

6 March 2023

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

**MICROSOFT’S RESPONSE TO THE CMA’S QUESTIONS AT THE
REMEDIES HEARING**

1. Executive Summary

- 1.1 This is Microsoft’s response to the questions raised by the CMA at the hearing on 27 February 2023 (the “**Remedies Hearing**”). During the Remedies Hearing, Microsoft restated its position that the Merger is not, and has never been, about acquiring titles like *Call of Duty* (“**CoD**”) and making them exclusive to the Xbox platform. Microsoft is focused on using the acquisition to bring more games to more people on more platforms and devices, enhancing competition and innovation in gaming markets.¹
- 1.2 Microsoft stands ready to enter an agreement with Sony to ensure that *CoD* remains on PlayStation. Microsoft has repeatedly committed to do so both publicly and privately. Sony has steadfastly refused to reach an agreement with Microsoft, calling instead for the Merger to be prohibited. Sony’s position must be seen for what it is: a self-serving attempt to protect its dominant market position, rather than one founded on genuine concerns regarding its continued access to *CoD* - which it could have secured on attractive terms months ago.
- 1.3 Since the Provisional Findings were issued, Microsoft has entered into legally binding, 10-year agreements with Nintendo and NVIDIA to bring *CoD* to millions of additional gamers on both console and cloud gaming services, if the Merger is approved. Microsoft estimates on a conservative basis that the relevant customer benefits (“**RCBs**”) to UK consumers will exceed \$[redacted] (£[redacted]). Globally, the benefits to consumers will, on a conservative basis, be at least \$[redacted] (£[redacted]).²
- 1.4 In light of these substantial customer benefits, the criteria for the CMA to accept behavioural remedies are met. This case is one where “*RCBs are likely to be substantial*”

¹ Brad Smith, Vice Chair and President of Microsoft, Brussels Press Conference, 21 February 2023 (link available [here](#)).

² Response to Provisional Findings, section 3.

*compared with the adverse effects of the merger, and these benefits would be largely preserved by behavioural remedies but not by structural remedies.”*³ Microsoft’s proposed remedies are the only remedies that will preserve the substantial RCBs arising from the Merger, while fully addressing the CMA’s provisional concerns.

1.5 The proposed remedies in this case involve arrangements that the parties would enter into under normal commercial circumstances.⁴

(a) First, the console gaming remedy consists of a licensing agreement in relation to *CoD* which supplements the existing publishing agreement between Sony and Microsoft. [§<]. Such publishing agreements in relation to *CoD* have been in place with Sony for the past 20 years.

(b) Second, the cloud gaming remedy consists of royalty-free, worldwide licenses to consumers and cloud gaming providers that enable consumers to stream Activision PC games which they have acquired. [§<] agreed with NVIDIA. NVIDIA has been unequivocal that this commercial arrangement “*is a major boost for cloud gaming and brings incredible choice to gamers.*”⁵

1.6 The proposed remedies present no risk that they will “*become ineffective or be circumvented as market conditions change.*”⁶ Nor do the remedies involve any “*information asymmetries between suppliers and customers*”.⁷ As outlined below, developing a new game is a transparent process, and substantive interactions with platforms - including Sony PlayStation - begin [§<] before game launch. Sony is both a leading console platform and developer, with significant legal protections under [§<]. These protections will be maintained and further enhanced following the Merger, given the [§<]. In any event, the gaming community would notice any degradation in the PlayStation experience.

1.7 Microsoft provides further details on these remedies in response to the questions asked by the CMA in the Remedies Hearing. Microsoft remains committed to engaging with the CMA to address any concerns with the Merger. The response is structured as follows:

(a) the CMA’s questions on the console gaming remedy are addressed in section 2;

³ CMA Guidance on Merger Remedies (CMA87), paras 3.45 and 3.48.

⁴ UK merger control in 2023 – a speech delivered by Sarah Cardell, Chief Executive of the CMA, to the UK Competition Law Conference 2023, 27 February 2023 (link available [here](#)).

⁵ See Nvidia’s press release of 23 February 2023, available at: <https://blogs.nvidia.com/blog/2023/02/23/geforce-now-thursday-feb-23/>.

⁶ UK merger control in 2023 – a speech delivered by Sarah Cardell, Chief Executive of the CMA, to the UK Competition Law Conference 2023, 27 February 2023.

⁷ *Ibid.*

- (b) the CMA’s questions on the cloud gaming remedy are addressed in section 3; and
- (c) the CMA’s questions on enforcement are addressed in section 4.

2. Console gaming remedy

(i) Comparison of Microsoft’s proposed remedy and Sony’s proposal

- 2.1 During the Remedies Hearing, the CMA asked how Microsoft’s proposed remedy differs from the proposal made by Sony during the commercial negotiations.
- 2.2 Sony [redacted] (the “**Sony Proposal**”).⁸ Sony states that [redacted].⁹ [redacted]. This is reflected in the proposed remedy and addresses the CMA’s Provisional Findings.
- 2.3 The major differences between the proposed remedy and the Sony Proposal are due to the fact that the Sony Proposal:
 - (a) [redacted]¹⁰ [redacted]¹¹
 - (b) [redacted]¹²[redacted]¹³; and
 - (c) [redacted].¹⁴
- 2.4 In these respects, the Sony Proposal is [redacted]. [redacted].¹⁵ [redacted].
- 2.5 Specifically in relation to console gaming, the key differences between the proposed remedy and the Sony Proposal relate to [redacted]. The key terms of Sony’s Proposal and the proposed remedy are set out in Table 1 below. Issues on which there is alignment are in green and where the differences are not merger-specific are in grey. The few merger-specific issues which are not agreed are in yellow.

Table 1 – Sony Proposal versus the proposed content licensing remedy

Key Elements	Sony’s Proposal	Microsoft’s Proposed Remedy
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]

⁸ Microsoft notes that the Sony proposal was [redacted]. See [redacted].
⁹ [redacted].
¹⁰ [redacted].
¹¹ [redacted].
¹² <https://www.playstation.com/en-gb/ps-vr2/>
¹³ [redacted].
¹⁴ [redacted].
¹⁵ Provisional Findings, paragraph 7.370.

Key Elements	Sony’s Proposal	Microsoft’s Proposed Remedy
[X]	[X]	[X]
	[X]	[X]
	[X]	[X]
	[X]	[X]
[X]	[X] ¹⁶	[X]
	[X]	[X]
[X]	[X]	[X]
[X]	[X]	[X]
[X]	[X]	[X]
[X]	[X]	[X]
[X]	[X]	[X]
[X]	[X]	[X]
[X]	[X]	[X]

2.6 Since [X], Microsoft has on multiple occasions attempted to engage with Sony. [X]. [X]. [X].¹⁷

(ii) Comparison of Microsoft’s proposed remedy and Sony’s existing terms

2.7 At the Remedies Hearing the CMA also asked Microsoft to explain how the proposed remedy differs from the existing agreement in effect today between Sony and Activision for *CoD*.

