

25 July 2023

MICROSOFT/ACTIVISION**MICROSOFT'S SUBMISSIONS ON MATERIAL CHANGES OF CIRCUMSTANCES
AND/OR SPECIAL REASONS FOR THE PURPOSES OF SECTION 41(3)
ENTERPRISE ACT 2002****Introduction**

1. Pursuant to the request of the CMA of 21 July 2023, these submissions draw together and supplement submissions on issues previously raised by Microsoft in: (i) its response to the notice of and consultation on the CMA's proposed final order (the "**Draft Order**") dated 26 June 2023; and (ii) its outline submissions dated 19 July 2023 on material changes of circumstances and/or special reasons which justify the terms of the Final Order diverging from the conclusions in the Final Report ("**FR**") pursuant to sections 41 and 84 of the Enterprise Act 2002 (the "**Act**").¹ Cross references to these previous submissions are provided for assistance.
2. Microsoft considers that it is clear that there are material changes in circumstance and special reasons under section 41(3) of the Act which mean that the CMA should not adopt the Draft Order prohibiting the Merger.
3. *First*, as the CMA is aware, prior to the FR, Microsoft entered into cloud gaming licensing agreements with NVIDIA, Boosteroid and Ubitus providing cloud gaming services (the "**Agreements**"). Since the FR, Microsoft has also entered into a fourth agreement with Cloudware S.L., which provides the cloud gaming service Nware. In the FR, the CMA stated that the Agreements Microsoft had entered into did not affect its view on the likely theory of harm because it had no assurance that Microsoft would not simply break, terminate or renegotiate the Agreements.² In reaching that conclusion, the CMA was not able to take into account the commitments accepted by the European

¹ This response is without prejudice to Microsoft's appeal against the CMA final report dated 26 April 2023 (the "**Final Report**" or "**FR**").

² See e.g. FR 8.332-337, 8.381 and 8.383.

Commission (the “**Commission**”) on 15 May 2023. These provide a statutory underpinning and enforcement structure to the Agreements.³ In particular:

- a. The commitments impose a legally binding ten-year obligation on Microsoft to grant royalty free worldwide licenses to NVIDIA, Boosteroid and Ubitus in accordance with the terms of Microsoft’s Agreements with those firms.
- b. The commitments prevent Microsoft from terminating or amending such terms without Commission consent.
- c. The commitments impose severe regulatory penalties for breach of such terms; put in place an independent monitoring trustee, who will report regularly to the Commission; and provide for a fast-track dispute resolution scheme that will apply to the agreements in addition to other contractual enforcement mechanisms.

For the reasons set out below, these commitments constitute a material change of circumstance, as well as a special reason for reaching a different decision. The Agreements (which cover 2 of the 5 largest cloud gaming providers, Microsoft being a third) cannot be broken, terminated or renegotiated without very significant regulatory consequences for Microsoft (in addition to the contractual sanctions). The change in status of the Agreements (and attendant consequences) means that the CMA could not rationally consider them of no material weight in the assessment of the ability or incentive of Microsoft to withhold Activision games from cloud gaming providers. Instead, it is clear that they are important and reshape any such analysis.

4. *Second*, on 15 July 2023 Sony entered into an extended agreement for the provision of *Call of Duty* (the principal Activision game with which Sony is and has been concerned). The entry into this agreement (the “**Sony Agreement**”) is a material change of circumstance and/or special reason for reaching a different decision, (both in its own right and in combination with the commitments referred to above). The Sony Agreement ensures that perhaps the most powerful player in the video games industry will have

³ Case M.10646 – Microsoft/Activision Blizzard, decision of 15 May 2023.

access in the long term to the Activision game it considers most important. As a result, Microsoft's ability and incentive to withhold Activision games [X].

5. [X], as submitted throughout, Microsoft's strategy (and business incentive) was and is to make games available to more gamers across more platforms, but it also ensures [X] guaranteed supply. Unlike the Agreements with NVIDIA, Boosteroid, Ubitus and Nware, the Sony Agreement concerns the provision of rights to console downloading [X]. As the CMA found in relation to Theory of Harm 1, Microsoft has a clear incentive to keep supplying Sony for economic reasons. In other words, the CMA has recognised that Microsoft would economically suffer if it were to breach the Sony Agreement and withhold game access. [X], the ability or incentive of Microsoft to withhold *Call of Duty* (and/or other Activision games) from cloud gaming providers is radically altered.
6. *Third*, since the FR, significant new material has become available which is relevant to the evidential assessment in the FR and which undermines the FR's conclusions, in particular, on the issues of market definition and ability and incentive. In the unusual circumstances in this case, the FTC only made a request for a preliminary injunction to enjoin the transaction after the FR. The parallel proceedings in the US concerned theories of harm in relation to both console and cloud, and involved a 5-day evidentiary hearing. It is therefore only by the happenstance of the particular timing of the FTC's application that material which is highly relevant to the CMA's assessment has recently emerged from that US process, after the date of the FR. The CMA should consider that material and, doing so properly, conclude that the basis for certain key findings in the FR have been placed in fuller context and, consequently, undermined.
7. The new material emerging from the US is further supported by new data analysis which has only been possible following the disclosure process in the Tribunal proceedings in the UK.⁴ The analysis provides new information which undermines key findings in the FR and is thus also relevant to the CMA's consideration of the appropriate final order.

⁴ It is clear that that new material would be admissible in the challenge before the CAT. See e.g. *R v SSHD, ex p Launder* [1997] 1 WLR 839 (HL), p860H-861B; *R (BAT) v SSH* [2016] EWCA Civ 1182 §246; *R (EU Lotto) v SSDCMS* [2018] EWHC 3111 (Admin) §58(i)-(ii).

8. Both the FTC material and the new analysis is supported by evidence that has only been disclosed to Microsoft following the FR, in the course of the UK proceedings. The analysis of that disclosure shows that there were significant pieces of evidence which were not taken into account in the evidential assessment in the FR, in particular regarding market definition and ability to foreclose. Whilst those matters could, of course, be raised in an appeal, the provisions of section 41(3) (and adjournment of the hearing) enable the CMA to revisit its conclusions in the light of these materials, which clearly support the conclusions that the FR's findings on market definition and/or ability could not be sustained.
9. In addition, as the CMA is aware from its confidential discussions with the Parties, Microsoft is in the advanced stages of putting forward a proposal to modify the relevant merger situation (RMS) that the FR addressed. The modified RMS would be different such that it would amount to a new RMS within the meaning of section 33 of the Act. In circumstances where a new RMS supersedes the RMS in relation to which the FR was produced, and can deal with the concerns identified in the FR, a Final Order which had the effect of prohibiting or qualifying the completion of the RMS would be plainly unjustified.
10. Each of these material changes in circumstances (or special reasons) alone justifies a Final Order which is not in the remedial terms proposed in the FR. In addition, these factors can and must also be considered together, and their cumulative effect also assessed.

The legal framework

11. The CMA's duty under section 41(2) of the Act is to take such action under sections 82 or 84 as it considers to be reasonable and practicable: (a) to remedy, mitigate or prevent the substantial lessening of competition concerned; and (b) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition.
12. Section 41(3) of the Act provides that the decision of the CMA under section 41(2) "*shall be consistent with its decisions as included in its report by virtue of section...36(2) unless*

there has been a material change of circumstances since the preparation of the report or the CMA otherwise has a special reason for deciding differently” (emphasis added).

