shortcoming that Microsoft could block such APIs following the transaction. By doing so, the Notifying Party could make streaming of Activision Blizzard games more difficult.

#### 8.4.3.2. Other concerns raised by market participants

- (870) One market participant submitted that “*the revised definition of ‘Eligible Games’ does not prevent Microsoft from disadvantaging rival cloud game streaming service providers, relative to Xbox Cloud Gaming, along the following dimensions: prices of games and additional content across different platforms; quality of games and additional content [...]; parity of bug fixes [...]; interoperability of hardware input [...]; levels of responsiveness to gamer interactions and other idiccia of latency across [...]; and other user experience issues*”.<sup>924</sup> The market participant therefore suggested that the proposed commitments should “*include broad parity language that would allow the Commission to step in should Microsoft elect to provide (or lack incentive to avoid providing) degraded versions of Eligible Games to rivals*”.<sup>925</sup> However, the Commission understands that prices and the quality of games would be the same regardless of whether the games are downloaded or streamed, and that the streamable version would be the same as the downloadable one, for all cloud game streaming services (see also the assessment in Section 8.3.3.2.51 above).
- (871) As for the other elements mentioned by the market participant (such as bug fixes, interoperability of hardware input), it is important to differentiate based on whether these elements pertain to the relationship between individual cloud game streaming services and the provider of the OS of the device to which the games are streamed, or whether they concern the relationship between the game developer and publisher and the cloud game streaming service. Only the latter relationship involves Microsoft or

---

<sup>924</sup> A market participant’s reply to Questionnaire 03\_Market test revised Commitments, question D.A.4 [ID7096]

<sup>925</sup> Ibid.

Activision Blizzard and can therefore be impacted by the Transaction. However, Microsoft has no possibility to specifically degrade the gaming experience of games that are being streamed as compared to games being downloaded and played locally.

- (872) With regard to the former relationship between a cloud game streaming provider and a provider of a non-Windows PC OS, both parties in such relationship are independent from Microsoft or Activision Blizzard. Concerns within this relationship are therefore not merger-specific. Furthermore, it is in the interest of every third-party cloud game streaming provider to optimise its service for as many end-devices as possible. Finally, the Commission notes that it has no concerns about whether the PC and a specific console version or the versions for two different consoles are the same in terms of quality (see also Section 8.3.3.2.1).
- (873) Another market participant submitted that the Revised Commitments still did not oblige Microsoft to “license Activision games to distributors of games via cloud gaming services”<sup>926</sup>, i.e. “cloud game streaming providers that sell games to be played via the cloud, and not only those operators that allow consumers to play games that have been bought elsewhere”.<sup>927</sup> In this regard, the Commission notes that already pre-Transaction, Activision Blizzard mainly distributes its PC video games via its first-party store Battle.net, and only recently re-started licensing a limited number of titles to Steam. Based on the evidence on file, the Commission has no indication that this would have changed absent the Transaction.<sup>928</sup> Therefore and as already set out in Section 8.3.3.2.1, the lack of an obligation for Microsoft to license Activision Blizzard games to third-party PC game stores (regardless of whether integrated with a cloud game streaming service or not) does not undermine the effectiveness of the commitments.

#### 8.4.3.3. Overall Assessment of the Revised Commitments

- (874) In light of the above considerations, the Commission considers that the Revised Commitments address the Commission’s main concerns about the Initial Commitments. However, the Second Market Test has shown that a number of provisions still lack clarity. Several of the definitions or obligations that require clarifications constitute crucial elements of the proposed commitments. Without these clarification, the Commission considers that there would be an implementation risk that undermines the effectiveness of the Revised Commitments. Therefore, the Commission considers that the Revised Commitments do not fully address the competition concerns outlined in Section 7.

### 8.5. The Final Commitments

#### 8.5.1. Description of the Final Commitments

- (875) Compared to the Revised Commitments, the Notifying Party has introduced a series of refinements in the Final Commitments, mainly clarifying the scope of the Commitments and limiting the risk of circumvention or misinterpretation of the Commitments.
- (876) The main changes in the Final Commitments are:

---

<sup>926</sup> Observations on Microsoft’s revised cloud gaming commitments of 11 April 2023, paragraph 13 [ID7042].

<sup>927</sup> Observations on Microsoft’s revised cloud gaming commitments of 11 April 2023, paragraph 12 [ID7042].

<sup>928</sup> See also Form RM, paragraph 42.

- (a) The definition of an Authorized Game Store now also covers game stores that distribute Eligible Games via a multi-game subscription service.
- (b) The definition of Entitlement Data also covers Eligible Games for which a consumer has obtained a license via Game Pass. Thus, under the Final Commitments, Microsoft is obliged to provide Eligible Cloud Services that are allowed to stream a game from a Major Publisher with information about games for which subscribers of Game Pass have a license.
- (c) The definition of Microsoft Game Store was amended to include any digital PC game store owned by Microsoft, including Battle.net or any successor store.
- (d) The list of Major Game Publishers was expanded to include Square Enix, Bandai Namco Entertainment, Sony and Nintendo. In addition, it was clarified in the Streaming Provider License Commitment that the determination of whether a Streaming Service is licensed to provide cloud game streaming by another Major Game Publisher would take place at the time the Streaming Service seeks access to a Microsoft Game Store.
- (e) The reference to a download of the game was deleted in the definition of Streaming Service and in the description of the Consumer License.
- (f) For the second alternative of the definition of an Eligible Streaming Service, it was clarified that it includes checking for a license via APIs.
- (g) Microsoft commits not to terminate or degrade the existing availability of access to Eligible Games through applications which do not require integration with an Authorized Game Store, including the availability of public APIs for the Microsoft Game Stores, as available at the Closing Date.
- (h) For new releases, the Streaming Provider License covers Eligible Games, including publicly available beta versions and early access releases, from the moment of availability of the respective game on Game Pass, in addition to the moment of availability on a Microsoft Game Store or any other Authorized Game Store.

#### 8.5.2. *The Commission's assessment of the Final Commitments*

- (877) The Commission concludes that the Final Commitments are capable of eliminating the Commission's competition concerns entirely, are comprehensive and effective from all points of view, proportionate, and capable of being implemented effectively within a short period of time. The Final Commitments implement suggestions made by market participants in the Second Market Test, and the changes they contain by reference to the Revised Commitments concern clarifications or limited amendments to the existing definitions that have been reviewed by market participants. Therefore the Commission considers that it does not need feedback from market participants during an additional market test in order to assess the Final Commitments.
- (878) The Final Commitments constitute an improvement on the Revised Commitments and fully address their shortcomings. Notably by applying the obligation to make Entitlement Data available also to Game Pass, the Commission notes that the licences would remain effective regardless of how multi-game subscription services develop compared to the currently prevalent buy-to-play model. In addition, making the Entitlement Data for Game Pass available to third-party cloud game streaming providers will allow these companies to stream all PC games included in Game Pass to any PC, even if it uses a non-Windows PC OS.

- (879) Taken together, the clarifications in the Final Commitments ensure not only that all potential business models of cloud game streaming providers can benefit from the licenses but also that all currently existing ways to verify whether a consumer has purchased a game on Battle.net fall under the second alternative of the definition of Eligible Streaming Service and will remain available during the term of the commitments. This will allow providers of cloud game streaming services with different business models and different ways of providing access to the games to qualify as Eligible Streaming Service.
- (880) With these clarifications, Microsoft has addressed all issues raised during the Second Market Test that the Commission considered relevant for the effectiveness of the commitments.
- 8.5.2.1. Adequacy of the Final Commitments to address input foreclosure concerns in relation to the distribution of console and PC games via cloud game streaming services
- (881) The Notifying Party presented two licensing commitments in order to address the Commission's competition concerns regarding the targeted input foreclosure of distributors of console and PC games that offer cloud game streaming services, namely the commitment to grant consumers that have a license for a game the right to stream Activision Blizzard's console and PC games, as well as the commitment to grant a royalty-free license to stream Activision Blizzard's console and PC games to Eligible Streaming Services, both for a period of 10 years from the closing of the Transaction. Moreover, the Notifying Party has already entered into license agreement with the rival cloud game streaming services Nvidia GeForce Now, Boosteroid and Ubitus. Taken together, these commitments adequately address the input foreclosure concerns regarding the distribution of console and PC games via cloud game streaming services identified by the Commission.
- (882) The Commission's input foreclosure concerns are based on the importance of Activision Blizzard's console and PC games as an input for rival providers of cloud game streaming services to compete with the merged entity in the distribution of console and PC games via cloud game streaming services. By committing to license Activision Blizzard's console and PC games both to consumers and to eligible cloud game streaming services post-Transaction pursuant to the terms mentioned above (see Sections 8.3.1, 8.4.1 and 8.5.1), the Final Commitments adequately address the Commission's competition concerns in the at least EEA-wide market for the distribution of console and PC games.
- (883) First, the Commission recalls that Activision Blizzard games are not licensed to any cloud game streaming service at the time of the Decision. The Final Commitments ensure that post-Transaction, not only Microsoft can start offering Activision Blizzard games on its own cloud game streaming service, but also several rival cloud game streaming services.
- (884) The Final Commitments are derived from existing commercial frameworks and will therefore be effective immediately. As confirmed by the Notifying Party<sup>929</sup>, but also by the majority of respondents that expressed a view in the First Market Test,<sup>930</sup> the structure of the Consumer License commitment and the Streaming Provider License commitment is based on industry practice, commonly used by publishers, whereby

---

<sup>929</sup> Form RM, paragraphs 50 and 51.

<sup>930</sup> Replies to Questionnaire 02\_Competitors – Commitments, question D.C.18.

licenses are granted to consumers and cloud game streaming providers on PC. The structure of the Final Commitments is therefore well-known to the market. With regard to the Streaming Provider License in particular, the Commission notes that it is in line with the commercial agreements that Microsoft entered into with Nvidia, Boosteroid and Ubisoft which further demonstrates that the terms are adequate and can be implemented.

- (885) Therefore, the Commission considers that the Final Commitments are as effective as a structural divestiture and even have additional benefits that go beyond preserving the situation absent the Transaction. Whatever part of the Activision Blizzard business Microsoft could have offered to divest, such divestiture would not have covered the entire existing and future games of Activision Blizzard. Furthermore, the Commission takes the view that the Final Commitments can be implemented and will be effective. The licenses will apply automatically. The license to consumers will grant to all consumers in the EEA as of day one streaming rights which empower these consumers to benefit from the games they have access to in additional ways that they did not have pre-Transaction. Taking a divestiture remedy as a benchmark for effectiveness and efficiency<sup>931</sup>, the Final Commitments are suitable to address the competition concerns.
- (886) In line with the above, the Commission considers that the Final Commitments have additional benefits that go beyond preserving the situation absent the Transaction, and are therefore more effective in addressing competition concerns than a prohibition. Even though the Commission concluded that absent the Transaction, Activision Blizzard would have made its games available for cloud game streaming, these games are not available at the time of the Decision. Following the Final Commitments, however, all Activision Blizzard games would be immediately available for streaming and will remain available for the duration of the Final Commitments. It is equally important that they are available not only to a handful of already large cloud game streaming providers but to almost all interested cloud game streaming providers. Under both these aspects, the situation following the implementation of the Final Commitments exceeds the conditions that would have prevailed absent the transaction.
- (887) In fact, by making the popular Activision Blizzard games available to all interested providers under a royalty-free license, the Final Commitments can be expected to significantly advance the development of cloud game streaming in the EEA.
- (888) The 10-year duration of both the Consumer License and the Streaming Provider License, in line with the Remedies Notice, means that the commitments may be considered, in this case, to be “equivalent to divestitures in their effects”.<sup>932</sup>
- 8.5.2.2. Adequacy of the Final Commitments to address conglomerate concerns regarding the supply of PC OS
- (889) The commitments presented by the Notifying Party also address the Commission’s conglomerate competition concerns regarding the foreclosure of competing suppliers of PC OS.
- (890) By committing to license Activision Blizzard’s console and PC games both to consumers and to eligible cloud game streaming services post-Transaction pursuant to the terms mentioned above (see Sections 8.3.1, 8.4.1 and 8.5.1), the Commitments

---

<sup>931</sup> Remedies Notice, paragraph 61.

