

22 February 2023

## ANTICIPATED ACQUISITION BY MICROSOFT CORPORATION OF ACTIVISION BLIZZARD, INC.

### MICROSOFT'S RESPONSE TO THE CMA'S REMEDIES NOTICE

#### 1. Executive summary

- 1.1 This is Microsoft's response to the CMA's Notice of Possible Remedies dated 8 February 2023 ("**Remedies Notice**") regarding the anticipated acquisition of Activision Blizzard, Inc. ("**Activision**") (the "**Merger**"). For reasons that will be set out in Microsoft's response to the Provisional Findings, Microsoft strongly disagrees with the CMA's provisional conclusion that the Merger may result in a substantial lessening of competition in console gaming ("**Console SLC**") and cloud gaming services ("**Cloud Gaming SLC**") in the UK.<sup>1</sup> This response should be read in conjunction with Microsoft's response to the Provisional Findings.
- 1.2 Microsoft has no intention of engaging in input foreclosure or of making *Call of Duty* ("**CoD**") exclusive to the Xbox platform. To the contrary, since day one, Microsoft has been focused on using this acquisition to bring more games to more people on more platforms and devices than ever before, to bring more competition into gaming than ever before.<sup>2</sup> Post-transaction, *CoD* will remain available on PlayStation, the largest console platform globally, and PC.<sup>3</sup> Moreover, Microsoft intends to expand the reach of *CoD* to new platforms and has signed binding agreements with Nintendo and Nvidia to bring the game to an additional 150 million gamers worldwide if the Merger is

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<sup>1</sup> CMA's Provisional Findings report dated 8 February 2023 (the "**Provisional Findings**").

<sup>2</sup> Brad Smith, Vice Chair and President of Microsoft, Brussels Press Conference, 21 February 2023 (link available [here](#)).

<sup>3</sup> VGC, "*Valve says long-term Call of Duty Steam offer not needed as Xbox always follows through on its promises*" 07 December 2022 (link available [here](#)) and statement by Mr. S. Lynch of Valve Corporation to the European Commission Oral Hearing in Case M.10646, 21 February 2023.

approved.<sup>4</sup>

- 1.3 The Merger will, therefore, result in substantial benefits to UK consumers and developers. Microsoft estimates on a conservative basis that the benefits to UK consumers will exceed \$[X] million (£[X] million) in the next 10 years alone. Globally, the benefits to consumers will, on a conservative basis, be at least \$[X] billion (£[X] billion) over the next decade.<sup>5</sup> A divestment of any part of Activision or *CoD* would extinguish these benefits and be ineffective. A divestment would preserve the *status quo*, whereby gamers on the dominant console platform, PlayStation, receive exclusive *CoD* benefits, which are not available to gamers on other platforms, including Xbox and PC.
- 1.4 In addition to the legally binding agreements entered into with Nintendo and Nvidia, Microsoft is proposing a package of licensing remedies which (i) guarantee parity between the PlayStation and Xbox platforms in respect of *CoD* and (ii) ensure wide availability of *CoD* and other Activision titles on cloud gaming services. These remedies protect all *CoD* gamers in the UK, as well as the incentives to invest and innovate.
- 1.5 Microsoft believes that the criteria for the CMA to consider behavioural remedies are met in this case. First, the relevant costs of any feasible structural remedy far exceed the scale of the adverse effects of the alleged SLCs. Second, relevant customer benefits (“RCBs”) are likely to be substantial compared with any adverse effects of the Merger, and these benefits would be largely preserved by behavioural remedies but not by structural remedies. Microsoft has carefully designed its package of remedies to be self-executing and enforceable at Microsoft’s own cost.
- 1.6 These remedies are under discussion with the European Commission, to the extent that the Commission finds a significant impediment to effective competition. The demands of comity require the CMA to consider the international dimension carefully, particularly given that the merger situation is taking place outside of the jurisdiction and the UK accounts for only [X]% of *CoD* revenues and [X]% of global *CoD* monthly active users.<sup>6</sup>

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<sup>4</sup> Microsoft, “*Microsoft and NVIDIA announce expansive new gaming deal*”, 21.02.2023 (link available [here](#)), Tweet from Phil Spencer, 21.02.2023 (link available [here](#)) stating “*We have signed a 10 year agreement with NVIDIA that will allow GeForce NOW players to stream Xbox PC games as well as Activision Blizzard PC titles, including COD, following the acquisition. We’re committed to bringing more games to more people – however they choose to play*”. Tweet from Brad Smith, 21.02.2023 (link available [here](#)) stating “*We’ve now signed a binding 10-year contract to bring Xbox games to Nintendo’s gamers. This is just part of our commitment to bring Xbox games and Activision titles like Call of Duty to more players on more platforms*”.

<sup>5</sup> **Annex 1** – Keystone, Analysis of Relevant Customer Benefits: UK, 22 February 2023. Further details and quantification of RCBs will be provided in Microsoft’s response to the Provisional Findings.

<sup>6</sup> Based on 2022 *CoD* monthly active users and revenues. See *Meta Platforms Inc. v CMA* [2022] CAT 26, 14 June 2022, paragraph 127(1).

## 2. The Merger will result in relevant customer benefits

2.1 The Merger will result in benefits to customers<sup>7</sup> in the form of lower prices, higher quality and greater choice in a number of products in the UK, as well as greater innovation. The RCBs relate to:

- (a) console and PC games;
- (b) cloud gaming; and
- (c) mobile gaming.

### (a) Console and PC games

2.2 Currently *CoD* is only available on PlayStation, Xbox and Windows PC (via Battle.net and Steam).<sup>8</sup> Gamers on PlayStation have access to *CoD* content and timed exclusives. As a result of the Merger, gamers on Nintendo, Xbox and PC will receive significant benefits. In addition, there will be benefits to the gaming platforms themselves, such as Valve (Steam) and Nintendo, which are also customers for the purposes of the RCB analysis.<sup>9</sup>

2.3 **The availability of *CoD* on Nintendo will result in a greater choice of goods and services.** *CoD* is currently only available on Xbox and PlayStation.<sup>10</sup> Microsoft entered into a final agreement with Nintendo on [REDACTED] February 2023 to publish *Call of Duty* titles on Nintendo post-Merger.

- (a) ***CoD* titles will be available on Nintendo platforms for at least 10 years.** The agreement provides that Microsoft will develop and publish future native console versions of *CoD* titles for Nintendo platforms for at least 10 years.<sup>11</sup> Microsoft will publish future *CoD* versions for Nintendo platforms on the same date as the release of those versions on Xbox console platforms; and will maintain feature and content parity to the console versions published on Xbox console platforms, subject to Nintendo policy requirements.
- (b) **The benefits will accrue within a reasonable time period.** Making *CoD* available on Nintendo platforms will increase the choice of Nintendo Switch

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<sup>7</sup> Relevant customers for these purposes are direct and indirect customers (including future customers) of the merger parties at any point in the chain of production and distribution and are therefore not limited to final consumers. CMA, Merger Remedies (CMA 87), paragraph 3.18.

<sup>8</sup> *CoD: Mobile* is available on mobile devices.

<sup>9</sup> Relevant customers for these purposes are direct and indirect customers (including future customers) of the merger parties at any point in the chain of production and distribution and are therefore not limited to final consumers. CMA, Merger Remedies (CMA 87), paragraph 3.18.

<sup>10</sup> With PlayStation gamers benefitting from enhanced content, interoperability and earlier releases.

<sup>11</sup> [REDACTED].

users. Some [X] million Nintendo consoles are sold each year worldwide, of which [X] million are sold in the UK.<sup>12</sup> Based on third party data, Nintendo has around [X]million monthly active users.<sup>13</sup>

- *CoD* includes both the free-to-play title *Warzone* and buy-to-play releases. The game engine that powers *Warzone* is mature and has been optimized to run on a wide range of hardware devices (ranging from the Xbox One console released in 2015 up to the Xbox Series X). *Warzone* supports PC hardware with GPU cards that were released as far back as 2015 (*i.e.*, prior to the release of Nintendo Switch in 2017).<sup>14</sup>
- The Activision development team have a long history of optimizing game performance for available hardware capabilities. The Parties are confident that in addition to *Warzone*, *CoD* buy-to-play titles (*e.g.*, *CoD: Modern Warfare 2*) can be optimised to run on the Nintendo Switch in a timely manner using standard techniques which have been used to bring games such as *Apex Legends*, *DOOM Eternal*, *Fortnite* and *Crysis 3* to the Switch.<sup>15</sup> Activision estimates that this could be done with a period of around [X] months.<sup>16</sup>
- [X]. [X]. [X].

(c) **The benefits will be substantial.** Even taking into account any technical limitations of the current Nintendo Switch, Microsoft estimates, on a highly conservative basis, that the net present value of the benefits to Nintendo customers of having access to *CoD* over 10 years to be at least \$[X] million (£[X] million).<sup>17</sup> By widening access to *CoD*, the Merger will have the added benefit of increasing the pool of gamers able to play the game, improving the cross-play functionality of the game and enabling more gamers to play with their friends.<sup>18</sup> This efficiency will arise from [X] and is, therefore, both timely and

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<sup>12</sup> IDG data.

<sup>13</sup> Based on the active installed base of Nintendo consoles reported by Ampere Analysis.

<sup>14</sup> Activision also offers a mobile experience of *Warzone* that runs natively on mobile phones which have much lower performance specifications than the Nintendo Switch.

<sup>15</sup> By optimising the display resolution, in-game texture resolution, reducing the rendering speed (*i.e.*, frames per second) and simplifying advanced rendering techniques (*e.g.*, raytracing, shadow, lighting, and antialiasing techniques).

<sup>16</sup> Statement by Mr. B. Kotick of Activision to the European Commission Oral Hearing in Case M.10646, 21 February 2023.

<sup>17</sup> **Annex 1** – Keystone, Analysis of Relevant Customer Benefits: UK, 22 February 2023. Further details and quantification of RCBs will be provided in Microsoft’s response to the Provisional Findings.

