MICROSOFT/ACTIVISION BLIZZARD MERGER INQUIRY

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

25 August 2023

Summary

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**).

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.

Introduction

16. On 15 September 2022, the CMA, in exercise of its duties under section 33 of the Act, referred the anticipated acquisition by Microsoft of Activision for further investigation and report by the Inquiry Group.

17. In our Report, published on 26 April 2023, we decided, in accordance with section 36 of the Act, that:

(a) the anticipated acquisition of Activision by Microsoft constitutes arrangements in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation (**RMS**);

(b) the creation of that situation may be expected to result in an SLC in the supply of cloud gaming services in the UK, due to vertical effects resulting from input foreclosure;

(c) the CMA should take action for the purpose of remedying, mitigating or preventing the SLC or any adverse effect which has resulted from, or may be expected to result from, the SLC; and

(d) the prohibition of the Merger would be the only effective and proportionate remedy to the SLC and any adverse effects which have resulted from, or may be expected to result from, the SLC.[1]

18. In accordance with paragraph 2(1)(a) of Schedule 10 to the Act, we gave notice of the proposed Order to remedy, mitigate or prevent the SLC and any resulting adverse effect, which we identified in the Report. The notice was published on the CMA website on 19 May 2023, along with the proposed Order.

19. In response to that notice, Microsoft made a series of submissions to the CMA about developments since the publication of the Report, which Microsoft submitted constitute MCCs and/or SRs under section 41(3) of the Act. We published a non-confidential version of Microsoft's final and consolidated submission on these matters together with a notice inviting comments on Microsoft's submission on 31 July 2023.

20. Submissions under section 41(3) of the Act regarding MCC and/or SR are very rare. It is not a usual part of the CMA's process during a remedies implementation period to consult on submissions received in response to a consultation on a proposed undertaking or order, nor is there a legal requirement for us to do so. However, in light of the guidance provided by the Competition Appeal Tribunal (the **Tribunal**) on this specific case,[2] we decided it was appropriate to do so in this case.

21. We received a number of responses from members of the public and interested parties to our consultation on Microsoft's submission, which we have considered.

(a) In terms of views from individual members of the public, as with responses from members of the public received in advance of the Report,[3] it was necessary for us to apply caution in interpreting these. In any event, the

[1] Unless otherwise provided, capitalised terms used in this decision are as defined in the Report.
[2] *Microsoft Corporation v CMA*, Case No:1590/4/12/23, transcript of the case management conference of 17 July 2023, page 36, lines 20-24.
[3] See CMA, Final Report, 26 April 2023, paragraph 5.17.

majority of these submissions did not raise issues that were relevant to the specific question of MCC/SR under consideration in this decision, and in those instances that relevant points were made, they are aligned with the issues under consideration below.

(b) In terms of other interested parties, we received detailed submissions from two market participants, an academic, and an economist. We have considered these responses below where they raise points that are either relevant to Microsoft's specific MCC/SR submissions under consideration or to how the CMA should assess MCC/SR submissions more generally.[4] Overall, the responses from interested parties were mixed in terms of whether they supported or disagreed with Microsoft's submissions on MCC/SR.

22. For the reasons set out in this decision, none of the developments submitted by Microsoft significantly impact the reasoning or conclusions in the Report, nor do they impact the remedy decision taken in that Report, either alone or cumulatively. Accordingly, we find that there is no MCC or SR under section 41(3) of the Act. The Act is clear that, in such circumstances, we must implement remedial action that is consistent with the decision in the Report. In the Report, we decided that prohibition of the Merger would be an effective and proportionate remedy to address the SLC in the market for cloud gaming services in the UK and its resulting adverse effects. As such, we have decided to implement a Final Order to effect prohibition of the Merger.

Legal Framework

23. Section 41 of the Act governs the form of remedy that will be imposed by the CMA once it has published a final report on a reference under section 38(1) of Act.

24. Section 41(2) sets out the CMA's duty to take such action as it considers reasonable and practicable to remedy, mitigate or prevent the substantial lessening of competition concerned, and any adverse effects which have resulted, or may be expected to result, from it. Section 41(3) of the Act provides that 'The decision of the CMA under subsection (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.'

25. Section 41(3) of the Act therefore requires the CMA to impose the remedy identified in its final report unless there has been an MCC or SR since the time at which the final report was prepared such that it should impose an alternative

[4] Where these responses instead sought to re-argue points decided in the Report more generally, not on the basis of any development that might constitute an MCC/SR, this is not discussed in this decision.

remedy (or no remedy at all). The focus of the assessment is whether the remedy identified in the final report remains appropriate in the light of a material change of circumstances or special reason since the publication of the final report.

26. Following the conclusion of a detailed and thorough Phase 2 investigation, the CMA has a relatively short period of time[5] 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. In particular, we consider s.41(3) is not intended to provide an opportunity to give further consideration to the appropriate remedy generally, for example, on the basis of information the CMA had available to it during its investigation,[6] or for merging parties to reargue their case on remedies.[7] The question is only whether an MCC has emerged since the preparation of the final report or the CMA otherwise has an SR for deciding the remedies question differently .

27. In *Ryanair*, the Tribunal suggested applying a two-stage approach to the assessment under section 41(3) of the Act –

    (a) The first stage is to consider whether there is a change of circumstances, or something that might amount to an SR, arising since the publication of the final report, that affects a significant aspect of the reasoning in its final report, or might otherwise result in a different decision on remedy (as opposed to matters which have no impact, or only limited impact, on its reasoning or appropriateness of the remedy);

    (b) If so, the second stage is to consider what the decision on remedy ought to be in the light of that change or reason.[8]

28. The assessment of whether there has been an MCC since the preparation of the final report or the CMA otherwise has an SR for deciding the remedies question differently is a matter on which the CMA has a wide margin of appreciation and evaluative discretion.[9]

29. In the remainder of this decision, and consistent with the Tribunal's approach in *Ryanair*, the CMA has considered whether the reasons put forward by Microsoft, individually and cumulatively, have significantly impacted its reasoning in the

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[5] Under section 41A of the Act, the CMA shall discharge its obligation under section 41(2) within 12 weeks of the publication of the final report, subject to an extension of up to six weeks if there are special reasons to do so.
[6] *Ecolab Inc v CMA* [2020] CAT 12, [111].
[7] *Groupe Eurotunnel S.A. v CMA* [2015] CAT 1, [95].
[8] *Ryanair Holdings Plc v CMA* [2015] CAT 14, [110]. *Ryanair* was primarily considering whether circumstances amounted to an MCC, but we consider the two-stage framework set out can equally be applied to the question of SR.
[9] *BAA Ltd v Ryanair* [2012] CAT 3, [21].

Report, whether this might affect its decision on remedy and, if so, what its decision on remedy ought now to be.

Microsoft's submission under section 41(3) of the Act

30. Microsoft's submissions under section 41(3) of the Act focus on four areas, each of which Microsoft submits constitute an MCC and/or SR, either individually or cumulatively:

    (a) First, since the Report, the European Commission (the **Commission**) has accepted 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**).

    (b) Second, since the Report, Microsoft has entered into an agreement for the provision of CoD to Sony Interactive Entertainment (**SIE**) covering both console downloading and cloud streaming (the **Sony Agreement**).

    (c) Third, since the Report, new material has become available through the parallel US proceedings, concerning the Federal Trade Commission (**FTC**)'s request for a preliminary injunction which is relevant to the CMA's assessment.

    (d) Fourth, since the Report, Microsoft has received further information from the CMA via the disclosure process in the Tribunal, in relation to its application for a review under section 120 of the Act of the CMA's decisions contained in the Report.