2.8 The proposed remedy is [X], the existing *CoD* agreement between Sony and Activision. [X]. This comparison is detailed below in Table 2. [X] the remedy would equalize the *CoD* content available across PlayStation and Xbox (*i.e.*, PlayStation gamers will no longer receive content advantages that Xbox and PC gamers do not

¹⁶ [X].

¹⁷ Activision opening presentation at Activision’s Remedies Hearing on 1 March 2023.

receive). As set out in Microsoft’s response to the Remedies Notice, this benefits the [REDACTED]% of UK *CoD* gamers who do not play on PlayStation.¹⁸

Table 2 - Comparison between existing Sony-Activision *CoD* Agreement and Proposed Remedy

Provision	[REDACTED] ¹⁹	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED] ²⁰	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED] ²¹ [REDACTED] ²²	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED] ²³ [REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED] ²⁴	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

(iii) Further details of Microsoft’s proposed remedy

2.9 Microsoft has addressed the CMA’s questions on each element of the proposed remedy below.

18 Response to Remedies Notice, paragraph 2.6(b).
 19 [REDACTED].
 20 [REDACTED].
 21 [REDACTED].
 22 [REDACTED].
 23 [REDACTED].
 24 [REDACTED].

(a) Scope

2.10 Microsoft notes that the CMA did not ask any questions at the Remedies Hearing in relation to the scope of the remedy, which would apply to all past, current and future *CoD* console titles.²⁵

(b) Term

2.11 Microsoft's proposal is that the remedy will apply for a period of 10 years.²⁶ [REDACTED].²⁷

2.12 At the Remedies Hearing the CMA asked Microsoft if the 10-year duration is sufficient and whether there would be a "cliff edge" for Sony at the end of this period. The 10-year period is [REDACTED]. Microsoft considers that a period of 10 years is sufficient for Sony, as a leading publisher and console platform, to develop alternatives to *CoD*.²⁸ The 10-year term will extend into the next console generation [REDACTED]. Moreover, the practical effect of the remedy will go beyond the 10-year period, since games downloaded in the final year of the remedy can continue to be played for the lifetime of that console (and beyond, with backwards compatibility).

2.13 *CoD* is an entertainment franchise which is already nearly 20 years old. [REDACTED], Microsoft will need to secure the broadest distribution of the franchise and will be heavily incentivized to keep it on the PlayStation platform [REDACTED]. Microsoft considers that having maintained *CoD* on PlayStation and grown its player base on Nintendo, GeForce Now and other cloud gaming platforms for a decade, it will have no incentive, or indeed ability, to take *CoD* exclusive.

2.14 A 10-year term is longer than the previous licensing remedy put in place in *Reckitt Benckiser/K-Y brand* (2015), which was for a period of eight years²⁹ and in line with the 10-year terms imposed in *Korean Air / Asiana Airlines* (2023) and *Bauer Media Group*.³⁰ This period is also in line with access commitments accepted by the European Commission in *Meta/Kustomer* (2022), *London Stock Exchange Group/Refinitiv Business* (2021), *Google/Fitbit* (2020) and *Telia Company/Bonnier Broadcasting* (2019). While Microsoft is prepared to continue to discuss this constructively with the

²⁵ Response to Remedies Notice, paragraph 3.3(a).

²⁶ Response to Remedies Notice, paragraph 3.3(b).

²⁷ [REDACTED].

²⁸ CMA, Market Studies and Market Investigations: Supplemental guidance on the CMA's approach (CMA 3), paragraph 4.21.

²⁹ Reckitt Benckiser/K-Y brand, Final Report, 12 August 2015, paragraph 24.

³⁰ Completed acquisitions by Bauer Media Group of certain businesses of Celador Entertainment Limited, Lincs FM Group Limited, Wireless Group Limited, and the entire business of UKRD Group Limited, Final Report, 12 March 2020. In addition in *Müller UK & Ireland Group LLP/Dairy Crest Group plc* (2015) the toll processing arrangement option had an initial term of five years, plus the option to fulfil any ongoing national multiple contract that is in place at the end of this initial term for an additional period of up to three years, *i.e.*, an overall duration of 8 years. See Anticipated acquisition by Muller UK & Ireland Group LLP of the dairies operations of Dairy Crest Group plc, paragraph 22. *Imerys Minerals Limited/Goonvean Limited* (2013), where a five-year price control was accepted. See Imerys Minerals Limited and Goonvean Limited, Final Report, 10 October 2012, paragraph 36.

CMA, there is no basis for extending the remedy beyond the period proposed by Microsoft [REDACTED].

(c) Console platforms

2.15 Microsoft’s proposal is that the remedy will apply to all Sony consoles (including PlayStation 4, PlayStation 4 Pro and PlayStation 5) and any successor consoles.³¹

2.16 The Sony Proposal [REDACTED].³² However, the Sony Proposal [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

Would Microsoft be open to extend the remedy to new entrants?

2.17 At the Remedies Hearing the CMA asked Microsoft if it would be willing to extend the proposed console licensing remedy to any “credible entrant” in the console market.

2.18 Microsoft does not consider that this is necessary in order to remedy, mitigate or prevent the Console SLC identified in the Provisional Findings, which does not relate to a hypothetical withholding of *CoD* from potential new entrants. Rather, the Provisional Findings focus specifically on the potential impact of the Merger on Sony.³³ In particular, the Provisional Findings conclude that *CoD* is an important input for Sony PlayStation. The CMA has not, however, found or presented evidence to suggest that *CoD* is an important input for console providers generally.

2.19 Nor could the CMA reach such a conclusion, given that *CoD* is not available on Nintendo – the second largest provider of consoles – today. As the Provisional Findings acknowledge, console platforms offer different technical specifications and differentiated gaming propositions.³⁴ Nintendo’s success demonstrates conclusively that a console platform’s ability to compete effectively is not dependent on the ability to offer *CoD* to its customers. Rather, this is possible with a “*differentiated offer*”.³⁵ In any event, Microsoft has already reached an agreement to bring *CoD* to the Nintendo platform for 10 years as part of its strategy to make *CoD* as widely available as possible.

2.20 The Provisional Findings also do not present any evidence to suggest there is likely to be any ‘credible’ entrant in the console market in the foreseeable future. Moreover, there is no evidence to suggest that even if a new entrant *did* enter the market in the future, Activision would have made *CoD* available on that entrant’s console platform. As acknowledged in the Provisional Findings, there are additional porting costs to make a game such as *CoD* available on different console platforms and there can be technical

³¹ Response to Remedies Notice, paragraph 3.3(c).