<sup>932</sup> Remedies Notice, paragraph 17.

adequately address the Commission's competition concerns in the worldwide market for the supply of PC OS.

- (891) As already explained in Section 8.3.3.2.6, the Commission considers the availability of Activision Blizzard games via third-party cloud game streaming services addresses the conglomerate concerns set out in Section 7.5.3. In particular, the Commission does not agree with one market participant that argues that making Game Pass Ultimate available on other PC OS would be necessary to address these concerns.
- (892) Third-party cloud game streaming services have every incentive to work towards optimizing their services for any device that meets their technical requirements for the streaming of games. As rival cloud game streaming services are independent of Microsoft, they have an incentive to make the games available as broadly as possible, which will ensure that Activision Blizzard games will be accessible also for gamers using rival PC OS, such as ChromeOS or MacOS.
- (893) Even if not all Eligible Streaming Services might strive to be available on non-Windows PC OS, it is expected that others will.<sup>933</sup> Since the licenses under the Commitments are not limited to a certain number of streaming providers, new and innovative players can enter the market at any time. The fewer cloud game streaming providers offer a good experience on non-Windows PCs, the more attractive it might become for others to compete for these users.
- (894) Following the amendments in the Final Commitment, the Commission furthermore notes that all PC games included in Game Pass (which at the date of this Decision exceed the number of games included for cloud game streaming in Game Pass Ultimate) are included in the licenses under the Commitments and subject to commitments by Microsoft to make the Entitlement Data for its Game Pass subscribers available to cloud game streaming services. Thus, an interested owner of a non-Windows PC could subscribe to Game Pass PC to gain the license to stream the games that are included in Game Pass as well as subscribing to a cloud game streaming service. By combining these two services, such consumer could play the games included in Game Pass on his non-Windows PC.

#### 8.5.2.3. Implementation, Monitoring Trustee and Dispute Resolution

- (895) The Commission considers that the monitoring and dispute resolution provisions set out in the commitments (see Section 8.3.1.3 and recital 847 above) will ensure the effective implementation of and compliance with the Consumer License Commitment and the Streaming Provider License Commitment.
- (896) In particular, first, the Commission notes that the Notifying Party cannot close the Transaction before having appointed a Monitoring Trustee. Second, the Monitoring Trustee may appoint advisors (in particular an IT expert with the capability to monitor the correct implementation of the Commitments), if the Monitoring Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the mandate. Third, the Final Commitments contain two clauses that impose on Microsoft the burden of proof of showing that (i) new PC or console games or franchises do not qualify as an Eligible Game under the wording or purpose of the Commitments; and (ii) with regard to

---

<sup>933</sup> A majority of respondents to the First Market Test considered that already the Initial Commitments will ensure that Activision Blizzard games will be available for streaming on PC OS that compete with Windows OS. Replies to Questionnaire 02\_Competitors – Commitments, question D.D.1.



third-party IP rights, Microsoft is acting in good faith and without intention to frustrate the application of the Commitments.

- (897) With regard to the Consumer License Commitment, given the fact that it consists in Microsoft amending its end-user license agreements in accordance with the Annex 3 of the Commitments, the Commission considers that this commitment will be implemented as of the date of closing of the Transaction.
- (898) As for the Streaming Provider License Commitment, the Final Commitments foresee a fast-track dispute resolution procedure in the event that an Eligible Streaming Service (including NVIDIA, Boosteroid and Ubitus), showing a sufficient legitimate interest, claims that Microsoft is failing to comply with its obligations arising from the Commitments. The dispute resolution procedure can take place in Brussels, Belgium, at the request of the Eligible Streaming Service. The Commission considers that these provisions allow for addressing any disputes between the Notifying Party and streaming providers in a timely manner.

#### 8.5.2.4. Conclusion

- (899) The Commission therefore concludes that the Final Commitments are capable of eliminating the Commission's competition concerns and are capable of being implemented effectively in a timely manner. Moreover, they are proportionate to the competition concerns identified by the Commission.

### 8.6. Conclusion

- (900) In the light of the above, the Commission considers the Final Commitments capable of rendering the Transaction compatible with the internal market and the EEA Agreement as it will not create a significant impediment to effective competition in all relevant markets in which competition concerns were identified, in particular on (i) the at least EEA-wide market for the distribution of console and PC video games via cloud game streaming services; and (ii) the worldwide market for the supply of PC OS.

## 9. CONDITIONS AND OBLIGATIONS

- (901) Pursuant to the second subparagraph of Article 8(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the internal market.
- (902) Making the licenses available at the terms set out in the Final Commitments is a condition, whereas the implementing steps which are necessary to achieve or complement these licenses are generally obligations on the parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the internal market is no longer applicable. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(6) of the Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the Merger Regulation.
- (903) In accordance with the basic distinction described in Recital (901) as regards conditions and obligations, this Decision should be made conditional on the full compliance by the Notifying Party with the Section II.A (including Annexes 1 and 3) and Section II.B (including Annexes 1 and 4-7) of the commitments submitted by the

Notifying Party on 20 April 2023 and all other Sections of these commitments should be obligations within the meaning of Article 8(2) of the Merger Regulation. The full text of the commitments is attached as an Annex to this Decision and forms an integral part thereof.

HAS ADOPTED THIS DECISION:

*Article 1*

The notified operation whereby Microsoft Corporation acquires sole control of Activision Blizzard, Inc. within the meaning of Article 3(1)(b) of the Merger Regulation is hereby declared compatible with the internal market and the EEA Agreement.

*Article 2*

Article 1 is subject to compliance with the conditions set out in the Section II.A and Section II.B of Annex 2.

*Article 3*

Microsoft shall comply with the obligations set out in the Sections III to VI of Annex 2.

*Article 4*

This Decision is addressed to:

Microsoft Corporation

1 Microsoft Way,

Redmond,

WA 98052,

United States of America

Done at Brussels, 15.5.2023

*For the Commission*

*(Signed)*

*Margrethe VESTAGER*

*Executive Vice-President*

## **M.10646 - Microsoft/Activision Blizzard**

### **Article 8(2) Commission Decision**

#### **Annex 1 – Quantitative Analysis**

##### **1. INTRODUCTION**

- (1) The annex is structured as follows. Section 2 considers a quantitative analysis of Microsoft's incentives to engage in total input foreclosure strategies concerning *Call of Duty* post-Transaction. Specifically, the Commission computes so-called critical diversion ratios and compares them with the likely diversion in case of total foreclosure based on gamers' engagement levels with *Call of Duty*. Section 3 uses Microsoft's [...] data to assess substitution patterns within and across genres [*business secrets concerning Microsoft internal data*].

##### **2. THE COMMISSION'S QUANTITATIVE ANALYSIS OF INCENTIVES TO ENGAGE IN TOTAL INPUT FORECLOSURE STRATEGIES**

- (2) The Commission analysed the merged entity's incentives for input foreclosure by means of quantitative analysis. The analysis of total input foreclosure assesses the question of whether the merged entity would find it profitable to withhold *Call of Duty* from Sony PlayStation post-Transaction to divert customers to Microsoft's Xbox.
- (3) The Commission's quantitative analysis starts from the consideration that a total foreclosure strategy entails a trade-off between decreased upstream sales and increased downstream sales.<sup>1</sup> For example, if the merged entity withheld *Call of Duty* from Sony PlayStation post-Transaction this would increase Microsoft's downstream console sales because a proportion of the foreclosed customers would switch to the Xbox console in order (to continue) to play *Call of Duty*. However, foreclosure would likely also decrease Activision Blizzard's upstream sales of *Call of Duty*, as Activision Blizzard would lose the revenues from PlayStation customers who are foreclosed and who decide not to buy Microsoft's console downstream product, the Xbox.
- (4) The Commission's quantitative analysis assesses the trade-off between won downstream and lost upstream sales by considering, in particular, three main variables: (i) the merged entity's downstream profit margin (to gauge the profitability of winning downstream customers), (ii) the merged entity's upstream profit margin (to gauge the cost of losing upstream sales), and (iii) the so-called "switching rate" from competitors to the merged entity (to gauge the proportion of customers in the downstream market that would switch to the merged entity in order to keep access to *Call of Duty*). An incentive to foreclose downstream competitors is said to exist if the gain in downstream profits from foreclosure

---

<sup>1</sup> Non-Horizontal Guidelines, paragraph 40.

exceeds the loss in upstream profits.<sup>2</sup> This is the case if the estimated ‘critical’ switching rate is larger than the likely actual switching rate.<sup>3</sup> The Commission’s model divides Activision Blizzard’s profits of selling *Call of Duty* for PlayStation by Microsoft’s profits from selling the Xbox to approximate the critical switching rate. In other words, input foreclosure pays off if it drives sufficiently many customers away from foreclosed rivals to the merged entity (taking into account the value of won and lost customers upstream and downstream).

- (5) A key challenge in assessing vertical arithmetic models is to obtain a reliable estimate of the likely actual switching rate from foreclosed rivals to the merged entity post-merger.<sup>4</sup>
- (6) The Commission considers it realistic to assume that gamers who play *Call of Duty* on PlayStation very intensely are relatively more likely to buy an Xbox in case of foreclosure. Absent a reliable estimate of the actual switching rate, the Commission therefore relies on the level of user engagement with *Call of Duty* to assess the likely post-merger behaviour of customers.

## **2.1. The Commission’s analysis addresses shortcoming of the Parties’ incentive analysis**

- (7) The Parties submitted an analysis of Microsoft’s incentive to withhold Activision Blizzard games from other consoles post-Transaction.<sup>5</sup> Their main finding is that for an exclusivity strategy involving *Call of Duty* to be profitable, [...] % of *Call of Duty* gamers on PlayStation would need to purchase a new Xbox.
- (8) The Commission considers that there are several assumptions and shortcomings in the Parties’ incentive analysis that lead to an understatement of the incentive to foreclose.
- (9) First, to calculate the spending on each PlayStation *Call of Duty* gamer, the Parties divide the total *Call of Duty* revenue on PlayStation by the number of PlayStation gamers who play *Call of Duty* within a month, so-called monthly active users (“MAU”). However, since not only *Call of Duty* MAUs, but also consumers who play *Call of Duty* less regularly contribute to the total *Call of Duty* revenue, this approach overstates the spending per *Call of Duty* gamer.
- (10) Second, the Parties assume that the life-time value (LTV) of a new Xbox console sale to Microsoft [*business secrets concerning internal data*]. For example, they

---

<sup>2</sup> Non-Horizontal Guidelines, paragraph 41.

<sup>3</sup> The quantitative model bases on standard economic models used in antitrust economics, so-called ‘vertical arithmetic’. E.g., see Commission decision of 24 February 2015 in case M.7194, *Liberty Global/Corelio/W&W/De Vijver Media*. Vertical arithmetic has been used widely across industries in vertical mergers. E.g., see R. Pittman, 2017, ‘Three Economist’s Tools for Antitrust Analysis. A Non-Technical Introduction’, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2898869](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2898869).

<sup>4</sup> Note that pre-merger, an independent upstream firm typically has no incentive to foreclose specific downstream distributors. Accordingly, internal estimates of switching rates are not always available. Margin estimates by contrast (the other variable necessary to conduct vertical arithmetic analyses) are usually readily available from companies’ ordinary course of business documents.

<sup>5</sup> “Estimating incentives to withhold Activision games from other consoles”, submitted as part of the Notifying Party’s reply to RFI 1.

submit that the LTV of a new Xbox console sale is [*business secrets concerning internal data*].<sup>6</sup> The Parties argue that this is because [*business secrets concerning internal data*].<sup>7</sup> The Commission considers that [*business secrets concerning internal data*] LTV is unrealistic. Amongst others, gamers who switch from PlayStation and purchase a new Xbox due to the non-availability of *Call of Duty* are unlikely to fit into the usual [*business secrets concerning internal data*] spending pattern of Xbox users. Also, the LTV provided by the Parties does not take into account that [*business secrets concerning internal data*].<sup>8</sup> This effect should counteract [...] LTV.