31. As an initial observation, 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 only impact a subset of providers or some limited parts of our substantive assessment.

32. In the Report, we found that cloud gaming is a nascent, dynamic, and rapidly growing market. We concluded that developments in this market could be transformative for the gaming industry in the next few years, helping to reach new customers and improve choice for existing customers. We further found that the cloud gaming market is characterised by direct and indirect network effects, competition is currently relatively concentrated with significant barriers to entry,

and that Microsoft enjoys a leading position and has several advantages over its rivals.[10]

33. The conclusion reached in the Report was that Microsoft would have the ability and incentive to foreclose existing rival providers and potential new entrants, and that not all competitors need to be foreclosed for foreclosure to result in substantial harm to overall competition in the downstream market.[11] While the Report explained that cloud gaming services using a B2P or BYOG model would be expected to feel the immediate effects of a foreclosure strategy most strongly, our findings were not limited to particular rivals or particular forms of cloud distribution.[12] Further, the ability to foreclose was on the basis of Activision games overall – in particular CoD and World of Warcraft (**WoW**), and to a lesser extent Overwatch.[13]

34. We consider this is important context when considering in detail, both individually and collectively, the impact of the claimed MCCs/SRs on the Report's reasons and, in turn, decision on remedy, as set out below.

The Cloud Agreements and the Sony Agreement

Background and Microsoft's submissions

35. Prior to the Report, Microsoft entered into the Cloud Agreements, which make provision for Activision games to be available on the counterparties' cloud gaming services for 10 years.[14] Microsoft, at the time, submitted to the CMA that these agreements meant that it could have no ability or incentive to foreclose cloud gaming rivals (both in respect of the counterparties to the Cloud Agreements and rivals more generally). Microsoft submitted that the Cloud Agreements would enhance competition in cloud gaming, and that they constituted a relevant customer benefit (**RCB**) under section 30 of the Act for the purposes of the CMA's remedy assessment. We considered the Cloud Agreements and Microsoft's submissions in relation to them in detail in each relevant part of the Report. Overall, we found that the Cloud Agreements did not have a material impact on the overall assessment of the Merged Entity's ability or incentive to foreclose cloud gaming service rivals.[15] In considering whether the Cloud Agreements constituted countervailing factors or RCBs, we placed weight *inter alia* on the conclusion reached that Activision's content would likely have been made available on cloud

[10] See eg CMA, Final Report, 26 April 2023 paragraphs 8.437, 8.438, 8.422.
[11] CMA, Final Report, 26 April 2023 paragraph 8.439.
[12] CMA, Final Report, 26 April 2023 paragraph 8.439.
[13] CMA, Final Report, 26 April 2023 paragraph 8.338.
[14] GeForce NOW Listing Agreement with NVIDIA dated 20 February 2023, Cloud Gaming License Agreement with Boosteroid dated 9 March 2023 and Cloud Gaming License Agreement with Ubitus dated 11 March 2023.
[15] CMA, Final Report, 26 April 2023 paragraphs 8.337, 8.345, 8.383, and 8.389.

gaming services absent the Merger, such that these benefits were not truly Merger-specific.[16]

36. After the Report was published, the Commission accepted commitments from Microsoft designed to address in the European Economic Area (**EEA**) the competition concerns the Commission identified in the distribution of games via cloud game streaming services and in relation to Microsoft's position in the market for PC operating systems.[17] The Commission's concerns in relation to cloud game streaming services were similar in nature to the conclusion in the Report that the Merger may be expected to result in an SLC in the supply of cloud gaming services in the UK.

37. The Commission Commitments primarily concern a 10-year licensing commitment. This involves a free licence to consumers in the EEA allowing them to stream, via any cloud game streaming services of their choice, all current and future Activision PC and console games for which they have a licence. They also involve a corresponding free licence to cloud game streaming service providers to allow EEA-based gamers to stream any Activision PC and console games. In addition to these EEA licensing commitments, Microsoft commits, for a period of 10 years, to grant a royalty-free worldwide licence to stream current and future Activision PC and console games to each of NVIDIA, Boosteroid and Ubitus in accordance with specific terms of the Cloud Agreements, which are directly incorporated into the Commission Commitments.[18]

38. Microsoft has submitted that the Commission Commitments remove any theoretical uncertainty over whether Microsoft will make Activision's games available to NVIDIA, Boosteroid and Ubitus for the next 10 years. Microsoft notes the monitoring and enforcement regime provided for in the Commission Commitments (with monitoring by a trustee and a fast-track dispute resolution procedure), as well as the potential consequences of breaching the Commission Commitments. Microsoft submits that this radically alters the analysis of whether Microsoft has the ability and/or incentive to withhold Activision games from cloud gaming providers, and submits that the conclusions reached on those issues in the Report (and in the context of remedial action) need to be changed. Microsoft also suggests the analysis regarding efficiencies and RCBs in the Report needs to take account of the consequences of breaching the Commission Commitments.

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[16] CMA, Final Report, 26 April 2023 paragraphs 9.74-9.77 and 11.183-11.186.
[17] Commission decision, Case M.10646 – Microsoft / Activision Blizzard, 15 May 2023
[18] Paragraph 7 and Annexes 5, 6 and 7 of the Commission Commitments and Microsoft submission on material change of circumstances and/or special reasons (**MCC/SR**), 25 July 2023, paragraphs 23-27.

Accordingly, Microsoft submits the Commission Commitments constitute an MCC and an SR to depart from the Report.[19]

39. After the Report was published, on 15 July 2023, Microsoft entered into the Sony Agreement.[20] This agreement primarily concerns making CoD available for the PlayStation console for a period of 10 years. However, it also makes provision for CoD in relation to SIE's multi-game subscription (**MGS**) and cloud services. In particular, [✂].[21] [✂].[22]

40. We understand that the agreement between Microsoft and SIE [✂].[23] [✂].[24] [✂].

41. Microsoft has submitted that the Sony Agreement is 'highly significant' in terms of the continued supply of Activision content, suggesting that it 'addresses the primary concern of the most outspoken opponent of the Merger and guarantees access to CoD to Microsoft's largest present cloud gaming rival.' Microsoft submits this development means the findings in the Report regarding the Merged Entity's ability and incentive to foreclose need to therefore be revisited, noting also the cumulative effect in this regard of Microsoft's other agreements (ie the Cloud Agreements, but also its agreements with Nintendo and Nware).[25]

Initial observations

42. Prior to setting out our detailed assessment of the Commission Commitments and the Sony Agreement as potential MCCs/SRs, we make the following initial observations.