MCC

13. In *Ryanair Holdings Plc v CMA* [2015] CAT 14, in considering the meaning of an MCC, the Tribunal held at §110:

“... The first step is to consider whether a change is material in the sense that it may result in a different decision on remedy. A change which affects a significant aspect of the reasoning in the Final Report may also be considered to be material. However, a change which does not have any impact on the reasoning or appropriateness of the remedy would not in the ordinary course of events be likely to be considered material. The second stage is to consider what the decision on remedy ought to be in the light of that material change in circumstances. ...”⁵

14. In relation to the first step identified by the Tribunal, the threshold is not a high one. It is simply a materiality threshold as to whether there may have been an impact on the final decision. Equally, it is not to be seen as a test which is heightened by section 41(3) somehow being an exception to a legal duty. There is no basis for such a reading having regard to *Ryanair*. Nor is there any good basis having regard to the language or purpose of section 41(3) itself. The “*unless*” language used in section 41(3) is not being used to derogate from a legal duty. Instead, it is ensuring that given the process of final report and then final order, the legal duty to act in relation to an identified SLC can take into account matters that may have changed between those two stages (having regard to the fact that circumstances may change quickly around a merger). It is not an exception to, but a fulfilment of, the legal duty to ensure proper and proportionate remedies are put in place.

Special reason

15. Section 41(3) refers to the existence of a “*special reason for deciding differently*”, which is distinct from an MCC. Understandably, no definition of the term “*special reason*” is

⁵ Original emphasis.

provided in the Act. A matter which is not an MCC may still be a special reason. As such, irrespective of whether the matters set out in Microsoft's submissions constitute a material change in circumstance, such factors constitute a special reason to reconsider the decision on remedy.

Application to the present case

16. In the present case, the relevant test is: do any of the material changes of circumstances or special reasons, alone or cumulatively, mean that, had they been known, the outcome of the FR *might* have been different. As set out further below, each and all of the identified changes and reasons meet that threshold in relation to critical findings in the FR, in particular, market definition and ability and/or incentive to foreclose. Each of those findings was a “*significant aspect of the reasoning in the Final Report*” in relation to Theory of Harm 2.
17. Once that threshold is passed, there is a further stage whereby the CMA must assess the findings at issue, having regard to the matters which constitute material changes of circumstances and/or special reasons. It is recognised that, in carrying out that exercise, the CMA has a margin of discretion. Nonetheless, where the changes or reasons show that the basis for key parts of the reasoning the FR are unfounded or wrong, the CMA should be slow to maintain its position. In those circumstances, the FR cannot be maintained on its current reasoning absent new, countervailing considerations. However, any such new considerations would need to be put to the parties in order to ensure a fair process.
1. **The EC commitments constitute a MCC and/or special reason to reconsider the FR**

The Agreements with cloud gaming providers

18. Activision games are currently not available on any cloud gaming service. At its highest, the FR found only that it was “*likely*” that Activision games would become available on cloud gaming in the next five years absent the deal⁶ (a conclusion Microsoft and

⁶ FR 8.278.

Activision dispute).⁷ The CMA concluded that “*this is more likely for cloud gaming services which do not have a MGS-based model, ie those with a B2P or BYOG model*” [X]. The FR accepts, therefore, that there remains a material degree of uncertainty regarding the counterfactual.⁸

19. In contrast, the Agreements provide certain and immediate access to Activision games to three cloud gaming rivals for at least ten years post-Merger. NVIDIA and Boosteroid are two of the top five cloud gaming providers identified by the CMA, with Microsoft itself being a third. Ubitus, similarly, is a serious rival with an established position as the outsourced provider of Nintendo’s cloud gaming offer and Nware is a relatively recent player in cloud gaming services. Because of the Agreements, it is certain that Activision’s games, including day and date releases, would be widely available for cloud streaming post-Merger, when otherwise they would not be.
20. The Agreements also provide immediate access to Microsoft’s own titles on other cloud gaming platforms. Implementation of this part of the Agreements is progressing even against the backdrop of the FR.
 - a. The first Microsoft title was launched on NVIDIA GeForce Now on 18 May 2023, with additional games added in the same month.⁹ Microsoft announced the availability of PC Game Pass titles on GeForce Now on 11 June 2023.¹⁰
 - b. Four Microsoft games were made available on Boosteroid from 1 June 2023.¹¹
 - c. Both cloud gaming providers are scheduled to launch additional Microsoft games [X] over the coming months.

⁷ And which was not the conclusion of the US court after having heard extensive testimony.

⁸ There is, for example, no evidence that Activision would have been able to agree commercial terms with a cloud gaming provider.

⁹ NVIDIA, “First Xbox Title Joins GeForce NOW”, 18 May 2023 (link available [here](#)); “Three More Xbox PC Games Hit GeForce NOW”, 25 May 2023 (link available [here](#)), Microsoft, “Xbox Debuts PC Games to NVIDIA GeForce NOW Members Beginning Today”, 18 May 2023 (link available [here](#)).

¹⁰ Xbox Wire, “Xbox’s Bright Future, and How We’ll Get There”, 11 June 2023 (link available [here](#)); The Verge, “Microsoft is bringing PC Game Pass to Nvidia’s GeForce Now service”, 11 June 2023 (link available [here](#)).

¹¹ Microsoft, “PC Games from Xbox Headed to Boosteroid Customers June 1”, 22 May 2023 (link available [here](#)).

21. The Agreements have therefore already secured tangible benefits for the cloud gaming providers, for competition in cloud gaming, and ultimately for gamers. They have done so far more quickly than was envisaged in the CMA’s own counterfactual, and with more to come. The parties to the Agreements are acting in reliance upon them, demonstrating their enforceability and validity.
22. [X].¹² NVIDIA has publicly stated that its agreement with Microsoft “*is a major boost for cloud gaming and brings incredible choice to gamers*”.¹³ Following the FR, NVIDIA publicly stated that “*GeForce NOW and other cloud gaming providers stand to gain an even deeper catalog of games if Microsoft’s acquisition of Activision is completed. We see this as a benefit to cloud gaming and hope for a positive resolution*”.¹⁴

The Agreements are conditions of the commitments

23. On 15 May 2023, the Commission issued a decision approving the Merger. The Commission decision is conditional on full compliance by Microsoft with the commitments submitted by Microsoft on 20 April 2023. The commitments are provided as **Annex 1** to this response.
24. The commitments were provided to the CMA in draft form on 14 April 2023. The final commitments signed by Microsoft were provided to the CMA on 20 April 2023. The FR states that the CMA reviewed the final commitments and considered that these did not “*change our assessment of the Microsoft Cloud Remedy set out in this chapter*”.¹⁵ The CMA did not, however, consider the impact of the commitments on the cloud gaming license agreements entered into by Microsoft and their relevance for the CMA’s SLC finding or its assessment of efficiencies and RCBs.¹⁶
25. Paragraph 7 of the commitments provides that:

¹² [X].

¹³ NVIDIA, “A New Window in the Cloud: NVIDIA and Microsoft to Bring Top PC Games to GeForce NOW”, 23 February 2023 (link available [here](#)).

¹⁴ NVIDIA GeForce Now tweet, 27 April 2023 (link available [here](#)).

¹⁵ FR 11.44.

¹⁶ FR 8.329-8.337 (in respect of ability to foreclose), paragraphs 8.375-8.383 (in respect of incentive to foreclose), paragraphs 9.79-9.80 (in respect of efficiencies) and paragraphs 11.173-11.189 (in respect of relevant customer benefits (“RCBs”)).

“(7) Microsoft further commits, for a period of 10 years from the Closing Date, to grant a royalty-free, worldwide license to stream Eligible Games to:

- NVIDIA in accordance with the terms in Annex 5;
- Boosteroid in accordance with the terms in Annex 6; and
- Ubitus in accordance with the terms in Annex 7”.