- (11) The Parties did not provide convincing internal documents showing that the LTV of a new Xbox console is indeed [*business secrets concerning Microsoft internal data*]. The Parties merely present one document that shows [...].<sup>9</sup> However, the Commission does not consider this convincing evidence. First, [*business secrets concerning Microsoft internal data*]. Second, it is unclear whether this document was prepared using data that is generated and used in Microsoft's ordinary course of business. Third, another document previously submitted by the Parties [*business secrets concerning Microsoft internal data*].<sup>10</sup>
- (12) Third, internal documents submitted by the Parties suggest the Xbox Series X and Series S LTVs to be [*business secrets concerning Microsoft internal data*]. According to the document [*business secrets concerning Microsoft internal data*], the 5-year LTV is USD [...] for the Series S and USD [...] for the Series X. Since according to the same document the [*business secrets concerning Microsoft internal data*].
- (13) Fourth, the Parties assume in their analysis that the revenue share for *Call of Duty* titles [*confidential internal analysis*].<sup>11</sup> However, the Parties confirmed in a later submission that [*business secrets concerning Parties' internal data*]."<sup>12</sup>
- (14) Fifth, the Parties assume the share of *Call of Duty* revenue that will be generated on PlayStation [*business secrets concerning Microsoft internal data*]. The Commission considers this assumption to be unrealistic, given that the Parties also assume [*business secrets concerning Microsoft internal data*].<sup>13</sup> For example, they submit that *Call of Duty* revenue on PC and console will [*business*

---

<sup>6</sup> "Estimating incentives to withhold Activision games from other consoles", submitted as part of the Notifying Party's reply to RFI 1, Table 12.

<sup>7</sup> "Estimating incentives to withhold Activision games from other consoles", submitted as part of the Notifying Party's reply to RFI 1, paragraph 49.

<sup>8</sup> [*business secrets concerning Microsoft internal data*]. In these surveys, [*business secrets concerning Microsoft internal data*]. Form CO, Annex 66, question 10(e) and Form CO, Annex 6.93, slide 10.

<sup>9</sup> Notifying Party's reply to RFI 18, question 2.

<sup>10</sup> See cells J29-J38 in tab [...] in the document "Accompanying calculations on Microsoft's incentive to withhold ABK content from Sony - 25052022.xlsx" that was submitted as part of the Notifying Party's reply to RFI 1, question 36.

<sup>11</sup> Notifying Party's reply to RFI 6, footnote 5.

<sup>12</sup> Notifying Party's reply to RFI 18, question 1.b.

<sup>13</sup> Form CO, Annex 13.2.

*secrets concerning Microsoft internal data*]. In addition, since Microsoft post-Transaction [*business secrets concerning Microsoft internal data*].<sup>14</sup>

## **2.2. The Commission's quantitative analysis in the Statement of Objections preliminarily finds incentives to engage in total input foreclosure of *Call of Duty* from PlayStation**

- (15) The Commission's quantitative analysis relies on [*business secrets concerning Microsoft's internal analysis*] but adjusts some assumptions to take into account the points discussed above. Four scenarios that are based on slightly varying assumptions are discussed below. In all four scenarios, instead of only focusing on *Call of Duty* [...], the analysis takes into account all PlayStation [...]. The Commission's analysis also focuses on [*business secrets concerning Microsoft's internal analysis*]. The results are reported in Annex Table 1.
- (16) In the first scenario, [...].
- (17) In the second scenario, [...].
- (18) In the third scenario, [...].
- (19) In the fourth scenario, [...].
- (20) As discussed above, a challenge of the incentive analysis is the [*business secrets concerning Microsoft's internal analysis*].
- (21) The Commission considers that the level of engagement with the franchise is one important factor that the actual switching rate of PlayStation users in the case *Call of Duty* is withheld from PlayStation will depend on.
- (22) In 2021, [...] of all PlayStation users played *Call of Duty*. More specifically, in 2021:<sup>15</sup>
- [...] spent more than [60-70]% of their time playing *Call of Duty*
  - [...] spent more than [50-60]% of their time playing *Call of Duty*
  - [...] spent more than [40-50]% of their time playing *Call of Duty*
  - [...] spent more than [20-30]% of their time playing *Call of Duty*
- (23) In the Statement of Objections, the Commission considers that users who did not spend at least [...]% of their time playing *Call of Duty* on PlayStation are very unlikely to buy a new Xbox if *Call of Duty* was withheld from PlayStation. Taking the [...]% figure of [...] implies that in three out of four scenarios discussed above the actual switching rate would be higher than the critical switching rate and foreclosure would be profitable.

---

<sup>14</sup> Contrary to the Commission's considerations, the Parties assume that [*confidential internal analysis of the Parties*]. However, [*confidential internal analysis of the Parties*]. Form CO, Annex 13.1, page 7

<sup>15</sup> Document submitted by Sony, Economic Analysis of Microsoft's Incentive to Withhold *Call of Duty* from PlayStation [ID544, filename: 2022.08.30 Microsoft Activision Foreclosure Incentive Analysis.pdf]

- (24) The Commission therefore preliminarily concludes in the Statement of Objections that – conditional on some alternative but reasonable assumptions – the analysis submitted by the Parties supports the view that the Parties have an incentive to withhold *Call of Duty* from Sony PlayStation.

2.2.1. *Response to the Notifying Party's arguments in its reply to the Article 6(1)(c) Decision*

- (25) First, in the quantitative analyses concerning total foreclosure that was presented in Annex 1 of the Article 6(1)(c) Decision, the Commission compared the critical diversion ratios to *Call of Duty* [confidential internal analysis] and preliminarily concluded that Microsoft would have incentives to engage in total foreclosure. Because *Call of Duty* [confidential internal analysis] were not available, the Commission used [confidential internal analysis]. In its reply to the Article 6(1)(c) Decision, the Parties argued that [confidential internal analysis].
- (26) The present quantitative analysis addresses the above points by comparing the critical diversion ratios directly to *Call of Duty* [confidential internal analysis], which in the course of the in-depth investigation was made available to the Commission, instead of [confidential internal analysis].
- (27) Second, the Parties insist that it is appropriate to use [confidential internal analysis] in the “Life-time Value” for Xbox Series X and Series S.
- (28) The Commission maintains its view that the Parties did not provide convincing internal documents showing that in the course of its ordinary business Microsoft indeed assumes that [business secrets concerning Microsoft strategy]. Specifically, the Commission did not find any internal documents related to Xbox LTVs in which [business secrets concerning Microsoft strategy]. For example, in the key presentation titled [business secrets concerning Microsoft strategy]<sup>16</sup> there is no single mention of [business secrets concerning Microsoft strategy] on 26 slides. The same holds for the recent presentation titled [business secrets concerning Microsoft strategy],<sup>17</sup> which consists of 28 slides.
- (29) Also, as already mentioned above, a document previously submitted by the Parties [business secrets concerning Microsoft strategy].<sup>18</sup>
- (30) Third, the Parties argue that the Commission’s assumption in Scenario 2 and Scenario 3, that [confidential internal analysis], is unrealistic. The Parties misunderstood the Commission’s assumption in these two scenarios. It is only assumed that post-Transaction *Call of Duty* revenue [confidential internal analysis]. This is for example completely in line with a hypothetical situation where *Call of Duty* revenues [confidential internal analysis].
- (31) Nevertheless, the Commission considers an additional scenario (Scenario 4) in which *Call of Duty* revenues [confidential internal analysis].

---

<sup>16</sup> Form CO, Annex 6.81

<sup>17</sup> Microsoft’s internal document [ID 1411-34497, filename: [Business secrets concerning Microsoft strategy]

<sup>18</sup> See cells J29-J38 in tab “[...]” in the document “Accompanying calculations on Microsoft's incentive to withhold ABK content from Sony - 25052022.xlsx” that was submitted as part of the Notifying Party’s reply to RFI 1, question 36.

### 2.3. The updated Commission analysis and the response to the Notifying Party's arguments in its reply to the Statement of Objections

- (32) The Parties submit in their reply to the Statement of Objections that the Commission overestimates the share of PlayStation gamers who are likely to switch to Xbox as a result of a hypothetical withholding of Call of Duty post-Transaction because its analysis ignores the absolute level of engagement that a PlayStation gamer has with *Call of Duty*.<sup>19</sup>
- (33) The Commission acknowledges that the absolute level of engagement is indeed an important variable that has to be considered when assessing incentives for foreclosure since it is unlikely that gamers with a very low absolute level of engagement on PlayStation would purchase a new Xbox console in case of foreclosure.
- (34) The updated vertical arithmetic presented in this section therefore considers the [confidential internal analysis].
- (35) Sony submitted the following figures on *Call of Duty* [confidential internal analysis]<sup>20</sup>:
- [confidential internal analysis].
  - [confidential internal analysis].
  - [confidential internal analysis].
  - [confidential internal analysis].
  - [confidential internal analysis].
- (36) This implies that, when considering the [confidential internal analysis], in two out of four scenarios shown in Table 1 the actual switching rate would be lower than the critical switching rate and foreclosure would not be profitable. When considering the [confidential internal analysis], foreclosure would not be profitable in three out of four scenarios.
- (37) The Commission takes note of Sony's argument that completing the single player campaign of the last two Call of Duty releases is reported to take about [...] hours and that on average users that play at least [...]% of their time *Call of Duty* spent [...] hours with these games on average.<sup>21</sup> In light of these figures, the [confidential internal analysis]. The very high engagement with *Call of Duty* titles, which is shown by the [...] hours spent on average playing Call of Duty, is clearly driven by the multi-player part of these games.
- (38) Taking into account at least [confidential internal analysis], there is no clear evidence that Microsoft would have an incentive to foreclose. The Commission

---

<sup>19</sup> Notifying Party's Response to the Commission's Statement of Objections, paragraph 152.

<sup>20</sup> Sony's reply to RFI 5.

<sup>21</sup> Sony's reply to RFI 5.



therefore concludes that there is no convincing evidence that the Parties would have an incentive to withhold *Call of Duty* from Sony PlayStation.

- (39) The Parties also reiterate their claims that the Commission's analysis overestimates the value of a new Xbox gamer.<sup>22</sup> In particular, the Parties argue that a *Call of Duty* PlayStation gamer who already owns a PlayStation will not abandon their existing console – instead they will allocate part of their gaming budget to the PlayStation and part to the (new) Xbox. As a consequence, gamers who switch will have a relatively [*confidential internal analysis*], which will lead to an increase in the critical switching rate, further lowering the likelihood that foreclosure would be profitable strategy for Microsoft.
- (40) The Commission will not discuss this argument in detail since the analysis above in any case implies that the actual switching rate is unlikely to be higher than the critical switching rate and foreclosure is therefore unlikely to be profitable.

## 2.4. Conclusion

- (41) The Commission concludes that it is unlikely that the merged entity would have the incentive to engage in a foreclosure strategy with regard to restricting Sony's access to *Call of Duty*.
- (42) The Commission considers that, while indicative, the quantitative analysis is [*business secrets concerning Microsoft's internal analysis*] and its ability to capture the merged entity's incentives to foreclose post-Transaction are limited.<sup>23</sup> In particular, [*business secrets concerning Microsoft's internal analysis*], the merged entity may [*business secrets concerning Microsoft's internal analysis*], such as [*business secrets concerning Microsoft's internal analysis*].

---

<sup>22</sup> Notifying Party's Response to the Commission's Statement of Objections, paragraph 155.

<sup>23</sup> More generally, the Commission notes that a common caveat to incentive analyses based on vertical arithmetic is that they rely on significant assumptions. For example, they generally do not take into account the effects of price changes that might occur as a result of a merger. Due to their simplistic nature, the results of incentive analyses based on vertical arithmetic should be regarded primarily as indicative and must be viewed in the context of other findings

**(17) Annex Table 2: Critical diversion ratios for four scenarios**

[...]

*Source: Commission calculations*

### 3. WHEN GAMERS START PLAYING A NEW GAME, THEY MOSTLY SPEND LESS TIME PLAYING GAMES OF THE SAME GENRE

- (43) An important question for the market definition is whether a broad market for the publishing and development of video games should be defined or whether it is more appropriate to consider a narrower market segmented by genre.
- (44) Based on the analysis of Microsoft’s “[...]” data, data that tracks [*confidential internal analysis*], the Parties provide evidence that [*confidential internal analysis*].<sup>957</sup> The Parties argue that this finding is consistent with [*confidential internal analysis*].
- (45) The Commission considers the evidence provided by the Parties to be of limited value for several reasons. First, the evidence provided by the Parties is presented in purely visual form. It is therefore difficult to assess whether the Parties’ claim that gamers spend less time playing games across all genres upon release of a new title actually holds in quantitative terms. Second, new game titles are released on Xbox very frequently, making it difficult to distinguish the impact of one release from another when they are released in close proximity. The Parties do not attempt to address this issue empirically.

