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Microsoft / Activision Blizzard

Cross-submission by Microsoft on submissions received on the Statement of Issues 11 July 2023

1. Microsoft Corporation ("**Microsoft**") provides this cross-submission in response to the four third-party submissions that the Commerce Commission (the "**NZCC**") received in response to its Statement of Issues ("**SOI**") regarding Microsoft's proposed acquisition of Activision Blizzard, Inc ("**Activision**") (the "**Transaction**").
2. It is notable that of those four submissions, three were in support of the Transaction - namely from:
 - (a) NVIDIA, which said: "*Rather than harming competition in New Zealand, NVIDIA believes that the acquisition will result in a better outcome than would be the case if the acquisition did not proceed*" (which is consistent with the European Commission's ("**EC**") conclusion that the Transaction would "*represent a significant improvement for cloud game streaming compared to the current situation*");¹
 - (b) Anonymous A, which said: "*[T]o me the concerns raised [about the] possible lack of competition in the cloud gaming environment is a flawed argument*"; and
 - (c) Anonymous B, which said: "*There should be no immediate cause for concern in this case*".
3. The above adds further to the weight of evidence outlined in Microsoft's 4 July 2023 response to the SOI (the "**Response**"), and the SOI itself (which referred to third-party evidence describing Microsoft as a "good actor"),² demonstrating that there is no credible prospect that a substantial lessening of competition could arise in any markets in New Zealand as a result of the Transaction.
4. Furthermore, it is also notable that the only submission the NZCC received that was not in support of the Transaction, from Anonymous C, sought to rely on issues already rightly ruled out by the NZCC (horizontal effects) and sought to draw a misleading analogy to Microsoft's 2021 acquisition of ZeniMax Media Inc ("**ZeniMax**") (referred to in that submission as Microsoft's acquisition of "Bethesda").
5. In particular, while Anonymous C sought to characterise the ZeniMax acquisition as a "warning" to regulators, to the contrary:
 - (a) Microsoft has acted consistently with all commitments and statements it made in relation to the ZeniMax acquisition; and
 - (b) that acquisition, in fact, illustrates Microsoft's consistent position on cross-platform play and its commitment to gamers on all platforms.
6. Demonstrating this:
 - (a) Following its acquisition of ZeniMax, Microsoft complied with all pre-existing contractual protections under the agreements between ZeniMax and Sony. As a result, the first two ZeniMax titles that launched post-acquisition, *Deathloop* and *Ghostwire: Tokyo*, were released as timed console exclusives for PlayStation.

¹ (15 May 2023). Mergers: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions. European Commission. Retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705

² Para [95], SOI.

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Both games were only later launched on Xbox after the one-year exclusivity period had elapsed.

- (b) Microsoft has acted consistently with public statements made that it would "honor all of ZeniMax's obligations to continue to make its current games available on other gaming hardware."³ Microsoft has not removed any of ZeniMax's existing content that was shipping on PlayStation on 9 March 2021 (the date when it closed its acquisition of ZeniMax) from PlayStation or other platforms. Moreover, it has continued to support, update, and release new content on PlayStation and all other relevant platforms for its largest multiplayer games like *Elder Scrolls Online*⁴ and *Fallout 76*.⁵
- (c) Microsoft has acted consistently with public statements made in relation to that acquisition that all other distribution decisions would be made on a case-by-case basis. In exercising this discretion, since the acquisition only three ZeniMax titles have, at launch, only initially been released for Xbox and PC, being *Starfield*, *Redfall*, and *Indiana Jones*. All of these games are entirely new games, and therefore did not have any pre-existing sales, revenue, or community of gamers on any console that would be impacted by a decision to release on limited platforms, and in the case of *Indiana Jones*, for example, Microsoft has confirmed that the decision to only initially release the game on Xbox and PC was about reducing risk by developing a new game for just limited platforms, at least initially, given that the title required "dealing with a licensor [Disney] who's going to have a ton of feedback on what you're making, add a lot of time to your schedule."⁶ Further, the first ZeniMax game released only initially for Xbox and PC was not released until 2023 - i.e. two years after the ZeniMax Acquisition completed, and while Sony has made allegations that *Elder Scrolls VI* will be "exclusive" to Xbox and PC, Microsoft has not made any decisions about which platforms that (single-player) title will be on (given the release of that title is still a number of years away).⁷

