

March 1, 2022

Lina Khan
Chair
Federal Trade Commission

Noah Joshua Phillips
Commissioner

Rebecca Kelly Slaughter
Commissioner

Christine S. Wilson
Commissioner

CC: Director Holly Vedova, FTC Bureau of Competition; Director Sam Levine, FTC Bureau of Consumer Protection

SENT VIA E-MAIL

Re: Investigate Microsoft's acquisition of Activision Blizzard

Dear Chair Khan and Commissioners,

The undersigned organizations ask that the Federal Trade Commission (FTC) closely scrutinize Microsoft's intended purchase of Activision Blizzard (Activision). Microsoft's buyout of a structurally important gaming developer and publisher, when viewed with its current and pending holdings, raise serious competition issues for the video game sector. We believe that the transaction may lead to an undue concentration of market power when viewed as a vertical or horizontal merger, threaten data privacy and security, undermine consumer protection online, impinge on the consumer right to repair and exacerbate worker disempowerment and wage suppression.

The FTC ought to closely investigate the potential move as a vertical merger. Microsoft is a major participant in the gaming industry through its Xbox console line of business. Indeed, with the formation of its recent Gaming Ecosystem Organization (GEO), Microsoft signaled its shifting focus away from strictly console-centric towards a cross-network and cross-product approach.¹ The company's status as a major hardware producer, platform provider and distributor raises the question of whether the acquisition of a sizable segment of the game publishing market will diminish competition. Gamers are already raising concerns that the merger will result in popular games becoming exclusive to Microsoft hardware.² The advent of streaming games and Microsoft's existing cloud infrastructure offers further opportunities for the corporation to stamp out smaller market participants through anticompetitive conduct. By

¹ McKinsey & Company, "Game on: An interview with Microsoft's head of gaming ecosystem," January 6, 2022 <https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/game-on-an-interview-with-microsofts-head-of-gaming-ecosystem>.

² *Gamerant*, "What the Microsoft Activision Blizzard Acquisition Means for Esports" January 23, 2022, <https://gamerant.com/microsoft-activision-blizzard-acquisition-esports-overwatch-league-call-of-duty/>

absorbing another major gaming studio and publisher, Microsoft will grow its ability to control content and self-preference its own at the expense of market competitors.

The Microsoft-Activision deal may constitute anticompetitive conduct as a horizontal merger within the video game publication and distribution market. At the very least, the deal poses the threat of anticompetitive horizontal effects due to vertical integration. Microsoft already holds a significant stake in gaming, especially after acquiring ZeniMax Media in 2020³ and Mojang in 2014.⁴ The ZeniMax purchase included popular developer Bethesda Softworks and seven other gaming development studios. Activision Blizzard is a substantial game publisher with an extremely popular roster of game franchises⁵ and a burgeoning customer base.⁶ Recent regulatory filings show that Activision has nearly 400 million monthly active users.⁷ If the FTC clears this merger, Microsoft will become the third largest gaming company in the world.⁸ The gaming industry, as the commission is aware, has now outstripped revenues from the global film and US sports business combined.⁹

The proposed merger fits an alarming pattern of concentration in the gaming industry over the past several years.¹⁰ Microsoft's expanding role in the gaming market may result in the company using its leverage to raise subscription prices and limit options, among other possible consumer harms.

Microsoft's planned growth in the gaming industry implicates concerns related to data privacy and surveillance advertising. Microsoft's proposed acquisition of programmatic (surveillance) data marketing company Xandr from AT&T will further expand its ability to track and target its users across its current and proposed holdings, including Activision Blizzard titles.¹³ Microsoft's current data driven targeting apparatus, given new added capacity from Xandr, raises consumer protection and privacy concerns, including for young users of Activision games.¹⁴ The FTC should closely analyze the data privacy

³ Microsoft Press Release, <https://news.microsoft.com/features/microsoft-finalizes-acquisition-of-zenimax-media/>

⁴ Mojang makes the incredibly popular game Minecraft. <https://news.microsoft.com/2014/09/15/minecraft-to-join-microsoft/>

⁵ *Washington Post*, "Call of Duty was already massive. With its mobile game, now it's everywhere," September 1, 2021. <https://www.washingtonpost.com/video-games/2021/09/01/call-of-duty-mobile-success/>

⁶ For example: Activision Press Release, <https://investor.activision.com/news-releases/news-release-details/activision-blizzard-completes-king-acquisition-becomes-largest;>