<sup>18</sup> Response to ToH 1 Working Paper, slide 52 notes that: [X]. As the CMA’s guidance notes, “*Where there are network effects, an increase in the number of access points to the network may result in an increase in the value of the network to customers*”. CMA, Merger Remedies (CMA 87), paragraph 3.23.

likely. It is also clear that the benefit is merger-specific, as Activision [REDACTED].<sup>19</sup>

2.4 **Microsoft’s plans to make Activision content available in Game Pass ‘day and date’ will increase customer choice and lower the cost of access.** As acknowledged by the CMA, the inclusion of Activision content in Game Pass ‘day and date’ will also benefit Xbox and PC gamers, who [REDACTED] *CoD* gamers in the UK.<sup>20</sup> Indeed, the Provisional Findings “*acknowledge that inclusion of Activision content in Game Pass on a ‘day and date’ basis is a potential benefit for gamers in the UK that would not arise absent the merger. This benefit would mean that gamers could access Activision content such as the most recent releases of CoD as part of Microsoft’s multi-game subscription bundle where, absent the Merger, only older games might have become available*”.<sup>21</sup>

(a) **Activision will not place new releases in subscription services day and date.** The CMA accepts that Activision will not make its most valuable games, such as *CoD*, available on subscription services on the date of release absent the Merger.<sup>22</sup> This reflects Activision’s concerns regarding the potential impact on its B2P revenue of placing any games, especially new games and day and date releases, on multi-game subscription services.<sup>23</sup> First, placing *CoD* on a multi-game subscription [REDACTED].<sup>24</sup> This risk make it practically impossible for a multi-game subscription service to offer a [REDACTED] to incentivize Activision to participate for new releases.<sup>25</sup> Second, popular content, such as *CoD* may attract gamers to a multi-game subscription, but gamers may easily switch to playing other games in the subscription catalogue at no additional cost. By placing its game on a multi-game subscription, Activision loses the direct relationship with gamers and cedes control over the marketing, messaging, curating, and quality control related to its games, [REDACTED]. Activision, therefore, expects to be [REDACTED]. During previous negotiations, Activision indicated that it [REDACTED].<sup>26</sup> The CMA accepts that other major publishers do not make their top titles available in multi-game subscriptions on release, given the risk of cannibalisation effects.<sup>27</sup>

(b) **Microsoft intends that future Activision releases will be made available on Game Pass on the day of release.**<sup>28</sup> As is acknowledged in the Provisional

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<sup>19</sup> **Annex 1** – Keystone, Analysis of Relevant Customer Benefits: UK, 22 February 2023. Further details and quantification will be provided in Microsoft’s response to the Provisional Findings.

<sup>20</sup> Provisional Findings, paragraphs 9.56.

<sup>21</sup> Provisional Findings, paragraphs 7.121.

<sup>22</sup> Provisional Findings, paragraphs 7.121.

<sup>23</sup> Provisional Findings, paragraphs 7.119.

<sup>24</sup> [REDACTED].

<sup>25</sup> [REDACTED].

<sup>26</sup> [REDACTED].

<sup>27</sup> Provisional Findings, paragraphs 7.120.

<sup>28</sup> FMN, paragraph 2.24.

Findings “it is likely that Microsoft will pursue a strategy of placing Activision’s content on Game Pass on a day-and-date basis post-merger”. The Parties agree, this is consistent with the Microsoft’s pre-merger plans and its consistent track-record of placing its first-party content on Game Pass day and date.<sup>29</sup> The CMA accepts that this will not happen without the Merger.

- (c) **The efficiency is merger-specific.** The source of the merger-specific benefit is that pre-merger Activision incurs [X] of bringing its titles (including *CoD*) to Game Pass, but does not internalize the full benefits of this decision, which will be to bring more users into Game Pass and increase engagement with other titles, generating benefits for Microsoft and third-party publishers. Post-transaction these spillovers will be internalized because the merged entity will be able to take a more holistic view taking into account the positive effects on Game Pass overall.
- This effect is not just hypothetical, but is rather proven by the way negotiations have unfolded in the past. The merged entity will always find it optimal to bring a title to Game Pass if the anticipated incremental revenues exceed the cost of cannibalized sales through other channels. By contrast, [X].<sup>30</sup> [X].
  - This effect is a form of “elimination of double marginalization” and is also consistent with standard results in the economics literature which show that negotiations over an asset will often lead to efficient trades failing to take place because the purchaser holds out for a lower sum and the seller for a higher one.<sup>31</sup> The Merger will cut through this dynamic and mean that *CoD* will be brought to Game Pass on the day of release, something which would not happen otherwise.
- (d) **The merger-specific efficiency will benefit consumers.**<sup>32</sup> As the CMA accepts, this benefit will mean that gamers can access Activision content, such as the most recent releases of *CoD*, as part of Microsoft’s multi-game subscription bundle where, absent the Merger, only older games might have become available for short periods of time.<sup>33</sup> Contractual provisions will prevent Microsoft placing new *CoD* releases on Game Pass before [X].<sup>34</sup> However,

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<sup>29</sup> Provisional Findings, paragraphs 9.59.

<sup>30</sup> [X].

<sup>31</sup> For a classic reference see Myerson, RB. Satterthwaite, MA. 1983. “Efficient mechanisms for bilateral trading”, *Journal of Economic Theory*. See also, “*Analysis of Incentives in Bargaining and Mediation*”, at this link

<sup>32</sup> Further details and quantification of efficiencies and RCBs will be provided in Microsoft’s response to the Provisional Findings.

<sup>33</sup> Provisional Findings, paragraphs 9.56.

<sup>34</sup> Provisional Findings, paragraphs 9.57.

other Activision games will be placed in Game Pass earlier. The benefit will therefore accrue within a reasonable time period. Consumers have confirmed this benefit to the CMA starting that “*Microsoft’s plans to add Call of Duty to Game Pass are pro-competitive and will lower the price of accessing games for consumers*”.<sup>35</sup> Bringing forward release dates is a substantial benefit: a significant proportion of sales of newly-released titles occur in the first days after release. This shows that users strongly value being able to play games on the day of release.<sup>36</sup>

- (e) **The addition of Activision content to Game Pass will reduce prices**[~~§~~], one of the goals and effects of the Merger is to expand Game Pass faster than in the counterfactual without the deal.<sup>37</sup> As such, the quality-adjusted price of Game Pass would fall post-Merger. Specifically, the addition of new content to Game Pass is a reduction in the combined price of a bundle consisting of the pre-existing bundle plus the new title. Prior to adding a new title, the price paid by a consumer wanting access to both the bundle and the new title for a year is the annual bundle price plus the purchase price of the title. After adding the title to Game Pass at unchanged prices, the price of the combination is reduced by the price of the new title. The benefits of this price reduction accrue to gamers who choose to purchase the bundle and play the new title. There are several ways gamers may realize this benefit: (i) gamers who would otherwise have purchased both Game Pass and the title, but after purchase only Game Pass to access the combined content, receive a price reduction benefit of the full avoided price of the new title; (ii) gamers who would have otherwise purchased only Game Pass and not the new title, but after the addition play the combined content, also receive a price reduction up to the full price of the new title; (iii) gamers who would otherwise have purchased only the new title (and forgone the purchase of Game Pass), but after the addition of the title choose instead to purchase only Game Pass experience a price discount for Game Pass up to the full price of the title; and (iv) gamers who currently neither buy *CoD* nor Game Pass but who choose to purchase Game Pass after addition of the title receive a price reduction of up to the full price of the title. Microsoft conservatively estimates the net present value of the benefit over 10 years to be around \$[~~§~~] million (£[~~§~~] million) for Game Pass subscribers on Xbox and around \$[~~§~~] million (£[~~§~~] million) for Game Pass subscribers on PC.<sup>38</sup>

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<sup>35</sup> Microsoft/Activision Blizzard, CMA summary of responses from members of the public to the issues statement, paragraph 5(g).

<sup>36</sup> Response to ToH 1 Working Paper, slide 36 notes that: “[~~§~~].”

<sup>37</sup> [~~§~~].

<sup>38</sup> **Annex 1** – Keystone, Analysis of Relevant Customer Benefits: UK, 22 February 2023. Further details and quantification of RCBs will be provided in Microsoft’s response to the Provisional Findings.

- (f) **Game Pass prices will not increase as a result of the Merger, and certainly will not increase to a point that offsets the substantial benefits of Activision titles coming to Game Pass on a day and date basis. This is especially so given Game Pass will continue to be constrained by B2P.** The Provisional Findings are postulating that the price of Game Pass would go up as a result of the Merger to a degree that offset the benefits set out above. But no mechanism is put forward to explain why this would be so. The integration of Activision and Microsoft will result in a classic elimination of double marginalization effect because Microsoft will be able to acquire these games at (opportunity) cost and will have incentives to distribute them more broadly and increase the output of Game Pass relative to its counterfactual level. In order to increase output Microsoft will need to offer Game Pass at a lower quality-adjusted price. This is exactly what Microsoft has done when it has added content to Game Pass in the past with, for example, the ZeniMax transaction resulting in additional content but no increase in Game Pass subscription prices.

This is especially so given that Game Pass users are price sensitive and an increase in the price of Game Pass would affect all users, including those that do not value or play *CoD*. Game Pass subscribers can cancel at any time after a month of play. As *CoD* titles are only released once a year, any impact would be short-lived as gamers who exhaust their enthusiasm for the new version of *CoD* within a few months will churn because of the higher price. As such any price increase would be counter-productive as it would increase subscriber churn rates [§].<sup>39</sup> This is entirely at odds with the Provisional Finding's assessment of Microsoft's rationale for the Merger.

- (g) **Inclusion of Activision content in Game Pass will spur Sony to invest in its subscription offering:** By enabling Microsoft to compete more effectively against Sony, the Merger can also be expected to push Sony to improve its subscription offering, to the benefit of its more than 46 million subscribers, which would in turn result in lower prices, higher quality and/or greater choice for console customers. This is reflected in the consumer feedback to the CMA which stated that "*the Merger will push Sony to innovate, such as by improving its subscription service*".<sup>40</sup> Indeed, Sony has already significantly improved PlayStation+ in response to the announcement of the Merger (introducing new tiers and adding additional content). Even without Sony first-party titles day and date, Sony's monthly prices for PlayStation+ are higher than Game Pass

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<sup>39</sup> See, for example, [§].