43. First, the Tribunal has made clear that the period following publication of the Report in which the CMA shall take action to remedy the SLC and any adverse effects 'does not provide for a further period in which the CMA can consider what remedy is appropriate'.[26] It has also explained: 'Nor can the fact that a party

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[19] Microsoft submission on MCC/SR, 25 July 2023, paragraphs 28-46. Microsoft also makes submissions regarding the immediate access to Microsoft's own titles on other cloud gaming platforms which has occurred as a result of the Cloud Agreements. However, as this relates to Microsoft's content and applies absent the Merger, we do not consider that relevant to the assessment here.
[20] Microsoft submission on MCC/SR, 25 July 2023, paragraph 47.
[21] [✂]. See also [✂] and Microsoft submission on MCC/SR, 25 July 2023, paragraph 47(c).
[22] [✂].
[23] Microsoft submission on MCC/SR, 25 July 2023, paragraph 48.
[24] [✂].
[25] Microsoft submission on MCC/SR, 25 July 2023, paragraphs 47-71. The agreement with Nintendo concerns commitments in relation to the publishing of future native console versions of CoD titles on Nintendo, and therefore is not discussed further in this decision which focuses on the SLC and remedy decisions concerning cloud gaming services. The agreement with Nware was signed shortly after the Report but has not been incorporated into the Commission Commitments. [✂] submitted that 'this agreement relates to a small bring-your-own-game provider, which is based in Spain and is unlikely to impact UK users. The Final Report did not mention Nware as an important existing or even potential cloud game streaming service provider'. [✂] response to the CMA's MCC/SR consultation, 4 August 2023, page 4. Given this agreement is not impacted by the acceptance of the Commission Commitments nor has Microsoft provided any detailed submissions in relation to it, it is not discussed further in this decision.
[26] *Ecolab Inc v CMA* [2020] CAT 12, [111].

wishes to re-argue part of the case on the merits constitute a "special reason" within section 41(3)'.[27] Accordingly, the CMA's assessment under section 41(3) in relation to the Commission Commitments and Sony Agreement must be limited to whether these constitute MCCs/SRs, and not otherwise re-opening matters which were decided in the Report.

44. Second, and in line with the Tribunal's commentary, 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 an ability and incentive to foreclose more generally), we expect these are generally unlikely to constitute an MCC or SR for the purposes of section 41(3) of the Act.

45. Third, we assessed in detail in the Report a content licensing remedy for cloud gaming, put forward by Microsoft seeking to address the CMA's competition concerns in the cloud gaming services market in the UK (the **Microsoft Cloud Remedy**).[28] Under the Microsoft Cloud Remedy, Microsoft would commit to license Activision games, including CoD and WoW, royalty-free to certain cloud gaming providers with a B2P or BYOG offering for a period of ten years.[29]

46. The Report concluded that the proposed Microsoft Cloud Remedy would not be effective in remedying the SLC and adverse effects that we have found. This was in light of a range of risks, including, among others, the lack of any provision for a direct commercial relationship between the cloud gaming service and the publisher and the related lack of coverage of alternative business models to BYOG and B2P[30] and its lack of coverage of operating systems other than Windows.[31]

47. In circumstances where the CMA has already reached its own conclusions on a proposed remedy, based on the evidence before it, the subsequent adoption of substantially the same remedy shortly after the CMA's decision by one or more overseas competition authorities would typically be unlikely to have a material impact on the CMA's decisions in its final report. In this case, at the time of the Report, we were aware that Microsoft had proposed commitments to the

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[27] *Groupe Eurotunnel S.A. v CMA* [2015] CAT 1, [95].
[28] See in general CMA, Final Report, 26 April 2023, Chapter 11.
[29] More detail is set out in CMA, Final Report, 26 April 2023, paragraphs 11.45-11.47.
[30] CMA, Final Report, 26 April 2023, paragraphs 11.91-11.102. This included both existing alternative business models and those that might emerge in the future. As examples of alternative business models and monetisation strategies, the Report mentioned (at paragraph 11.95) 'joint marketing arrangements, negotiation with games publishers to provide exclusive or early access content (both of which are current features of Activision's commercial relationship with SIE) or to provide competitive differentiation around game access or content, and MGS deals (such as Amazon's deal with Ubisoft)'.
[31] CMA, Final Report, 26 April 2023, paragraphs 11.103-11.110. Other risks identified in the Report include risks related to the proposed remedy's duration, specification and circumvention risks, distortion risks and risks regarding the cost and potential difficulty of monitoring and enforcement. See CMA, Final Report, 26 April 2023, Chapter 11

Commission which were very similar to the Microsoft Cloud Remedy we were considering. Accordingly, the possibility of the Commission accepting the Commission Commitments was known at the time of the Report. In the Report, we considered whether our assessment of the proposed Microsoft Cloud Remedy would have changed if certain proposed amendments to the Commission Commitments were made, and concluded that it would not: 'We have reviewed Microsoft's amendments and consider that these extra elements (if they were to be incorporated into the Microsoft Cloud Remedy to address the SLC we have identified) do not change our assessment of the Microsoft Cloud Remedy set out in this chapter.'[32]

48. Furthermore, depending on the nature of the competition concern and the type of remedy in question, there may be material risks for the CMA in seeking to discharge its statutory duty to promote competition, both within and outside the United Kingdom, for the benefit of consumers[33] on the basis of a non-UK competition authority having adopted commitments.[34] Where ongoing monitoring and enforcement may be required, overseas regulators may be limited in their ability to enforce particular remedies in relation to breaches which affect the UK, and moreover are likely to have their own administrative priorities focussed on the needs of the citizens they have the legal power or duty to represent.

49. In any event, we have considered carefully and in detail the Cloud Agreements (as supported by the Commission Commitments) and the Sony Agreement and their impact on the reasoning and decisions in the Final Report in line with the Legal Framework set out above.

Impact on ability

50. In the Report, we assessed the ability of the Merged Entity to foreclose rival providers of cloud gaming services using Activision content. Our full assessment is set out in paragraphs 8.281-8.347 of the Report. We repeat here some of the key findings, as these are relevant to MCC/SR assessment:

    (a) The assessment and conclusion on ability to foreclose was based on Activision games in general – and in particular CoD, WoW, and to a lesser extent Overwatch – which we found would likely become an important input to cloud gaming services absent the Merger.[35] This was in the context of the importance of range to downstream competition: 'Where downstream

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[32] CMA, Final Report, 26 April 2023, paragraph 11.44. We also note in this regard the submission from [✂], which makes this observation, [✂] response to the CMA's MCC/SR consultation, 4 August 2023, page 5.
[33] Enterprise and Regulatory Reform Act 2013, section 25.
[34] This may depend, for example, on whether the commitments or remedies imposed in other jurisdictions fully eliminate any competition concerns relating to the UK and whether they are structural in nature or require significant ongoing monitoring and enforcement. See generally chapter 18 of the CMA's jurisdiction and procedure guidance (CMA2).
[35] CMA, Final Report, 26 April 2023, paragraph 8.341.

customers want to access a range of products, reducing the range (or quality of that range) that rivals are able to offer may have a significant impact on downstream competition'.[36] We also considered that, as cloud gaming rivals are still negotiating to attract the larger publishers to their platforms in order to be successful, this is likely to be a crucial time. As such, being foreclosed from Activision content had even greater potential to significantly reduce these rival providers' prospects of success.[37]

(b) The Cloud Agreements were not considered to have any material impact on this overall assessment, for several reasons. One key aspect of that reasoning included the difficulty for contracts to allow for future developments in a dynamic and growing market.[38] In this regard we note the concerns highlighted above with the Cloud Remedy regarding the lack of coverage of alternative business models including those which could arise in the future.[39]

(c) Another key aspect for the reasoning in the Report was that the Cloud Agreements only covered three providers with a BYOG model or B2B focus, whereas our assessment of the Merged Entity's ability to use Activision content to foreclose rivals in the cloud gaming market was not limited to any specific rivals. The Report noted that, 'In the context of a nascent and growing market, we 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.' [40]

(d) Other aspects of the reasoning in the Report as to why the Cloud Agreements did not have any material impact on the overall assessment of ability included that contracts can be terminated early or renegotiated, and uncertainty over the ability of counterparties to enforce.[41] We considered that specific clauses in the Cloud Agreements gave rise to further uncertainty.