#### 3.1. Methodology

- (46) To address these concerns, the Commission provides its own methodology to analyse the Xbox telemetry data. The methodology consists of the following steps.
- (47) First information on [...] in the [...] data is aggregated by genre<sup>958</sup>. In doing so, [*confidential analysis of Microsoft’s business data*].
- (48) Second, using this aggregated data, separately for each genre the following differences-in-difference regression equation is estimated:

[*confidential analysis of Microsoft’s business data*]

- (49) The coefficient of interest is  $\gamma$ , which captures the [*confidential analysis of Microsoft’s business data*]. Comparing the [*confidential analysis of Microsoft’s business data*] allows to estimate the causal effect of the treatment [...], while controlling for any other factors that may have affected the outcome. In particular, this estimation approach controls for the [*confidential analysis of Microsoft’s business data*].
- (50) Since the dependent variable is specified in logs, the coefficient  $\gamma$  has to be interpreted as the (approximate) percentage change in [...] for the genre of interest. The exact percentage change is given by  $\exp(\gamma) - 1$ .

---

<sup>957</sup> See Annex 44 of the Notifying Party’s Response to the Commission’s 6(1)(c) Decision, in particular Section 5.

<sup>958</sup> We follow the Notifying Party’s approach in Annex 44 and consider the following genres: [*confidential internal analysis*].

- (51) Third, for each genre, we can calculate [confidential analysis of Microsoft's business data].
- (52) Fourth, dividing the [confidential analysis of Microsoft's business data] for each genre by the [confidential analysis of Microsoft's business data] across all genres provides an estimate for the "implied diversion ratio" for each genre. The implied diversion ratio for a given genre can be interpreted as the [confidential analysis of Microsoft's business data].

### 3.2. Results

- (53) Annex Table 2 below reports a [confidential analysis of Microsoft's business data] (first column), the [confidential analysis of Microsoft's business data] (second column), the implied diversion ratios from titles belonging to the same genre (third column) and the [confidential analysis of Microsoft's business data] (fourth column). For example, for the [confidential analysis of Microsoft's business data], the [confidential analysis of Microsoft's business data] from the [confidential analysis of Microsoft's business data]: This [confidential analysis of Microsoft's business data].
- (54) Under the hypothesis that game titles compete with titles that belong to the same genres as intensely as with titles that belong to other genres, we would expect the implied diversion ratio to be similar to the [confidential analysis of Microsoft's business data]. This is clearly not the case: the implied diversion ratios are consistently substantially larger than what would be expected if diversion would be [confidential analysis of Microsoft's business data]. For example, for the [confidential analysis of Microsoft's business data]. For [confidential analysis of Microsoft's business data]. For [confidential analysis of Microsoft's business data].
- (55) Annex Tables 3 to 13 below show detailed results for [confidential analysis of Microsoft's business data] illustrating the implied diversion ratios across genres [...] the [confidential analysis of Microsoft's business data] and the [confidential analysis of Microsoft's business data].<sup>959</sup>

---

<sup>959</sup> [confidential internal analysis], see Annex Table 14 for details.

**Annex Table 2: [business secrets concerning Xbox user data]**

<b>Title</b>	<b>Genre</b>	<b>[...]</b>	<b>[...]</b>	<b>[...]</b>
Assassin's Creed Valhalla	Action + Adventure	[60-70]%	[20-30]%	<i>not available</i>
Mortal Kombat 11	Fighting	[50-60]%	[0-5]%	[0-5]%
Forza Horizon 5	Racing + Flying	[40-50]%	[0-5]%	[0-5]%
Elden Ring	Role Playing	[20-30]%	[5-10]%	[10-20]%
<i>Call of Duty</i> Modern Warfare	Shooter	[70-80]%	[40-50]%	[40-50]%
<i>Call of Duty</i> Black Ops Cold War	Shooter	[70-80]%	[40-50]%	[30-40]%
Halo Infinite	Shooter	[70-80]%	[40-50]%	[40-50]%
Farming Simulator 22	Simulation	[60-70]%	[5-10]%	[5-10]%
FIFA 21	Sports	[70-80]%	[10-20]%	[10-20]%
FIFA 22	Sports	[80-90]%	[10-20]%	[10-20]%
NBA 2K22	Sports	[60-70]%	[10-20]%	[20-30]%

*Source: [Commission calculations based on Microsoft' [...] data].*

### 3.3. Response to the Notifying Party's arguments in its reply to the Statement of Objections

- (56) First, the Parties submit that the Commission's analysis overstates the within-genre diversion of [*confidential analysis of Microsoft's business data*]<sup>960</sup>.
- (57) However, the Commission notes that [*confidential analysis of Microsoft's business data*]. Since [*confidential analysis of Microsoft's business data*] does not contradict the Commission's conclusion that there is large within-genre substitution and that a potential segmentation of the market for video game software development and publishing by genre cannot be excluded.
- (58) Moreover, in its analysis the Commission also separately reports the [*confidential analysis of Microsoft's business data*], see Annex Tables 3 to 13. This overview shows that the within-franchise diversion [*confidential analysis of Microsoft's business data*], see Annex Tables 5, 8, 11, and 12. However, it is important to note that [*confidential analysis of Microsoft's business data*]. A large within-franchise diversion is therefore not surprising and does not contradict the Commission's conclusion that the relevant market is potentially narrower than an overall market for video game software development and publishing.
- (59) In particular, the Commission notes that [*confidential analysis of Microsoft's business data*]. Examples are [*confidential analysis of Microsoft's business data*]. Since [*confidential analysis of Microsoft's business data*]. Due to this closeness of substitution, a market delineation by genre therefore cannot be excluded.
- (60) Second, the Parties submit that the Commission's analysis overstates within genre diversion because its [*confidential analysis of Microsoft's business data*].<sup>961</sup> In particular, the Parties submit that [*confidential analysis of Microsoft's business data*].<sup>962</sup> Column 5 of Annex Table 2 shows the [*confidential analysis of Microsoft's business data*]. As is shown there, the [*confidential analysis of Microsoft's business data*]. The Commission therefore considers that the original interpretation of the table does not change by the Parties' alternative proposal.
- (61) Third, the Parties submit that the Commission's analysis fails to control for confounding factors that affect the estimated diversions.<sup>963</sup> In particular, they submit that the [*confidential analysis of Microsoft's business data*] and that the results of the differences-in-difference estimation are therefore invalid.<sup>964</sup> However, the Commission's differences-in-difference approach yields valid results in situations in which there are differences between the treatment and control group as long as these differences are time-invariant, i.e., as long as they exist both pre- and post-treatment. This is because the methodology relies on comparing the changes in outcomes pre- and post-treatment within each group and then comparing the difference in these changes between the two groups. The evidence submitted by the Parties does not show that there are time-varying

---

<sup>960</sup> Notifying Party's Response to the Commission's Statement of Objections, Annex II.A.1, Section 3.1.  
<sup>961</sup> Notifying Party's Response to the Commission's Statement of Objections, Annex II.A.1, Section 3.2.  
<sup>962</sup> Notifying Party's Response to the Commission's Statement of Objections, Annex II.A.1, paragraph 26.  
<sup>963</sup> Notifying Party's Response to the Commission's Statement of Objections, Annex II.A.1, Section 4.  
<sup>964</sup> Notifying Party's Response to the Commission's Statement of Objections, Annex II.A.1, Table 6.

differences between the treatment and control groups. For this reason, the Parties' claim that the Commission's results are biased is without foundation.

- (62) Fourth, the Parties submit that the “parallel trends” assumption, a standard assumption for a differences-in-difference model to produce reliable results, might not be met.<sup>965</sup> The Parties provide [*confidential analysis of Microsoft's business data*].<sup>966</sup> For example, they submit that “[*confidential analysis of Microsoft's business data*]. This puts serious doubt on the reliability of the DiD model [...]”.<sup>967</sup>
- (63) The Commission submits that, first, the Parties' criticism does not constitute a systematic evaluation of the “parallel trends” assumption but instead is [*confidential analysis of Microsoft's business data*]. Second, the “parallel trends” assumption does not in fact imply that the pre-treatment [...] between the treatment and control group must be “similar”. Instead, it assumes that the pre-treatment difference in [...] between the control and treatment is constant over time (i.e., the pre-treatment trends are parallel). The Commission considers that this assumption does not appear to be violated [*confidential analysis of Microsoft's business data*]. Third, since the dependent variable in equation (1) is in logs, the visual plots should also have been presented with a log-transformed variable to allow for a meaningful visual assessment of the “parallel trends” assumption. The presentational form chosen by the Parties would instead suggest a lack of parallel trend even for perfectly aligned trends.

### 3.4. Conclusion

- (64) The analysis of the [...] data described above exploits [*confidential internal analysis*] to provide a robust empirical assessment of how gamers switch games within and across genres. The results show that [*confidential internal analysis*]. The Commission's findings therefore support the view that a narrower definition of the game development and publishing market, specifically a segmentation by genre, might be appropriate.

---

<sup>965</sup> Notifying Party's Response to the Commission's Statement of Objections, Annex II.A.1, Section 5.

<sup>966</sup> Notifying Party's Response to the Commission's Statement of Objections, Annex II.A.1, Figures 2 to 6.

<sup>967</sup> Notifying Party's Response to the Commission's Statement of Objections, Annex II.A.1, paragraph 39.

**Annex Table 3: [business secrets concerning Xbox user data]**

<b>Genre</b>	<b>[...]</b>	<b>[...]</b>
<b>Action + Adventure</b>	<b>[60-70]%</b>	<b>[20-30]%</b>
Assassin's Creed	[10-20]%	
other Action + Adventure	[40-50]%	
Fighting	[0-5]%	[0-5]%
Multi-Player Online Battle Arena	[0-5]%	[0-5]%
Racing + Flying	[0-5]%	[0-5]%
Role Playing	[5-10]%	[5-10]%
Shooter	[5-10]%	[40-50]%
Simulation	[0-5]%	[5-10]%
Sports	[10-20]%	[10-20]%
Strategy	[0-5]%	[0-5]%
Other titles	[0-5]%	[0-5]%

*Source: [Commission calculations based on Microsoft' [...] data]*



**Annex Table 4: [business secrets concerning Xbox user data]**

<b>Genre</b>	<b>[...]</b>	<b>[...]</b>
<b>Fighting</b>	<b>[50-60]%</b>	<b>[0-5]%</b>
Mortal Kombat	[30-40]%	
other Fighting	[20-30]%	
Action + Adventure	[30-40]%	[20-30]%
Multi-Player Online Battle Arena	-[0-5]%	[0-5]%
Racing + Flying	-[0-5]%	[0-5]%
Role Playing	[0-5]%	[5-10]%
Shooter	[10-20]%	[40-50]%
Simulation	-[0-5]%	[5-10]%
Sports	[0-5]%	[10-20]%
Strategy	-[0-5]%	[0-5]%
Other titles	-[0-5]%	[0-5]%

*Source: [Commission calculations based on Microsoft' [...] data]*

**Annex Table 5: [business secrets concerning Xbox user data]**

<b>Genre</b>	<b>[...]</b>	<b>[...]</b>
<b>Racing + Flying</b>	<b>[40-50]%</b>	<b>[0-5]%</b>
Forza	[30-40]%	
other Racing + Flying	[5-10]%	
Action + Adventure	[20-30]%	[20-30]%
Fighting	-[0-5]%	[0-5]%
Multi-Player Online Battle Arena	[0-5]%	[0-5]%
Role Playing	[0-5]%	[5-10]%
Shooter	[20-30]%	[40-50]%
Simulation	[5-10]%	[5-10]%
Sports	[10-20]%	[10-20]%
Strategy	-[0-5]%	[0-5]%
Other titles	-[0-5]%	[0-5]%

*Source: [Commission calculations based on Microsoft' [...] data]*

**Annex Table 6: [business secrets concerning Xbox user data]**

<b>Genre</b>	<b>[...]</b>	<b>[...]</b>
<b>Role Playing*</b>	<b>[20-30]%</b>	<b>[0-5]%</b>
Action + Adventure	[30-40]%	[20-30]%
Fighting	[0-5]%	[0-5]%
Multi-Player Online Battle Arena	[0-5]%	[0-5]%
Racing + Flying	[0-5]%	[0-5]%
Shooter	[20-30]%	[40-50]%
Simulation	[0-5]%	[5-10]%
Sports	[0-5]%	[10-20]%
Strategy	-[0-5]%	[0-5]%
Other titles	[0-5]%	[0-5]%

\* There is no previous release of the “Elden Ring” franchise.