<sup>40</sup> Microsoft/Activision Blizzard, CMA summary of responses from members of the public to the issues statement, paragraph 5(e).



prices.

2.5 The Parties also note that the CMA has argued in the Mobile Ecosystems Market Study<sup>41</sup> that allowing developers to obtain a larger share of their revenues from app sales would lower prices and increase incentives for investment and innovation to increase app quality and choice.<sup>42</sup> The vertical integration of Microsoft and Activision will mean that the commissions currently paid by Activision for sales on Xbox will be internalized and the same logic implies that this will generate equivalent incentives leading to analogous benefits in terms of increased innovation and choice.

2.6 **The availability of existing *CoD* exclusive content on Xbox and PC will result in a higher quality of goods and services.** *CoD* is not currently available on “*equal terms*” on PlayStation, Xbox and PC, due to the agreements which Sony has had in place since 2015.<sup>43</sup> Following the Merger, benefits which are currently only available to PlayStation gamers would be made available to Xbox and PC gamers.

(a) **Sony has *CoD* content and timed exclusives.** One element of Sony’s acknowledged “content leadership” is the fact that it has *CoD* content and timed exclusives. These include exclusive content, such as extra tier skips on the battle pass, the ability to access additional experience points (*e.g.*, through playing in party and exclusive events), combat packs, certain in-game character customisations, discounted console bundles and exclusive early access to alpha and beta versions of the game.

(b) **Following the Merger, these benefits will be available to Xbox and PC gamers.** The majority of gamers who play *CoD* each month in the UK ([X]) are on Xbox ([X]%) and PC ([X]%).<sup>44</sup> PlayStation gamers represent [X]% of *CoD* monthly active users in the UK.

(b) **Benefits to consumers and distributors of cloud gaming**

2.7 Neither *CoD* nor other Activision games are currently available on any cloud gaming services. Since the Provisional Findings were issued, Microsoft has entered a

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<sup>41</sup> CMA, Mobile Ecosystems, Market Study final report, 10 June 2022 (link available [here](#)).

<sup>42</sup> See, for example, Mobile Ecosystems, Market Study final report paragraph 7.37 (“*commission[s] charged to certain app developers...may also serve to hold up or prevent some new apps or services from making it onto the platform*”), and 7.68 (“*Consumers might benefit in a range of ways if the level of commission was lower. While some of the savings might be retained by app developers as additional profit, we would expect a material proportion of the savings to either be re-invested, passed through as a saving to consumers in the form of lower prices, or enable an expansion in the range of available apps.*”).

<sup>43</sup> These include exclusive access to the online alpha version of the game and access to the beta version of the game five days earlier than gamers on Xbox consoles or PC, game bonuses such as extra “tier skips” on the battle pass, the ability to access additional “experience points” (*e.g.*, through exclusive events), discounted console bundles and certain in-game character customisations and content bundles.

<sup>44</sup> Activision data for 2022. There were [X] million average *CoD* MAU on Xbox and PC in 2021 also representing [X]% of *CoD* MAU in the UK.

comprehensive agreement with Nvidia which provides for Activision content [REDACTED] to be made available on Nvidia GeForce Now (“GFN”) post-Merger (the “Nvidia Agreement”).<sup>45</sup> The key terms of the agreement are as follows:

- (a) [REDACTED].
- (b) [REDACTED].
- (c) [REDACTED].
- (d) [REDACTED].
- (e) [REDACTED].
- (f) [REDACTED].
- (g) [REDACTED].

2.8 Nvidia has [REDACTED].<sup>46</sup>

2.9 The benefit is merger specific. The CMA provisionally considers it likely that [REDACTED].<sup>47</sup> However, it has also found that strong indirect network effects mean that publishers will not license their content to small providers given the costs involved.<sup>48</sup> Activision has been clear that it would not enter into such a deal as [REDACTED].<sup>49</sup> Even if the evidence in the Provisional Findings shows that [REDACTED]. Following signing of the Nvidia Agreement, the Merger will ensure that Activision content is available on multiple cloud gaming providers, thereby delivering significant benefits to consumers in terms of dynamic competition (see below).

**(c) Benefits to consumers and distributors of mobile games**

2.10 **Microsoft will expand in mobile gaming and challenge the existing duopoly over mobile app distribution.** The Merger will also result in benefits to customers in mobile game distribution in the form of lower prices, higher quality greater choice and greater innovation. This includes both end consumers and developers of native mobile games,

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<sup>45</sup> The NVIDIA Agreements provided as **Annex 2**.

<sup>46</sup> [REDACTED].

<sup>47</sup> Provisional Findings, paragraph 8.237.

<sup>48</sup> Provisional Findings, paragraph 8.65. Depending on the level of integration, there are substantial engineering costs involved in providing access to a new cloud gaming provider, even one with a BYOG or B2P model.

<sup>49</sup> [REDACTED].

each of which are relevant customers of mobile app stores.<sup>50</sup>

- (a) **Mobile gaming is the key strategic rationale for the deal.** The key strategic rationale for the Merger is to expand Xbox’s presence in mobile, where its ability to reach gamers is impeded by Apple and Google’s effective duopoly in the provision of mobile app stores. Building on Activision’s existing communities of mobile gamers, including *Call of Duty: Mobile*, *Warzone Mobile* and *Diablo Immortal*, Microsoft aims to scale the Xbox Store to create a new mobile game distribution platform, Xbox Mobile Platform. Activision’s attractive content and experience with player engagement and acquisition will help to enhance the discoverability, searchability, and ease of user engagement of the new mobile platform.<sup>51</sup>
- (b) **A new mobile game distribution platform will benefit consumers and developers.** By creating a new mobile game distribution platform, the Merger will deliver significant benefits to gamers and developers, which will be provided with additional distribution options outside of the existing mobile app stores. More than [X] billion gamers played games on mobile devices in 2022, of which [Y] million are in the UK.<sup>52</sup> The CMA has identified that “*weak competition within and between Apple’s and Google’s mobile ecosystems is harming consumers and many small UK businesses*”<sup>53</sup>, including through “*acting as a brake on innovation*”, imposing “*prices...above a competitive rate*” and “*degraded*” user experiences.<sup>54</sup> By enabling Microsoft to challenge the existing duopoly in mobile game distribution, the Merger has the potential to create substantial benefits for UK consumers and game developers. Indeed, the European Game Developers Federation has expressed its clear support for the Merger, owing in part to the fact it will allow Microsoft to “*challenge Apple and Google as dominant mobile game market application stores*”.<sup>55</sup> As noted above, the CMA has argued in the Mobile Ecosystems Market Study<sup>56</sup> that allowing developers to obtain a larger share of their revenues from app sales would lower

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<sup>50</sup> As set out in the CMA’s market study on mobile ecosystems, since mobile app stores “*serve to connect two different customer groups – users and app developers, they are a two-sided platform*”. CMA, Mobile ecosystems – Market study final report, 10.06.2022, paragraph 4.2.

<sup>51</sup> As explained in the FMN, [X]. However, this is currently prevented by Apple’s rules while on Android devices, Google’s rules allow Microsoft to distribute Game Pass Ultimate in the Google Play Store as a native app, but only in a limited functionality “consumption-only” mode with all abilities for users to make in-app purchases and monetization disabled.

<sup>52</sup> Newzoo Global Games Market Data, January 2023. 37% of UK gamers played on a mobile device in 2021. See Ofcom Online Nation report 2022, Figure 3.4, p.84 (link available [here](#)).

<sup>53</sup> CMA, Mobile ecosystems – Market study final report, 10.06.2022, paragraph 1.12.

<sup>54</sup> CMA, Mobile ecosystems – Market study final report, 10.06.2022, page 255.

<sup>55</sup> European Games Developer Federation Observations on Microsoft / Activision Blizzard Acquisition, 23.12.2022 (link available [here](#)). The European Games Developer Federation represents over 2,500 game developer studios in 22 European countries, including the UK.

<sup>56</sup> CMA, Mobile Ecosystems, Market Study final report, 10 June 2022 (link available [here](#)).

prices and increase incentives for investment and innovation to increase app quality and choice.<sup>57</sup>

- (c) **The process of dynamic competition has economic value in the present.** While Microsoft’s ability to break the mobile app store duopoly is not guaranteed, its entry attempt constitutes an RCB. The CMA accepts that the process of dynamic competition has economic value in the present, even where entry attempts may ultimately be unsuccessful.<sup>58</sup> This is because “*where dynamic competition gives customers the chance to benefit from a wider variety of products or a future increase in competition, this represents value to customers even where there is some uncertainty that these products or services will ever ultimately be made available to customers*”.<sup>59</sup> Moreover, the CMA accepts that existing providers, such as Google and Apple, may “*invest in order to protect future sales from dynamic competitors, and the removal of the threat of entry may lead to a significant reduction in innovation or efforts by other firms*”.<sup>60</sup>
- (d) **The RCBs are merger-specific.** Microsoft will not establish the Xbox Mobile Platform without the Merger, as establishing a new mobile store will require a catalogue of attractive mobile content, as well as the capability to develop additional mobile content. [REDACTED] of Activision’s gaming community are mobile gamers. Activision’s native mobile content will therefore create “natural onramps” for players on to the Xbox Mobile Platform (e.g., through in-game advertising), which it would not be possible for Microsoft to replicate absent the Merger (i.e., given the restrictions which Google and Apple have imposed on their mobile ecosystems). [REDACTED].<sup>61</sup> The benefit will, therefore, accrue within a reasonable time period.