51. We consider below the extent to which the incorporation of the Cloud Agreements into the Commission Commitments impacts the assessment in the Report regarding the impact of the Cloud Agreements on the Merged Entity's ability to foreclose. We note in this respect that while certain parts of the Commission Commitments apply to the EEA, the incorporation of the Cloud Agreements is of worldwide application, and therefore includes the UK.[42]

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[36] CMA, Final Report, 26 April 2023, paragraph 8.292.
[37] CMA, Final Report, 26 April 2023, paragraph 8.344.
[38] CMA, Final Report, 26 April 2023, paragraphs 8.333-8.334.
[39] See paragraph 46 above, and footnote 30.
[40] CMA, Final Report, 26 April 2023, paragraph 8.336.
[41] CMA, Final Report, 26 April 2023, paragraph 8.332.
[42] Clause 7 of the Commission Commitments provide that Microsoft commits, in accordance with the terms set out in Annexes 5, 6 and 7, to grant a royalty-free worldwide licence to stream the eligible games for a period of 10 years to each of NVIDIA, Boosteroid and Ubitus. However, note the observations in paragraph 48 above regarding the difficulties in relying on an overseas regulator to protect UK consumers.

Impact of Commission Commitments on ability

52. In the Report, we noted that contracts may be renegotiated, terminated, or not enforced in light of Microsoft's relative bargaining position.[43] We also considered that the [✂] clauses, [✂], and certain [✂] provisions gave rise to further uncertainty.[44]

53. Microsoft and NVIDIA submitted that a breach of the Commission Commitments would be enforceable directly by the Commission,[45] and that under the Commission Commitments, the key provisions of the agreements have force under independent of any other contractual terms (ie those provisions that were not incorporated in the Commission Commitments).[46]

54. We note that only specific terms of the Cloud Agreements have been incorporated into the Commission Commitments, and the incorporation of these terms is stated to be 'in accordance with and subject to' each of the Cloud Agreements, as relevant.[47] However, our understanding is that, because of the specific clauses which have been incorporated, if Microsoft sought not to comply with those provisions (or to renegotiate them), it could not use provisions not expressly incorporated in the Commission Commitments as a basis for doing so without being in breach. Accordingly, we understand that, if Microsoft wished not to comply with a term, it would have to request a waiver or modification of the Commission Commitments pursuant to the review clause, which would require Microsoft showing good cause and exceptional circumstances.[48] Breach of the Cloud Agreements would risk enforcement action by the Commission. The Commission Commitments also make provision for a Monitoring Trustee, as well as a fast-track dispute resolution procedure, which we understand apply to the incorporated terms of the Cloud Agreements.[49]

55. In light of this, we consider that the incorporation of the Cloud Agreements into the Commission Commitments reduces the concerns outlined in the Report regarding the possibility of the terms of the Cloud Agreements being renegotiated, terminated early or not enforced. We also consider that the ability of NVIDIA, Boosteroid and Ubitus to enforce the key terms incorporated into the Commission Commitments is enhanced by the monitoring and enforcement provisions of those

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[43] CMA, Final Report, 26 April 2023, paragraph 8.332.
[44] CMA, Final Report, 26 April 2023, paragraph 8.333-8.335.
[45] Microsoft submission on MCC/SR, 25 July 2023, paragraph 37(b). NVIDIA submitted that 'the Commitments… prevent Microsoft from terminating or amending the terms of the GFN Agreement without the Commission's consent'. NVIDIA response to the CMA's MCC/SR consultation, 4 August 2023, paragraph 9.
[46] Microsoft submission on MCC/SR, 25 July 2023, paragraph 38. The 'key provisions' refer to the specific provisions of each agreement that were listed in Annexes 5, 6, and 7 of the Commission Commitments.
[47] Annexes 5, 6 and 7 of the Commission Commitments.
[48] Clause 32 of the Commission Commitments.
[49] Microsoft submission on MCC/SR, 25 July 2023, paragraph 29.

commitments.[50] We note that the Report already acknowledged that the Cloud Agreements may provide NVIDIA, Boosteroid and Ubitus with some level of a protection against foreclosure to some extent,[51] and we consider the effect of the Commission Commitments is to increase that protection for these three particular providers, at least within the confines of the terms of the Cloud Agreements.

56. However, as explained above, such concerns were only a subset of the reasons why the Cloud Agreements were not considered to have any material impact on the overall assessment of ability in the Report. We consider a substantial and crucial portion of reasoning underpinning the reasoning and conclusion on ability in the Report is unaffected by the Commission Commitments.

57. In particular, the Report explained that we were assessing whether the Merged Entity would have the ability to use Activision's games to foreclose cloud gaming service rivals in general (ie the possibility for any actual or potential rivals in the market to be foreclosed, not foreclosure of specific rivals only or foreclosure of the entire market). In the context of a nascent and growing market, we cannot be confident that agreements with a limited number of providers remove the Merged Entity's ability to foreclose providers in the cloud gaming services market more generally.[52] This observation, which we consider is an important one, is unaffected by the incorporation of the Cloud Agreements into the Commission Commitments.[53] We received a consultation response from [✂] which made this same observation.[54] As a result, the Cloud Agreements would have no effect on Microsoft's ability to foreclose any other firms that are currently in the market or that may enter it in the future (for example, but not limited to, Amazon or [✂]). Our Report made clear that, given the nascency of the market and Microsoft's existing strength, loss of competition from any of these competitors would be concerning, and a reduction in competitiveness in a market characterised by network effects can also raise barriers to entry for others.[55] The Report sets out our assessment of cloud gaming as a nascent market characterised by a dynamic process of entry and expansion by a range of rivals, and protection of a small subset of these would not protect this wider process of dynamic competition.

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[50] While there could be some uncertainty about how the Commission Commitments would be enforced specifically in relation to UK consumers, as discussed in footnote 42 above, we consider the commitments do still reduce at least some of the uncertainty previously found in this regard.
[51] CMA, Final Report, 26 April 2023, paragraph 8.337.
[52] CMA, Final Report, 26 April 2023, paragraph 8.336.
[53] We note that the commitments allow for consumers in the EEA the right to stream Activision games once they have purchased it. This means other cloud rivals with a BYOG model who want to let consumers stream games on their platform can do so as long as the consumer is based in the EEA, but does not cover consumers in the UK.
[54] [✂] response to the CMA's MCC/SR consultation, 4 August 2023, page 5
[55] CMA, Final Report, 26 April 2023, paragraph 8.439. While this point was made in the analysis on effects in the Report, it serves to demonstrate the importance of the limited coverage of the Cloud Agreements in the market as a whole.

58. Relatedly, the Report considered that the immediate effect of foreclosure would be felt most strongly by actual or potential rivals with a BYOG or B2P business model,[56] and the Cloud Agreements make provision for such business models for three rivals. However, the wider process of dynamic competition means it is still a concern if these rivals (especially if they are the only rivals with access to Activision's content) are limited in their ability to innovate and experiment with different business models or operating systems in light of the specific terms on which they have been granted access to Activision content (ie in circumstances where the Merged Entity would not otherwise have the incentive to provide access to Activision's important content on broader terms).[57] The Report found that this is a dynamic market where industry participants are continuously experimenting with different payment models, and where even a single participant may have more than one way of monetising content.[58] We were concerned in the Report that the proposed Cloud Remedy, by seeking to control outcomes in a market for a long period of time, would be unable to adequately replace normal market-driven incentives and strategies.[59] Similarly, we considered the proposed Cloud Remedy would exclude or restrict providers that may wish to provide cloud gaming services using other OSs, either now or in the future.[60] We consider similar limitations and distortion risks[61] arise with the Cloud Agreements, given their similar limitations.[62]

59. Accordingly, while there is some impact on certain aspects of the reasoning in the Report, we do not consider the incorporation of terms of the Cloud Agreements into the Commission Commitments significantly impacts the findings in the Report regarding the Merged Entity's ability to foreclose rival cloud gaming providers. It does not, as Microsoft submits, fundamentally change the factual basis on which the assessment in the Report was conducted.[63] We recognise that, following the incorporation of the Cloud Agreements into the Commission Commitments, Microsoft will have a more limited ability than found in the Report to foreclose NVIDIA, Boosteroid, and Ubitus. However, we consider that its ability to foreclose rivals in the cloud gaming market more broadly remains materially unaffected.