26. As such, Microsoft commits to grant royalty-free, worldwide licenses to stream Activision games for a period of ten years from the closing date on the terms as set out in annexes to the commitments. Annexes 5-7 of the commitments set out key provisions of: (i) the GeForce NOW Listing Agreement between Microsoft and NVIDIA dated [X] February 2023; (ii) the Cloud Gaming License Agreement between Microsoft and Boosteroid dated [X] March 2023; and (iii) the Cloud Gaming License Agreement between Microsoft and Ubitus dated [X] March 2023.¹⁷ The terms listed in Annexes 5-7 are, therefore, covered by the commitments.¹⁸

27. Annexes 5-7 of the commitments set out terms of the agreements under which:

- a. Microsoft agrees to allow the cloud gaming providers’ customers to stream Microsoft’s first-party PC games, including Activision’s PC games should the Merger proceed, on their respective cloud gaming services, and to ensure that any end user license agreement that Microsoft offers any Microsoft customer does not prohibit those customers from playing Microsoft’s first-party PC games on the cloud Gaming Providers’ service.¹⁹
- b. Microsoft grants the cloud gaming providers non-exclusive, royalty-free, non-transferable rights to the Activision games that are reasonably necessary for the

¹⁷ The Agreements have previously been provided to the CMA and are referred to in the FR.

¹⁸ EC Decision, recital (763).

¹⁹ Clause 2.2A of the NVIDIA Agreement, clause 4.1 of the Boosteroid Agreement, clause 4.1 of the Ubitus Agreement.

cloud gaming providers to make the games available on their respective cloud gaming services.²⁰

- c. The cloud gaming providers will retain all of the revenue from their cloud gaming services and will not provide any form of payment or minimum guarantee for the rights to stream the games.²¹ The cloud gaming providers will [X] from the game sales and in-game monetisation.
- d. The parties to each agreement agree that they will comply with all applicable laws.²²
- e. The agreements are effective for an initial period of ten years from the date of signing, following which the agreements shall automatically renew for one year renewal periods unless a party provides notice at least one month before expiration of the term.²³

28. Accordingly, as a condition of the Commission clearance decision, Microsoft must comply with the terms of the agreements requiring Microsoft to make Activision's PC games available to NVIDIA, Boosteroid and Ubitus on a royalty-free basis, for at least ten years. As the Commission noted in its clearance decision, the majority of respondents to the remedy market test that expressed a view "*considered that the Commitments would enable Nvidia, Boosteroid and Ubitus to effectively compete in the market for the distribution of video games on PC on a lasting basis*".²⁴ In addition, the majority of respondents considered that the ten-year duration was sufficiently long.²⁵

²⁰ Clause Clause 2.2C of the NVIDIA Agreement, clause 4.2 of the Boosteroid Agreement, clause 4.3 of the Ubitus Agreement.

²¹ Clause 2.1D of the NVIDIA Agreement, clause 3.4 of the Boosteroid Agreement, clause 3.4 of the Ubitus Agreement. The FR cites evidence from a cloud gaming provider that the average price for licensing a AAA game for cloud gaming is \$10 million, often structured as minimum guarantees (FR 8.427).

²² Clause 7.1 of the NVIDIA Agreement, clause 10.1 of the Boosteroid Agreement, clause 10.1 of the Ubitus Agreement.

²³ Clause 4.1 of the NVIDIA Agreement, clause 6.1 of the Boosteroid Agreement, clause 6.1 of the Ubitus Agreement.

²⁴ EC Decision, recital (791).

²⁵ EC Decision, recital (792).

29. The commitments are supported by an effective monitoring and enforcement regime, which was subject to rigorous review and market testing by the Commission prior to adopting its clearance decision. The commitments provide for:
- a. ***Monitoring by a trustee:*** A monitoring trustee will be appointed before the Merger is completed. Microsoft has started the process of appointing a monitoring trustee, in consultation with the European Commission. The monitoring trustee may appoint advisors including an IT expert with the capability to monitor the correct implementation of the commitments.
 - b. ***Fast track dispute resolution:*** Fast track dispute resolution will apply in cases where NVIDIA, Boosteroid or Ubitus (as well as other cloud gaming providers that benefit from the remedy) consider that Microsoft is failing to comply with its obligations arising from the commitments (including the agreements).
30. These monitoring and dispute resolution provisions are in addition to the contractual protections set out in the agreements. The Commission concluded that the dispute resolution provisions in the commitments will “*ensure the effective implementation of and compliance with the Consumer License Commitment and the Streaming Provider License Commitment*”.²⁶ Breaches of the agreements will be readily apparent to the public, as well as the cloud gaming providers and monitoring trustee. Overall, the Commission concluded that the Merger, in combination with the commitments, was pro-competitive.

Potential consequences of breach of commitments

31. The Commission clearance decision is expressly stated to be conditional on the full compliance by Microsoft with Section II.B, including paragraph 7 and Annexes 5-7, of the commitments.²⁷ Paragraph 7 and Annexes 5-7 of the commitments are, therefore, conditions to the Commission decision. The consequences of breach of the commitments

²⁶ EC Decision, recital (895).

²⁷ EC Decision, recital (903).

would be extremely severe for Microsoft from a legal, financial and reputational perspective.

32. From a legal perspective, if Microsoft were to breach such a condition, the Commission clearance decision would no longer be valid. As a consequence, assuming the Merger had completed, it would be treated in the same way as a concentration implemented without authorisation and the Commission would have the power to order dissolution of the Merger or disposal of all of the acquired shares in Activision, as well as interim measures appropriate to restore or maintain conditions of effective competition.²⁸ From a financial perspective, Microsoft would, in addition, be at risk of fines of up to 10% of its worldwide turnover (*i.e.*, up to USD 19.8 billion based on Microsoft's 2022 turnover).²⁹
33. Microsoft would equally suffer severe reputational damage as a result of enforcement action being taken by the Commission. Any breach would be immediately apparent and highlighted by the gamer community (as shown by the level of interest and engagement which the CMA has witnessed throughout the merger review process). Indeed, regardless of any enforcement action, Microsoft would suffer severe criticism from gamers if it were to breach its public commitments to make Activision's content available on NVIDIA, Boosteroid and Ubitus' cloud gaming services.

Effect of the consequences of breaching the commitments on the conclusions in the FR

34. The fact that termination of or failure to honour the agreements would constitute a breach of the commitments was not considered in the FR, by reason only of the fact that the FR predated the acceptance of those commitments by the EC.
 - a. ***Ability to foreclose:*** In relation to ability, the CMA accepted that the agreements may provide NVIDIA, Boosteroid and Ubitus with "*some level of a protection against foreclosure to some extent*".³⁰ However, the CMA declined to place any material weight on these agreements "*given the uncertainty flowing from the terms*

²⁸ EU Merger Regulation, Article 8(4) and 8(5), Recital (31).

²⁹ EU Merger Regulation, Articles 14(2) and 15(1).