³² [REDACTED].

³³ See for example, Provisional Findings, paragraphs 43-47 and 53.

³⁴ Provisional Findings, paragraph 7.68

³⁵ Provisional Findings, paragraph 7.150(b).

limitations in doing so.³⁶ [REDACTED].³⁷ In such circumstances the CMA could not conclude that a SLC could arise as a result of a hypothetical withholding of *CoD* from a future unknown entrant (and certainly not within the next five years, as required in accordance with *Meta v Giphy*³⁸).

- 2.21 The fact that Microsoft has entered into agreements with Nintendo and NVIDIA in relation to *CoD* and has made its content (including Game Pass) available on new handheld console devices, such as Steam Deck and Razer Edge, is evidence that Microsoft has a clear incentive to provide *CoD* to new consoles. The CMA's assessment of incentives in the Provisional Findings cannot be relied upon to conclude that Microsoft would be incentivised to withhold *CoD* from any such entrant.³⁹ The potential benefits of any hypothetical withholding strategy to Microsoft would be even further reduced if the CMA accepts Microsoft's proposed licensing remedies.⁴⁰
- 2.22 Accordingly, in the Parties' view any suggestion the licensing remedy should be extended to potential future entrants would be clearly disproportionate and unnecessary to remedy the SLC provisionally identified. There is no evidence that: (a) any firm is likely to seek to enter the console market in the foreseeable future; (b) *CoD* could be considered an important input for them if they did; (c) [REDACTED]; or (d) Microsoft would be incentivised to withhold *CoD*, particularly in circumstances where it has entered into agreements with Nintendo and NVIDIA, supplied Game Pass to new handheld console entrants and provided commitments to make *CoD* broadly available, including on cloud gaming platforms.

(d) Parity

- 2.23 Microsoft's proposal is that the remedy will provide Sony with parity on release date, content, features, upgrades, quality and playability with the Xbox platform.⁴¹ The Sony Proposal refers to [REDACTED].⁴²

Practical implementation of parity provisions

- 2.24 At the Remedies Hearing the CMA asked Microsoft to clarify how parity is defined,

³⁶ Provisional Findings, paragraphs 7.56-7.71.

³⁷ Similarly, in relation to PC gaming, Activision [REDACTED].

³⁸ Case No: 1429/4/12/21, *Meta v CMA*, [2022] CAT 26 paragraphs 103-104.

³⁹ As with the CMA's 'ability' analysis, the Provisional Findings focuses on Microsoft's incentives to use *CoD* to foreclose PlayStation. See for example Provisional Findings, paragraph 7.354.

⁴⁰ While the CMA relies on several purported "strategic benefits" that might provide Microsoft with incentives to make Activision content exclusive to Xbox in the Provisional Findings at paragraph 7.351, Xbox content will not be exclusive given the agreements with Nintendo and NVIDIA, as well as the proposed remedies. Microsoft would have no ability to foreclose given the potential alternative supply of *CoD* via cloud gaming providers. Moreover, Microsoft would stand to gain less from any withholding strategy since customers of the 'foreclosed' entrant wishing to play *CoD* would also be able to divert to PlayStation (or Nintendo, as a result of Microsoft's agreement with Nintendo), as well as playing *CoD* on their consoles via one of multiple providers of cloud gaming.

⁴¹ Response to Remedies Notice, paragraph 3.3(a).

⁴² [REDACTED].

and how it is practically implemented and measured. [REDACTED]. [REDACTED].⁴³ [REDACTED]. Similarly, contracts between Sony and ZeniMax in relation to [REDACTED].⁴⁴ To the Parties' knowledge, [REDACTED] in connection with the application of parity requirements to these games. Features and content are designed to be seen and key performance parameters can be measured by gamers, independent reviewers of games (e.g., Digital Foundry⁴⁵), and, indeed, Sony itself.

2.25 Generally, developing a new game is a transparent process, and substantive interactions with platforms - including Sony PlayStation - begin [REDACTED] before game launch. In the case of *Call of Duty* specifically, development closely involves the platform, with [REDACTED]. [REDACTED]. Table 3 below sets out an indicative summary of the process.

Table 3 – Summary of *CoD* development path

[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED] ⁴⁶

Source: Activision

2.26 Any issues are [REDACTED]. It is difficult for Activision to [REDACTED]. [REDACTED], this will only serve to *increase* Sony's scrutiny. In any event, Activision cannot [REDACTED].

2.27 Throughout the process, Activision continually measures performance between the

43 [REDACTED].
 44 [REDACTED].
 45 <https://www.digitalfoundry.net/>.
 46 [REDACTED].

Sony, Xbox and PC builds ([REDACTED]) across a variety of metrics ([REDACTED]). [REDACTED].

Supporting PlayStation-specific features

- 2.28 At the Remedies Hearing the CMA asked how the parity framework would allow Microsoft to accommodate advanced, PlayStation-specific features in *CoD* which are not available on Xbox.
- 2.29 Sony’s GDPR sets out the core obligations on [REDACTED]. [REDACTED]. [REDACTED]. These protections will [REDACTED]. Indeed, [REDACTED]. The key provisions governing these obligations are set out in **Annex 3** and are summarised below.
- 2.30 [REDACTED]. [REDACTED]⁴⁷ [REDACTED].⁴⁸ [REDACTED].⁴⁹ [REDACTED]. [REDACTED].⁵⁰ [REDACTED].⁵¹ Moreover, [REDACTED]. [REDACTED].
- 2.31 [REDACTED].⁵² [REDACTED]. [REDACTED]. [REDACTED].
- 2.32 [REDACTED].⁵³ [REDACTED]. [REDACTED]. [REDACTED].