Impact of Sony Agreement on ability

60. We have assessed the impact of the Sony Agreement as a freestanding contract given it has not been incorporated into the Commission Commitments and

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[56] CMA, Final Report, 26 April 2023, paragraph 8.439.
[57] The Report was clear that 'we did not rule out that cloud gaming services with different business models would arise absent the Merger, and we note that it is difficult to predict with any certainty how an emerging and dynamic market will continue to evolve', CMA, Final Report, 26 April 2023, paragraph 11.93.
[58] CMA, Final Report, 26 April 2023, paragraph 8.11.
[59] CMA, Final Report, 26 April 2023, paragraph 11.96.
[60] CMA, Final Report, 26 April 2023, paragraph 11.104.
[61] See CMA, Final Report, 26 April 2023, paragraph 11.125.
[62] As explained in the Report, the [✂] clause included in the Cloud Agreements demonstrates the difficulty of contracts adequately allowing for developments in a dynamic and evolving market.
[63] Microsoft submission on MCC/SR, 25 July 2023, paragraph 35.

therefore the points raised by Microsoft in relation to a reduction in uncertainty arising from the Commission Commitments do not apply to the Sony Agreement.[64]

61. The Report considered the impact of an existing contract in place between Activision and SIE with regards to the availability of CoD to PlayStation and explained why the guidance in the CMA's Merger Assessment Guidelines (**MAGs**) on contractual protections was applicable to that agreement. The Report explained that contractual protections: (i) may not account for all the possible foreclosure mechanisms that could be available to the Merged Entity, (ii) may be renegotiated or terminated early, or (iii) may not be enforced depending on the respective parties' bargaining positions. We also did not have sufficient confidence that SIE (or any other third party) would be able to enforce the terms of any relevant contracts should it need to do so.[65] We consider that a number of these factors also apply to the Sony Agreement.

62. As Microsoft notes in its submission, our Report found that Microsoft would not have the incentive to totally or partially foreclose SIE in the market for console gaming services in the UK.[66] The Sony Agreement provides for the availability of CoD on SIE PlayStation as a console, as well as making some provision for streaming. While we consider that the strength of SIE's bargaining position in relation to cloud streaming elements of the Sony Agreement is likely to be less than in relation to the console elements,[67] we accept Microsoft's submission that SIE could potentially use [✂]– as leverage, at least to some extent, against potential breaches of the [✂] terms.[68]

63. However, we consider that there are several limitations of the Sony Agreement with respect to making provision for Activision games to be available for SIE's cloud gaming service. First, the Sony Agreement only covers CoD. While the Report found that CoD was a particularly important Activision game in this context, the ability assessment in the Report was based on Activision games in general, which we found would likely become an important input to cloud gaming services absent the Merger.[69] This was in the context of the importance of range to downstream competition. Additionally, the Sony Agreement, similar to the Cloud Agreements, makes provision for the streaming of CoD in certain prescribed ways. This could restrict SIE from innovating in its cloud streaming service (ie in

[64] We also note, as highlighted earlier, that the remedies implementation period does not provide for a further period in which the CMA can consider what remedy is appropriate absent an MCC/SR.
[65] CMA, Final Report, 26 April 2023, paragraphs 7.288-7.289, citing CMA129, paragraph 7.15.
[66] CMA Final Report, 26 April 2023, chapter 7 and Microsoft submission on MCC/SR, 25 July 2023, paragraph 52.
[67] And could become further reduced if Microsoft's strength in the cloud gaming services market continues to grow comparatively.
[68] Microsoft submission on MCC/SR, 25 July 2023, paragraph 54. Microsoft submits that [✂].
[69] CMA, Final Report, 26 April 2023, paragraph 8.341.

circumstances where the Merged Entity would not otherwise have the incentive to provide access to Activision's important content on broader terms).

64. We also consider there are specific terms regarding cloud gaming within the Sony Agreement that give rise to further uncertainty regarding their application in practice. In particular, the Sony Agreement contains an [✂] clause of the kind already discussed in the Report in the context of the Cloud Agreements.[70] Microsoft also notes certain clauses that are subject to technical limitations or [✂],[71] and there are [✂] (such as to [✂][72]). While such provisions may be standard in such contracts, this does not mean they are without effect and we consider they limit any protection against foreclosure concerns. Accordingly, we consider that while the Sony Agreement may provide SIE with some protection against foreclosure, this is subject to limitations and uncertainty.

65. Finally, and in any case, as with the Cloud Agreements, the Sony Agreement concerns a particular cloud gaming rival, while the Report assessed whether the Merged Entity would have the ability to use Activision's games to foreclose cloud gaming service rivals in general.[73] While Microsoft refers to SIE's current market shares in the cloud gaming market, and also the cumulative market shares of rivals covered by the Sony Agreement and Cloud Agreements,[74] (i) this only represents the static position today in the context of a nascent and growing market and (ii) in any event we did not find that SIE was Microsoft's closest rival, or its most important competitor in cloud gaming. The Report noted certain limitations in SIE's current cloud gaming offering[75] and it was not among those rivals expected to most strongly feel the immediate effects of a foreclosure strategy.[76] While we noted that 'SIE could present a greater constraint in the future as it expands it cloud gaming service,'[77] taking account of Sony's significance and its strengths, our reasoning in the Report in relation to foreclosure in cloud gaming was not predicated on, or driven by, concerns that SIE would be foreclosed. SIE is just one of a number of current (for instance Amazon) and potential competitors (for instance [✂]) in this market. As set out above, cloud gaming is characterised by entry and expansion by a range of different competitors, and we consider the protection of individual rivals does not prevent harm to this overall dynamic competitive process.

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[70] Clause [✂] of the Sony Agreement.
[71] Microsoft submission on MCC/SR, 25 July 2023, paragraph 63.
[72] Clause [✂] of the Sony Agreement.
[73] CMA, Final Report, 26 April 2023, paragraph 8.336.
[74] Microsoft submission on MCC/SR, 25 July 2023, paragraphs 66-69.
[75] See for example CMA, Final Report, 26 April 2023, paragraph 8.79(d). This is also highlighted by [✂] in its response to the CMA's MCC/SR consultation, 4 August 2023, page 9.
[76] CMA, Final Report, 26 April 2023, paragraph 8.439.
[77] CMA, Final Report, 26 April 2023, paragraph 8.438.

66. Accordingly, we do not consider the Sony Agreement significantly impacts the reasoning or analysis on the Merged Entity's ability to foreclose rival cloud gaming providers in the Report.

Overall impact on ability

67. While there is some impact on certain aspects of the reasoning in the Report on the Merged Entity's ability to foreclose rival cloud gaming providers, we do not consider that either the incorporation of terms of the Cloud Agreements into the Commission Commitments or the signing of the Sony Agreement significantly impacts the reasoning in the Report regarding the Merged Entity's ability to foreclose, and does not in any event affect the conclusion reached in the Report in that regard.