³⁰ FR 8.337.

of these agreements which relate only to three cloud gaming providers".³¹ In particular, the CMA stated that "*contracts may be renegotiated or terminated early, or may not be enforced*" and that the CMA could "*not be sure that NVIDIA, Boosteroid or Ubitus (or any other third party) would be able to enforce the terms of any relevant contracts*".³² No consideration was given to the consequences of breaching the commitments in this context.³³

- b. ***Incentive to foreclose***: In relation to incentive to foreclose, the CMA accepted that "*it is possible in principle that the financial or reputational impacts of breaching these agreements could impact the Merged Entity's incentive to foreclose*".³⁴ The CMA also accepted that this would depend "*on the likely consequences in the event the Merged Entity did adopt a foreclosure strategy and therefore breached the agreements*" as well as "*the materiality of those consequences in the context of an overall foreclosure strategy and the strength of the Merged Entity's market power*".³⁵ Moreover, the CMA accepted that breaching the agreements would "*risk actions potentially being brought against Microsoft which could have financial and reputational impact*".³⁶

However, relying on the same factors as it considered in the context of ability, the CMA concluded that there was "*uncertainty as to what the consequences would be for Microsoft*" and that it had not "*received any evidence to indicate this would result in consequences that would outweigh the benefits we have identified above of pursuing a foreclosure strategy*".³⁷ On this basis, the CMA concluded that the agreements would not "*materially impact the Merged Entity's incentive to foreclose cloud gaming rivals*".³⁸ No consideration was given to the consequences of breaching the commitments in this context.³⁹

31 FR 8.337.

32 FR 8.332.

33 Cf. FR 11.44.

34 FR 8.380.

35 FR 8.380.

36 FR 8.381.

37 FR 8.381.

38 FR 8.383.

39 Cf. FR 11.44.

- c. **Efficiencies:** In relation to efficiencies, the CMA accepted that “*efficiencies resulting from the agreements with NVIDIA, Boosteroid and Ubitus would be capable at least in principle of benefiting some customers in the UK, in the sense that they may bring Activision’s content to these rival cloud gaming providers*”.⁴⁰ However, the CMA again referred to the uncertainties in relation to the agreements, including that “*over time contracts may be renegotiated or terminated, and firms may waive their rights to enforce any breaches in light of their overall bargaining position*”.⁴¹ No consideration was given to the consequences of breaching the commitments in this context.⁴²
- d. **Relevant customer benefits (RCBs):** In relation to RCBs, the CMA “*found a tension between the terms of the agreements, which seek to provide rival cloud gaming services with Activision games, and Microsoft’s post-Merger commercial incentives to make Activision content exclusive*”.⁴³ In particular, the CMA concluded that Microsoft would be likely to “*hold considerable leverage in relation to any subsequent negotiation or contractual dispute*” and referred to “*specific terms which introduce further uncertainty*”.⁴⁴ The CMA considered that there was “*significant uncertainty as to whether any material benefits*” would accrue in practice in “*light of the tension between the agreements and Microsoft’s post-Merger commercial incentives, together with the material limitations on the contractual obligations and protections*”.⁴⁵ No consideration was given to the consequences of breaching the commitments in this context.⁴⁶

The commitments constitute a MCC and a special reason to depart from the FR

35. The CMA’s assessment of the agreements was a significant aspect of the reasoning in the FR (both on SLC and on the appropriateness of the remedy).⁴⁷ The commitments

⁴⁰ FR 9.80.

⁴¹ FR 9.79.

⁴² Cf. FR 11.44.

⁴³ FR 11.179.

⁴⁴ FR 11.180.

⁴⁵ FR 11.181.

⁴⁶ Cf. FR 11.44.

⁴⁷ Microsoft is appealing the FR and strongly disagrees with the CMA’s assessment of the agreements. Microsoft fully reserves its right in this regard.

fundamentally change the factual basis on which this assessment was conducted, such that once they are factored in, the CMA's reasons for placing no material weight on the agreements fall away. The commitments therefore constitute a MCC and, separately, a special reason to depart from the FR (particularly in light of the requirements of comity).

36. *First*, under the terms of those commitments, if Microsoft refused to license Activision games to the cloud gaming providers or their customers during the ten-year term of the agreements, this would constitute a clear breach of the commitments. As a result, Microsoft would face not only contractual liability but also serious regulatory consequences for breach of the commitments. The regulatory penalties which could be imposed are enormous in legal, financial and reputational terms. The idea that Microsoft would breach commitments in relation to cloud streaming and face such consequences is plainly fanciful.
37. *Second*, the *general issues* identified by the CMA were that contracts may be renegotiated or terminated early, or may not be enforced.⁴⁸ Setting aside whether these points find any basis under US contract law⁴⁹, they fall away as a result of the commitments in the following ways:
- a. ***Renegotiation or early termination***: Microsoft cannot terminate the agreements before the end of their term, or renegotiate key terms of the agreements, without breaching the commitments. It must comply with the terms set out in paragraph 7 and Annexes 5-7 of the commitments or face the consequences of breach of those commitments (see paragraphs 25-27 above). This is a material change to the factual basis on which the CMA assessed the likelihood that Microsoft would undertake such action.
 - b. ***Enforceability of the agreements***: Whether or not the cloud gaming providers enforce the agreements through the courts, under the commitments the key terms of those agreements are enforceable directly by the Commission and subject to monitoring by the monitoring trustee. NVIDIA, Boosteroid and Ubitus will be able to contact the monitoring trustee with any concerns and will also have access to the

⁴⁸ FR 8.322.

⁴⁹ Microsoft and Activision consider that these points do not have any basis under US contract law.

dispute resolution process set out in Annex 2 of the commitments. This is a material change to the factual basis on which the CMA assessed the enforceability of the agreements.

38. *Third*, the CMA identified a number of *specific issues* with the terms of the agreements. However, even on the basis of the CMA's analysis (which is not accepted), the commitments fundamentally change the factual position. In particular, as a result of the commitments, it is clear that Microsoft must make Activision's games available to the cloud gaming providers under the agreements or Microsoft will be in breach of the commitments. That is the case irrespective of what Microsoft and/or NVIDIA, Boosteroid or Ubitus might consider the *contractual* position to be under their respective agreement; the key provisions of the agreements have force under the commitments independent of any other contractual terms.⁵⁰
39. Furthermore, as outlined further below, the CMA now has the benefit of a US Judge's insights into the nature and force of these US Agreements.
40. *Fourth*, the existence of the Agreements and the commitments is consistent with – and only codifies in regulatory commitments – Microsoft's avowed strategy that it would provide games to more gamers on more platforms. The strategic incentives are not to withhold content: to the contrary they are to make it widely available. The conduct manifested in the Agreements makes clear that whatever the basis for the findings about Microsoft's past practice in relation to provision of content to cloud gaming providers,⁵¹ those considerations must be revisited. The CMA cannot rely on past practice and ignore present practice which is now enshrined in regulatory commitments.
41. Furthermore, the Agreements ensure that the level of competition in cloud gaming is both greater and sooner than that contemplated in the CMA's own counterfactual analysis. That conclusion was to the effect that Activision's most valuable games would become available for cloud streaming in the "foreseeable future".⁵² The Agreements and the

⁵⁰ This is clear, for example, from EC Decision, recital (763).

⁵¹ FR 8.362-8.374 - for the avoidance of doubt, Microsoft has always made clear that the basis for non-supply of games was due to lack of licencing agreements.

⁵² FR 6.13

commitments not only ensure that Activision games are available but make sure they are available now not just in the foreseeable future.

The scope of the agreements is sufficient to materially change the nature of the CMA's assessment

42. For the reasons set out above, the MCC and special reason in relation to the removal of uncertainty means the CMA should reconsider its remedial conclusions in this case. In addition, the CMA considered that the agreements were not sufficient to remove Microsoft's incentive to foreclose cloud gaming rivals because they only related to three cloud gaming providers, and did not address potential foreclosure of other competitors such as Amazon and SIE. In particular, the CMA stated that it "*cannot be confident that agreements with a limited number of providers remove the Merged Entity's ability to foreclose in the cloud gaming services market more generally*".⁵³ On incentive to foreclose, the CMA concluded that "*even if Microsoft games were not entirely exclusive to xCloud, Microsoft would still recapture many sales*" due to its current market shares and multi-product ecosystem.⁵⁴
43. The CMA cannot sustain the position that the agreements – with their enforceability put beyond question by the commitments – would have no impact on Microsoft's incentive to foreclose other cloud gaming providers. As the FR acknowledges, the incentive to withhold an input from rivals must be assessed with regards to the merged entity's ability to "recoup" the foregone profits from wider distribution of the input.⁵⁵ The recoupment of such profits depends on the likelihood that the withholding strategy would divert sufficient end users of the rival services to the merged entity's offering. This, in turn, depends on the options which those end users have to access the withheld input.
44. The FR's conclusions are based on an assumption that Microsoft would make Activision content exclusively available for cloud gaming on xCloud and that, as a result, Microsoft would bring about "*significant recapture*" of cloud gaming users "*especially in the long*

⁵³ FR 8.336.