Optional PlayStation platform features

- 2.33 Sony has certain optional PlayStation features that Sony uses to help market its platform, and are not central to the gaming experience. Examples include [REDACTED]. [REDACTED]. [REDACTED].
- 2.34 [REDACTED].⁵⁴ [REDACTED]. [REDACTED].
- 2.35 Under the remedy, these provisions, [REDACTED]. [REDACTED]. [REDACTED]. Microsoft notes that there are [REDACTED].⁵⁵ Microsoft has found other ways to showcase and market the Xbox console features.
- 2.36 The Parties note, in particular, that there is no basis in the Provisional Findings for what would essentially amount to a “beyond parity” obligation, requiring Microsoft to develop a PlayStation version of *CoD* which has *more* features than the Xbox version. Rather, the relevant partial foreclosure mechanisms considered in the Provisional Findings, which the remedy is designed to address, relate to releasing a worse version of *CoD* titles on PlayStation consoles for example “*with fewer features*” and “*degrading the graphical quality*” of the PlayStation version.⁵⁶ The concern

47 [REDACTED].
48 [REDACTED].
49 [REDACTED].
50 [REDACTED].
51 [REDACTED].
52 [REDACTED].
53 [REDACTED].
54 [REDACTED].
55 FMN, Annex 6.
56 Provisional Findings, paragraph 7.269.

provisionally identified is that Sony would be a “*substantially less effective competitor than it would be absent the Merger*”.⁵⁷

2.37 As Microsoft will be shipping *CoD* on PlayStation in compliance with its remedy commitments [§<], Microsoft will have every incentive to develop games with optimised support for PS5 features, such as haptics, and future consoles in order to maximise sales on the platform. [§<].

(e) Economic terms

2.38 Microsoft’s proposal is that purchases will be subject to a revenue sharing arrangement, with Sony retaining [§<]% of the revenue from sales of *CoD* Games, and content related to any *CoD* Games. This reflects [§<]. Taking account of all payments from Sony to Activision, Sony currently receives [§<]. As such, the proposed remedy [§<] (see also below).

(f) Wholesale pricing parity

2.39 Microsoft’s proposal is that the wholesale price of *CoD* Games offered to Sony (“**Wholesale Price**”) is no higher than [§<]% of the retail price charged by Microsoft for the equivalent version of the game on the Xbox platform. [§<].⁵⁸

2.40 At the Remedies Hearing, the CMA asked for further details of how the Wholesale Price is typically set. [§<]. [§<].⁵⁹ [§<]. [§<].⁶⁰ [§<].⁶¹

2.41 Typically, the wholesale price allows publishers to set a minimum wholesale price (*e.g.*, so that Sony does not set the retail price at zero and pay nothing under the revenue sharing arrangement). Under the proposed remedy, Microsoft agrees that it will not set the Wholesale Price on PlayStation at a level which is above [§<] of its own retail price on Xbox. The remedy prevents Microsoft from raising a rival’s costs or engaging in a ‘margin squeeze’. Sony remains free to set its retail price on PlayStation (which may differ from the price on the Xbox platform).

2.42 Microsoft notes that Sony’s proposal to [§<]. Microsoft notes that this proposal is [§<]. [§<].

⁵⁷ Provisional Findings, paragraph 7.364
⁵⁸ [§<].
⁵⁹ [§<].
⁶⁰ [§<].
⁶¹ [§<].

(g) Subscription and streaming rights

Right for Sony to put CoD on a subscription even if Microsoft does not

2.43 Microsoft's original proposal was that any [REDACTED].⁶² This was [REDACTED].⁶³

2.44 At the Remedies Hearing the CMA asked Microsoft if it would be willing to extend the right for Sony to put *CoD* into its MGS service, even if Microsoft does not do so. [REDACTED]. [REDACTED].

MGS wholesale pricing

2.45 Microsoft's original proposal was that, [REDACTED].⁶⁴ The [REDACTED] was chosen as Sony requires developers to provide free 2 hour game trials for PlayStation Plus ("PS+") Premium subscribers.⁶⁵ Microsoft's original proposal gives Sony the flexibility to place new *CoD* releases in PS+ 'day and date'. This is a substantial benefit to Sony as the CMA accepts that [REDACTED].⁶⁶ Microsoft receives the [REDACTED]. [REDACTED].⁶⁷ Indeed, it is clear from the Provisional Findings that [REDACTED].

2.46 The Sony Proposal was that [REDACTED].⁶⁸ [REDACTED]. Applying the [REDACTED] to new releases of *CoD* Games would [REDACTED].⁶⁹

2.47 In Microsoft's view, the Sony Proposal is [REDACTED]. Moreover, Microsoft notes that this proposal is [REDACTED]. [REDACTED].

2.48 Microsoft understands that Sony has raised concerns that [REDACTED]. This clearly depends on [REDACTED]. Microsoft has not seen Sony's calculations. [REDACTED]:

(a) [REDACTED]⁷⁰ [REDACTED].

(b) [REDACTED].

Streaming rights

2.49 Microsoft's original proposal was that [REDACTED].⁷¹ At the Remedies Hearing the CMA asked Microsoft if it would be willing to extend the right for Sony to put *CoD* into its cloud

⁶² Response to Remedies Notice, paragraph 3.3(g).

⁶³ [REDACTED].

⁶⁴ Response to Remedies Notice, paragraph 3.3(g).

⁶⁵ This requirement is contained in guidelines posted to the Sony Developer Portal in April 2022, which developers are required to comply with under the GDPR. The guidelines were widely reported. See, for example, Game Developer, "Timed game trials are now a requirement for some PlayStation developers", 26.04.2022 (link available [here](#)).

⁶⁶ Provisional Findings, paragraphs 7.121.

⁶⁷ For example, [REDACTED].

⁶⁸ [REDACTED]. As set out in the response to Question 6 of RFI 13 dated 21 February 2023 [REDACTED].

⁶⁹ [REDACTED].

⁷⁰ Microsoft considers [REDACTED].

⁷¹ Response to Remedies Notice, paragraph 3.3(g).

gaming service on console, even if Microsoft does not do so. [REDACTED].⁷²

(h) Terms

[REDACTED]

2.50 [REDACTED].⁷³ [REDACTED].⁷⁴

2.51 [REDACTED]. [REDACTED].⁷⁵

2.52 [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

2.53 [REDACTED]:

(a) [REDACTED]⁷⁶

(b) [REDACTED]⁷⁷

(c) [REDACTED]⁷⁸

(d) [REDACTED]⁷⁹

(e) [REDACTED]⁸⁰

(f) [REDACTED]⁸¹

(g) [REDACTED]⁸²

(h) [REDACTED]⁸³ [REDACTED]⁸⁴

⁷² Microsoft notes that in relation to cloud gaming, the CMA provisionally concludes that “SIE currently only offers cloud gaming as a way to play older games from its catalogue. It therefore does not currently offer a strong constraint, although this may change in the future if it expands its cloud gaming offer. It is likely to be weaker than other competitors such as Microsoft, Amazon, and NVIDIA on cloud infrastructure, as it does not have a large cloud infrastructure network or advantages in building one.” (Provisional Findings, paragraph 8.326). The CMA goes on to provisionally find that “SIE’s disadvantages on cloud infrastructure mean that it is unlikely to present an adequate constraint in the longer term” (Provisional Findings, paragraph 8.342).

⁷³ The signed PlayStation Global Developer & Publisher Agreement between Sony and [REDACTED] Response to Remedies Notice, paragraph 3.3(h).