7. In addition, there are a number of additional factors which further demonstrate that Microsoft would have no incentive to withhold *Call of Duty* ("**CoD**") content from other console or cloud gaming providers post-Transaction – namely:

- (a) Microsoft has made it clear in numerous public statements that it will not withhold *CoD* from other providers, and that it will continue to make *CoD* and other popular Activision Blizzard titles available for purchase on any platform on which they are currently available. Any alternative approach would risk huge gamer backlash to Microsoft, including due to those public commitments,⁸ and as demonstrated through the ZeniMax acquisition, Microsoft acts consistently with its public statements.
- (b) Microsoft has:

³ Para 3.55(b) of Microsoft's Response to the CMA's Issues Statement (31 October 2022).

⁴ Indeed, ZeniMax released the newest chapter of the *Elder Scrolls Online* saga, *Necrom*, simultaneously on PlayStation, Xbox and PC on 20 June 2023 at a price of USD 39.99.

⁵ [].

⁶ (23 June 2023). Bethesda's Indiana Jones is exclusive to Xbox and PC. The Verge. Retrieved from: <https://www.theverge.com/2023/6/22/23770141/bethesda-indiana-jones-game-xbox-pc-exclusive>

⁷ (June 2023). The Elder Scrolls 6 is "so far out" even Phil Spencer doesn't know what console it'll be on. Games Radar. Retrieved from: <https://www.gamesradar.com/the-elder-scrolls-6-is-so-far-out-even-phil-spencer-doesnt-know-what-console-itll-be-on/>

⁸ See paragraph 3.13(f)(iii) of the Response.

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- (i) entered into the legally binding Nintendo Contract to bring *CoD* to Nintendo [];⁹
- (ii) reached out to Sony to offer continued availability of *CoD* on PlayStation for the next 10 years [];¹⁰ and
- (iii) given the EC Commitments and entered into legally binding contracts with NVIDIA, Boosteroid and Ubitus to stream Activision Blizzard games via those and other cloud gaming providers for at least 10 years (with significant ongoing independent monitoring, and severe repercussions if not adhered to),¹¹

and as demonstrated through the ZeniMax acquisition, Microsoft acts consistently with its contractual commitments.

- (c) Compared to ZeniMax titles (none of which are as popular as *CoD*), the financial impact on Microsoft of any hypothetical withholding of *CoD* from other providers would be significantly greater again, including because:
 - (i) the loss of cross-play (multiplayer) functionality that such a strategy would entail would alone result in significant consumer backlash, both by undermining the *CoD* experience on Xbox and undermining the relevance of *CoD*;¹² and
 - (ii) Microsoft's modelling of Activision Blizzard's value forecasts an average USD\$[] annual revenue by distributing *CoD* on PlayStation between 2023 and 2032.

In this respect, it is important to note that any value from making a title exclusive to a particular platform does not have a linear relationship with the popularity of the game (as shown in Figure 1 below). To the contrary, the costs of attempting to make a popular title, such as *CoD*, exclusive when it already has pre-existing sales, revenue, and a community of gamers would be significant.

Figure 1 – Stylised relationship between value of exclusivity and size of game



⁹ See paragraph 3.13(c) of the Response.

¹⁰ See paragraph 3.13(f)(iv) of the Response.

¹¹ See paragraph 4.46 of the Response.

¹² See paragraph 3.13(f)(iv) of the Response.

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Accordingly, a better comparison to *CoD* would be *Minecraft*, which is a globally popular multi-player franchise with a strong player community and social element that was available on multiple platforms when Microsoft acquired it in 2014. Following this acquisition, *Minecraft* has remained on all rival platforms, including PlayStation, in addition to being made available on many new platforms, including Nintendo. As well as benefiting gamers, *Minecraft's* multi-platform strategy has been a significant financial success, with over 275 million copies sold to date.

8. As such, to the extent an analogy can be drawn to the ZeniMax acquisition, that previous acquisition demonstrates that Microsoft acts consistently with its commitments and statements, and that Microsoft has no incentive to foreclose rival console or cloud gaming providers.
9. Accordingly, for the reasons outlined above, the submissions elicited by the NZCC's SOI process (all but one of which are in support of the Transaction) only serve to further demonstrate that there is no credible prospect that a substantial lessening of competition could arise in any markets in New Zealand as a result of the Transaction, and therefore, that clearance must be granted.