⁵⁴ FR 8.385-8.386.

⁵⁵ FR 8.349.

run”.⁵⁶ However, in circumstances where Activision content is available on at least three rival cloud gaming providers, this assumption simply does not hold. In a scenario in which Activision games are available (as a minimum) on xCloud, NVIDIA GeForce Now, Boosteroid, and Ubitus, [X], gamers on other cloud gaming services who would be willing to divert to a rival to access the games will not divert only to xCloud. Instead, they are equally likely to divert to one of the many services where the games are available, including NVIDIA, Boosteroid, Ubitus, Sony or alternative native gaming options on console, PC and mobile.

45. In such a scenario, the recoupment rate for xCloud would be significantly lower than in the hypothetical scenario that was assumed for the purpose of the FR and under which xCloud is the only cloud gaming service offering Activision games. Hence, any assessment of Microsoft’s incentive to withhold content from other rivals must include an analysis of the likelihood of users of those providers to divert to the different services on which Activision games will be available. The FR conducted no such assessment and its conclusions therefore cannot be relied upon in circumstances where the Agreements must be factored into the CMA’s analysis.⁵⁷

Conclusions on the commitments

46. Following the Commission’s acceptance of the commitments, the CMA must take proper account of the Agreements in an assessment of Microsoft’s ability and incentive to foreclose, as well as the appropriate remedial action (if any). Even leaving aside Microsoft’s views on the CMA’s interpretation the terms of the Agreements in the FR, the commitments remove any theoretical uncertainty over whether Microsoft will make Activision’s games available to the NVIDIA, Boosteroid and Ubitus for the next ten years. That radically changes the analysis of whether Microsoft has the ability and/or incentive to withhold Activision games from cloud gaming providers. The conclusions

⁵⁶ FR 8.386.

⁵⁷ This is particularly the case where xCloud is predominantly used on console to “try before you download”. Since the launch of xCloud on console, [X]% of all UK use (across all platforms) and [X]% of all UK use (on consoles) is accounted for by users trying a game before downloading it (see Microsoft’s Response to the Provisional Findings, paragraph 3.27). As such, those gamers are not engaged in using cloud gaming as an alternative means of acquiring gaming content. Instead, they are merely using cloud gaming as an additional function – to their console or PC gaming. They are trying the game before playing it natively on console or PC.

reached on those issues in the FR (and in the context of remedial action) clearly need to be changed.

2. The Sony Agreement constitutes a MCC and/or special reason to reconsider the FR

47. On 15 July 2023, Microsoft entered into an agreement with SIE that ensures that Activision content remains available to SIE following the Merger. The Sony Agreement:

- a. [REDACTED];
- b. [REDACTED]; and
- c. [REDACTED].

48. As explained in Ms Norman’s witness statement (at §18), SIE [REDACTED]. [REDACTED]. These are matters Microsoft anticipates will be resolved shortly [REDACTED]. [REDACTED].

49. The Sony Agreement is highly significant in terms of the continued supply of Activision content.

50. As the CMA is aware, Sony was the principal opponent of the transaction and maintained that Microsoft was not serious about entering into a deal with Sony. As the change of analysis in relation to Theory of Harm 1 recognised, there was no incentive for Microsoft to act in that way. Microsoft has always maintained publicly and privately that, in line with its strategy to make more games available to more gamers on more platforms, it would not withdraw or withhold Activision games from Sony. The Sony Agreement now formalises this public commitment, [REDACTED].

51. The Sony Agreement is an extension of a long-standing publishing agreement between Microsoft and Sony covering [REDACTED] (as most recently encapsulated in the Global Developer and Publisher Agreement (“GDPA”) dated [REDACTED] (as amended)). The GDPA is a very well established and understood set of terms of dealing between the parties. The present Sony Agreement therefore not only addresses the concerns of the most outspoken opponent of the Merger but does so on terms which are well understood by both parties.

It guarantees access to key Activision content to the presently largest (or at least besides Microsoft, largest)⁵⁸ [redacted] - using the CMA's own figures.

The Sony Agreement [redacted]

52. As the CMA found in its Theory of Harm 1 analysis, Microsoft does not have the incentive to withhold *Call of Duty* from SIE post-Merger, given the importance of the PlayStation console to Activision sales. The analysis which reached that conclusion shows that Microsoft would suffer a huge loss if it withdrew *Call of Duty* from PlayStation (see FR Appendix E). Much of the modelling used suggested potentially billions of dollars in losses.
53. In these circumstances, in addition to the massive reputational damage it would suffer if it were to pull *Call of Duty* from PlayStation (which it would not), Microsoft has a huge economic incentive not to breach the Sony Agreement. If Microsoft were to breach it, it could suffer huge losses.
54. Given the scale of console [redacted], the vast majority of those losses would flow from a loss of revenue from console gaming use. The impact of breach could be huge, and [redacted] cannot be considered in isolation: they form part of the overall contractual structure which involves clear and substantial rights of enforcement and protection for Sony.
 - a. First, Sony is an extremely powerful and well-resourced entity. It would be expected that it could, and would, take action to protect its interests in relation to [redacted] whether directly under the Agreement or otherwise.
 - b. Second, the Agreement provides Sony with [redacted]. If Microsoft were to breach one part of the Agreement, [redacted]. Thus [redacted].
 - c. Third, Microsoft [redacted]. [redacted]. [redacted].
 - d. Fourth, having entered into the Sony Agreement alongside the Agreements, and other agreements with Nintendo and Nware (which make games more available to

⁵⁸ As explained below, once adjusting for “try-before-downloading” users, [redacted]. On the CMA's unadjusted market shares, it is the second largest provider.

more platforms and for streaming), Microsoft knows that were it to breach deals [X], it would face immediate regulatory scrutiny. That is the case in relation to agreements (including [X]) which are not covered by the EC commitments: even though breach would not be subject to enforcement and sanction by the EU under the commitments, it is clear that the European Commission, CMA and FTC (amongst numerous other regulators) would be ready to scrutinise carefully any divergence by Microsoft from its avowed strategy.

55. There can be no doubt that Sony can secure and enforce the operation of the Sony Agreement (leaving aside the massive reputational damage Microsoft would suffer if it sought in any way to renege on the agreement). It is in any event uncertain that Microsoft would even have the practical ability to provide games to SIE for console use [X].
56. In those circumstances, the assessment of the dynamics of competition in gaming and the ability and incentive of Microsoft to withhold (and thereby foreclose) [X] needs to be entirely revisited. Where the [X], the idea that Microsoft has either the ability or the incentive to withhold games from cloud gaming providers more generally can no longer be tenable. This is even more clearly the case once it is considered that agreements with the two remaining [X] cloud gaming providers (on any measure) are now backed by and enforceable under commitments to the EC.
57. In relation to **ability to foreclose**:
 - a. [X] – [X] – means that foreclosure of the whole market is no longer possible even if, *quod non*, no other cloud gaming providers were to obtain the content.
 - b. This is all the more material when allied to the fact that two other of the largest cloud gaming providers are protected by the EC commitments: the market is clearly not foreclosed.
 - c. Effective competition against Microsoft is clearly possible, by a range of parties, who are the largest current market participants. Any suggestion that Microsoft is

somehow going to be able to reserve the putative cloud gaming market to itself is not tenable.⁵⁹

- d. [X] the level of competition in cloud gaming is materially similar to, or better than, that contemplated in the CMA's own counterfactual analysis. That conclusion (at FR 6.13) was to the effect that Activision's most valuable games would become available for cloud streaming in the "foreseeable future". [X] is concerned is available but makes sure it is available now: there is no wait for the foreseeable future.