⁷⁴ [REDACTED].

⁷⁵ [REDACTED].

⁷⁶ [REDACTED].

⁷⁷ [REDACTED].

⁷⁸ [REDACTED].

⁷⁹ [REDACTED].

⁸⁰ [REDACTED].

⁸¹ [REDACTED].

⁸² [REDACTED].

⁸³ [REDACTED].

⁸⁴ [REDACTED].

(i) [REDACTED]⁸⁵

(j) [REDACTED]⁸⁶

(k) [REDACTED].⁸⁷

Treatment of confidential information

2.54 At the Remedies Hearing the CMA asked Microsoft whether developing games for future new versions of PlayStation might raise concerns in terms of Microsoft having access to Sony's confidential information.

2.55 As explained at the Remedies Hearing, Microsoft already successfully navigates these confidentiality issues today as a developer for PlayStation, notably in relation to the *Minecraft* franchise, as well as, post-acquisition of ZeniMax, Sony exclusives *Deathloop* and *Ghostwire: Tokyo*. [REDACTED].

2.56 [REDACTED]⁸⁸⁸⁹.⁹⁰ [REDACTED].⁹¹

(a) [REDACTED]⁹²⁹³.

(b) [REDACTED]⁹⁴⁹⁵. [REDACTED].⁹⁶ [REDACTED]:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED].

85 [REDACTED].
86 [REDACTED].
87 [REDACTED].
88 [REDACTED].
89 [REDACTED].
90 [REDACTED].
91 [REDACTED].
92 [REDACTED].
93 [REDACTED].
94 [REDACTED].
95 [REDACTED].
96 [REDACTED].

2.57 [REDACTED].⁹⁷ [REDACTED].⁹⁸ [REDACTED].⁹⁹ [REDACTED].¹⁰⁰

2.58 [REDACTED]. Microsoft is confident that the existing safeguards enacted under highly negotiated contractual requirements have been, and will remain, sufficient to ensure that Sony confidential information is properly accessed by Activision development teams under Microsoft’s ownership.

3. Cloud gaming remedy

3.1 In response to the Panel’s questions, Microsoft has significantly expanded access to the Eligible Games. The proposed remedy is now a royalty-free worldwide license which is generally available to consumers and cloud gaming providers. The streaming right granted to consumers in respect of the Eligible Games is, therefore, “portable” in the sense that it can be used to access the game which the consumer has acquired on any Eligible Streaming Service (or more than one Eligible Streaming Service).

(a) Games covered by the proposed remedy

3.2 The remedy will apply to the Activision titles for PC and associated content listed in the updated table below, including all past, current and future releases of such titles available on PC (“**Eligible Games**”). The list of Eligible Games includes [REDACTED] Activision PC games [REDACTED].¹⁰¹

Eligible Franchise	Eligible Title (release year)
[REDACTED]	[REDACTED]
	[REDACTED]
	[REDACTED]
	[REDACTED]
	[REDACTED]
	[REDACTED]
	[REDACTED]

97 [REDACTED].
 98 [REDACTED]
 99 [REDACTED].
 100 [REDACTED].
 101 NVIDIA Agreement, [REDACTED].

	[X]
	[X]
	[X]
	[X]
	[X]
[X]	[X]
	[X]
	[X]
	[X]
[X]	[X]
[X]	[X]
[X]	[X]
[X]	[X]
[X]	[X]
[X]	[X]
	[X]
	[X]
	[X]
	[X]
	[X]

	[REDACTED]
	[REDACTED]
	[REDACTED]
	[REDACTED]
[REDACTED]	[REDACTED]

(b) Term

- 3.3 The remedy will apply for a period of 10 years. This is in line with the term of the NVIDIA Agreement¹⁰² and [REDACTED].¹⁰³ Microsoft is not aware of any streaming agreements in the market with a longer duration, [REDACTED]. This period is sufficiently long for cloud gaming to establish itself as a consumer service and for providers to secure a range of popular games.
- 3.4 Activision PC games consistently account for less than [REDACTED]% of revenues from PC game publishing both in the UK and worldwide. The Parties do not accept that *CoD*, *WoW* or any other Activision title plays an important role in shaping downstream competition in cloud gaming at present, given that these titles are not licensed for cloud gaming in the UK and [REDACTED]. However, even on the CMA's reasoning it is important to recognize that the key Activision PC games identified by the CMA, *CoD* and *WoW*, are already nearly 20 years old. As noted above, it is not plausible to suggest [REDACTED]. By 2033, both franchises will be nearly 30 years old.
- 3.5 A 10-year term is longer than the previous licensing remedy put in place in *Reckitt Benckiser/K-Y brand* (2015), which was for a period of eight years¹⁰⁴ and in line with the 10-year terms imposed in *Korean Air / Asiana Airlines* (2023) and *Bauer Media Group*.¹⁰⁵ [REDACTED] in line with access commitments accepted by the European Commission in *Meta/Kustomer* (2022), *London Stock Exchange Group/Refinitiv Business* (2021) and *Telia Company/Bonnier Broadcasting* (2019). While Microsoft is confident that a

¹⁰² NVIDIA Agreement, [REDACTED].

¹⁰³ [REDACTED].

¹⁰⁴ Reckitt Benckiser/K-Y brand, Final Report, 12 August 2015, paragraph 24.

¹⁰⁵ Completed acquisitions by Bauer Media Group of certain businesses of Celador Entertainment Limited, Lincs FM Group Limited, Wireless Group Limited, and the entire business of UKRD Group Limited, Final Report, 12 March 2020. In addition in *Müller UK & Ireland Group LLP/Dairy Crest Group plc* (2015) the toll processing arrangement option had an initial term of five years, plus the option to fulfil any ongoing national multiple contract that is in place at the end of this initial term for an additional period of up to three years, *i.e.*, an overall duration of 8 years. See Anticipated acquisition by Muller UK & Ireland Group LLP of the dairies operations of Dairy Crest Group plc, paragraph 22. *Imerys Minerals Limited/Goonvean Limited* (2013), where a five-year price control was accepted. See Imerys Minerals Limited and Goonvean Limited, Final Report, 10 October 2012, paragraph 36.

10-year period is more than sufficient to address the SLC provisionally identified by the CMA, Microsoft is prepared to constructively engage on this issue.