Impact on incentive

68. In the Report, we assessed the incentive of the Merged Entity to foreclose rival providers of cloud gaming services using Activision content. Our full assessment is set out in paragraphs 8.348–8.390. We repeat here some of the key findings, as these are relevant to MCC/SR assessment:

(a) Our overall finding on incentive to foreclose rivals was made in the context of an expectation that the market for cloud gaming services would continue to grow and become profitable in the next five years. We took into account that the market is nascent and characterised by some elements of direct/indirect network effects, uncertainty around the success of new entrants, and stronger opportunity and incentives for incumbents to engage in foreclosure strategies in a bid to acquire market power in such circumstances.[78]

(b) We found that Microsoft has a strong multi-product ecosystem that gave it substantial advantages (arising from its ownership of Windows, Azure and the Xbox gaming catalogue[79]), and makes it one of the strongest incumbents, in competing for cloud gaming services as it grows and develops. We concluded that Microsoft's strong position would mean it could expect to recapture a significant proportion of sales lost by foreclosed rivals, leading to a stronger incentive to foreclose.[80] We found that Microsoft could expect significant recapture even if games were not entirely exclusive to xCloud.[81]

(c) We did not consider the Cloud Agreements to materially impact this overall assessment, for several reasons. The Report acknowledged potential financial and reputational impacts of breaching these agreements, but noted

[78] CMA, Final Report, 26 April 2023, paragraph 8.384.
[79] CMA, Final Report, 26 April 2023, paragraph 8.224
[80] CMA, Final Report, 26 April 2023, paragraph 8.385-8.386.
[81] CMA, Final Report, 26 April 2023, paragraph 8.386.

uncertainty around Microsoft incurring such impacts given certain clauses in the agreements and the possibility of contracts being renegotiated, terminated early, or not enforced.[82] The Report also noted that, in any case, these agreements only covered three cloud gaming providers, and only a BYOG (or B2B) business model,[83] whereas we were assessing whether the Merged Entity would have the incentive to use Activision's games to foreclose cloud gaming service rivals in general, in what is an otherwise nascent and growing market.[84]

(d) We considered that Microsoft entering into these agreements did not provide us with reliable evidence regarding its incentives in the same way as other past behaviour separate from the Merger and Merger review process, or our general analysis of the Merged Entity's incentives above. Microsoft may have short-term incentives to enter into these agreements to seek to address the competition concerns arising from the Merger, but this is not informative of its longer-term commercial incentives. Accordingly, we did not consider the fact that Microsoft had entered into these agreements undermined our findings on its post-Merger incentives.[85] We consider the same reasoning as set out in the Report on the Cloud Agreements on this point extends at least in principle to the Sony Agreement,[86] and that we cannot infer solely from the fact that an agreement has been reached during the Merger review process that Microsoft has an incentive to continue to supply Sony. Rather, the impact of the Sony Agreement on incentives to foreclose requires a more detailed assessment.

Impact of Commission Commitments on incentive

69. As we noted in the section above on the impact of the Commission Commitments on ability, the incorporation of the Cloud Agreements into these commitments reduces the concerns outlined in the Report regarding the possibility of the Cloud Agreements being renegotiated, terminated early or not enforced. In addition, we recognise that the Commitments are directly enforceable by the Commission, and, as Microsoft has submitted, a breach of the Commitments may potentially carry large fines.[87]

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[82] CMA, Final Report, 26 April 2023, paragraph 8.381.
[83] CMA, Final Report, 26 April 2023, paragraph 8.336.
[84] CMA, Final Report, 26 April 2023, paragraph 8.383.
[85] CMA, Final Report, 26 April 2023, paragraph 8.382.
[86] We also consider that that reasoning applies to the view expressed in the submission from Joost Reitveld, an academic, that 'Microsoft's intensions [sic] to not foreclose any competing platforms on Call of Duty content were confirmed once more when it was announced that Sony finally signed an agreement for the provision of Call of Duty on PlayStation consoles for the provision of Call of Duty on PlayStation consoles'. Joost Reitveld response to the CMA's MCC/SR consultation, 4 August 2023, page 4.
[87] Microsoft submission on MCC/SR, 25 July 2023, paragraph 32.

70. We consider an expectation of incurring fines or increased reputational impact in case of breach is relevant to the assessment of the Merged Entity's incentive to foreclose. However, we note that this development only directly impacts the incentive to foreclose the counterparties to those agreements.

71. The Merged Entity's broader incentive to foreclose may be reduced to the extent that certain rivals are protected from foreclosure, as the protected rivals will recapture a greater proportion of sales in the event of foreclosure of other rivals, thereby reducing the benefits of foreclosure for the Merged Entity and therefore its overall incentive to foreclose.[88] Notwithstanding this, we consider that the Merger would continue to give rise to an incentive to foreclose. Our finding in the Report that the recapture of sales by Microsoft would be significant in the event of foreclosure reflected our conclusion on Microsoft's strengths in cloud gaming relative to its rivals.[89] Since Microsoft is expected to remain a particularly strong competitor in cloud gaming (including as a result of its strong multi-product ecosystem), we considered that sales lost by foreclosed rivals would accrue to Microsoft. This remains true, regardless of whether certain (weaker) rivals are individually better protected from foreclosure.[90]

72. In addition, we consider any impact on recapture by Microsoft arising from the agreements is substantially dampened by (i) firms that do not have agreements, and (ii) for those with agreements, the limitations already discussed above including in the ability to innovate and experiment with different business models and strategies in light of the specific terms on which they have been granted access to Activision content.)

73. Our conclusion therefore remains that, even if some rivals have some protection from foreclosure, it is still likely that Microsoft would recapture a significant proportion of sales lost by rivals who were foreclosed.

Impact of Sony Agreement on incentive

74. In relation to the impact of the Sony Agreement on incentive to foreclose SIE, we make the following observations:

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[88] An argument of this sort was submitted by David Foster (an economist) in response to our consultation on Microsoft's MCC/SR submission. Mr Foster submitted that, following a remedy (or, by extension, agreement), any foreclosure strategy would need to focus on behaviours not within the scope of that remedy; that this would leave some forms of competition 'active in the market' and, as a result, rivals would recapture sales and reduce the incentive to foreclose. David Foster, response to the CMA's MCC/SR consultation, 4 August 2023

[89] CMA, Final Report, 26 April 2023, paragraphs 8.96 to 8.225. At paragraph 8.224 we concluded that 'we believe that Microsoft is already in a uniquely strong position in the market for cloud gaming services.' In addition, as described in 8.385 and 8.386, even if Activision games were not exclusive to xCloud, Microsoft would still recapture many sales due to its current market shares and multi-product ecosystem.

[90] CMA, Final Report, 26 April 2023, paragraph 8.439.

(a) First, as noted above we cannot infer solely from the fact that an agreement has been reached during the Merger review process that Microsoft has an incentive to continue to supply SIE.

(b) Second, while the Sony Agreement may reduce the incentive to foreclose SIE through CoD because a breach of the agreement would result in reputational and financial consequences, we concluded above in relation to ability that there are certain limitations of the agreement which limit any increase in costs associated with foreclosing Sony.[91] In particular:

(i) The Sony Agreement, similar to the Cloud Agreements, makes provision for streaming of CoD in certain prescribed ways (ie only via MGS [✂] and B2P) and does not allow for certain business strategies that may come about naturally from competition (for example joint marketing arrangements, or negotiations with games publishers to provide exclusive or early access to content etc).[92] This could restrict SIE from innovating in its cloud streaming service, as the Sony Agreement does not make provision for Activision content to be supplied for such alternative strategies.