58. In relation to the **incentive to foreclose**:⁶⁰

- a. There is no good basis for identifying any incentive to foreclose (or simply withhold) Activision content, [X]. [X], it is impossible to understand why Microsoft would still have the incentive to withhold the content from other, less close, rivals.
- b. That is particularly so when Microsoft has already entered into agreements with a number of these other rivals and those agreements benefit from the protection of the EC commitments.
- c. [X], addressing another concern expressed in the FR about the similarity in business model and reliance on Microsoft technology of the rival covered by the existing cloud gaming agreements.⁶¹

59. While the FR stresses the nascent and growing nature of cloud gaming, the coverage of current providers, [X] is so broad, that it can no longer credibly be dismissed, even in an analysis that is forward looking over the next five years. While the market will evolve over this period, the FR itself only identifies a very limited number of potential new

⁵⁹ The suggestion that in the context of a nascent and growing market, the CMA cannot be confident that agreements with a limited number of providers remove the Merged Entity's ability to foreclose in the cloud gaming services market more generally simply does not amount to a rational basis for a finding of foreclosure when it is the key players (some of whom are huge enterprises: NVIDIA [X] in particular) who have content access with protections. See FR 8.336 and 8.337.

⁶⁰ FR 8.383.

⁶¹ See *e.g.*, FR 9.81.

entrants, finds that “*there are significant barriers to entry and expansion in cloud gaming*”⁶² and, in assessing the likely **effect on competition**, relies on a finding that “*cloud gaming therefore appears likely to be a relatively concentrated market in the UK*” and that “[i]n a concentrated market, harm to rivals is likely to constitute harm to competition”.⁶³

60. In summary, it is clear that [X] fundamentally changes the assessment of the future availability of Activision content post-Merger and therefore undermines the sole basis for the FR’s finding of a to be expected SLC – *i.e.*, the likely foreclosure of that content.

Uncertainty

61. The concerns the CMA has expressed in the FR about the potential **uncertainty** of the cloud licencing agreements with NVIDIA, Boosteroid and Ubitus (at least prior to the additional protection now afforded by the commitments) do not arise in the context of [X].
62. [X]. [X].
63. As with any other content publishing agreement, the Sony Agreement contains clauses that are subject to technical limitations [X]. However, any concerns [X] – such as the CMA has expressed for example in relation to the NVIDIA agreement⁶⁴ – are clearly misplaced.
64. The GDPA is already in full operation. Its terms are effective. It provides a proven contractual mechanism, accompanied by a set of Guidelines, for making Microsoft content available on the PlayStation platforms, [X]. It has previously been extended, for example to accommodate new technology in the form of the PlayStation 5 Amendment, dated [X], and it is clear that both parties have trust in it. SIE would have had no reason to sign up to the Sony Agreement, otherwise, and it would not be seeking further amendments to its terms, including clarifying amendments.

⁶² FR 8.431.

⁶³ FR 8.422.

⁶⁴ FR 11.180(a).

65. Moreover, as outlined above, whatever theoretical uncertainties which might exist in the Sony Agreement, Microsoft has no incentive to withhold the content from the PlayStation platform, as it would suffer significant losses if it were to do so.⁶⁵ Compliance with an agreement that also ensures the publication of Microsoft (and Activision) content on the PlayStation console is therefore strongly in Microsoft's interest. Given that console gaming will also, at least for the foreseeable future, commercially [X] of the Sony Agreement, it would be unreal to suggest that there is any lack of parity in bargaining strength: to the contrary, it is clear that SIE is in the stronger position in relation to potential enforcement of the Sony Agreement.

Scope

66. Looking at [X] the scope of market coverage, on both of the CMA's estimated (narrow) market shares,⁶⁶ and Dr Foschi's adjusted shares (adjusted to account for native gamers who use the cloud simply to try games before downloading them),⁶⁷ [X].

67. [X] significantly expands the share of cloud gaming users to which Activision content will be available post-Merger:

68. When excluding try-before-download sessions, Dr Foschi estimates that [X] alone accounted for [X]% of the UK monthly active user ("MAU") base in 2022, or [X]% when considering only paid services.

69. Together with the NVIDIA GFN and Boosteroid agreements, [X] ensures the supply of Activision content to approximately [X]% of 2022 MAUs (this figure is the same whether including unpaid services or not).

70. Adding Microsoft's own user base, *Call of Duty* will be available through cloud gaming providers which in 2022 accounted for more than [X]% of MAUs, or [X]% of MAUs on paid services only.

Conclusions on the Sony Agreement

⁶⁵ FR 7.399 and 7.400.

⁶⁶ FR Tables 8.2, 8.3 and 8.4.

⁶⁷ Tables 5 and 6 of Dr Foschi's First Expert Report.

71. The Sony Agreement is a highly significant change of circumstances. It addresses the primary concern of the most outspoken opponent of the Merger and guarantees access to *Call of Duty* to Microsoft's largest [X] rival, and one of the largest enterprises in video gaming overall. There can be no real doubt that Sony would be able to enforce the agreement if needed, although given the existing working relationship that is unlikely to occur. With key Activision content therefore guaranteed to be available to Microsoft's largest rival, any incentive or ability to foreclose [X] more generally is simply not there, and the FR's findings in this respect need to be revisited (even before considering the other cloud licensing Agreements Microsoft has signed, which are now enshrined in the EC commitments).

3. New material available post-FR is an MCC/SR

72. Since the FR, significant new evidentiary and judicial material has become available to the CMA. This changes the evidential picture and undermines the FR's conclusions, in particular on the issues of market definition and ability and incentive as well as its treatment of the Agreements Microsoft entered into with third parties.

73. The new evidence requires the CMA to revisit its decision before making a final order, in order to ensure this reflects the actual current circumstances. Individually or cumulatively, each of the following categories of fresh evidence and analysis thus constitute an MCC and/or a special reason under section 41(3).

A. Material provided through the FTC court process in the US

74. As was common ground before the Tribunal, the rulings of the US District Court for the Northern District of California and the US Ninth Circuit Court of Appeals do not have any legally binding effect in relation to findings to be made under the UK regulatory process. However, the material disclosed, and certain findings made in the US, are instructive as to matters on which findings were made in the FR.

(i) US Judge's findings on the US law regarding the Agreements

75. The CMA's concerns about the certainty of the terms of the Agreements, which are governed by US law, should be alleviated by the fact that, since the FR, a US federal

court, applying US law, saw no difficulty in according central importance to the Agreements in rejecting any argument of possible foreclosure in cloud gaming.

76. US District Judge Jacqueline Scott Corley, dismissing the FTC’s application for a preliminary injunction blocking the merger, found that:⁶⁸

“The FTC has also failed to show a likelihood of success on its claim the merger will probably lessen competition in the cloud gaming market because the combined firm will foreclose Activision’s content, including Call of Duty, from cloud-gaming competitors. This argument is foreclosed by Microsoft’s post-FTC complaint agreements with five cloud-streaming providers. Before the merger, there is no access to Activision’s content on cloud-streaming services. After the merger, several of Microsoft’s cloud-streaming competitors will—for the first time—have access to this content. The merger will enhance, not lessen, competition in the cloud-streaming market”.