(c) Consumer License

3.6 Activision grants end-user licenses to consumers who purchase its PC games (the “**Consumer Licenses**”), which are available online. For example, the Blizzard End User License Agreement is available [here](#). The Consumer Licenses are currently subject to certain limitations which prevent the use of a game in connection with a cloud gaming service.¹⁰⁶ Microsoft commits to unilaterally amend the Consumer Licenses to give consumers the right to play Eligible Games on Eligible Streaming Services, regardless of whether the Consumer License was obtained prior to or after the Merger. The updated Consumer Licenses will be published on Microsoft’s website.¹⁰⁷ The streaming right granted to consumers in respect of the Eligible Games is, therefore, “portable” in the sense that it can be used to access a game which the consumer has acquired on any Eligible Streaming Service (or more than one Eligible Streaming Service). For the avoidance of doubt, there will be no charge for this change to the Consumer License.

(d) Eligible Streaming Services

3.7 In response to the CMA’s questions at the Remedies Hearing, Microsoft has significantly expanded access to the Eligible Games. The proposed remedy is now a royalty-free worldwide license which is generally available to cloud gaming providers.

Proposal to create an open streaming license for Activision PC games

3.8 Microsoft is proposing to grant a royalty-free, worldwide license to stream Eligible Games to PC cloud gaming providers that allow consumers to play PC games that they have already acquired a Consumer License for. The Consumer License may be acquired from the cloud streaming provider itself or a third-party game store. There is no restriction on how the Consumer License is paid for by the consumer (*i.e.*, the consumer may pay for the license by means of an upfront purchase, subscription, free-to-play, freemium or other basis).

3.9 To be eligible for a license, the cloud gaming provider must either be: (i) permitted by an Authorized PC Game Store to provide access to Eligible Games; or (ii) offer access

¹⁰⁶ The Blizzard End User License Agreement states that “Blizzard may suspend or revoke your license to use the Platform, or parts, components and/or single features thereof, if you violate, or assist others in violating, the license limitations set forth below. You agree that you will not, in whole or in part or under any circumstances, do the following: ... Use the Platform, including a Game, in connection with any unauthorized third-party “cloud computing” services, “cloud gaming” services, or any software or service designed to enable the unauthorized streaming or transmission of Game content from a third-party server to any device”.

¹⁰⁷ This is consistent with the NVIDIA Agreement which provides that [§<].

to Eligible Games through applications which do not require integration with the Authorized PC Game Store (“**Eligible Streaming Services**”). An Authorized PC Game Store is defined as a first-party or third-party digital PC game store that distributes the Eligible Games post-closing. No further conditions will be imposed.

- 3.10 The first limb means that any cloud gaming provider which distributes Eligible Games or has an agreement with a first or third-party game store that distributes Eligible Games will automatically be entitled to stream the Eligible Games. This includes cloud gaming providers, such as GeForce Now (which now has a 10-year agreement with Microsoft), and also enables game stores, such as Steam and Epic Games Store, to launch streaming services in the future. Microsoft is in discussions to [REDACTED].
- 3.11 The second limb means that any cloud gaming provider which does not require integration with an Authorized PC Game Store, for example, GeForce Now, Boosteroid¹⁰⁸, NetBoom¹⁰⁹, Playkey¹¹⁰, [REDACTED] and Shadow, will automatically be entitled to stream the Eligible Games. Boosteroid, for example, provides access to games via a remote desktop. Consumers using Boosteroid log into their Steam account the first time they use the service and are subsequently able to go directly to the games. Similarly, GeForce Now has previously provided access to Battle.net in this way, during a limited free beta trial version of the service [REDACTED]. As there is no requirement for the cloud gaming provider to have a minimum number of users or revenue or to stream games from any other publisher, the remedy is open to new entrant cloud gaming providers. There is also no risk of providers losing their status because they fall below a minimum threshold.

Definition of Authorized PC Game Stores

- 3.12 The Eligible Games are currently available on Battle.net and, for certain titles, on Steam.¹¹¹ Placing PC games in new digital game stores requires additional development work, as each store has separate software development kits, executable files and systems. The PC version of a game developed for distribution via Steam will not, for example, run on the Epic Games Store or *vice versa*. Given these costs, [REDACTED].
- 3.13 Microsoft has a long-term relationship with Valve and has consistently placed its first-party games in Steam for over a decade. Steam is the leading digital PC game store in the UK, with a sustained market share of more than [REDACTED]%.¹¹² Epic Games Store, which is [REDACTED], also offers a range of first- and third-party content. Other digital PC game stores

¹⁰⁸ <https://boosteroid.com/>

¹⁰⁹ <https://www.netboom.com/>

¹¹⁰ <https://welcome.playkey.net/en/lp/intro-ww-quiz-offer>

¹¹¹ *WoW* is, for example, only available on Battle.net given [REDACTED].

¹¹² FMN, Table 35.

typically offer only first-party titles. [REDACTED].

- 3.14 To ensure that the remedy can be implemented without delay, Microsoft is proposing [REDACTED]. This means that cloud gaming providers, such as GeForce Now, Boosteroid¹¹³, NetBoom¹¹⁴, Playkey¹¹⁵, [REDACTED], Shadow, and many others, will be able to stream all of the Eligible Games [REDACTED].

Business model of cloud gaming providers

- 3.15 This proposed remedy is open as it grants a royalty-free license to cloud gaming providers in all circumstances in which the consumer already owns the entitlement to the game and there is [REDACTED]. The proposed remedy applies irrespective of whether the consumer obtains that entitlement from the cloud gaming provider itself (e.g., via a B2P, F2P or freemium model) or from a third-party digital PC game store (e.g., via a BYOG model). [REDACTED].¹¹⁶ Microsoft has gone further and included in its remedy all business models which do not give rise to a risk of cannibalization.
- 3.16 Not only is the proposed remedy open, it addresses the CMA’s provisional findings that “*Activision’s content is especially likely to become available on cloud gaming services under a B2P or BYOG approach*”.¹¹⁷ As set out below, the CMA finds no evidence that in the counterfactual, Activision’s games would have been made available on cloud gaming services with a multi-game subscription (“**MGS**”) model.
- (a) The CMA concludes that “*this is more likely for cloud gaming services which do not have an MGS-based model*”.¹¹⁸
 - (b) The CMA further notes that “*this would be more likely the case for cloud gaming rivals which have or will have in the future a BYOG or B2P business model (either standalone or in combination with an MGS model) rather than just an MGS-based model*”.¹¹⁹
 - (c) Indeed, in considering whether Activision’s content would become an important input for cloud gaming the CMA has focused “*primarily on the importance of this content for rivals who have, or are likely to have, a BYOG or B2P business model*”.¹²⁰
 - (d) The CMA refers to evidence that multi-game subscription-based cloud gaming

¹¹³ <https://boosteroid.com/>
¹¹⁴ <https://www.netboom.com/>
¹¹⁵ <https://welcome.playkey.net/en/lp/intro-ww-quiz-offer>
¹¹⁶ [REDACTED].
¹¹⁷ Provisional Findings, paragraph 8.11.
¹¹⁸ Provisional Findings, paragraph 8.235.
¹¹⁹ Provisional Findings, paragraph 8.241.
¹²⁰ Provisional Findings, paragraph 8.243.