Source: [Commission calculations based on Microsoft’ [...] data]

**Annex Table 7: [business secrets concerning Xbox user data]**

<b>Genre</b>	<b>[...]</b>	<b>[...]</b>
<b>Shooter</b>	<b>[70-80]%</b>	<b>[40-50]%</b>
Call of Duty	[20-30]%	
other Shooter	[50-60]%	
Action + Adventure	[10-20]%	[20-30]%
Fighting	[0-5]%	[0-5]%
Multi-Player Online Battle Arena	[0-5]%	[0-5]%
Racing + Flying	[0-5]%	[0-5]%
Role Playing	[0-5]%	[5-10]%
Simulation	-[0-5]%	[5-10]%
Sports	[10-20]%	[10-20]%
Strategy	-[0-5]%	[0-5]%
Other titles	[0-5]%	[0-5]%

*Source: [Commission calculations based on Microsoft' [...] data]*

**Annex Table 8: [business secrets concerning Xbox user data]**

<b>Genre</b>	<b>[...]</b>	<b>[...]</b>
<b>Shooter</b>	<b>[70-80]%</b>	<b>[40-50]%</b>
Call of Duty	[60-70]%	
other Shooter	[10-20]%	
Action + Adventure	-[0-5]%	[20-30]%
Fighting	[0-5]%	[0-5]%
Multi-Player Online Battle Arena	[0-5]%	[0-5]%
Racing + Flying	[0-5]%	[0-5]%
Role Playing	-[0-5]%	[5-10]%
Simulation	[0-5]%	[5-10]%
Sports	[10-20]%	[10-20]%
Strategy	[0-5]%	[0-5]%
Other titles	-[0-5]%	[0-5]%

*Source: [Commission calculations based on Microsoft' [...] data]*

**Annex Table 9: [business secrets concerning Xbox user data]**

<b>Genre</b>	<b>[...]</b>	<b>[...]</b>
<b>Shooter</b>	<b>[70-80]%</b>	<b>[40-50]%</b>
Halo	[5-10]%	
other Shooter	[60-70]%	
Action + Adventure	[10-20]%	[20-30]%
Fighting	[0-5]%	[0-5]%
Multi-Player Online Battle Arena	-[0-5]%	[0-5]%
Racing + Flying	[5-10]%	[0-5]%
Role Playing	[0-5]%	[5-10]%
Simulation	<[0-5]%	[5-10]%
Sports	[0-5]%	[10-20]%
Strategy	[0-5]%	[0-5]%
Other titles	-[0-5]%	[0-5]%

*Source: [Commission calculations based on Microsoft' [...] data]*

**Annex Table 10: [business secrets concerning Xbox user data]**

<b>Genre</b>	<b>[...]</b>	<b>[...]</b>
<b>Simulation</b>	<b>[60-70]%</b>	<b>[5-10]%</b>
Farming Simulator	[50-60]%	
other Simulation	[5-10]%	
Action + Adventure	[5-10]%	[20-30]%
Fighting	-[0-5]%	[0-5]%
Multi-Player Online Battle Arena	-[0-5]%	[0-5]%
Racing + Flying	[10-20]%	[0-5]%
Role Playing	[0-5]%	[5-10]%
Shooter	[0-5]%	[40-50]%
Sports	[5-10]%	[10-20]%
Strategy	-[0-5]%	[0-5]%
Other titles	[0-5]%	[0-5]%

*Source: [Commission calculations based on Microsoft' [...] data]*

**Annex Table 11: [business secrets concerning Xbox user data]**

<b>Genre</b>	<b>[...]</b>	<b>[...]</b>
<b>Sports</b>	<b>[70-80]%</b>	<b>[10-20]%</b>
FIFA	[70-80]%	
other Sports	[0-5]%	
Action + Adventure	-[0-5]%	[20-30]%
Fighting	[0-5]%	[0-5]%
Multi-Player Online Battle Arena	[0-5]%	[0-5]%
Racing + Flying	[0-5]%	[0-5]%
Role Playing	[0-5]%	[5-10]%
Shooter	[20-30]%	[40-50]%
Simulation	[0-5]%	[5-10]%
Strategy	-[0-5]%	[0-5]%
Other titles	[0-5]%	[0-5]%

*Source: [Commission calculations based on Microsoft' [...] data]*



**Annex Table 12: [business secrets concerning Xbox user data]**

<b>Genre</b>	<b>[...]</b>	<b>[...]</b>
<b>Sports</b>	<b>[80-90]%</b>	<b>[10-20]%</b>
FIFA	[70-80]%	
other Sports	[5-10]%	
Action + Adventure	[5-10]%	[20-30]%
Fighting	[0-5]%	[0-5]%
Multi-Player Online Battle Arena	[0-5]%	[0-5]%
Racing + Flying	[0-5]%	[0-5]%
Role Playing	[0-5]%	[5-10]%
Shooter	[5-10]%	[40-50]%
Simulation	[0-5]%	[5-10]%
Strategy	[0-5]%	[0-5]%
Other titles	[0-5]%	[0-5]%

*Source: [Commission calculations based on Microsoft' [...] data]*

**Annex Table 13: [business secrets concerning Xbox user data]**

<b>Genre</b>	<b>[...]</b>	<b>[...]</b>
<b>Sports</b>	<b>[60-70]%</b>	<b>[10-20]%</b>
NBA 2K	[60-70]%	
other Sports	[5-10]%	
Action + Adventure	[10-20]%	[20-30]%
Fighting	[0-5]%	[0-5]%
Multi-Player Online Battle Arena	[0-5]%	[0-5]%
Racing + Flying	[0-5]%	[0-5]%
Role Playing	[0-5]%	[5-10]%
Shooter	[10-20]%	[40-50]%
Simulation	[0-5]%	[5-10]%
Strategy	[0-5]%	[0-5]%
Other titles	[0-5]%	[0-5]%

*Source: [Commission calculations based on Microsoft' [...] data]*

**Annex Table 14: [business secrets concerning Xbox user data]**

Release	Genre	+/- 8 weeks	Baseline (+/- 10 weeks)	+/- 12 weeks
Assassin's Creed Valhalla	Action + Adventure	[50-60]%	[60-70]%	[60-70]%
	Assassin's Creed	[10-20]%	[10-20]%	[10-20]%
	Other Action + Adventure	[40-50]%	[40-50]%	[40-50]%
	Fighting	[0-5]%	[0-5]%	[0-5]%
	Multi-Player Online Battle Arena	[0-5]%	[0-5]%	-[0-5]%
	Racing + Flying	[0-5]%	[0-5]%	[0-5]%
	Role Playing	[5-10]%	[5-10]%	[5-10]%
	Shooter	[5-10]%	[5-10]%	[0-5]%
	Simulation	[0-5]%	[0-5]%	[0-5]%
	Sports	[10-20]%	[10-20]%	[10-20]%
	Strategy	[0-5]%	[0-5]%	[0-5]%
Other titles	[0-5]%	[0-5]%	[0-5]%	
Call of Duty Black Ops Cold War	Shooter	[80-90]%	[70-80]%	[80-90]%
	Call of Duty	[60-70]%	[60-70]%	[60-70]%
	Other Shooter	[10-20]%	[10-20]%	[10-20]%
	Action + Adventure	-[0-5]%	-[0-5]%	-[0-5]%
	Fighting	[0-5]%	[0-5]%	[0-5]%
	Multi-Player Online Battle Arena	[0-5]%	[0-5]%	[0-5]%
	Racing + Flying	[0-5]%	[0-5]%	[0-5]%
	Role Playing	-[0-5]%	-[0-5]%	-[0-5]%
	Simulation	[0-5]%	[0-5]%	[0-5]%
	Sports	[10-20]%	[10-20]%	[10-20]%
	Strategy	[0-5]%	[0-5]%	[0-5]%
Other titles	-[0-5]%	-[0-5]%	-[0-5]%	
Call of Duty Modern Warfare	Shooter	[70-80]%	[70-80]%	[70-80]%
	Call of Duty	[10-20]%	[20-30]%	[20-30]%
	Other Shooter	[50-60]%	[50-60]%	[50-60]%
	Action + Adventure	[10-20]%	[10-20]%	[10-20]%
	Fighting	[0-5]%	[0-5]%	[0-5]%
	Multi-Player Online Battle Arena	[0-5]%	[0-5]%	[0-5]%
	Racing + Flying	-[0-5]%	[0-5]%	[0-5]%
	Role Playing	[0-5]%	[0-5]%	[0-5]%
	Simulation	-[0-5]%	-[0-5]%	-[0-5]%
	Sports	[10-20]%	[10-20]%	[10-20]%
	Strategy	-[0-5]%	-[0-5]%	-[0-5]%
Other titles	[0-5]%	[0-5]%	[0-5]%	
Elden Ring	Role Playing	[20-30]%	[20-30]%	[20-30]%
	Action + Adventure	[30-40]%	[30-40]%	[30-40]%
	Fighting	[0-5]%	[0-5]%	[0-5]%
	Multi-Player Online Battle Arena	[0-5]%	[0-5]%	[0-5]%
	Racing + Flying	[0-5]%	[0-5]%	[0-5]%
	Shooter	[20-30]%	[20-30]%	[30-40]%
	Simulation	[0-5]%	[0-5]%	[0-5]%
	Sports	[0-5]%	[0-5]%	[0-5]%
	Strategy	[0-5]%	-[0-5]%	[0-5]%
	Other titles	[0-5]%	[0-5]%	[0-5]%
FIFA 21	Sports	[70-80]%	[70-80]%	[70-80]%
	FIFA	[60-70]%	[70-80]%	[70-80]%
	Other sports	[5-10]%	[0-5]%	[0-5]%
	Action + Adventure	[0-5]%	-[0-5]%	-[0-5]%
	Fighting	[0-5]%	[0-5]%	[0-5]%
	Multi-Player Online Battle Arena	[0-5]%	[0-5]%	[0-5]%
	Racing + Flying	[0-5]%	[0-5]%	[0-5]%
	Role Playing	[0-5]%	[0-5]%	[0-5]%
	Shooter	[10-20]%	[20-30]%	[20-30]%
	Simulation	[0-5]%	[0-5]%	[0-5]%
	Strategy	-[0-5]%	-[0-5]%	-[0-5]%
Other titles	[0-5]%	[0-5]%	[0-5]%	