77. Judge Corley also concluded at 50:15-16: *“The Court cannot ignore this factual reality [of the signed cloud agreements]. The combined firm will probably not have an incentive to breach these agreements and make Activision content exclusive to xCloud”.*⁶⁹

(ii) *Evidence regarding market definition*

78. Evidence made available in the US court proceedings clearly shows that the evidence that the CMA relied upon was incomplete in relation to market definition. Key players have spelled out their views clearly in the FTC proceedings, under oath:

- a. Google Stadia’s former Product Director Dov Zimring testified that Stadia competed against consoles and PC’s:

“1 You testified on direct that Google launched a cloud

⁶⁸ Opinion p. 49, ll. 7–14. The US Court of Appeals for the Ninth Circuit similarly refused an application for an injunction, with the three Circuit Judges noting only that the courts of appeals’ standard for evaluating an injunction is similar to that employed by district courts, thereby implicitly endorsing District Judge Corley’s findings.

⁶⁹ Microsoft’s chairman and CEO Satya Nadella was under oath whether *“Microsoft [will] honor those contracts”* and answered *“yes, a hundred percent”*: Tr. (Nadella) 153:12-17.

2 gaming service in 2019 called Stadia; correct?
 3 A. Yes.
 4 Q. Stadia had several competitors when it launched; right?
 5 A. When you say "competitors," I'm not sure what you're
 6 describing.
 7 Q. Did Stadia have several competitors when it launched?
 8 A. So I think Stadia's -- I would say that our perspective
 9 was that the existing console and PC gaming participants were
 10 what represented who we were competing with.
 11 Q. So Stadia competed with consoles including Xbox?
 12 A. Yes.
 13 Q. And Stadia competed with PC distribution platforms?
 14 A. Yes.
 15 Q. Such as Steam and Epic?
 16 A. I think that's fair to say."

The statement that Google Stadia as a cloud gaming service competed against “*the existing console and PC gaming participants*,” as well as cloud gaming competitors, could not have been clearer.⁷⁰ That statement shows that Google unequivocally viewed native gaming as a competitive constraint on cloud gaming, which is contrary to the FR’s market definition assessment.⁷¹

- b. The FTC’s deposition questioning of NVIDIA’s Vice President and General Manager of GeForce NOW Cloud Gaming, Phil Eisler, which was played via video in court, established that cloud gaming is an alternative to downloading and playing PC games locally. In particular, Mr Eisler agreed that “*GeForce NOW offers an alternative to downloading and playing PC games locally*”.⁷² Again, this is highly relevant to the CMA’s findings on market definition.
- c. Sony’s Jim Ryan acknowledged in his video deposition testimony that he considers cloud gaming to be merely “*a service component of PlayStation Plus*”, rather than a “*platform*” and agreed that it is “*difficult*” to determine when “*great cloud gaming*” will be made available.⁷³

⁷⁰ 6/23/23 Tr. (Zimring) 483:1-16

⁷¹ FR at 5.75 – 5.102.

⁷² PX3382, Eisler Public Clip Report, at 29:16-30:02 (“Q: *And GeForce NOW offers an alternative to downloading and playing PC games locally; is that correct? A: That’s correct.*”)

⁷³ RX5059, Ryan Public Clip Report, at 62:21-62:24; 83:25-84:10; that tallies with Microsoft’s own experience: see e.g. Tr. (Bond) 144:20-146:24.

79. Thus three of the largest players who operate (or have operated) in cloud gaming spelled out clear evidence in support of Microsoft’s wider market definition. If the relevant market were to be found (correctly) to be wider than cloud gaming, that would fundamentally reshape the analysis in the FR, in particular in relation to ability and incentive to foreclose.

(iii) *Evidence regarding ability and incentive*

80. Furthermore, there was evidence directly related to the consideration of ability and incentive that was provided in the US proceedings which is contrary to the FR conclusions:

- a. Several Microsoft witnesses (even those called by the FTC) explained that content “*really isn’t a durable advantage, that others can enter a field and that others can build content libraries fairly quickly.*”⁷⁴ In addition, Ms Bond was asked: “*Is there any game you think of that’s so essential you have to have it?*” – she unequivocally answered: “*No*”.⁷⁵
- b. Third parties, such as Mr Zimring of Google Stadia, stated that they sought to have AAA games on their platforms but did not suggest that these needed to include specific Activision titles.⁷⁶
- c. Mr Ryan named multiple other (non-Activision) AAA games, each of which could presumably have comparable pulling power to *e.g.*, *Call of Duty*.⁷⁷
- d. Moreover, Mr Eisler of NVIDIA confirmed that *Call of Duty* titles were available on GeForce Now, but that their “*popularity does tend to go up and down*” compared to other games, with nothing marking them out as a unique ‘must-have’.⁷⁸

⁷⁴ Tr. (Booty) 80:21-81:4.

⁷⁵ Tr. (Bond) 148:19-21.

⁷⁶ Tr. (Zimring) 476:20-479:21.

⁷⁷ Tr. (Ryan) 112:05-112:16.

⁷⁸ Tr (Eisler) 71:24-72:04.

81. The evidence before the US courts also confirmed that the cost of streaming to Microsoft was higher than the revenue it gained from streaming.⁷⁹
82. None of this evidence was included in the FR. All of it goes to the heart of the CMA's considerations in this case and, in particular, its treatment of the agreements, and its findings on market definition and on ability / incentive. Had the CMA had this material before it and taken it into account, it manifestly should have reached different decisions on the key issues.
83. As such, the emergence of this material post-FR through the parallel FTC process (in which the CMA was closely interested) is an MCC or at very least a SR why the position should be reconsidered.
84. This new evidence from the FTC is also supported by material from other third parties that Microsoft has identified in the disclosure that was provided post-FR. For example:
 - a. [redacted] – “[redacted].”⁸⁰
 [redacted],⁸¹ [redacted].⁸² [redacted].⁸³ [redacted].
 - b. [redacted]: “[redacted].”⁸⁴

B. *New data analysis post FR following disclosure*

85. In the course of the proceedings before the Tribunal the CMA disclosed certain material to Microsoft which the parties had not previously had opportunity to comment upon or analyse. In the FR, it was suggested that [redacted] provided evidence in relation to “*ability*”

⁷⁹ Tr. (Bond) 209:2-210:9; see also Tr. (Stuart) 1035:13-20.

⁸⁰ CMA note of call with [redacted] ([redacted]), cl. 20 [JR1/2/11608].

⁸¹ It is noted that the CMA official asked the question only by reference to a [redacted]% price rise, not the normal 5-10% indicative, in circumstances where the more marginal the change, the less likely a positive response.

⁸² CMA note of a call with [redacted] [redacted] [JR1/2/11728].

⁸³ In the CMA note of a call with [redacted] on [redacted], the CMA specifically asked [redacted] about a document on [redacted], noting that [redacted]. However [redacted] stated that this [redacted] and would not agree with the CMA's characterisation that these were [redacted] closest competitors [JR1/2/11728-11730].

⁸⁴ Johnson 1 [C/171].

that indicated that Activision games were of particular or special importance to cloud gaming providers. It appears that the [REDACTED] material was critical to the CMA’s findings.

86. Microsoft has now been able to have the [REDACTED] material provided to Microsoft on 30 June 2023 analysed by Dr Foschi. He details this in a second expert report (“**Foschi 2**”), which was provided to the CMA under cover of Microsoft’s submission of 21 July 2023.