platforms are [REDACTED] and notes that that this “*would further increase Activision’s incentives to add content to those platforms, as [REDACTED] would not lead to any cannibalization*”.¹²¹

- (e) Finally, having concluded that “*absent the Merger, Activision’s content is likely to become available on cloud gaming services using a B2P or BYOG model*”, the CMA concludes that “*the immediate effects would be felt most strongly by players such as NVIDIA, Amazon [REDACTED]*”.¹²²

3.17 The remedy will not, therefore, distort competition [REDACTED]. Multi-game subscriptions account for [REDACTED] of PC gaming revenues, which is expected to remain the case. This reflects the much greater importance of F2P games on PC. Latest IDG estimates confirm that subscription’s share of overall PC gaming revenues worldwide would be [REDACTED] by 2026 (see below).

[REDACTED]

Source: [REDACTED]

3.18 As set out in Microsoft’s response to the Remedies Notice, section 36(2) Enterprise Act 2002 provides that the CMA is to decide whether action should be taken for the purpose of “*remedying, mitigating or preventing*” the SLC. 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. The proposed remedy is a reasonable and practicable solution which addresses the SLC provisionally identified by the CMA in cloud gaming. It provides a self-executing remedy for free to consumers and the cloud gaming business models that account for over [REDACTED]% of the revenues from PC gaming.

(d) **Games available for streaming from date of release on PC (*i.e.*, day and date)**

3.19 The games which will be made available for streaming will be the same as those provided for consumers to acquire from Authorized PC Game Stores. The remedy will allow Eligible Streaming Services to start streaming the Eligible Games from the date of release on PC (*i.e.*, on a “day and date” basis). The Licenses will be granted for Eligible Games regardless of whether Microsoft currently, and/or will in the future, offer Eligible Games for streaming on its own cloud gaming service.

¹²¹ Provisional Findings, paragraph 8.206.

¹²² Provisional Findings, paragraph 8.343.

3.20 Eligible Streaming Services will be responsible for (i) securing any third-party public performance, communication to the public or other rights that are not owned by Microsoft to the extent necessary to support the Eligible Streaming Service¹²³; (ii) adapting their services, to the extent necessary, to allow consumers to stream Eligible Games; and (iii) compliance with relevant laws, including the Data Protection Act 2018.

4. Enforcement

4.1 Microsoft has proposed monitoring and dispute resolution procedures in the Remedies Notice response.¹²⁴ At the Remedies Hearing the CMA raised questions on how these would work, in particular in relation to the console licensing remedy. This section provides further detail on Microsoft's proposal.

(i) Overview of compliance and reporting procedure

4.2 Microsoft proposes a comprehensive compliance and reporting process in order to ensure the remedy remains effective throughout the term. As described, this involves significant steps by Microsoft to ensure self-certification with the undertakings, which can then be verified by an objective, third-party Adjudicator. These also provide for assessment of Microsoft's compliance with the parity provisions of the remedy by an Objective Third Party Assessor.

4.3 **Compliance Director.** Microsoft will appoint [X] to be responsible for monitoring and certifying the company's ongoing compliance with the undertakings (the "**Compliance Director**").

(a) The CMA will be informed of the identity of this Compliance Director promptly after the undertakings are implemented and will be notified of any subsequent changes to the individual assuming the role.

(b) The Compliance Director will be responsible for preparing an annual report certifying the company's compliance with the undertakings (the "**Compliance Report**").¹²⁵

(c) In addition, the Compliance Director will be responsible for, *inter alia*, monitoring compliance with the terms of the undertakings, facilitating requests for information (*e.g.*, from the CMA, Adjudicator or Objective Third Party Assessor), reporting and rectifying any instances of non-compliance and

¹²³ This is a standard provision in licensing agreements. For example in Clause [X] of the NVIDIA Agreement, [X].
¹²⁴ Remedies Notice response, paragraph 3.4.

¹²⁵ As explained further below, the Compliance Report would be provided to the Adjudicator or, alternatively, a monitoring trustee.

maintaining staff awareness of the requirements of the undertakings.

- 4.4 **Adjudicator.** Microsoft proposes to appoint an Adjudicator to (i) ensure compliance with the parity provisions of the remedy, with the assistance of an Objective Third Party Assessor - see section 4(ii) below; and (ii) resolve any disputes which arise in relation to Microsoft's compliance with the undertakings – see section 4(iii) below. The Adjudicator will be appointed at Microsoft's own expense and will be agreed with the CMA. The Adjudicator will be suitably qualified for the role and will be required to have sufficient expertise of the gaming industry. In the case of any instances of non-compliance, Microsoft agrees to be bound by any directions or requests as may be reasonably required by the Adjudicator. Microsoft notes that an adjudicator role of this nature has been provided for in undertakings accepted by the CMA in previous cases including *Bauer Media Group*, *Macquarie UK Broadcast Ventures / National Grid Wireless Group* and *Carlton/Granada*.
- 4.5 Microsoft proposes that the Adjudicator would also assume the monitoring trustee functions and be responsible for certifying Microsoft's compliance with the undertakings to the CMA. However, Microsoft would equally be willing to appoint a standalone monitoring trustee, at Microsoft's expense.
- 4.6 **Objective Third Party Assessor.** Given the technical nature of the parity provisions of the proposed console licensing remedy, Microsoft proposes to also appoint an Objective Third Party Assessor, at Microsoft's expense, to provide a technical assessment of the parity between the Xbox and PlayStation console versions of each new *CoD* title prior to its release on any console platform. The Objective Third Party Assessor's work would be overseen by, and it would report to, the Adjudicator. As explained further in section 4(ii) below, the Adjudicator will take decisions on Microsoft's compliance with the parity provisions on the basis of reports prepared by the Objective Third Party Assessor.
- 4.7 The Objective Third Party Assessor would be required to have sufficient expertise in the gaming industry to be able to undertake a technical evaluation of the parity of the PlayStation and Xbox console versions of games. Microsoft notes that assessing the comparative performance of console games is a relatively straightforward task for an experienced gaming engineer, and there are also several organisations which specialise in technical analysis of gaming hardware and software.
- 4.8 Microsoft is considering potential candidates for the Adjudicator and Objective Third Party Assessor roles and can propose a shortlist to the CMA in due course.
- (ii) Verification of compliance with parity provisions**
- 4.9 As set out in section 2(iii)(d) above, developing a new *CoD* game is a transparent process which involves substantive interactions with platforms, including Sony