⁷ Activision-Blizzard Annual Report on Form 10-K 2021, https://investor.activision.com/node/33966/html#ib0ddcf3b6dfc48f1887e8f41dda6461e_136

⁸ *Reuters*, "Microsoft to gobble up Activision in \$69 billion metaverse bet," January 18, 2022 <https://www.reuters.com/technology/microsoft-buy-activision-blizzard-deal-687-billion-2022-01-18/>

⁹ *MarketWatch*, "Video Games are a bigger industry than sports and movies combined thanks to the pandemic," January 2, 2022 <https://www.marketwatch.com/story/videogames-are-a-bigger-industry-than-sports-and-movies-combined-thanks-to-the-pandemic-11608654990>

¹⁰ See Sony-Bungie acquisition, *The Verge*, "Sony is buying Bungie, the developer of Destiny and original creator of Halo," January 31, 2022 <https://www.theverge.com/22910846/sony-bungie-acquisition-playstation-destiny-halo>. See also *CNBC*, "Take-Two Interactive to buy FarmVille creator Zynga for \$12.7 billion" January 10, 2022 <https://www.cnn.com/2022/01/10/take-two-interactive-to-buy-farmville-creator-zynga-for-12point7-billion.html> "Microsoft bought Bethesda, the company behind the Fallout and The Elder Scrolls franchises, for \$7.5 billion in 2020, while Electronic Arts acquired U.K. racing game developer Codemasters for \$1.2 billion later that year. In 2021, Tencent announced deals to buy British gaming studio Sumo Group, as well as Turtle Rock Studios, the U.S.-based creator of zombie game Back4Blood."

¹³ Microsoft Advertising Blog, December 21, 2021 <https://about.ads.microsoft.com/en-us/blog/post/december-2021/microsoft-to-acquire-xandr-to-accelerate-its-digital-advertising-and-retail-media-solutions>

¹⁴ See examples of Microsoft programmatic ad practices here, including for LinkedIn: <https://about.ads.microsoft.com/en-us/solutions/audience-targeting/linkedin-profile-targeting>; <https://about.ads.microsoft.com/en-us/solutions/microsoft-audience-network>; <https://dynamics.microsoft.com/en-us/marketing/overview/>; <https://azure.microsoft.com/en-us/solutions/digital-marketing/>

dimensions of Microsoft's planned purchase of Activision, including the use of AI, influencers, neuromarketing and other practices now used for its gaming operations. In addition to concerns about data privacy, the FTC should examine the consolidation of user and developer data that may result from this merger and consider to what extent it may have anticompetitive effects.

This merger could strengthen Microsoft's power to impinge on consumers' right to repair their own video game equipment, or to have it repaired by a service provider of their choice. Despite making repair-friendly moves in other areas of the consumer electronics industry, Microsoft has continued to lobby hard against right to repair legislation affecting video games consoles. Microsoft's Xbox uses software that pairs the motherboard with the optical drive, using locking software that Microsoft has refused to make available to consumers or independent repair shops. As a result, electronics repair shops can't harvest parts from old devices as they normally do, and consumers are forced to replace multiple parts at once—which can be nearly as expensive as a whole replacement device. Although the Librarian of Congress granted a video game console optical drive repair exemption to Section 1201 of the Digital Millennium Copyright Act, it has limitations in that it did not legalize reverse engineering the software pairing tool (which Microsoft keeps proprietary), and did not extend to video game consoles without optical drives (which includes most modern consoles). With the additional power of Activision's game portfolio, it may be easier for Microsoft to continue the parts pairing strategy, and harder for a competitor to offer an alternative. While blocking this merger may not be sufficient to address concerns around repairability of Xbox devices, better repairability protections would facilitate competition in the adjacent markets of used devices and repair services. The White House and FTC have stated the intention to target anticompetitive restrictions on consumer's right to repair.¹⁵ We ask that the agency follow through and give close scrutiny to any repair restrictions of the proposed deal.