### 3. Content licensing remedy for console

- 3.1 In this section, Microsoft sets out why a content licensing remedy to Sony is the most proportionate and effective remedy available should the CMA maintain the Console

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<sup>57</sup> See, for example, Mobile Ecosystems, Market Study final report paragraph 7.37 (“*commission[s] charged to certain app developers...may also serve to hold up or prevent some new apps or services from making it onto the platform*”), and 7.68 (“*Consumers might benefit in a range of ways if the level of commission was lower. While some of the savings might be retained by app developers as additional profit, we would expect a material proportion of the savings to either be re-invested, passed through as a saving to consumers in the form of lower prices, or enable an expansion in the range of available apps.*”).

<sup>58</sup> Merger Assessment Guidelines (CMA129), paragraph 5.20, Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc., Final report on the case remitted to the CMA by the Competition Appeal Tribunal, 18.10.2022 (“*Meta/Giphy*”), paragraph 7.21.

<sup>59</sup> Merger Assessment Guidelines (CMA129), paragraph 5.20, *Meta/Giphy*, paragraph 7.22.

<sup>60</sup> Merger Assessment Guidelines (CMA129), paragraph 5.23, *Meta/Giphy*, paragraph 7.22.

<sup>61</sup> [REDACTED].

Gaming SLC in its final report. Specifically this section:

- (a) outlines Microsoft's proposed content licensing remedy;
- (b) explains why Microsoft's proposed content licensing remedy effectively addresses the Console Gaming SLC; and
- (c) explains why Microsoft's proposed content licensing remedy will preserve and enhance RCBs.

3.2 Microsoft submits that, for the reasons set out below, its proposed remedy will not give rise to specification, circumvention, distortion or monitoring and enforcement risks.

(a) **Microsoft's proposed content licensing remedy**

3.3 To resolve the Console Gaming SLC, Microsoft will commit to continue licensing *CoD* to Sony – including all existing and future releases on the Xbox console – for a period of 10 years. The key elements of the proposed licensing remedy are set out below:

- (a) **Scope:** The remedy will apply to *CoD* titles for consoles and associated content (“***CoD Games***”). *CoD Games* includes all past and current *CoD* titles available on PlayStation. In addition, all future *CoD* titles available on the Xbox console will also be available on PlayStation. *CoD Games* account for more than [X]% of Activision’s publishing revenue on console.<sup>62</sup>
- (b) **Term:** The remedy will apply for a period of 10 years.
- (c) **Console platforms:** The remedy will apply to all Sony consoles (including PlayStation 4, PlayStation 4 Pro and PlayStation 5) and any successor consoles.
- (d) **Parity:** The remedy will provide Sony with parity on release date, content, features, upgrades, quality and playability with the Xbox platform. Microsoft is prepared to commit to have an Objective Third Party Assessor [X]. The Objective Third Party Assessor [X].
- (e) **Economic terms:** All purchases will be subject to a revenue sharing arrangement, with Sony retaining [X]% of the revenue from sales of *CoD Games*, and content related to any *CoD Games*. [X], [X]. Taking account of all payments from Sony to Activision, Sony currently receives a [X] of [X] %.

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<sup>62</sup> CoD accounts for [X]% of the Activision’s 2021 share by revenue of [X]% in console game publishing. The shares of supply of all other Activision console games are each less than [X]% and less than [X]% cumulatively. Although Microsoft’s proposed remedy is limited to CoD, Microsoft has committed to honour (i) the existing licensing agreement between Sony and Activision Blizzard post-Transaction for any non-CoD game; and (ii) its [X] contractual offer to Sony to extend access to those games through [X].

As such, the proposed remedy represents a [REDACTED] in Sony's economic terms.

- (f) **Wholesale pricing parity:** The remedy will provide that the wholesale price of *CoD* Games offered to Sony (“**Wholesale Price**”) is [REDACTED] for the equivalent version of the game on the Xbox platform.
- (g) **Subscription and streaming rights:** Any *CoD* Game in a Microsoft multi-game subscription is eligible for inclusion in Sony's multi-game subscription service, at the same time and for the same duration. [REDACTED]. [REDACTED].
- (h) **Terms:** [REDACTED].<sup>63</sup>

3.4 Microsoft's remedy will include the following mechanisms for monitoring compliance and dispute resolution:

- (a) **Monitoring Trustee:** A monitoring trustee will be appointed to monitor Microsoft's compliance with the remedy and to report to the CMA on a periodic basis. The identity of the monitoring trustee will be agreed with the CMA. The monitoring trustee will be remunerated by Microsoft.
- (b) **Objective Third Party Assessor:** An Objective Third Party Assessor will be appointed to [REDACTED]. The identity of the Objective Third Party Assessor will be agreed with the CMA. Microsoft is considering potential candidates and can propose a shortlist to the CMA in due course. The Objective Third Party Assessor will be [REDACTED].
- (c) **Fast-track Dispute Resolution Mechanism:** Microsoft and Sony would be required to seek to resolve any dispute through cooperation and consultation within a reasonable period of time. If [REDACTED]. The arbitrator will be required to take into account that the purpose of the remedy is to allay concerns relating to the Merger. The CMA will be entitled to participate in all stages of the procedure. In the event of disagreement between the parties regarding the interpretation of the remedies, the arbitrator may seek the CMA's interpretation of the commitments and will be bound by the interpretation.

(c) **Microsoft's proposed remedy addresses the Console Gaming SLC and the CMA's concerns in the Remedies Notice**

3.5 The Console Gaming SLC is based on the CMA's concerns that Microsoft could (i) cease to license *CoD* to the PlayStation platform (*i.e.*, make it exclusive to Xbox), (ii) make *CoD* available for release on the PlayStation platform at a later date compared to

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<sup>63</sup> [REDACTED].

Xbox (*i.e.*, timed exclusivity), (iii) degrade the graphical quality (e.g., resolution and frame rate) of the *CoD* content available on the PlayStation platform, (iv) make features of *CoD* unavailable to the PlayStation platform (*i.e.*, content exclusivity) and/or (v) raise the wholesale price of *CoD* on the PlayStation platform.<sup>64</sup>

3.6 The proposed licensing remedy fully addresses each of these concerns. Moreover, the requirement to have [REDACTED]. [REDACTED].

3.7 In particular:

(a) ***CoD* will not be exclusive to Xbox:** As a result of the proposed remedy, *CoD* will be made available to Sony [REDACTED]. As a result of the Nintendo Agreement, *CoD* will also be available on the Nintendo platform.

(b) ***CoD* will not be timed exclusive to Xbox:** As a result of the proposed remedy, *CoD* will be made available on the same date to PlayStation and Xbox gamers. The remedy also includes subscription and streaming.

(c) **There will be parity of quality and playability of *CoD* between PlayStation and Xbox:** As a result of the proposed remedy, Microsoft will release *CoD* Games [REDACTED] as having quality and playability parity on the Xbox and PlayStation platforms.

(d) **Xbox will not have content exclusivity:** As a result of the proposed remedy, Microsoft will release *CoD* Games [REDACTED] as having parity of content, features, upgrades (as well as quality and playability) on the Xbox and PlayStation platforms.

(e) [REDACTED].

3.8 Based on existing contractual relations, the proposed remedy is capable of a full and timely implementation. The remedy reflects the existing market characteristics given that it ensures the continued access to a content input (*i.e.*, *CoD*) that is already available. The existing contractual relations also ensure that the parameters of the remedy are workable, clear and not complex. As *CoD* has been on the PlayStation platform for 20 years, this is not a new or untested relationship but is instead the continuation of a long-standing commercial relationship. They can be fully implemented with certainty.

3.9 Finally, because the commercial terms would be [REDACTED]. [REDACTED].<sup>65</sup>

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<sup>64</sup> Provisional Findings, paragraphs 7.124-7.126.

<sup>65</sup> [REDACTED].

3.10 In addition, Microsoft submits that the proposed remedy gives rise to no specification, circumvention, distortion or monitoring and enforcement risks. In particular:

- (a) **No specification risk.** As detailed above, Microsoft’s proposed remedy is clear and simple being based on existing licensing terms and precisely addresses the Console Gaming SLC as set out in the Provisional Findings. There is only [REDACTED] one game franchise subject to the remedy. The proposed remedy is comprehensive in scope, covering all existing editions of the *CoD* franchise available on PlayStation, including the PS4 prior generation, as well as any future *CoD* titles to be released on the Xbox console during the next 10 years. The parity provisions also ensure that any future content, features, upgrades and improvements are made available for the duration of the remedy on the same terms. Parity is a well-understood legal concept, which is commonly used in console game licensing agreements, [REDACTED].<sup>66</sup>
- (b) **No circumvention risk.** Until the remedy enters into force, Sony remains protected by its existing agreements with Activision, which consist of (i) [REDACTED] and (ii) [REDACTED].<sup>67</sup> Microsoft has complied with the terms of all contracts following previous acquisitions and Sony has not alleged otherwise. Once the remedy enters into force, Sony will be protected by (i) Microsoft’s undertakings to the CMA, (ii) [REDACTED] and (iii) [REDACTED].
- Under the remedy, Microsoft [REDACTED]. [REDACTED]. [REDACTED].
  - [REDACTED]. [REDACTED]. *Minecraft* has grown to become a highly popular game on multiple gaming platforms, including PlayStation and Nintendo. *Minecraft Legends* is due for release on 18 April 2023 and will be available on the same date on Nintendo, PlayStation, Steam, Windows and Xbox.<sup>68</sup> [REDACTED]. [REDACTED].<sup>69</sup> In any event Microsoft would, as part of the remedy, [REDACTED].
  - In terms of enforcement, [REDACTED] are supplemented by the appointment of a Monitoring Trustee who will provide regular reports to the CMA. Microsoft is prepared to commit to have the parity of the PlayStation and Xbox versions of *CoD* Games [REDACTED]. [REDACTED]. This will provide Microsoft with a strong incentive to ensure that *CoD* games are developed in a way that will ensure that that the commitments are complied with.

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<sup>66</sup> [REDACTED].

<sup>67</sup> [REDACTED].

<sup>68</sup> Minecraft, “*Minecraft Legends Official Release Date - Coming to multiple platforms on April 18*”, 25.01.2023 (link available [here](#)).