FIFA 22	Sports	[80-90]%	[80-90]%	[80-90]%
	FIFA	[70-80]%	[70-80]%	[70-80]%
	Other sports	[5-10]%	[5-10]%	[5-10]%
	Action + Adventure	[5-10]%	[5-10]%	[5-10]%
	Fighting	[0-5]%	[0-5]%	[0-5]%
	Multi-Player Online Battle Arena	-[0-5]%	[0-5]%	[0-5]%
	Racing + Flying	[0-5]%	[0-5]%	[0-5]%
	Role Playing	[0-5]%	[0-5]%	[0-5]%
	Shooter	[5-10]%	[5-10]%	[5-10]%
	Simulation	[0-5]%	[0-5]%	[0-5]%
	Strategy	[0-5]%	[0-5]%	[0-5]%
	Other titles	[0-5]%	[0-5]%	[0-5]%
Farming Simulator 22	Simulation	[60-70]%	[60-70]%	[70-80]%
	Farming Simulator	[50-60]%	[50-60]%	[60-70]%
	Other Simulation	[5-10]%	[5-10]%	[5-10]%
	Action + Adventure	[5-10]%	[5-10]%	[5-10]%
	Fighting	[0-5]%	-[0-5]%	[0-5]%
	Multi-Player Online Battle Arena	-[0-5]%	-[0-5]%	-[0-5]%
	Racing + Flying	[10-20]%	[10-20]%	[10-20]%
	Role Playing	[5-10]%	[0-5]%	[0-5]%
	Shooter	[5-10]%	[0-5]%	[0-5]%
	Sports	[5-10]%	[5-10]%	[10-20]%
	Strategy	-[0-5]%	-[0-5]%	-[0-5]%
Other titles	[0-5]%	[0-5]%	[0-5]%	
Forza Horizon 5	Racing + Flying	[40-50]%	[40-50]%	[40-50]%
	Forza	[30-40]%	[30-40]%	[30-40]%
	Other Racing + Flying	[5-10]%	[5-10]%	[5-10]%
	Action + Adventure	[20-30]%	[20-30]%	[20-30]%
	Fighting	-[0-5]%	-[0-5]%	-[0-5]%
	Multi-Player Online Battle Arena	[0-5]%	[0-5]%	[0-5]%
	Role Playing	[0-5]%	[0-5]%	[0-5]%
	Shooter	[10-20]%	[20-30]%	[20-30]%
	Simulation	[5-10]%	[5-10]%	[5-10]%
	Sports	[10-20]%	[10-20]%	[5-10]%
	Strategy	-[0-5]%	-[0-5]%	-[0-5]%
Other titles	-[0-5]%	-[0-5]%	-[0-5]%	
Halo Infinite	Shooter	[70-80]%	[70-80]%	[70-80]%
	Halo	[5-10]%	[5-10]%	[5-10]%
	Other Shooter	[60-70]%	[60-70]%	[60-70]%
	Action + Adventure	[10-20]%	[10-20]%	[10-20]%
	Fighting	[0-5]%	[0-5]%	[0-5]%
	Multi-Player Online Battle Arena	-[0-5]%	-[0-5]%	[0-5]%
	Racing + Flying	[10-20]%	[5-10]%	[5-10]%
	Role Playing	[0-5]%	[0-5]%	-[0-5]%
	Simulation	-[0-5]%	[0-5]%	[0-5]%
	Sports	[0-5]%	[0-5]%	[5-10]%
Strategy	[0-5]%	[0-5]%	[0-5]%	
Other titles	-[0-5]%	-[0-5]%	-[0-5]%	
Mortal Kombat 11	Fighting	[40-50]%	[50-60]%	[60-70]%
	Mortal Kombat	[20-30]%	[30-40]%	[30-40]%
	Other Fighting	[10-20]%	[20-30]%	[20-30]%
	Action + Adventure	[20-30]%	[30-40]%	[20-30]%
	Multi-Player Online Battle Arena	-[0-5]%	-[0-5]%	-[0-5]%
	Racing + Flying	-[0-5]%	-[0-5]%	-[0-5]%
	Role Playing	[0-5]%	[0-5]%	[5-10]%
	Shooter	[20-30]%	[10-20]%	[10-20]%
	Simulation	[0-5]%	-[0-5]%	-[0-5]%
	Sports	[5-10]%	[0-5]%	[0-5]%
	Strategy	-[0-5]%	-[0-5]%	-[0-5]%
Other titles	[0-5]%	-[0-5]%	-[0-5]%	

	Sports	[60-70]%	[60-70]%	[60-70]%
	NBA 2K	[50-60]%	[60-70]%	[60-70]%
	Other Sports	[5-10]%	[5-10]%	[5-10]%
	Action + Adventure	[10-20]%	[10-20]%	[5-10]%
	Fighting	[0-5]%	[0-5]%	[0-5]%
NBA 2K22	Multi-Player Online Battle Arena	[0-5]%	[0-5]%	[0-5]%
	Racing + Flying	[0-5]%	[0-5]%	[0-5]%
	Role Playing	[0-5]%	[0-5]%	[0-5]%
	Shooter	[20-30]%	[10-20]%	[10-20]%
	Simulation	[0-5]%	[0-5]%	[0-5]%
	Strategy	[0-5]%	[0-5]%	[0-5]%
	Other titles	[0-5]%	[0-5]%	[0-5]%

*Source: [Commission calculations based on Microsoft' [...] data]*

**COMMITMENTS TO THE EUROPEAN COMMISSION**

---

**Case M.10646  
Microsoft/Activision Blizzard**

---

## TABLE OF CONTENTS

<b>I.</b>	Definitions .....	3
<b>II.</b>	The Commitments .....	6
<b>A.</b>	Consumer License .....	6
<b>B.</b>	Streaming Provider License.....	6
<b>III.</b>	Monitoring Trustee .....	7
<b>A.</b>	Appointment procedure .....	7
<b>B.</b>	Functions of the Monitoring Trustee .....	8
<b>C.</b>	Duties and obligations of the Parties .....	9
<b>D.</b>	Replacement, discharge and reappointment of the Monitoring Trustee.....	10
<b>IV.</b>	Dispute Resolution.....	10
<b>V.</b>	The Review Clause .....	11
<b>VI.</b>	Entry into force .....	11
	Annex 1 – List of Activision Blizzard Studios .....	12
	Annex 2 – Fast-Track Dispute Resolution Procedure.....	13
	Annex 3 – Consumer License .....	17
	Annex 4 – Streaming Provider License .....	18
	Annex 5 – NVIDIA Terms .....	19
	Annex 6 – Boosteroid Terms .....	20
	Annex 7 – Ubitus Terms .....	21

## Case M.10646 – Microsoft/Activision Blizzard

### COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 8(2) of Council Regulation (EC) No 139/2004 (the “**Merger Regulation**”), Microsoft Corporation hereby enters into the following Commitments (the “**Commitments**”) vis- à-vis the European Commission (the “**Commission**”) with a view to rendering its proposed acquisition of Activision Blizzard, Inc. (the “**Concentration**”) compatible with the internal market and the functioning of the EEA Agreement.

This text shall be interpreted in light of the Commission’s decision pursuant to Article 8(2) of the Merger Regulation to declare the Concentration compatible with the internal market and the functioning of the EEA Agreement (the “**Decision**”), in the general framework of European Union law, in particular in light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the “**Remedies Notice**”).

#### I. Definitions

- (1) For the purpose of the Commitments, the following terms shall have the following meaning:

**Activision Blizzard:** Activision Blizzard, Inc. or any undertakings controlled by Activision Blizzard, Inc. or any successor entities.

**Activision Blizzard Studios:** the studios listed in **Annex 1**.

**Affiliated Undertakings:** undertakings controlled by the Parties and/or by the ultimate parents of the Parties, whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

**APIs:** application programming interfaces that are designed to provide Entitlement Data to a Streaming Service.

**Authorized Game Store:** a Microsoft Game Store or a third-party digital PC or console game store on which Microsoft distributes, including via a multi-game subscription service, Eligible Games after the Closing Date.

**Boosteroid:** Limited Liability Company Boosteroid Ukraine.

**Closing Date:** the closing date of the Concentration.

**Commission:** the European Commission.

**Confidential Information:** any business secrets, know-how, commercial information, or any other information of a proprietary nature that is not in the public domain.

**Conflict of Interest:** any conflict of interest that impairs the Monitoring Trustee's objectivity and independence in discharging its duties under the Commitments.

**Consumers:** consumers based in the EEA who are licensed to play Eligible Games for their personal use pursuant to the Consumer License set out below.



**Digital Services Act:** Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

**Effective Date:** the date of adoption of the Decision.

**Eligible Games:** all current and future PC and console franchises, titles in these PC and console franchises, and any other PC and console games that (i) have been developed in the past or will be developed in the future, either in part or in full, by any of the Activision Blizzard Studios (as listed in **Annex 1**); or (ii) are based, either in part or in full, on IP rights of any PC or console franchises, titles in these PC or console franchises, and any other PC or console games that Activision Blizzard Studios have developed in the past or will develop in the future. In case there are different versions of a PC game for different operating systems, each of these versions are Eligible Games. For the avoidance of doubt, the definition of Eligible Games further includes all additional content that is being made available for Eligible Games, such as add-ons, download content or in-game purchases.

**Eligible Streaming Service:** a Streaming Service which currently provides or intends to provide cloud game streaming services to Consumers, irrespective of the Streaming Service's business model, and either: (i) is permitted by an Authorized Game Store to provide access to Eligible Games including Streaming Services that are granted access in accordance with para. 5 of these Commitments; or (ii) offers access to Eligible Games through applications which do not require integration with an Authorized Game Store, including by checking for a license via APIs.

**Entitlement Data:** the list of Eligible Games for which a consumer has obtained a license on the Microsoft Game Stores and/or Game Pass.

**e-Privacy Directive:** Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

**Game Pass:** a multi-game subscription service provided by Microsoft, including any successor products and services offered by Microsoft during the Term.

**GDPR:** Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

**Major Game Publisher:** Tencent, Valve Corporation, Nexon, NetEase, EA, SmileGate Embracer (THQ) - Perfect World, Roblox Corporation, Take Two, Epic Games, Ubisoft, Square Enix, Bandai Namco Entertainment, Sony and Nintendo.

**Microsoft:** Microsoft Corporation, or any Affiliated Undertakings of Microsoft Corporation.

**Microsoft Game Store:** any digital PC game store owned by Microsoft, including Battle.net or any successor store, which distributes PC versions of Eligible Games after the Closing Date.

**Monitoring Trustee:** one or more natural or legal persons who are approved by the Commission and appointed by Microsoft, and who have the duty to monitor Microsoft's compliance with the conditions and obligations attached to the Decision.

**NVIDIA:** NVIDIA Corporation.

**NVIDIA GeForce NOW:** NVIDIA's cloud game streaming service.

**Parties:** Microsoft and Activision Blizzard.

**Streaming Service:** a cloud game streaming service that allows Consumers to play, from the service provider's cloud-based servers, PC or console games for which the Consumers have already obtained a license for the game (including through either buy-to-play, free-to-play, or subscription).

**Term:** duration of the Commitments, namely 10 years from the Closing Date.

**Ubitus:** Ubitus K.K.

**Xbox:** a dedicated video gaming console produced by Microsoft.

**Xbox Cloud Gaming Service:** Microsoft's cloud game streaming service currently offered as a feature of Game Pass Ultimate, one of the subscription plans for Game Pass, including any successor cloud game streaming services offered by Microsoft during the Term as part of Game Pass.

## II. The Commitments

### A. Consumer License

- (2) Microsoft commits to grant Consumers that have a license for the game (including through either buy-to-play, free-to-play, or subscription) the right to stream the Eligible Games from the Closing Date for a period of 10 years, by amending its end-user license agreements (“**Consumer License**”) in accordance with **Annex 3**. Consumers will be granted this right regardless of whether the Eligible Game was obtained prior to or after the Closing Date.

### B. Streaming Provider License

- (3) Microsoft commits for a period of 10 years from the Closing Date to grant a royalty-free license to stream Eligible Games to Eligible Streaming Services in accordance with the terms in **Annex 4** (each a “**Streaming Provider Licence**”).
- (4) Microsoft commits to grant Streaming Provider Licenses in accordance with this paragraph (4) regardless of whether Microsoft currently streams or will in the future stream Eligible Games on its own cloud game streaming service, Xbox Cloud Gaming. For new releases, the Streaming Provider License covers Eligible Games, including publicly available beta versions and early access releases, from the availability of the respective game on a Microsoft Game Store, Game Pass or any other Authorized Game Store, whichever date is the earliest.
- (5) Microsoft commits that the Microsoft Game Stores will permit a Streaming Service to provide access to PC versions of Eligible Games. Microsoft further commits to provide, with consumer consent, access to Entitlement Data through a standard interface. This obligation is limited to Streaming Services that are already licensed to provide cloud game streaming by at least one Major Game Publisher at the time the Streaming Service seeks access to a Microsoft Game Store.
- (6) For access to Eligible Games through applications which do not require integration with an Authorized Game Store, including by checking for a license via APIs, Microsoft commits not to terminate or degrade the availability of such access, as available at the Closing Date, including the availability of public APIs for the Microsoft Game Stores.
- (7) Microsoft further commits, for a period of 10 years from the Closing Date, to grant a royalty-free, worldwide license to stream Eligible Games to:
- NVIDIA in accordance with the terms in **Annex 5**;
  - Boosteroid in accordance with the terms in **Annex 6**; and
  - Ubitus in accordance with the terms in **Annex 7**.
- (8) Licenses granted under the Streaming Provider License commitment will be available on Microsoft’s website and subject to the following terms:

- Unless otherwise agreed with Authorized Game Stores, Eligible Streaming Services shall not receive any game sales revenues, in-app purchases or any other future game-related transactional revenue generated by Eligible Games for the streaming of Eligible Games. For the avoidance of doubt, in case Eligible Streaming Services also offer Eligible Games for purchase, or as part of a multi-game subscription service under a respective agreement with Microsoft, this clause has no impact on the allocation of revenue set out in such agreement.
  - Eligible Streaming Services [*business secrets concerning the market test questionnaire*], whereas Microsoft will not invoke the existence of any third-party public performance or similar licenses that are not owned by Microsoft, if any, as a reason for seeking to invalidate the Streaming Provider License; and (ii) compliance with relevant laws, including the Digital Services Act, the GDPR, the e-Privacy Directive, and privacy standards.
- (9) Microsoft may amend the terms of Consumer Licenses or Streaming Provider Licenses with the approval of the Monitoring Trustee and the Commission.