Workers at Activision Blizzard have powerfully mobilized over the past year to shine a light on a workplace culture rife with sexual harassment, gender discrimination, and instances of assault that top management swept under the rug.¹⁶ Now, as those workers seek to form a union to address their collective interests, the potential takeover by Microsoft threatens to further undermine workers' rights and suppress wages.¹⁷ The fact that none of Microsoft's US-based employees belong to a union underscores Microsoft's success in preventing its labor force from organizing to protect worker interest. The impact extends beyond its own labor force. Game designers will have fewer potential employers and independent developers will have fewer partners competing for their work, suppressing wages and innovation.¹⁸ The

¹⁵ FTC Policy Statement on Repair Restrictions Imposed by Manufacturers and Sellers, July 21, 2021, "the Commission will scrutinize repair restrictions for violations of the antitrust laws." https://www.ftc.gov/system/files/documents/public_statements/1592330/p194400repairrestrictionspolicystatement.pdf; Executive Order on Promoting Competition in the American Economy, July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>

¹⁶ *Washington Post*, "Blizzard employees walk out over company's handling of discrimination, sexual harassment suit," July 28, 2021. <https://www.washingtonpost.com/video-games/2021/07/27/blizzard-employees-walkout-ign/>; *IGN*, "Raven Software Walkout Over Recent Layoffs Gains Support From Blizzard and Other Activision Employees," December 8, 2021. <https://www.ign.com/articles/raven-software-walkout-activision-blizzard-solidarity>; *Wall Street Journal*, "Activision CEO Bobby Kotick Knew for Years About Sexual-Misconduct Allegations at Videogame Giant, November 16, 2021. https://www.wsj.com/articles/activision-videogames-bobby-kotick-sexual-misconduct-allegations-11637075680?mod=article_inline

¹⁷ *Bloomberg*, "Activision Blizzard Workers Take First Steps Toward Unionizing," December 9, 2021. <https://www.bloomberg.com/news/articles/2021-12-09/activision-blizzard-employees-take-steps-toward-unionizing>

¹⁸ *VGC News*, "Indie developers say they're 'worried Xbox's Activision deal could harm them,'" February 9, 2022, <https://www.videogameschronicle.com/news/indie-developers-say-theyre-worried-xboxs-activision-deal-could-harm-them/>

prevalence of high labor market concentration across the economy has resulted in wage depression below levels that would prevail under competitive conditions.¹⁹ Meanwhile, workers face massive employer resistance to their attempts to exercise countervailing power through collective bargaining. Regulators increasingly recognize that in cases where mergers will worsen labor monopsony and constrain the elasticity of labor supply, transactions that harm labor cannot be justified by their potential benefits to downstream purchasers in the form of lower prices. In addition to traditional concentration analysis for both upstream and downstream markets, the FTC should examine direct evidence of the companies' current and potential exercise of market power over workers in the form of restrictive contracts (including no-poach, non-compete, and non-disclosure agreements) and other means of denying workers the ability to exercise their rights.

Microsoft has a market capitalization of over \$2 trillion and is an extremely large business operating in several concentrated sectors of the economy including, but not limited to, consumer electronics, cloud computing, software development, hardware development, internet search, social networking, virtual reality, and video gaming. The gaming industry appears to be experiencing a wave of concentration at an increasingly rapid pace. Microsoft's acquisition of Activision would be a record-breaking, watershed move that sets the future course of the gaming industry.²⁰ We strongly urge the FTC to undertake a searching examination of the deal with an eye towards ensuring open, fair, and competitive markets.

Thank you for your attention to this matter.

Sincerely,

Public Citizen
Center for Digital Democracy
Communications Workers of America
The Repair Association
Public Knowledge
American Economic Liberties Project
The Revolving Door Project
National Employment Law Project
Open Markets Institute
Towards Justice
People's Parity Project
Institute for Local Self-Reliance
Main Street Alliance
Fight for the Future
Demand Progress Education Fund

¹⁹ Ioana Elena Marinescu and Eric A. Posner, "Why Has Antitrust Law Failed Workers?" February 14, 2019, <https://ssrn.com/abstract=3335174>; Efraim Benmelech, Nittai Bergman and Hyunseob Kim, "Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?," Nat'l Bureau of Econ. Research, Working Paper No. 24307, 2018, <https://www.nber.org/papers/w24307.pdf>; José Azar, Ioana Marinescu, and Marshall Steinbaum, "Antitrust and Labor Market Power," Economics for Inclusive Prosperity Research Brief, May 2019, <https://econfip.org/wp-content/uploads/2019/05/Antitrust-and-Labor-Market-Power.pdf>.

²⁰ *The Verge*, "With Activision, Microsoft is one gigantic step closer to game subscription dominance" January 22, 2022," <https://www.theverge.com/2022/1/19/22890553/microsoft-activision-xbox-game-pass-competition-subscription> "Right now, Microsoft is competing for more exclusive games for Xbox at an unheard-of scale — the nearly \$69 billion Activision deal is set to be more than double Microsoft's previous largest."