<sup>69</sup> [REDACTED].



- (c) **No distortion risk.** Offered for a 10-year term, the proposed remedy is comprehensive in duration, ensuring that Sony has access to *CoD* throughout the current console generation and upon release of the next generation (likely to occur no earlier than [X]). If the game is guaranteed to be available on the next PlayStation, which will be released within the next 10 years, there is no concern that Sony may be disadvantaged with the introduction of a new console generation.
- (d) **No monitoring and enforcement risk.** Microsoft has included specific mechanisms to allow for monitoring, audit of compliance with the parity undertakings and dispute resolution. The remedies take place in a highly transparent marketplace and Sony is a long-term and experienced licensee of *CoD* Games and has all of the information it needs to detect potential breaches [X]. The remedy proposal is easily monitored and Microsoft will provide the Monitoring Trustee, and the Objective Third Party Assessor with the information required in order to certify compliance with the remedy.

(c) **The proposed remedy will preserve and enhance RCBs**

3.11 Microsoft's proposed remedy will preserve the RCBs outlined above.<sup>70</sup> By ensuring parity between Sony, as the largest console platform, and Microsoft, the proposed remedy will ensure that *CoD* is, in fact, made available on "equal terms" (which has not been the case for the past 20 years), benefitting Xbox and PC gamers, as well as PlayStation gamers. Moreover, the proposed remedy will allow Sony to place *CoD* in its own subscription service PlayStation Plus. Microsoft estimates the additional benefit to customers of including *CoD* on PlayStation Plus would be around \$[X]million (£[X] million) over 10 years in the UK.<sup>71</sup> The net present value of the benefits retained and this additional benefit is approximately \$[X] billion (£[X]billion) over 10 years in the UK. Globally, the lost benefits are in the region of \$[X] billion (£[X] billion).

3.12 The economic literature supports that behavioural remedies providing rivals' access to content are a way of achieving the benefits of vertical integration while protecting against potential costs and, as such, are preferable to structural approaches. The work of Crawford et al, in the analogous context of integration between distributors and content producers in cable-TV, states that "*Our results highlight the importance of program access rules in determining the effects of vertical integration. In*

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<sup>70</sup> Section 36(4) Enterprise Act 2002 and Merger Remedies Guidance, paragraph 3.10.

<sup>71</sup> Benefits to customers from including *CoD* in the PlayStation Plus subscription service are expected to take the form of [X]. In its deal model, Microsoft estimates that [X]% of *CoD* revenue on console occurs on Xbox, and [X]% occurs on PlayStation, [X]. Therefore, if the PlayStation Plus multi-game subscription [X], Microsoft expects that [X].

*counterfactual simulations that enforce program access rules, we find that vertical integration leads to significant gains in both consumer and aggregate welfare.”*<sup>72</sup> In other words, access-based remedies are better than divestiture remedies because they permit the achieving of the benefits of vertical integration (which a structural remedy would destroy) while guarding against potential costs.

#### 4. Cloud Gaming SLC

4.1 In this section, Microsoft sets out why a content licensing remedy is the most proportionate and effective remedy available should the CMA maintain the Cloud Gaming SLC in its final report. Specifically this section:

- (a) outlines Microsoft's proposed content licensing remedy; and
- (b) explains why Microsoft's proposed content licensing remedy effectively addresses the Cloud Gaming SLC; and
- (c) explains why Microsoft's proposed content licensing remedy will preserve and enhance RCBs.

4.2 Microsoft submits that, for the reasons set out below, its proposed remedy will not give rise to specification, circumvention, distortion or monitoring and enforcement risks.

##### (a) Microsoft's proposed licensing remedy

4.3 Activision games are not currently available on any cloud gaming service. The CMA provisionally considers that in the counterfactual at least some cloud gaming providers—especially those with a buy-to-play (“**B2P**”) or bring-your-own-game (“**BYOG**”) offering—would have Activision's most valuable games available on their platforms on the date of their release in the next five years.<sup>73</sup> In particular, the CMA provisionally considers it likely, in particular, that Activision would [§<] in the near future absent the Merger.<sup>74</sup> The CMA provisionally considers that the availability of Activision content, in particular *CoD* and *World of Warcraft* (“*WoW*”) would be a particularly important input to cloud gaming services.<sup>75</sup>

4.4 To resolve the Cloud Gaming SLC, Microsoft will commit to license Activision games, including *CoD* and *WoW*, [§<] to cloud gaming providers with a B2P or BYOG offering for a period of 10 years.

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<sup>72</sup> Crawford, GS. Lee, RS. Whinston, MD. Yurukoglu, A. 2018. “The welfare effects of vertical integration in multichannel television markets”, *Econometrica*.

<sup>73</sup> Provisional Findings, paragraph 8.235.

<sup>74</sup> Provisional Findings, paragraph 8.237.

<sup>75</sup> Provisional Findings, paragraph 8.272.

- 4.5 A summary of the key elements of the proposed licensing remedy is provided below:
- (a) **Scope:** The remedy will apply to the Activision titles for PC and associated content listed in the Appendix below, including all past, current and future releases of such titles available on PC (the “**PC Games**”).
  - (b) **Term:** The remedy will apply for a period of 10 years.
  - (c) **Consumer License:** Microsoft will unilaterally grant a license to any consumer who has purchased or obtained a free license to play a PC Game from an authorized third-party PC digital storefront (“**Eligible Game**”) to stream the game using a generally-recognized PC consumer cloud gaming provider to a device they own (the “**Consumer License**”). Microsoft will grant the Consumer License by publishing it on Microsoft’s website. The Consumer License will be granted for the Term.
  - (d) **Eligible Provider License:** Microsoft will grant a license to stream Eligible Games to PC cloud gaming providers with a B2P or BYOG business model (the “**Eligible Provider License**”). To qualify as an eligible provider, a PC cloud gaming provider must be a generally-recognized consumer PC cloud gaming provider that meets the following criteria (“**Eligible Provider**”): (i) [REDACTED];<sup>76</sup> and (ii) it must comply with applicable data protection legislation and commonly used security standards aimed at protecting gamers and games to ensure necessary and sufficient protection of all consumers accounts used to stream Eligible Games.<sup>77</sup>
  - (e) **Pricing:** The Consumer License and the Eligible Provider License will be [REDACTED].
  - (f) **Release date parity:** The remedy will provide Eligible Providers release date parity with buy-to-play on PC. The Licenses will be granted for Eligible Games [REDACTED].
  - (g) **Authorized PC Digital Storefront.** An Authorized PC Digital Storefront is any third-party PC digital storefront to which Microsoft decides to distribute Eligible Games post-Transaction. Microsoft commits to distribute Eligible Games post-Transaction to at least one third-party PC digital storefront for the Term.
  - (h) Licenses will be subject to the following limitations with regard to Eligible

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<sup>76</sup> [REDACTED].

<sup>77</sup> ISO 27000 is a family of standards that provide a framework for policies and procedures that include all legal, physical, and technical controls involved in an organization’s information risk management processes.

Games:

- The Provider will be responsible to adjust its service, to the extent necessary, to allow for consumers to stream Eligible Games. Microsoft does not expect that any technical adaptations will be needed to be made to Eligible Games to enable streaming on the Providers' service.
- It will be the Provider's sole responsibility to secure potential third-party IP rights necessary to stream Eligible Games (e.g., music, voice talent). This is in line with market practice, as cloud game streaming providers currently need to separately obtain a license for third-party IP rights to stream games. [X].

4.6 Microsoft's remedy will include the following mechanisms for monitoring compliance and dispute resolution:

- (a) **Monitoring Trustee:** A monitoring trustee will be appointed to monitor Microsoft's compliance with the remedy and to report to the CMA on a periodic basis. The identity of the monitoring trustee will be agreed with the CMA. The monitoring trustee will be remunerated by Microsoft.
  - (b) **Dispute Resolution Mechanism:** A fast-track dispute resolution to an independent adjudicator. The identity of the adjudicator will be agreed with the CMA. The adjudicator will be remunerated by Microsoft.
- (c) **Microsoft's proposed remedy addresses the Cloud Gaming SLC and the CMA's concerns in the Remedies Notice**

4.7 The Cloud Gaming SLC is based on the CMA's concerns that Microsoft could for BYOG (i) refuse to license *CoD* to cloud gaming services (i.e., make it exclusive to Xbox Cloud Gaming) or (ii) make *CoD* available for release on cloud gaming services at a later date compared to Xbox (i.e., timed exclusivity).<sup>78</sup>

4.8 The proposed licensing remedy fully addresses each of these concerns. In particular:

- (a) **The PC Games will not be exclusive to Xbox Cloud Gaming.** As a result of the proposed remedy, the PC Games will be made available to other cloud gaming providers. Microsoft's proposed licensing remedy goes beyond what would occur even if, *quod non*, the CMA's counterfactual were to materialize absent the Transaction. In particular, even if – absent the Merger and despite ample evidence to the contrary – Activision were to [X], its games would [X].

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<sup>78</sup> Provisional Findings, paragraph 8.2.

Microsoft's commitments go significantly beyond this counterfactual and enable any Eligible Provider to stream the PC Games. The PC Games will be available to stream on rival cloud gaming services [X].

- (b) **The PC Games will not be timed exclusive to Xbox Cloud Gaming.** As a result of the proposed remedy, the PC Games will be made available to other cloud gaming providers at the same time as it is released for sale on PC. The PC Games [X].