### **III. Monitoring Trustee**

#### **A. Appointment procedure**

- (10) No later than the Closing Date, Microsoft shall appoint a Monitoring Trustee to carry out the functions specified in these Commitments for a Monitoring Trustee. Microsoft commits not to close the Concentration before the appointment of a Monitoring Trustee.
- (11) The Monitoring Trustee shall, at the time of appointment, be independent of the Parties and each of their Affiliated Undertakings; possess the necessary experience, competence and qualifications to carry out its mandate; and neither have nor become exposed to a Conflict of Interest.
- (12) The Monitoring Trustee shall be remunerated by Microsoft in a way that does not impede the independent and effective fulfilment of its mandate.
- (13) *Proposal by Microsoft.* No later than two weeks after the Effective Date, Microsoft shall submit the name or names of one or more natural or legal persons whom Microsoft proposes to appoint as the Monitoring Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the person or persons proposed as Monitoring Trustee fulfil the requirements set out in paragraph 11 and shall include:
- a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Monitoring Trustee to fulfil its duties under these Commitments; and
  - b) the outline of a work plan which describes how the Monitoring Trustee intends to carry out its assigned tasks.
- (14) *Approval or rejection by the Commission.* The Commission shall have the discretion to approve or reject the proposed Monitoring Trustee(s) and to approve the proposed

mandate subject to any modifications it deems necessary for the Monitoring Trustee to fulfil its obligations. If only one name is approved, Microsoft shall appoint or cause to be appointed the person or persons concerned as Monitoring Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, Microsoft shall be free to choose the Monitoring Trustee to be appointed from among the names approved. The Monitoring Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

- (15) *New proposal by Microsoft.* If all the proposed Monitoring Trustees are rejected, Microsoft shall submit the names of at least two more natural or legal persons within one week of being informed of the rejection, in accordance with paragraphs 10 and 14 of these Commitments.
- (16) *Monitoring Trustee nominated by the Commission.* If all further proposed Monitoring Trustees are rejected by the Commission, the Commission shall nominate a Monitoring Trustee, whom Microsoft shall appoint, or cause to be appointed, in accordance with a Monitoring Trustee mandate approved by the Commission.

#### **B. Functions of the Monitoring Trustee**

- (17) The Monitoring Trustee shall assume its specified duties and obligations in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Monitoring Trustee or Microsoft, give any orders or instructions to the Monitoring Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.
- (18) The Monitoring Trustee shall:
  - a) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision;
  - b) provide to the Commission, sending Microsoft a non-confidential copy at the same time, a written report within 15 days after the end of each 6 month period so that the Commission can assess whether the Commitments are being complied with;
  - c) propose, as applicable, to Microsoft such measures as the Monitoring Trustee considers necessary to ensure Microsoft's compliance with the Commitments;
  - d) promptly report in writing to the Commission, sending Microsoft a non-confidential copy at the same time, if it concludes on reasonable grounds that Microsoft is failing to comply with the Commitments;
  - e) act as a contact point for questions from third parties about the nature and scope of the Commitments; andassume any other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision.

### C. Duties and obligations of the Parties

- (19) Microsoft shall provide and shall cause its advisors to provide the Monitoring Trustee with all such co-operation, assistance and information as the Monitoring Trustee may reasonably require to perform its tasks. The Monitoring Trustee shall have full and complete access to Microsoft's books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and Microsoft shall provide the Monitoring Trustee upon request with copies of any documents except where such disclosure would give rise to a loss of any applicable legal privilege. Microsoft shall be available for meetings in order to provide the Monitoring Trustee with all information necessary for the performance of its tasks.
- (20) Microsoft shall indemnify the Monitoring Trustee and its employees and agents (each an "***Indemnified Party***") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to Microsoft for, any liabilities arising out of the performance of the Monitoring Trustee's duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Monitoring Trustee, its employees, agents or advisors.
- (21) At the expense of Microsoft, the Monitoring Trustee may appoint advisors (in particular an IT expert with the capability to monitor the correct implementation of the Commitments, or any advisors for corporate finance or legal advice), subject to Microsoft's approval (this approval not to be unreasonably withheld or delayed) if the Monitoring Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the mandate, provided that any fees and other expenses incurred by the Monitoring Trustee are reasonable. Should Microsoft refuse to approve the advisors proposed by the Monitoring Trustee the Commission may approve the appointment of such advisors instead, after having heard Microsoft. Only the Monitoring Trustee shall be entitled to issue instructions to the advisors. Paragraph 20 of these Commitments shall apply *mutatis mutandis*.
- (22) Microsoft agrees that the Commission may share Confidential Information proprietary to Microsoft with the Monitoring Trustee. The Monitoring Trustee shall not disclose such information and the principles contained in Article 17 (1) and (2) of the Merger Regulation apply *mutatis mutandis*.
- (23) Microsoft agrees that the contact details of the Monitoring Trustee are published on the website of the Commission's Directorate-General for Competition and Microsoft shall inform interested third parties of the identity and the tasks of the Monitoring Trustee.
- (24) For a period of 10 years from the Closing Date the Commission may request all information from the Parties that is reasonably necessary to monitor the effective implementation of these Commitments.
- (25) If the Monitoring Trustee, acting reasonably, suspects that Microsoft is not making a PC or console game or PC or console franchise available which should have been made available under the Commitments, or that Microsoft is circumventing the application of these Commitments to a PC or console game or PC or console franchise that would, in

part or in full, have been developed by any of the Activision Blizzard Studios absent the Transaction, Microsoft shall bear the burden of proof to demonstrate to the Monitoring Trustee that the PC or console game or PC or console franchise does not qualify as an Eligible Game under the wording or purpose of the Commitments. In this context, the purpose of the Commitments is to make all PC or console games that have been developed in the past or would have been developed in the future by Activision Blizzard Studios absent the Transaction available for cloud game streaming.

- (26) If the Monitoring Trustee, acting reasonably, suspects that Microsoft is using third party rights mentioned under paragraph (8) of the Commitments to circumvent the application of the Commitments, Microsoft shall bear the burden of proof to demonstrate to the Monitoring Trustee that Microsoft is acting in good faith and without intention to frustrate the application of the Commitments.

#### **D. Replacement, discharge and reappointment of the Monitoring Trustee**

- (27) If the Monitoring Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Monitoring Trustee to a Conflict of Interest:
- a) the Commission may, after hearing the Monitoring Trustee and Microsoft, require Microsoft to replace the Monitoring Trustee; or
  - b) Microsoft may, with the prior approval of the Commission, replace the Monitoring Trustee.
- (28) If the Monitoring Trustee is removed according to paragraph 27 of these Commitments, the Monitoring Trustee may be required to continue in its function until a new Monitoring Trustee is in place to whom the Monitoring Trustee has effected a full hand over of all relevant information. The new Monitoring Trustee shall be appointed in accordance with the procedure referred to in paragraphs 10-16 of these Commitments.
- (29) Unless removed according to paragraph 27 of these Commitments, the Monitoring Trustee shall cease to act as Monitoring Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Monitoring Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

#### **IV. Dispute Resolution**

- (30) In the event an Eligible Streaming Service (including NVIDIA, Boosteroid and Ubitus), showing a sufficient legitimate interest, claims that Microsoft is failing to comply with its obligations arising from the Commitments, the Fast-Track Dispute Resolution Procedure described in **Annex 2** shall apply.
- (31) In the event an Eligible Streaming Service (including NVIDIA, Boosteroid and Ubitus), breaches the terms of its license agreement with Microsoft, Microsoft shall inform the Eligible Streaming Service of that breach in writing. If the Eligible Streaming Service fails to comply with the terms of its license agreement within 30 days, Microsoft shall

have the right to terminate the license agreement with the Eligible Streaming Service, following an opinion of the Monitoring Trustee and approval by the Commission. If the Eligible Streaming Service wishes to oppose to Microsoft's termination of its license agreement, the Fast-Track Dispute Resolution Procedure described in **Annex 2** shall apply.

**V. The Review Clause**

- (32) The Commission may, in response to a reasoned request from Microsoft showing good cause waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to Microsoft. The request shall not have the effect of suspending the application of the undertaking and, in particular, of suspending the expiry of any time period in which the undertaking has to be complied with.
- (33) In the event that the market structure with respect to game publishers changes during the Term of these commitments (*e.g.*, because of an acquisition of a publisher or due to significant shifts in the market presence of one or several of the publishers), the Commission may amend and/or expand the definition of Major Game Publisher by replacing individual publishers with other companies and/or by adding new companies to the list of Major Game Publishers to ensure that a sufficient number of Major Game Publishers are available to license their games for streaming at any point during the Term. Before taking a decision, the Monitoring Trustee shall prepare a report, including a comparison of the Major Game Publishers as of the date of the Decision and at the time of the report and a list of other publishers that the Monitoring Trustee considers suitable to be included in the definition of Major Game Publisher. Following such report, which shall be shared with the Commission and a non-confidential version of it with Microsoft, Microsoft shall have two weeks to provide its view on the report before the Commission takes a decision.

**VI. Entry into force**

- (34) The Commitments shall take effect upon the date of adoption of the Decision.

.....  
duly authorised for and on behalf of  
Microsoft Corporation



**Annex 1 – List of Activision Blizzard Studios**

High Moon Studios, LLC
Infinity Ward, Inc.
Sledgehammer Games, Inc.
Toys for Bob, Inc.
Treyarch Corporation
Beenox, Inc.
Digital Legends Entertainment, SLU
Raven Software
Solid State Studios
Blizzard Entertainment
King

## Annex 2 – Fast-Track Dispute Resolution Procedure

- (35) An Eligible Streaming Service (including NVIDIA, Boosteroid and Ubitus), that wishes to avail itself of the fast-track dispute resolution procedure (the “**Requesting Party**”) shall inform Microsoft and the Monitoring Trustee in writing, setting out in detail the reasons leading the Requesting Party to believe that Microsoft is failing to comply with the requirements in the Commitments. The Requesting Party and Microsoft will use commercially reasonable efforts to settle all disputes that may arise through cooperation and consultation within a reasonable period of time not exceeding fifteen working days (such period being extendable by mutual consent of Microsoft and the Requesting Party) (“**Consultation Period**”) after receipt of the request.
- (36) The Monitoring Trustee shall present its own proposal (the “**Trustee Proposal**”) for resolving the dispute within eight working days, specifying in writing the rationale for the Trustee Proposal, and the action, if any, to be taken by Microsoft in order to ensure compliance with Commitments vis-à-vis the Requesting Party.
- (37) Should the Requesting Party and Microsoft (together, the “**Parties to the Arbitration**”) fail to resolve their differences of opinion in the Consultation Period, then the Requesting Party may, within 20 working days after the Consultation Period has expired, serve a notice (the “**Notice**”), in the sense of a request for arbitration, to the International Chamber of Commerce (the “**Arbitral Institution**”), with a copy of such Notice and request for arbitration to Microsoft.
- (38) The Notice shall set out in detail the dispute, difference or claim (the “**Dispute**”) and shall contain, *inter alia*, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon shall be attached, *e.g.*, documents, agreements, expert reports, and witness statements. The Notice shall also contain a detailed description of the action to be undertaken by Microsoft and the Trustee Proposal, including a comment as to its appropriateness.
- (39) Microsoft shall, within ten working days from receipt of the Notice, submit its answer (the “**Answer**”), which shall provide detailed reasons for its conduct and set out, *inter alia*, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon, *e.g.*, documents, agreements, expert reports, and witness statements. The Answer shall, if appropriate, contain a detailed description of the action which Microsoft proposes to undertake vis-à-vis the Requesting Party and the Trustee Proposal (if not already submitted), including a comment as to its appropriateness.