(ii) The Sony Agreement has not been incorporated into the Commission Commitments and therefore does not benefit from the enhanced monitoring and enforcement discussed above in this regard. We recognise that SIE is in a stronger bargaining position than some other rivals and could use [✂] – as leverage against potential breaches of the terms which relate to [✂]. However, the agreement contains various clauses which give rise to uncertainty,[93] and while such provisions may be standard in such contracts, we consider that they limit the protection against foreclosure concerns.

(c) The Sony Agreement only covers CoD. As noted above, while the Report found that CoD was a particularly important Activision game in this context, the assessment in the Report was based on Activision games in general which we found would likely become an important input to cloud gaming services absent the Merger. It therefore has no impact on Microsoft's incentive to foreclose SIE in cloud gaming through other Activision games including WoW, Overwatch and Diablo.

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[91] These issues were also discussed in the Report in relation to our assessment of Microsoft's proposed behavioural remedy (see CMA, Final Report, 26 April 2023, paragraphs 11.93 to 11.110).
[92] See, for instance, CMA, Final Report, 26 April 2023, paragraph 11.95, in relation to similar concerns with the Microsoft Cloud Remedy.
[93] See paragraph 52.

75. In any case, in relation to the impact of the Sony Agreement on the incentive to foreclose generally, ie including in relation to other rivals, we make the following observations:

(a) Contrary to Microsoft's submission,[94] we did not find that SIE was Microsoft's closest rival, or its most important competitor in cloud gaming. The Report considered a range of evidence that reflected SIE's strong position in console gaming and recognised that it currently had a substantial (albeit declining) share of cloud gaming MAUs. While we concluded that 'the biggest constraints to Microsoft come from NVIDIA, and Amazon, both of which are significantly weaker than Microsoft', we noted that 'SIE could present a greater constraint in the future as it expands its cloud gaming service.'[95] However, our reasoning in the Report in relation to foreclosure in cloud gaming was not solely predicated on, or driven by, concerns about foreclosure of SIE.

(b) Furthermore, there are certain important competitors, such as Amazon, that are not covered by any relevant agreements with Microsoft. Relatedly, cloud gaming is a nascent and evolving market and we are concerned about the impact on potential new entrants, such as [✂].

(c) Finally, in line with the reasoning set out in relation to the Commission Commitments in paragraph 71, our conclusion that the recapture of sales by Microsoft would be substantial was predicated on an assessment of Microsoft's strengths as a competitor in cloud gaming absent the Merger, and not on an assumption that all rivals would be foreclosed.

Overall impact on incentive

76. While there is some limited impact on certain aspects of the reasoning in the Report on the Merged Entity's incentive to foreclose for the reasons discussed (in particular as regards the Merged Entity's incentive to foreclose the counterparties to the Cloud Agreements and the Sony Agreement), we do not consider that either the incorporation of terms of the Cloud Agreements into the Commission Commitments or the signing of the Sony Agreement affects a significant aspect of the reasoning in the Report regarding the Merged Entity's incentive to foreclose, and does not in any event affect the conclusion reached in the Report in that regard.

[94] Microsoft submission on MCC/SR, 25 July 2023,paragraph 58 (a)
[95] CMA, Final Report, 26 April 2023, paragraph 8.438.

Impact on efficiencies

77. Microsoft submits that, in relation to efficiencies, the CMA accepted that efficiencies resulting from the Cloud Agreements would be capable at least in principle of benefitting some customers in the UK, in the sense they may bring Activision's content to those rivals. However, the CMA noted the uncertainties in relation to these agreements, as discussed above. Microsoft submits that no consideration was given to the consequences of breaching the Commission Commitments in this context.[96]

78. Much of the analysis regarding the Cloud Agreements is also relevant to the assessment of their impact on the efficiencies findings in the Report. Moreover, we note that the key concern in the efficiencies assessment related to the withholding of Activision content from individual actual and potential rivals across the market, and the impact this would have on competition in the market. The provision of content only to certain providers (with limitations as to business models and strategies as discussed above) would not enhance rivalry across the market; rather, it would put select market participants at an advantage compared to the rest of the market. The Report explained that, even if these select participants were to account for a large portion of the market, an advantage given to certain market participants alone would not necessarily be rivalry enhancing, particularly in the context of a nascent market where other participants may use a variety of business models (not always involving Windows OS) and where future entry/expansion and changes in the competitive landscape are to be expected.[97] We consider this reasoning, which was important to our conclusion on efficiencies in the Report, is unaffected by the incorporation of the Cloud Agreements into the Commission Commitments. We note Microsoft has made no submissions on efficiencies in relation to the Sony Agreement; however, we consider this same reasoning applies.

79. In addition, we found in the Report that the Cloud Agreements were not merger-specific, as absent the merger, Activision would likely have made its games available for cloud gaming in the next five years, and that this was most likely for cloud gaming services with a B2P or BYOG model.[98] The Commission Commitments do not change that assessment. Any benefit from the Cloud Agreements would still be transitory in nature, and they still do not meet the criteria to constitute rivalry-enhancing efficiencies resulting from the Merger.[99]

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[96] Microsoft submission on MCC/SR, 25 July 2023, paragraph 34(c).
[97] CMA, Final Report, 26 April 2023, paragraph 9.81.
[98] CMA, Final Report, 26 April 2023, paragraphs 9.74-9.77.
[99] As set out in the Merger Assessment Guidelines (CMA129), March 2021, paragraph 8.8.

Impact on RCB assessment

80. Microsoft submits in relation to RCBs that, when considering the claimed Cloud Gaming RCB (which concerned the Cloud Agreements), the CMA found a tension between the terms of the agreements and Microsoft's post-Merger incentives to make Activision content exclusive. Microsoft notes that the CMA concluded Microsoft would be likely to hold considerable leverage in relation to any subsequent negotiation or contractual dispute and referred to specific terms of the contracts introducing further uncertainty. Microsoft submits that no consideration was given to the consequences of breaching the Commission Commitments in these circumstances.[100]

81. This submission again overlooks key aspects of the reasoning in the Report. In particular, one of the reasons for considering that the claimed Cloud Gaming RCB did not meet the statutory criteria to constitute an RCB was that this benefit was likely to accrue without the RMS or a similar lessening of competition, such that it did not meet the condition in section 30(3)(b) of the Act. We considered this point was also relevant to the likely size of the RCB even if it did satisfy the relevant statutory criteria.[101] In this regard, we consider the points made in paragraph 78 above are also relevant here. Accordingly, while the discussion above regarding the impact of the Commission Commitments on the certainty of the Cloud Agreements is relevant to certain aspects of the RCB assessment, we consider that (i) it is still the case that the claimed Cloud Gaming RCB does not meet the relevant statutory criteria and (ii) even if it did satisfy the relevant statutory criteria, the size of the benefit would not be material.

Conclusion on Commission Commitments and Sony Agreement

82. While these developments have some effect on parts of the analysis and reasoning in the Report, as described above, we consider that their impact is limited. Both individually and cumulatively, these developments do not significantly impact the reasoning in the Report or change any of the conclusions on the key components of our competitive assessment. We therefore do not consider that the Commission Commitments or Sony Agreement constitute MCCs/SRs for the purposes of section 41(3) of the Act that would result in a change to the remedy decision. Even if the limited impact on the reasoning in the Report did constitute an MCC or SR (under stage one of the *Ryanair* test), this would not in any event lead us to take a different decision on remedies in this case.[102] This latter point is considered further below.

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[100] Microsoft submission on MCC/SR, 25 July 2023, paragraph 34(d).
[101] See CMA, Final Report, 26 April 2023, paragraphs 11.185-11.189.
[102] As explained later in this decision, we still consider once all the MCC/SR grounds are assessed individually and cumulatively that the overall SLC decision remains and that prohibition remains an effective and proportionate remedy.