4.9 In addition, Microsoft submits that the proposed remedy gives rise to no specification, circumvention, distortion or monitoring and enforcement risks. In particular:

- (a) **Specification:** The structure of the proposed licensing remedy is based on industry practice, commonly used by publishers, whereby licenses are granted to each consumer and cloud game streaming provider on PC (including the Nvidia Agreement). The remedy is simple, clear, and does not require complex implementation or technical adaptation, or any significant monitoring or supervision.
- (b) **Circumvention:** Microsoft currently distributes its PC games through a number of third-party PC digital storefronts. Microsoft will commit to distribute Eligible Games through at least one third-party PC digital storefront throughout the term of the remedy. This eliminates any hypothetical risk of circumvention of the remedy, by ensuring that Microsoft distributes Eligible Games outside its owned and operated PC digital storefronts post-Merger. In addition, Microsoft commits to make Eligible Games available [X].
- (c) **Distortion:** Microsoft's proposed remedy does not give rise to any risk of market distortion. It will remain in place for a targeted period, and is based on existing market based terms commonly used by publishers. BYOG is the most successful business model on cloud gaming, with a number of providers including Nvidia GeForce Now and Shadow. The BYOG business model has the lowest barriers to entry, allowing gamers to stream games they already own. Cloud providers do not require an extensive catalogue of content to launch, but many cloud providers offer a range of different payment options and, as the CMA has noted, are open to different ways of monetizing their services.<sup>79</sup> The proposed remedy also addresses the B2P business model to avoid distortion.
- (d) **Monitoring and enforcement:** Microsoft's proposed cloud gaming remedy is self-executing and its implementation does not require significant monitoring or

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<sup>79</sup> Provisional Findings, paragraph 8.10.

supervision. Nonetheless, Microsoft has included specific mechanisms to allow for monitoring and dispute resolution. The Eligible Providers will have all of the experience and information they need to (i) request a license and (ii) detect potential breaches of Microsoft's obligations and bring a dispute before the adjudicator. Microsoft will periodically provide the Monitoring Trustee with the information required to certify compliance with the remedy. Monitoring and enforcement costs should be modest due to the simplicity of the remedy and its transparency to customers.<sup>80</sup>

**(c) The proposed remedy is proportionate to the Cloud Gaming SLC and will preserve and enhance RCBs**

4.10 Microsoft's proposed remedy is proportionate to the Cloud Gaming SLC and will preserve and enhance the RCBs outlined above.<sup>81</sup>

(a) **The cloud gaming market is *de minimis* and will remain so.** As explained above, cloud gaming on PC is *de minimis*. Around [X] users a month access Xbox Cloud Gaming via a PC in the UK.<sup>82</sup> [X] is estimated to have around [X] subscribers on PC in the UK.<sup>83</sup> The CMA has not considered UK shares of supply, but this is an extremely small proportion of the roughly 18 million PC gamers in the UK (*i.e.*, less than [X]%). While cloud gaming may grow, Microsoft expects that it will account for only [X]% of the total consumer spend on gaming by 2025.<sup>84</sup> As such, any SLC will be limited. The proposed licensing remedy is proportionate to the size of the SLC.

(b) **The proposed licensing remedy preserves and enhances the RCBs.** The CMA considers it likely that [X].<sup>85</sup> It has also found that strong indirect network effects mean that publishers will not license their content to small providers given the costs involved.<sup>86</sup> Activision has been clear that [X].<sup>87</sup> The CMA provides no evidence that Activision [X].<sup>88</sup> As a result of the Nvidia Agreement, Activision content will already be on two cloud gaming services post-Merger. The proposed content licensing remedy creates further RCBs

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<sup>80</sup> Imerys Minerals Limited and Goonvean Limited, paragraph 9.110.

<sup>81</sup> Section 36(4) Enterprise Act 2002 and Merger Remedies Guidance, paragraph 3.10.

<sup>82</sup> Average MAU of Xbox Cloud Gaming in 2022 on PCs. [X].

<sup>83</sup> Based on Ampere Analysis and assuming that [X]% of [X] subscribers are on PC. Provisional Findings, paragraph 5.83.

<sup>84</sup> Total consumer spend includes gross revenues from PC, console, mobile, browser and cloud game streaming. It excludes advertising and video streaming (*e.g.*, Twitch) revenues. Microsoft bases its estimates on a mix of internal projections and third-party sources (IDG, Newzoo, IDC, PWC, App Annie, S&P Capital IQ, public filings).

<sup>85</sup> Provisional Findings, paragraph 8.237.

<sup>86</sup> Provisional Findings, paragraph 8.65. Depending on the level of integration, there are substantial engineering costs involved in providing access to a new cloud gaming provider, even one with a BYOG or B2P model.

<sup>87</sup> [X].

<sup>88</sup> [X].

including for cloud gaming providers (as a result of the absence of a licensing fees) and consumers (as a result of the increase in the number of cloud gaming providers which will have access to the PC Games).

## 5. Divestment remedy

5.1 The CMA has identified two potential structural remedies: (i) prohibition of the Merger or (ii) a partial divestiture of part of Activision (*i.e.*, the business associated with *CoD*, the Activision segment or the Activision and Blizzard segments).<sup>89</sup> Before turning to the specifics of the CMA's proposed remedies, Microsoft notes the following legal points.

### (a) The CMA's proposed divestment remedies would be inappropriate

5.2 In considering possible divestment remedies, it is important to recall the nature of the relevant statutory provisions. Section 36(2) Enterprise Act 2002 provided that the CMA is to decide whether action should be taken for the purpose of "*remedying, mitigating or preventing*". Thus the language of the statute does not require full prevention of any SLC identified and instead recognises that mitigation may be sufficient. The requirements of section 36(2) are also qualified by section 36(3) to the effect that the CMA "*shall have regard*" to achieving as comprehensive solution to the SLC and any adverse effects arising as is "*reasonable and practicable*". The obligation to "*have regard to*" a condition or requirement is not an obligation to fulfil that requirement. Any such consideration is of a solution which is both reasonable and practicable.

5.3 In carrying out its assessment, the CMA has consistently recognised that any remedy must be proportionate. That means that the remedy (1) must be effective to achieve the legitimate aim in question (appropriate), (2) must be no more onerous than is required to achieve that aim (necessary), (3) must be the least onerous, if there is a choice of equally effective measures (minimal), and (4) in any event must not produce adverse effects which are disproportionate to the aim pursued.

5.4 Those considerations must also take into account the potentially extra-territorial nature or effect of any remedy. If and insofar as a remedy would necessarily affect the manner in which the parties carry out their business outside the jurisdiction, the CMA will need to take such ramifications into account. Whilst the remedial powers of the CMA may have impacts overseas, the more and greater those effects, the less reasonable, proportionate and practicable will be any remedy. This is particularly relevant in this case, as the Merger delivers rivalry-enhancing efficiencies and substantial customer

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<sup>89</sup> Remedies Notice, paragraph 14.

benefits globally and has been cleared in a number of jurisdictions. The demands of comity require the CMA to consider the international dimension carefully, particularly given that the merger situation is taking place outside of the jurisdiction and the UK accounts for only [X]% of *CoD* revenues and [X]% of global *CoD* monthly active users.<sup>90</sup>

- 5.5 For the reasons further outlined below, the structural remedies considered in the Remedies Notice – even if effective and practicable – are not proportionate in circumstances where, in the context of a vertical merger, behavioural remedies are effective in remedying (and, *a fortiori*, significantly mitigating) any SLC and/or adverse effects. Furthermore, the structural remedies considered would have significant extra-territorial impacts and in any event, are each, such as to produce adverse effects on the development of competition and innovation that they are disproportionate.
- 5.6 **Prohibition would effectively involve the largest divestment ever required by the CMA.** A prohibition of the Merger is wholly unjustified given that the SLCs identified by the CMA relate to only one franchise in relation to consoles and cloud gaming in the UK. This is particularly the case given the agreement reached between Microsoft and Nvidia, which Microsoft considers resolves the Cloud Gaming SLC completely. Nor would such a remedy be reasonable, given its extra-territorial ambit and effect. This is a Merger which has been found to increase competition by a number of competition agencies worldwide and which will deliver benefits conservatively estimated at \$[X] billion) to customers globally. To prohibit the deal because of the impact on Sony in the UK (which accounts for only a small proportion of *CoD* revenues and gamers) is not reasonable, given the CMA’s ability to mitigate the harm in other ways.
- 5.7 **A *CoD* or Activision divestment would still effectively involve the largest divestment ever required by the CMA.** The Activision and Blizzard segments operate on a largely independent basis both from each other and from King. As such, there is no basis on which a prohibition of the Merger could be justified. However, even a divestment of the *CoD* business or the Activision segment alone would be the largest divestment the CMA has required under the Enterprise Act 2002. The businesses to be divested are outside of the UK, again making the remedy aggressively extra-territorial in nature. A divestment of part of Activision that is active globally in order to address the UK specific issues identified is not reasonable, given the benefits which the Merger will deliver globally.
- 5.8 **In any event, a partial divestment would be highly uncertain and impracticable.** The value of the Activision Publishing business ([X]) is around \$[X]. From

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<sup>90</sup> Based on 2022 *CoD* monthly active users and revenues. See *Meta Platforms Inc. v CMA* [2022] CAT 26, 14 June 2022, paragraph 127(1).



Microsoft's perspective the Activision segment accounts for [REDACTED]. A partial divestment of the Activision *and* Blizzard segments would [REDACTED]. Moreover Microsoft would [REDACTED]. From the CMA's perspective, the success of a divestment process would be highly uncertain, given the size and global nature of the business to be divested. There are [REDACTED]. [REDACTED]. Achieving such a divestment on the CMA's standard 6 month timetable would [REDACTED].

5.9 **A divestment would have severe adverse effects on the development of competition because it would prevent Microsoft from achieving its key strategic objective, namely building a mobile gaming business with sufficient scale in order to challenge Google and Apple.** A divestment of the Activision segment would include a divestment of *CoD: Mobile* and *CoD Warzone Mobile* ("**Warzone Mobile**"). An additional divestment of the Blizzard segment would also include *Diablo Immortal* (which is available on PC and mobile). These are among the most relevant mobile games published by Activision. It is these games, particularly *Warzone Mobile* and *Diablo Immortal* (rather than the King games), which would provide Microsoft with the assets, know-how and talent to develop mobile versions of its own console games.

5.10 A carve-out of these mobile games from the divestment perimeter would not be practicable for the reasons outlined below.