PlayStation, over a period of [X] before the game launches. Microsoft envisages that its compliance with the parity provisions of the remedy would be assessed and verified by the Adjudicator – with the assistance of an Objective Third Party Assessor – as part of this process, as follows:

- (a) Microsoft will report to the Objective Third Party Assessor at regular intervals (which will be specified in the undertakings) throughout the game development process on the performance of the Xbox and PlayStation console versions of the game being developed. Copies of these reports will be provided to the Adjudicator.
- (b) The Objective Third Party Assessor will have the opportunity to raise questions on the reports provided by Microsoft and make recommendations.
- (c) Sony will have the opportunity to make submissions to the Objective Third Party Assessor and Adjudicator at any time during the development process. As set out in section 2(iii)(d) above, [X].
- (d) Before the launch of each game, Microsoft will submit the full *CoD* game, in both Xbox and PlayStation console native format, to the Objective Third Party Assessor for certification with the parity requirements (“**Full Game Submission**”), together with a final report on the parity between the two games. [X].
- (e) The Objective Third Party Assessor will then prepare a report on whether there is parity between the Xbox and PlayStation console versions of the game in terms of content, feature, quality and playability (“**Parity Report**”). The Parity Compliance Report will be provided to the Adjudicator and Microsoft.
- (f) On the basis of the Parity Report, the Adjudicator will determine whether the parity provisions of the undertakings are complied with (“**Parity Decision**”). A copy of each Parity Decision will be provided to the CMA.
- (g) The Parity Decision may impose reasonable conditions which Microsoft must comply with before, or (if the Adjudicator considers it appropriate) as soon as reasonably practicable after, launching the *CoD* title. In serious cases of non-compliance, the Adjudicator will have the power to delay the release of the *CoD* title until appropriate steps have been taken to ensure compliance. The Adjudicator will have regard to the impact of any differences between the Xbox and PlayStation versions on the gaming experience for Xbox and PlayStation gamers in determining whether the parity provisions are complied with. Material differences will only be permitted if these are due to material platform limitations on the relevant PlayStation platform or solely caused by Sony.

- (h) Microsoft will not be permitted to release a new *CoD* release on the Xbox console platform until the Adjudicator has issued a Parity Decision verifying compliance with the parity provisions (potentially subject to conditions, as noted above).
- 4.10 The role of the Objective Third Party Assessor and Adjudicator is to ensure that an independent expert has verified parity between the Xbox and PlayStation console versions of *CoD* in accordance with the undertakings. [X]. [X]. As set out in section 2(iii)(d), [X].
- (iii) Fast-track dispute resolution mechanism**
- 4.11 In the unlikely event that it will be required, Microsoft proposes to include an effective fast-track dispute resolution mechanism that would be available to SIE Group and any remedy-taker under the cloud licensing remedy (a “**Remedy-Taker**”).
- 4.12 In Microsoft’s response to the Remedies Notice, Microsoft proposed that disputes which may arise in relation to Microsoft’s compliance with the undertakings would ultimately be determined by binding arbitration under the Arbitration Rules of the International Chamber of Commerce (in London).¹²⁶
- 4.13 Having considered further, Microsoft considers that it would be more effective to provide for the appointment of an independent Adjudicator¹²⁷ to resolve any disputes in accordance with a fast-track dispute resolution mechanism. This would enable disputes to be determined by an Adjudicator with pre-existing knowledge of the undertakings given by Microsoft and the concerns relating to the Merger which they are intended to address, and provide greater assurance that disputes would be determined in a timely manner.¹²⁸
- 4.14 In summary the fast-track dispute resolution mechanism would operate as follows:
- (a) Microsoft would offer a dispute resolution mechanism by way of undertaking. Remedy-Takers would be free to decide whether or not to accept, and therefore be bound by, this mechanism. The dispute resolution mechanism would apply to all disputes between Microsoft and a Remedy-Taker regarding the undertakings.
- (b) Microsoft and the relevant Remedy-Taker would be required to use commercially reasonable efforts to seek to reach a negotiated outcome within a

¹²⁶ Paragraph 3.4(c).

¹²⁷ For the avoidance of doubt this would be the same Adjudicator appointed to verify compliance with the parity provisions.

¹²⁸ Microsoft notes that, both for the purposes of international comity and practicality, the dispute resolution mechanism provided for by the undertakings will need to be aligned with any remedies accepted in other jurisdictions

specified period. This would involve Microsoft and the Remedy-Taker seeking to resolve the dispute through cooperation.

- (c) Failing that, the Remedy-Taker will have the opportunity to have its concerns dealt with promptly, with the outcome determined by the Adjudicator.

4.15 The proposed Adjudication procedure would operate as follows:

- (a) The Remedy-Taker would be required to issue an Adjudication Notice briefly setting out: (a) the issues in dispute for which adjudication is required; (b) the material facts and any documentary or other evidence relied upon; and (c) the relief sought. Microsoft will be required to provide a written response to the Adjudication Notice within a specific timeframe.¹²⁹
- (b) The adjudication process will be conducted in private and remain confidential. The parties will be subject to stringent cooperation procedures with the Adjudicator and agree to be bound by its final decision (including any directions or requests it may reasonably make).
- (c) The Adjudicator will act fairly and impartially, making use of its specialist knowledge to determine any disputes between the parties.¹³⁰ It will be required to take into account that the purpose of the remedy is to allay concerns relating to the Merger.
- (d) If a dispute relates to the parity provisions the Adjudicator will take into account any relevant Parity Compliance Report and any other relevant materials that may be provided by the Objective Third Party Assessor as part of the adjudication process.
- (e) The Adjudicator will be required to issue a decision on the dispute within a specified deadline. The Adjudicator's decision shall be final and binding and a copy of its decision will be given to the CMA.
- (f) Each party will bear its own costs of the Adjudication Procedure. The costs of the Adjudicator shall be borne by Microsoft.
- (g) The CMA will be entitled to participate in all stages of the adjudication procedure and may, on request, have access to any materials relevant to the

¹²⁹ Before Microsoft responds, the Adjudicator will first confirm if, in its view, the Adjudication Notice is incomplete in any material respect and/or discloses no reasonable grounds for it to act.

¹³⁰ In particular, the Adjudicator will: (a) avoid incurring an unnecessary expense; (b) determine the procedure and requirements to be followed by the parties, giving each party a reasonable opportunity in the light of the overall timetable to put its case and deal with that of the other party; (c) determine the dispute based on the written materials submitted by the parties and without an oral hearing; and (e) take into account any submissions that the CMA might choose to provide.

procedure. To the extent the dispute relates to the parity provisions the Adjudicator may also ask the Objective Third Party Assessor to participate.