87. In outline, the position is that in the FR [REDACTED], the CMA argued that there is high demand for *Call of Duty* games on cloud gaming platforms, based on exit survey data from [REDACTED].⁸⁵ It emphasised that this data, [REDACTED], showed that *Call of Duty* [REDACTED]. However, as Dr Foschi’s analysis shows:

a. [REDACTED]. [REDACTED]. [REDACTED].

b. [REDACTED].⁸⁶ [REDACTED]. [REDACTED].

c. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].⁸⁷

88. In the circumstances, the new analysis indicates that the data cannot reasonably support the FR’s conclusions.

89. The data provided by [REDACTED]⁸⁸ also shows that the leading Activision game, *Call of Duty*, practically never featured among the most played games.⁸⁹ Neither do other Activision titles have any particular primacy, with different developers’ titles consistently more popular. There is significant churn across the top games with, on average, one new game in the ranking every week.⁹⁰ If anything, the dominant titles [REDACTED], neither of which are Activision games, and which accounted for more than [REDACTED] of the total gametime.⁹¹

85 [REDACTED].

86 [REDACTED].

87 [REDACTED].

88 [REDACTED] – between [REDACTED] only featured in the top 10 once, in [REDACTED] where it featured [REDACTED] in the month that [REDACTED] launched.

89 Foschi 2 §§12-13.

90 Foschi 2 §§21-22.

91 Foschi 2 Figure 4.

90. The FR suggests that gamers might have been put off from playing *Call of Duty* on [X] “given there was no certainty the service would have continued after the testing phase”.⁹² That, however, is not consistent with the evidence that:
- a. [X] of the [X] games that featured at least once in [X] top 10 rankings were also [X] games, in respect of which the same rationale would apply;⁹³ and
 - b. Gamers play through *Call of Duty* games relatively quickly, with more than half of their game-time happening within the first week after purchase, and then move on to other games, as shown by the Xbox telemetry data provided by Microsoft.⁹⁴
91. Dr Foschi’s analysis thus shows that the data in fact demonstrates that the importance of Activision content to [X] was similar to that of other third parties. Activision games in general, and *Call of Duty* in particular, were no more ‘must-have’ than any other AAA games. Insofar as Activision content might – theoretically – be withheld in the future, cloud gaming providers’ ability to compete would not be reduced materially because there is significant other rival content available that they could draw on.
92. In circumstances, where the new analysis carried out on the data provided points to very different conclusions from those in the FR, those new insights constitute an MCC. Alternatively, this new, post FR material, gives rise to a special reason why the assessment reached in the FR needed to be revisited.

C. *Material disclosed to Microsoft in the CAT proceedings*

93. For completeness, Microsoft has reviewed the evidential material disclosed post-FR in relation to ability. All of it supports the notion (in line with the analysis of the [X] data above) that Activision games are not ‘special’ amongst AAA games. Whilst cloud gaming providers do need access to some AAA games, they need not be Activision games:

⁹² FR §8.304(b); FR §8.304(c) also states that “users with a gaming PC would have been more likely to play *CoD* on their PC in any event” – that is correct and a key reason why cloud gaming is not a separate market.

⁹³ Foschi 2 §17; Top 10 played games included (*inter alia*) [X] games such as [X]. *See e.g.*, [X].

⁹⁴ Foschi 2 §§18-20.

- a. [X] said Activision’s games are “[X].”⁹⁵ And explained that “[X].”⁹⁶ It described Activision content as “[X].”⁹⁷ As such, while certain Activision games (such as *Call of Duty*) were “[X]”,⁹⁸ the CMA recorded that “[X].”⁹⁹
- b. [X] stated that it “[X].”¹⁰⁰ It emphasised that “[X].”¹⁰¹ As such, while it preferred to have as much content on its platforms as possible – including Activision content – its “[X]” if this did not include Activision content.¹⁰²
- c. [X] emphasised that “[X].”¹⁰³
- d. [X] also made clear that “[X]”,¹⁰⁴ with multiple different games by different developers identified as being particularly import.¹⁰⁵ While these are at one point described as “[X]”, it is apparent that [X] did not consider that a platform’s competitive success depended on access to *all* of these titles, as opposed to some of them.¹⁰⁶
- e. [X] told the CMA that it was “[X]”¹⁰⁷ It identified *Call of Duty* and *World of Warcraft* as but two examples of AAA games.¹⁰⁸ [X] also told the CMA that it did not have concerns regarding the merger.¹⁰⁹
- f. [X] stated that “[X]”¹¹⁰

95 Notes of a CMA call with [X], [X] [JR1/2/11866].

96 Minutes of CMA discussion with [X], [X] [JR1/2/11609].

97 Minutes of CMA discussion with [X], [X] [JR1/2/11724].

98 Minutes of CMA discussion with [X], [X] [JR1/2/11721].

99 *Ibid.*

100 [X] response to CMA RFI, [X] [JR1/2/992-1011].

101 Minutes of CMA discussion with [X], [X] [JR1/2/11613-11614].

102 *Ibid.* [JR1/2/11614-11615].

103 [X] response to CMA RFI, [X] [JR1/2/6740].

104 [X] response to CMA RFI, [X] [JR1/2/6770-6771].

105 Minutes of CMA discussion with [X], [X] [JR1/2/11651].

106 [X] response to CMA RFI, [X] [JR1/2/6770-6771]; cf. FR §8.300(a) [B/315].

107 [X] response to CMA RFI, [X] [JR1/2/7851].

108 *Ibid.*

109 Minutes of CMA discussion with [X], [X] [JR1/2/11712-11713].

110 [X] Response to CMA RFI1 [JR1/2/7193].

94. Whilst all of this material was available to the CMA prior to the FR, Microsoft had not had any opportunity to draw these relevant parts to the CMA's attention. They are not quoted or specifically referred to in the FR. Microsoft considers that this material, even if not amounting to a change of circumstance, would constitute a special reason for modifying the FR conclusions, particularly when allied to the new analysis of the [X] data provided above.
95. Indeed, there is a more general concern about what evidence was available to or considered by the CMA in the FR. For example, from the FTC proceedings, it has come to the attention of Microsoft that certain emails from senior individuals within Sony appeared to paint a very different picture as to Sony's position as compared with that apparently set out in its submissions. In particular, Mr Ryan in his testimony said that Sony "*feel extremely confident that Call of Duty and other Activision games will continue to be published on our platform*".¹¹¹ This was a matter specifically commented on by Judge Scott Corley in relation to an email sent in January 2022 (Opinion p.34 ll2-10):

"The next day, Sony PlayStation CEO Jim Ryan wrote his mentor about the proposed merger: "It's not an xbox exclusivity play at all, they're thinking bigger than that, and they have the cash to make moves like this. I've spent a fair bit of time with both Phil and Bobby over the past day. I'm pretty sure we will continue to see COD on PS for many years to come." (RX2064-001.) Two weeks later, Microsoft sent Sony a written proposal. (PX3109.) After reading the proposal, Ryan had no concerns Microsoft was going to make Call of Duty exclusive. (PX7053 (Ryan Depo. Tr. Vo. I) at 186:18-21.)"

96. It is not clear that the CMA had sight of that email which was highly relevant to the assessment of any evidence and submissions.

Conclusions on material changes of circumstances and/or special reasons

¹¹¹ Tr. (Ryan) 226:02-226:05; this was also confirmed by contemporaneous documentation such as an internal email by Mr Ryan dated 20 January 2022, in which he stated that the Merger is "*not an xbox exclusivity play at all I've spent a fair bit of time with both Phil and Bobby over the past day, I'm pretty sure we will continue to see COD on PS for many years to come*" (RX2064).

97. For the reasons outlined above, each and all of the matters set out clearly warrant reconsideration and departure from the key findings and remedial conclusions in the FR. They are put forward without prejudice to the grounds of challenge in the Notice of Application.
98. In addition to the matters outlined, and as noted above, Microsoft intends to put forward a proposal for a modified RMS which would mean that the current approach in the FR and a potential final order would be superseded. Whilst it is noted that such an arrangement might itself be considered a material change of circumstances or a special reason for diverging from the terms of the FR in respect of a final order, those are matters being further discussed with the CMA in relation to the application of section 33 of the Act.