- (a) ***CoD: Mobile*** was developed and is owned by TiMi Studios, a subsidiary of Tencent. [REDACTED]. [REDACTED]. Any spinout of the game would therefore [REDACTED]. *CoD: Mobile* is expected to be phased out over time (outside of China) with the launch of *Warzone Mobile*.
- (b) ***Warzone Mobile*** which is scheduled for release later in 2023, [REDACTED]. *Warzone Mobile* [REDACTED].
- (c) ***Diablo Immortal*** was released in June 2022 by Blizzard on PC and mobile. *Diablo Immortal* was co-developed with NetEase [REDACTED]. The mobile and PC versions of the games [REDACTED] and there is cross-play and cross-progression across both versions. The mobile and PC versions of the game are tied technically and commercially, and there are also ties to other *Diablo* titles in terms of art and game mechanic similarities (although there is no cross-progression between these titles).
- (d) ***Hearthstone*** was released in March 2014 by Blizzard on PC and MacOS and later on Android and iOS. The mobile and PC versions of the games [REDACTED] and the game features cross-platform play, allowing players on any supported device to compete with one another.
- (e) ***Warcraft Arclight Rumble*** was recently released on mobile in beta by Blizzard.

The game was developed in-house by Blizzard and is a mobile action strategy game set within the *World of Warcraft* universe, which features miniature versions of classic *World of Warcraft* characters. The game is a fully mobile companion to the series which is connected thematically to *World of Warcraft*, but has separate code and content.

**(b) The CMA's proposed divestment remedy would be disproportionate**

5.11 In carrying out its assessment, the CMA must select a remedy which is (1) appropriate, (2) necessary, (3) minimal and (4) must not produce adverse effects which are disproportionate to the aim pursued. Both a prohibition and partial divestment are clearly disproportionate. The divestment remedies proposed eliminate substantial RCBs. The loss of benefits is not limited to the UK. Given that the divestment remedies proposed are extra-territorial in scope, substantial harm will be caused to consumers in other countries (including countries where the deal has already been cleared). Finally, a prohibition or partial divestment remedy in this case will: (i) result in costs to UK consumers through distortions in market outcomes; (ii) be disproportionate to the size of the Cloud Gaming SLC which the CMA has provisionally identified; and (iii) reduce investment and innovation.

5.12 **A divestment remedy will extinguish RCBs.** A divestment will result in the loss of the RCBs outlined above.<sup>91</sup> The loss of such RCBs due to the implementation of a divestment is a material cost which the CMA must take into account in making its remedy selection.<sup>92</sup> The net present value of such losses would be in excess of \$[X] billion (approximately £[X] billion) over 10 years in the UK. Globally, the lost benefits would be in the region of \$[X] billion (£[X] billion).

(a) **Loss of exclusive *CoD* content to Xbox and PC gamers.** Following the Merger, benefits which are currently only available to PlayStation gamers would be made available to Xbox and PC gamers. These benefits will be lost in the event of a divestment. Publishing deals are negotiated on a global basis, as any purchaser of the Activision segment would be assumed to have the same incentives as Activision currently does. Sony, as the largest console platform, will continue to be able to pay the divested business more for content and timed exclusivity than Microsoft can, given its smaller scale.

(b) **Loss of benefits from *CoD* on the Nintendo console platform.** Following the Merger, Microsoft will develop and publish future native console versions of *CoD* titles for Nintendo platforms for at least 10 years. [X].<sup>93</sup> This efficiency

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<sup>91</sup> Section 36(4) Enterprise Act 2002 and Merger Remedies Guidance, paragraph 3.10.

<sup>92</sup> Further details and quantification will be provided in Microsoft's response to the Provisional Findings.

<sup>93</sup> Further details and quantification will be provided in Microsoft's response to the Provisional Findings.

will be lost in the event of a divestment, as any purchaser of the Activision segment would be assumed to have the same incentives as Activision currently does.<sup>94</sup>

- (c) **Loss of benefits from *CoD* and other Activision content on Game Pass.** Microsoft's plans to make Activision content available in Game Pass 'day and date' will increase customer choice and lower the cost of access. The CMA accepts that Activision will not make its most valuable games, such as *CoD*, available on subscription services on the date of release absent the Merger.<sup>95</sup> This reflects Activision's concerns regarding the potential impact on its B2P revenue of placing any games, especially new games and day and date releases, on multi-game subscription services.<sup>96</sup> This efficiency will be lost in the event of a divestment, as any purchaser of the Activision segment would be assumed to have the same incentives as Activision currently does and would also not internalize the broader benefits of including its titles within Game Pass.<sup>97</sup>
- (d) **Loss of benefits from Xbox Mobile Platform.** A significant portion of Activision's value for Microsoft's mobile strategy comes from native mobile versions of its popular console and PC games such as *Call of Duty: Mobile*, *Diablo Immortal*, and the upcoming *Warzone Mobile* and *Warcraft Arclight Rumble*, as well as the potential to develop native mobile versions of console and PC games in future. These games are not developed by King, [X].<sup>98</sup> Rather, it is the combination of Activision's games and the mobile expertise across the Activision business (including King) that drives Microsoft's strategy. The acquisition of King or King and Blizzard will not be sufficient to realise these RCBs. While difficult to quantify, the CMA accepts that the process of dynamic competition has economic value in the present, even where entry attempts may ultimately be unsuccessful.<sup>99</sup>

5.13 **A divestment remedy will result in costs to UK customers through the same distortions in market outcomes that the CMA is seeking to prevent.**<sup>100</sup> The CMA's Merger Remedies Guidance views "*competition as a dynamic process of rivalry between firms seeking to win customers' business over time*".<sup>101</sup> In a typical case,

<sup>94</sup> Further details and quantification will be provided in Microsoft's response to the Provisional Findings.

<sup>95</sup> Provisional Findings, paragraphs 7.121.

<sup>96</sup> Provisional Findings, paragraphs 7.119.

<sup>97</sup> Further details and quantification of efficiencies and RCBs will be provided in Microsoft's response to the Provisional Findings.

<sup>98</sup> While *Call of Duty: Mobile*, which was developed by Activision with Tencent, *Warzone: Mobile*, which will be launched shortly, has [X].

<sup>99</sup> Merger Assessment Guidelines (CMA129), paragraph 5.20, Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc., Final report on the case remitted to the CMA by the Competition Appeal Tribunal, 18.10.2022 ("*Meta/Giphy*"), paragraph 7.21.

<sup>100</sup> CMA, Merger Remedies (CMA 87), paragraph 3.6.

<sup>101</sup> CMA, Merger Remedies (CMA 87), paragraph 3.5(a).

restoring this process of rivalry through structural remedies, such as divestitures, which re-establish the structure of the market expected in the absence of the merger, should be expected to address the adverse effects at source.

- 5.14 This is not a typical case. Instead, this is an unprecedented case where the company allegedly at risk of foreclosure has been the market leader for more than 20 years and is significantly larger than the merging party. Looking at the relative size of Sony and Microsoft, the installed console base is split roughly [X]% to Sony and [X]% to Microsoft.<sup>102</sup> The CMA accepts that Sony has a significant lead over Microsoft in content and that content is a very important factor affecting console choice.<sup>103</sup> [X].<sup>104</sup>
- 5.15 There is a further unique aspect in this case. That is that one of the competition concerns which the CMA is attempting to prevent already exists – just directed at the smaller player in the market, Microsoft. The CMA provisionally finds that, even where content is available on PlayStation and Xbox, competition is only effective where *CoD* is available on “*equal terms*”.<sup>105</sup> That is not the case today, with Sony having exclusive access to certain *CoD* content. The CMA’s logic implies that Xbox - as the console with the reduced offering - exerts “*a weaker competitive constraint*” as a result.<sup>106</sup>
- 5.16 There has never been a vertical merger where input foreclosure was found to give rise to an SLC in such circumstances.<sup>107</sup> In this case, a divestment will eliminate rivalry-enhancing efficiencies and preserve the *status quo* where PlayStation has double the installed base, acknowledged content leadership and exclusive content in relation to *CoD*, a game the CMA says is “*capable of making a material difference to the competitiveness of rivals’ gaming platforms*”.<sup>108</sup> This is why a divestment is Sony’s preferred outcome, as the dominant market leader globally. In considering the interests of consumers, the CMA should treat Sony’s statements with utmost caution.
- 5.17 In imposing a remedy, the CMA is permitted to take reasonable and practicable action to remedy, mitigate or prevent the SLC or any adverse effects which may be expected to result from the SLC.<sup>109</sup> However, in choosing between two remedies which address the SLC on grounds of proportionality, the CMA may consider whether a proposed

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<sup>102</sup> Generation 8 and 9 consoles based on third-party data from IDG and Omdia.

<sup>103</sup> Provisional Findings, paragraph 7.48.

<sup>104</sup> Provisional Findings, paragraphs 7.134 and 7.136.

<sup>105</sup> [X].

<sup>106</sup> Provisional Findings, paragraphs 9.10 and 9.11.

<sup>107</sup> The CMA has found a substantial lessening of competition on the basis of input foreclosure in only three Phase 2 cases. *Intercontinental Exchange / Trayport* (2017) (link available [here](#)); *Tobii / Smartbox Assistive Technologies* (2019) (link available [here](#)); and *Facebook (Meta Platforms) / Giphy* (2021 and on remittal 2022) (link available [here](#)). Potential input foreclosure concerns were identified in one further case abandoned following provisional findings: *Thermo Fisher Scientific / Roper Technologies (Gatan business)* (2019 – merger abandoned) (link available [here](#)). Such cases are exceptional – accounting for less than 1% of the CMA’s merger decisions – and have in each case involved the protection of substantial market power.

<sup>108</sup> Provisional Findings, paragraph 40.

<sup>109</sup> Enterprise Act, section 41(2).

divestment remedy would distort competition, even if such distortion pre-dates the Merger. There is no requirement on the CMA to ignore pre-existing distortions of competition which harm competition and consumers. Failure to take this into account is to ignore a relevant fact.

