

MICROSOFT/ACTIVISION BLIZZARD MERGER INQUIRY

Summary of Final Decision on possible material change of circumstances or special reason for deciding differently under section 41(3) of the Enterprise Act 2002

22 August 2023

1. This is the decision of the Competition and Markets Authority (**CMA**) on whether there has been a material change of circumstances (**MCC**) or a special reason (**SR**) under section 41(3) of the Enterprise Act 2002 (the **Act**) for deciding differently on the remedy set out in the final report ([‘Anticipated acquisition by Microsoft of Activision Blizzard, Inc. Final report’](#)) (the **Report**) in the anticipated acquisition by Microsoft Corporation (**Microsoft**) of Activision Blizzard, Inc. (**Activision**) (the **Merger**). The full reasons of the CMA for this decision will be published in due course.
2. Following the conclusion of an investigation into the Merger by a group of CMA panel members (the **Inquiry Group**), the CMA published the Report on 26 April 2023. In the Report, we decided that the Merger may be expected to result in a substantial lessening of competition (**SLC**) in the supply of cloud gaming services in the UK, due to vertical effects resulting from input foreclosure, and that the prohibition of the Merger would be the only effective and proportionate remedy to the SLC.
3. On 19 May 2023, we published a [proposed Order](#) that would put in place measures to implement the decision of the Report to prohibit the Merger and invited comments on that proposed Order. In response, Microsoft made a series of submissions culminating in a final and consolidated [submission](#) on 25 July 2023. Microsoft submitted that there had been four main developments since the Report which, individually or collectively, amounted to an MCC or SR under section 41(3) of the Act, and that, as a result of these MCC/SR, the CMA should not adopt an order prohibiting the Merger. Under section 41(3), the remedial action taken by the CMA (eg through a final order) must be consistent with its final report unless there has been an MCC or SR since the preparation of the final report.
4. The developments outlined by Microsoft are: (1) the acceptance by the European Commission (the **Commission**) of Commitments (the **Commission Commitments**) from Microsoft, which Microsoft submits provide a statutory underpinning and enforcement structure to the cloud gaming licensing agreements

Microsoft entered into with NVIDIA, Boosteroid and Ubitus (the **Cloud Agreements**); (2) an agreement entered into between Sony and Microsoft providing access to *Call of Duty (CoD)* (the **Sony Agreement**); (3) new evidence that has become available through litigation in the US relating to the Merger; and (4) new information obtained by Microsoft through UK court proceedings relating to its appeal of the Report.

5. We received a number of submissions from the public and interested parties in response to our [notice](#) inviting comments on Microsoft's MCC/SR submission, and have taken these into account as relevant.
6. Having considered Microsoft's submission and the other submissions we received, we have found that none of the developments highlighted by Microsoft, either individually or cumulatively, constitute an MCC or SR under section 41(3) of the Act that would result in a change to the remedy decision.
7. Before summarising our assessment of Microsoft's claimed MCCs and SRs, we first make some preliminary observations.
8. Following the conclusion of a detailed and thorough Phase 2 investigation, the CMA has a relatively short period of time within which to implement the remedy decision set out in the final report. It is well established in the case law that it is not appropriate for merger parties to use this implementation period to seek to re-argue the merits of the CMA's case, or to submit new remedy proposals, and it is rare for the CMA to receive submissions on MCCs or SRs in practice.
9. With particular regard to Microsoft's submission, some of the evidence or developments Microsoft points to as constituting an MCC and/or SR were substantially known and taken into account by the CMA at the time of the Report. Other aspects of Microsoft's submissions do relate to developments since the time of the Report, but we have found that they only impact a subset of providers or some limited parts of our substantive assessment. Our SLC finding was in the market for cloud gaming services in the UK and was based on a finding of Microsoft's ability and incentive to foreclose rivals in that market in general. Given that cloud gaming is a nascent, dynamic, and rapidly growing market, we do not consider that developments concerning a limited number of current rivals address the fundamental concern about the risk of foreclosure of other current and future rivals in the market more generally, including those with innovative and new business models.
10. Moreover, we assessed in detail in the Report a remedy proposed by Microsoft (the **Microsoft Cloud Remedy**) that was substantially the same as the Commission Commitments, and also shared many similarities with the Cloud Agreements. Having already reached our own conclusion based on the evidence before us, we consider that the subsequent adoption of substantially the same

remedy shortly after the CMA's decision by one or more overseas competition authorities is unlikely to have a material impact on the CMA's decisions in the final report.

11. In addition, where merging parties take action in the intervening period between the final report and final determination of the reference to seek to address some (but not all) competition concerns in the final report (for example, by entering into new supply agreements with third parties that still preserve the ability and incentive to foreclose more generally), we consider that these are also unlikely to have a material impact on the CMA's decisions in the final report.
12. In this case, we have considered the developments submitted by Microsoft carefully and in detail. In relation to the Cloud Agreements and the Sony Agreement, we find that, while these developments have some limited effect on parts of the analysis and reasoning in the Report both individually and cumulatively, they ultimately do not significantly impact the reasoning in the Report, and do not constitute MCCs/SRs for the purposes of section 41(3) of the Act that would result in a change to the remedy decision.
13. In relation to Microsoft's submissions on the information and evidence arising from court proceedings related to the Merger in the US and the UK, we find that this has little to no impact on any of the reasoning or conclusions set out in the Report, and does not constitute MCCs/SRs for the purposes of section 41(3) of the Act that would result in a change to the remedy decision.
14. We find that considering all of the developments submitted by Microsoft cumulatively does not change the assessment.
15. As we have found no MCC or SR under section 41(3) of the Act, we will now take remedial action that is consistent with the remedies decision in the Report (ie action to effect prohibition of the Merger). We will therefore proceed to implement a final order to effect the prohibition of the Merger.