### *Appointment of the arbitrators*

- (40) The Arbitral Tribunal shall consist of three persons. The Requesting Party shall nominate its arbitrator in the Notice; Microsoft shall nominate its arbitrator in the Answer. The arbitrator nominated by the Requesting Party and by Microsoft shall, within five working days of the nomination of the latter, nominate the chairman, making such nomination known to the parties and the Arbitral Institution which shall forthwith confirm the appointment of all three arbitrators.
- (41) Should the Requesting Party wish to have the Dispute decided by a sole arbitrator it shall indicate this in the Notice. In this case, the Requesting Party and Microsoft shall agree

on the nomination of a sole arbitrator within five working days from the communication of the Answer, communicating this to the Arbitral Institution.

- (42) Should Microsoft fail to nominate an arbitrator, or if the two arbitrators fail to agree on the chairman, or should the Parties to the Arbitration fail to agree on a sole arbitrator, the default appointment(s) shall be made by the Arbitral Institution.
- (43) The three-person arbitral tribunal or, as the case may be, the sole arbitrator, are herein referred to as the “**Arbitral Tribunal**”.

#### *Arbitration Procedure*

- (44) The Dispute shall be finally resolved by arbitration under the International Chamber of Commerce Rules of Arbitration, with such modifications or adaptations as foreseen herein or necessary under the circumstances (the “**Rules**”). The arbitration shall be conducted, at the Requesting Party’s choice, in Brussels, Belgium; London, United Kingdom; or New York, United States of America, in the English language. For good cause, any Party may apply to the Arbitral Institution (or Arbitral Tribunal as may be appropriate) for an extension of the timelines provided in this Annex.
- (45) The procedure shall be a fast-track procedure. For this purpose, the Arbitral Tribunal shall shorten all applicable procedural time-limits under the Rules as far as admissible and appropriate in the circumstances. The Parties to the Arbitration shall consent to the use of email for the exchange of documents.
- (46) The Arbitral Tribunal shall, as soon as practical after the confirmation of the Arbitral Tribunal, hold an organizational conference to discuss any procedural issues with the Parties to the Arbitration. Terms of Reference shall be drawn up and signed by the Parties to the Arbitration and the Arbitral Tribunal at the organizational meeting or thereafter and a procedural time-table shall be established by the Arbitral Tribunal. An oral hearing shall, as a rule, be established within two months of the confirmation of the Arbitral Tribunal.
- (47) In order to enable the Arbitral Tribunal to reach a decision, it shall be entitled to request any relevant information from the Parties to the Arbitration, to appoint experts and to examine them at the hearing, and to establish the facts by all appropriate means. The Arbitral Tribunal is also entitled to ask for assistance by the Monitoring Trustee in all stages of the procedure if the Parties to the Arbitration agree.
- (48) The Arbitral Tribunal shall not disclose confidential information and apply the standards attributable to confidential information under the EU Merger Regulation. The Arbitral Tribunal may take the measures necessary for protecting confidential information in particular by restricting access to confidential information to the Arbitral Tribunal, the Monitoring Trustee, and outside counsel and experts of the opposing party.
- (49) The burden of proof in any dispute under these Rules shall be borne as follows: (i) the Requesting Party must produce evidence of a *prima facie* case; and (ii) if the Requesting Party produces evidence of a *prima facie* case, the Arbitral Tribunal must find in favor of the Requesting Party unless Microsoft can produce evidence to the contrary.

### *Involvement of the Commission*

- (50) The Commission shall be allowed and enabled to participate in all stages of the procedure by
- Receiving all written submissions (including documents and reports) made by the Parties to the Arbitration;
  - Receiving all orders, interim and final awards and other documents exchanged by the Arbitral Tribunal with the Parties to the Arbitration (including Terms of Reference and procedural time-table);
  - Giving the Commission the opportunity to file *amicus curiae* briefs; and
  - Being present at the hearing(s) and with the permission of the Arbitral Tribunal, it may also make oral observations.
- (51) The Arbitral Tribunal shall forward, or shall order the Parties to the Arbitration to forward, the documents mentioned to the Commission without delay.
- (52) In the event of disagreement between the Parties to the Arbitration regarding the interpretation of the Commitments, the Arbitral Tribunal may seek the Commission's interpretation of the Commitments before finding in favor of any Party to the Arbitration and shall be bound by the interpretation.

### *Decisions by the Arbitral Tribunal*

- (53) The Arbitral Tribunal shall decide the dispute on the basis of the Commitments and the Decision. Issues not covered by the Commitments and the Decision shall be decided (in the order as stated) by reference to the EU Merger Regulation, EU law and general principles of law common to the legal orders of the EU Member States without a requirement to apply a particular national system. The Arbitral Tribunal shall take all decisions by majority vote.
- (54) Upon request of the Requesting Party, the Arbitral Tribunal may make a preliminary ruling on the Dispute. The preliminary ruling shall be rendered within one month after the confirmation of the Arbitral Tribunal, shall be applicable immediately and, as a rule, remain in force until a final decision is rendered.
- (55) The Arbitral Tribunal shall, in the preliminary ruling as well as in the final award, specify the action, if any, to be taken by Microsoft in order to comply with the Commitments vis-à-vis the Requesting Party. The final award shall be final and binding on the Parties to the Arbitration and shall resolve the Dispute and determine any and all claims, motions or requests submitted to the Arbitral Tribunal. The arbitral award shall also determine the reimbursement of the costs of the successful party and the allocation of the arbitration costs. In case of granting a preliminary ruling or if otherwise appropriate, the Arbitral Tribunal shall specify that terms and conditions determined in the final award apply retroactively.

- (56) The final award shall, as a rule, be rendered within six months after the confirmation of the Arbitral Tribunal. The time-frame shall, in any case, be extended by the time the Commission takes to submit an interpretation of the Commitments if asked by the Arbitral Tribunal.
- (57) The Parties to the Arbitration shall prepare a non-confidential version of the final award, without business secrets. The Commission may publish the non-confidential version of the award. The Parties to the Arbitration, the Arbitral Tribunal, all other persons participating in the proceedings and all further persons involved, *i.e.* in the administration of the arbitral proceedings, shall maintain confidentiality towards all persons regarding the conduct of arbitral proceedings. All proceedings will be held in private and remain confidential.
- (58) Nothing in the arbitration procedure shall affect the power of the Commission to take decisions in relation to the Commitments in accordance with its powers under the EU Merger Regulation.

### **Annex 3 – Consumer License**

Microsoft will include in its End User License Agreement (EULA), and publish on its website, the following Consumer License:

*As an integral part of its End User License Agreement (EULA), Microsoft agrees to allow Consumers to play, solely for their personal use, Eligible Games on a Streaming Service on any device that they own, as defined in and pursuant to the Commitments entered into by Microsoft and made legally binding by the European Commission in its decision under Article 8(2) of Regulation (EC) 139/2004 in case M.10646 – Microsoft/Activision Blizzard.*

## **Annex 4 – Streaming Provider License**

Microsoft will publish on its website the following Streaming Provider License:

*Microsoft licenses its rights under a non-exclusive, non-transferable, non-sublicensable license to Eligible Streaming Services to stream Eligible Games for the sole benefit of Consumers in accordance with the Consumer License, as defined in and pursuant to the Commitments entered into by Microsoft and made legally binding by the European Commission in its decision under Article 8(2) of Regulation (EC) 139/2004 in case M.10646 – Microsoft/Activision Blizzard.*

## **Annex 5 – NVIDIA Terms**

In accordance with and subject to the GeForce NOW Listing Agreement dated 20 February 2023:

**Clause 2.2 A.** *Publisher [Microsoft] agrees to grant Publisher's Customers the right to play Publisher's Games on GFN. Publisher will ensure that any End User License Agreement (EULA) that Publisher offers any Customer will permit Customer to play Publisher's Games on GFN.*

**Clause 2.2 C.** *Publisher grants to NVIDIA non-exclusive, royalty-free, non-transferable rights to Publisher's Games in the Territory that are reasonably necessary for NVIDIA to make the Games available on GFN and to provide Publisher's Customers with the best possible gaming experience on GFN, including but not limited to right to pre-install the games on GFN and make any copies incidental to serving Publisher's Customers, as well as the right to use mutually agreed upon Assets and / or other related marketing materials for co-marketing purposes.*

**Clause 2.1 D.** *NVIDIA will receive zero percent (0%) of Publisher's Game sales and in-app purchases or any other future game-related transactional revenue not yet contemplated generated on the GeForce NOW service.*

**Clause 7.1** *The Parties agree that they shall comply with applicable federal, state and local orders, laws, regulations and ordinances, including specifically and export control laws, rules and regulations.*

**Clause 4.1** *This Agreement shall be effective as of the Effective Date [i.e., the date of signing of the agreement] and shall continue for ten (10) years unless where otherwise stated. Following the initial ten (10) year period, the Agreement shall then automatically renew for one (1) year renewal periods unless a Party provides notice at least one month before expiration of the term.*



## Annex 6 – Boosteroid Terms

In accordance with and subject to the Cloud Gaming License Agreement dated 9 March 2023:

**Clause 4.1.** *Microsoft agrees it will allow Microsoft's Customers to play the Games on the [Boosteroid] Service. Microsoft will ensure that any End User License Agreement (EULA) that Microsoft offers any Microsoft Customer does not prohibit Service Customers to play Microsoft's Games on the Service.*

**Clause 4.2.** *To the extent Microsoft owns or holds such rights, Microsoft grants to Boosteroid non-exclusive, royalty-free, non-transferable rights to the Games in the Territory that are reasonably necessary for Boosteroid to make the Games available on the Service.*

**Clause 3.4.** *No revenue share. Boosteroid will receive zero percent (0%) of Game sales and in-app purchases or any other future game-related transactional revenue not yet contemplated generated on the Service.*

**Clause 10.1.** *The Parties agree that they shall comply with applicable federal, state and local orders, laws, regulations and ordinances, including specifically export control laws, rules and regulations.*

**Clause 6.1.** *This Agreement shall be effective as of the Effective Date [i.e., the date of signing of the agreement] and shall continue for ten (10) years [...]. Following the initial ten (10) year period, the Agreement shall then automatically renew for one (1) year renewal periods unless a Party provides notice at least one month before expiration of the term.*

## **Annex 7 – Ubitus Terms**

In accordance with and subject to the Cloud Gaming License Agreement dated 11 March 2023:

**Clause 4.1.** *Microsoft agrees it will allow Microsoft’s Customers to play the Games GameNow. Microsoft will ensure that any End User License Agreement (EULA) that Microsoft offers any Microsoft Customer does not prohibit Ubitus Customers to play Microsoft’s Games on GameNow.*

**Clause 4.3.** *To the extent Microsoft owns or holds such rights, Microsoft grants to Ubitus non-exclusive, royalty-free, non-transferable rights to the Games in the Territory that are reasonably necessary for Ubitus to make the Games available on GameNow.*

**Clause 3.4.** *No revenue share. Ubitus will receive zero percent (0%) of Game sales and in-app purchases or any other future Game-related transactional revenue not yet contemplated generated on GameNow.*

**Clause 10.1.** *The parties agree that they shall comply with applicable federal, state and local orders, laws, regulations and ordinances, including specifically export control laws, rules and regulations.*

**Clause 6.1.** *This Agreement shall be effective as of the Effective Date [i.e., the date of signing of the agreement] and shall continue for ten (10) years. Following the initial ten (10) year period, the Agreement shall then automatically renew for one (1) year renewal periods unless a Party provides notice at least one month before expiration of the term.*

\*\*\*