- 5.18 If the CMA upholds its provisional conclusion that making *CoD* partially exclusive to Xbox would give rise to an SLC, the CMA must recognise that *CoD* has been partially exclusive to PlayStation since 2015. A divestment which restores the status quo, restores the partial exclusivity in favour of PlayStation. Based on the logic set out in the CMA’s provisional findings, a divestment would cause harm to Xbox and PC gamers as compared to Microsoft’s proposed licensing remedy.
- (a) ***The contribution of CoD on Xbox is similar to PlayStation.*** The CMA provisionally concludes that *CoD* is an “important input” to PlayStation: it is one of the three largest franchises on PlayStation and contributed a significant share of PlayStation’s consumer spend and gameplay time in 2021.<sup>110</sup> The Parties do not agree with the CMA’s conclusion, but *CoD* is also one of the three largest franchises on Xbox and contributed a similar share of Xbox’s consumer spend ([§<]%) and gameplay time ([§<]%) in the UK.<sup>111</sup> As such, if *CoD* is an “important input” for PlayStation (which is denied), the CMA has to accept that it is also an “important input” for Xbox.
- (b) **Microsoft would be a weaker competitive constraint with a divestment.** The CMA also provisionally concludes that partial *CoD* exclusivity would “*significantly weaken SIE as a competitive constraint to the Merged Entity*”.<sup>112</sup> A partial exclusivity in relation to certain features of *CoD* would, according to the CMA, have a similar effect on console competition to total exclusivity.<sup>113</sup> The Parties do not agree with the CMA’s conclusion, but in any event the existing agreement with Activision gives Sony [§<].<sup>114</sup> [§<].<sup>115</sup>
- (c) ***CoD* content and timed exclusives impact Xbox more than PlayStation.** The CMA provisionally concludes that “*not making [Activision content] available on equal terms, would reduce that console’s competitive offering*” (emphasis added).<sup>116</sup> Microsoft’s YouGov survey shows that the potential impact of *CoD* partial exclusivity is small, but importantly the impact is greater on Xbox than

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<sup>110</sup> Provisional Findings, paragraph 7.209.

<sup>111</sup> 2021 figures based on Xbox revenue data for consumer spend and Xbox telemetry data for gametime.

<sup>112</sup> Provisional Findings, paragraph 7.370.

<sup>113</sup> Provisional Findings, paragraph 7.336(b) and 7.337.

<sup>114</sup> Issues Statement Response, paragraph 3.42(b). [§<].

<sup>115</sup> [§<].

<sup>116</sup> Provisional Findings, paragraph 9.10.

on PlayStation.<sup>117</sup> A small percentage of gamers ([REDACTED]%) who intend to purchase PlayStation for their next main gaming console would switch to Xbox if *CoD* was partially withheld from PlayStation but available on Xbox.<sup>118</sup> A larger percentage ([REDACTED]%) of gamers who intend to purchase an Xbox as their next main gaming console would switch to PlayStation if *CoD* was partially withheld from the Xbox but available on PlayStation. Microsoft internal documents also show that [REDACTED].<sup>119</sup>

- (d) **A divestment preserves the status quo and harms Xbox and PC gamers.** As such, if the CMA expects that Sony will be “*significantly weakened*” by partial exclusivity, the CMA must equally acknowledge that Microsoft is “*significantly weakened*” by the status quo arrangements, which would be preserved by a divestment. Publishing deals are negotiated on a global basis. Sony, as the larger console platform with a larger roster of exclusive titles, will continue to be able to pay the divested Activision business more for content and timed exclusivity than Microsoft can, given its smaller scale globally. While these distortions exist pre-Merger, the CMA can take them into account in considering the costs and benefits of proposed remedies.<sup>120</sup>

5.19 Microsoft’s proposed content licensing remedy ensures parity in relation to *CoD* and avoid distortions in market outcomes. Moreover, as explained below, the status quo weakens Nintendo as a competitor, whereas the Merger would enable it to offer *CoD*.

5.20 **A divestment remedy is wholly disproportionate to the size of the Cloud Gaming SLC.** The CMA has provisionally found that the Merger may result in a SLC in the market for the supply of cloud gaming services in the UK.<sup>121</sup> Microsoft does not agree with this conclusion, but notes that cloud gaming in the UK is *de minimis* and expected to remain so. Requiring a multi-billion dollar global divestment of Activision or Activision and Blizzard in order to address such a tiny and uncertain SLC is wholly disproportionate.

- (a) **The cloud gaming market is *de minimis* and will remain so.** As will be explained in the response to the Provisional Findings, cloud gaming is not a “product”, let alone a “market”, on console. Gamers on PlayStation, Nintendo and Xbox can access cloud gaming as a feature of their existing console experience. PlayStation and Nintendo are “walled gardens”, so gamers cannot

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<sup>117</sup> [REDACTED].

<sup>118</sup> In-game aspects include: cosmetic virtual goods, power upgrades, additional playable character/vehicles, additional maps/quests/campaigns/tracks, and XP boosts.

<sup>119</sup> [REDACTED].

<sup>120</sup> If the CMA were to conclude that Activision or the divested purchaser would be likely to enter into an exclusive agreement with Microsoft, there would be no SLC.

<sup>121</sup> Provisional Findings, paragraph 8.343.

use these consoles to access other cloud gaming services. Cloud gaming on console cannot be divorced from the console itself – and is no more than another parameter on which consoles compete against each other.<sup>122</sup> Around [X] users a month access Xbox Cloud Gaming via a PC in the UK.<sup>123</sup> [X] is estimated to have around [X] subscribers on PC in the UK.<sup>124</sup> The CMA has not considered UK shares of supply, but this is an extremely small proportion of the roughly 18 million PC gamers in the UK (*i.e.*, less than [X]%). While cloud gaming may grow, Microsoft expects that it will account for only [X]% of the total consumer spend on gaming by 2025.<sup>125</sup>

- (b) **A divestment remedy will deliver minimal benefits (if any) based on the CMA’s provisional findings.** The CMA considers it likely that [X].<sup>126</sup> It has also found that strong indirect network effects mean that publishers will not license their content to small providers given the costs involved.<sup>127</sup> Activision has been clear that [X].<sup>128</sup> [X].<sup>129</sup> There is no reason to consider that a divestment purchaser would act differently to Activision. Even if the divestment purchaser agreed to a deal with [X], the CMA’s evidence demonstrates that a divestment purchaser would not place Activision content on multiple cloud gaming platforms available in the UK, given the small scale of such services and significant costs involved. The technical work required would entail extensive testing, software adaptation and optimization to enable a game runs smoothly on a cloud provider’s systems all while ensuring uniformity of the gaming experience across platforms. This investment is not justified by the size of the commercial opportunity available.<sup>130</sup> The consumer benefit from a divestment would, therefore, be limited. In contrast, Microsoft’s proposed content licensing remedy ensures access to *CoD* on multiple cloud gaming services.

5.21 **A divestment remedy will reduce investment and innovation.** In considering dynamic competition, the CMA must also conduct a broader cross-check on incentives to invest and innovate in the UK, as well as the costs imposed on the Parties. As the Competition Appeal Tribunal notes “[*u*]nwise intervention can just as easily lessen

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<sup>122</sup> Around [X]% of the usage on console is to try a game before downloading it.

<sup>123</sup> [X].

<sup>124</sup> Based on Ampere Analysis and assuming that [X]% of [X] subscribers are on PC. Provisional Findings, paragraph 5.83.

<sup>125</sup> Total consumer spend includes gross revenues from PC, console, mobile, browser and cloud game streaming. It excludes advertising and video streaming (*e.g.*, Twitch) revenues. Microsoft bases its estimates on a mix of internal projections and third-party sources (IDG, Newzoo, IDC, PWC, App Annie, S&P Capital IQ, public filings).

<sup>126</sup> Provisional Findings, paragraph 8.237.

<sup>127</sup> Provisional Findings, paragraph 8.65. Depending on the level of integration, there are substantial engineering costs involved in providing access to a new cloud gaming provider, even one with a BYOG or B2P model.

<sup>128</sup> [X].

<sup>129</sup> [X].

<sup>130</sup> [X].

*competition as an unwise failure to intervene*".<sup>131</sup>

- 5.22 A divestment remedy will deprive Microsoft of anticipated synergies, which it planned to invest in new products and services, as well as imposing significant costs.<sup>132</sup> Microsoft has been clear that the assets, know-how, talent and revenues acquired as part of the Activision business (including the revenues from distributing *CoD* on PlayStation) will be used to facilitate investment in developing new products and services, particularly in mobile gaming. These assets, talent and know-how includes *CoD: Mobile*, which was developed by Activision with Tencent, as well as *Warzone Mobile*, which will be launched shortly and [§<]. Without the assets, know-how, talent and revenues from the Activision business, Microsoft will not be able to develop new products and services in mobile. The games produced by King are not sufficient for Microsoft to proceed with this strategy.
- 5.23 As the loss of these synergies will also harm customers, these are considered in the context of the loss of RCBs above. Microsoft's proposed content licensing remedies address the SLCs identified by the CMA while preserving Microsoft's ability to invest and innovate.

## 6. Conclusion

- 6.1 Microsoft is proposing a package of licensing remedies which (i) guarantee parity between the PlayStation and Xbox platforms in respect of *CoD* and (ii) ensure wide availability of *CoD* and other Activision titles on cloud gaming services. These remedies protect all *CoD* gamers in the UK and provide substantial benefits to consumers and developers of roughly £[§<] billion (\$[§<] billion)<sup>133</sup> in the UK and £[§<] billion globally (\$[§<] billion). These RCBs are substantial compared with any adverse effects of the Merger, and these benefits would be largely preserved by behavioural remedies but not by structural remedies. Microsoft therefore believes that the criteria for the CMA to consider behavioural remedies are met in this case.

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<sup>131</sup> *Meta Platforms Inc. v CMA* [2022] CAT 26, 14 June 2022, paragraph 110.

<sup>132</sup> [§<].

<sup>133</sup> For completeness, Microsoft notes that the benefit ranges between £[§<] billion and £[§<] billion – both of which round up to £[§<] billion.