83. We therefore find that the Commission Commitments and the Sony Agreement do not, either individually or cumulatively, mean that it is necessary or appropriate to depart from our decision in the Report to prohibit the Merger under section 41(3) of the Act.

Material from FTC court proceedings

Summary of Microsoft's submission

84. Microsoft submitted that the emergence of material through litigation between itself and the FTC in the US, for which hearings occurred after publication of the FR, constitutes an MCC or SR.[103] It submitted that 'had the CMA had this material before it and taken it into account, it manifestly should have reached different decisions on the key issues.'[104]

85. Microsoft identified three categories of material emerging from the litigation in the US that it said contributed to this claimed MCC or SR:

(a) A US judge's findings on the US law regarding the Cloud Agreements.[105]

(b) Evidence regarding market definition provided in the testimony of third-party witnesses.[106]

(c) Evidence regarding ability and incentive provided both by these same third-party witnesses and in the testimony of Microsoft employees.[107]

Our assessment

86. Although the US testimony and judicial ruling were delivered after the publication of the Report, we consider they do not represent new factual developments affecting the cloud gaming market or the merging parties' position within it since the publication of the final report. Nor do they amount to 'a discovery that information has been supplied which is false or misleading in a material respect'.[108] Rather, the testimony consists of statements made in the context of US legal proceedings by parties from whom we received evidence in our own investigation, and the US judgment provides brief comments on a matter we considered in the Report. Accordingly, we do not consider that the matters

[103] Microsoft submission on MCC/SR, 25 July 2023, paragraph 83.
[104] Microsoft submission on MCC/SR, 25 July 2023, paragraph 82.
[105] Microsoft submission on MCC/SR, 25 July 2023, paragraph 75.
[106] Microsoft submission on MCC/SR, 25 July 2023, paragraphs 78-79.
[107] Microsoft submission on MCC/SR, 25 July 2023, paragraph 80.
[108] Definition of 'change of circumstances' in section 129 of the Act.

identified by Microsoft can properly be described as an MCC because there is no change in circumstances.

87. The focus of our assessment in this section is therefore on whether the testimony constitutes an SR. We do not consider that this focus materially impacts the approach to our assessment. In line with the legal framework set out above, we consider whether this evidence would significantly impact the reasoning in the Report or might otherwise result in a different decision on remedy.

The US court judgment

88. As Microsoft acknowledges in its submission, court judgments from its litigation with the FTC in the US 'do not have any legally binding effect in relation to findings to be made under the UK regulatory process.'[109] For this reason, we consider that the ruling does not contribute anything to Microsoft's claimed MCC or SR. As pointed out by one third party [✂], Microsoft's claim that some of the findings made in the judgment are 'instructive'[110] 'serves as a backdoor to reintroduce the US litigation as a relevant factor'.[111]

89. In any event, we consider the US judgment contains very limited analysis or discussion of the agreements themselves,[112] as this was not a focus of the litigation in the US. Microsoft's submission on this point — though it seeks to re-argue a position already decided in the Report[113] — does not engage with the reasoning set out in the Report[114] and does not affect that reasoning or the conclusions based upon it.

Third party testimony on market definition

90. Microsoft's submission here focuses on specific statements made by three third parties to whom we spoke during the merger investigation, and from whom we gathered evidence, during our own investigation.[115] The CMA's duty during its investigation is to 'do what is necessary to put itself into a position properly to decide the statutory questions'.[116] We therefore consider it would be unusual circumstances that would lead to such statements constituting an MCC or SR under section 41(3) of the Act.

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[109] Microsoft submission on MCC/SR, 25 July 2023, paragraph 74.
[110] Microsoft submission on MCC/SR, 25 July 2023, paragraph 74.
[111] [✂] response to the CMA's MCC/SR consultation, 4 August 2023, page 8.
[112] The passages from the judgment cited in Microsoft submission on MCC/SR, 25 July 2023, at paragraphs 76 and 77, comment on the Cloud Agreements only in very general terms.
[113] As noted earlier (see paragraph 26), this does not constitute an SR.
[114] This reasoning is set out earlier in this decision (see, eg, paragraphs 50 and 68).
[115] Eg NVIDIA response to the CMA's RFI [✂]; Google response to the CMA's RFI [✂]; SIE response to the provisional findings, 1 March 2023.
[116] See *BAA Limited v. Competition Commission*, [2012] CAT 3, at paragraph 20(3).

91. In the case of NVIDIA, the evidence obtained by the CMA during its investigation includes a statement similar to the one Microsoft relies on from the US proceedings.[117] We also consider that Mr Ryan's statement in the US proceedings, which appears mostly to be describing SIE's own cloud gaming offering, does not make any claims that would cause us to change our position on substitution or market definition.

92. One third party [✂] has submitted that Microsoft's submission has mischaracterised [✂], in that [✂].[118]

93. In addition, we consider third party views on market definition specifically to be less probative than other available sources of evidence in this case, given the nascent state of cloud gaming. Instead, the Report focused on qualitative evidence about the likely evolution of cloud gaming in the future,[119] as well as wider evidence available regarding supply and demand side substitutability.[120] As is clear from the third party statements both cited by Microsoft in its submission and which were made to the CMA in the context of the investigation, this is a hypothetical question in a fast-growing and nascent market which third parties find challenging to answer and on which they have different perspectives.

94. Moreover, the SLC finding did not depend on a particular market definition. The Report makes it clear that a conclusion on the precise boundaries of the relevant market was not necessary, particularly in the context of a dynamic and nascent market.[121] The CMA's assessment that Microsoft holds a strong position in cloud gaming and is well-placed to compete in cloud gaming in the future, and that the constraint from PC and console gaming in the future will be limited, holds irrespective of where the precise boundary is drawn on market definition. Even if the statements identified by Microsoft caused us to change our view on the

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[117] NVIDIA told us that 'cloud gaming both complements and competes with PC gaming and console gaming' and 'cloud gaming also competes with console and PC gaming because it provides a potential substitute for console and PC purchases' (NVIDIA response to CMA RFI, [✂]). These are similar to the statement referred to by Microsoft as part of the US proceedings: 'GeForce NOW offers an alternative to downloading and playing PC games locally.' However, as described below [✂], we consider the fact that GFN takes customers from console and PC is not particularly informative on the question of whether console and PC are constrains on cloud gaming.

[118] [✂] response to the CMA's MCC/SR consultation, 4 August 2023, footnote 39. In our view it is not unusual for a newly launched service with a new product to cause migration from a more traditional product. However, this does not mean that customers who migrate from console to cloud gaming would consider switching back once they have moved.

[119] See, eg: evidence from two third parties going to the fact that cloud gaming will lead to a significant growth in gamers by making complex games more accessible at CMA, Final Report, 26 April 2023, paragraph 5.82; evidence from a third party going to the pattern of use of a standalone cloud gaming service (ie, not linked to a console) at paragraph 5.92; evidence from two third parties about the benefit of cloud gaming, and that it was drawing customers who were unable or unwilling to purchase console and PC hardware at paragraphs 8.49 and 8.52(a).

[120] See CMA, Final Report, 26 April 2023, paragraphs 5.83-5.93. 5.95 and 5.96 for demand-side considerations and paragraph 5.94 for an assessment of the supply side.

[121] This was explicitly noted at CMA, Final Report, 26 April 2023, paragraph 5.24.

appropriate market definition (which they do not) this would therefore not affect our finding on SLC.

Testimony on ability and incentive

95. As discussed in relation to the testimony on market definition, we spoke to and gathered evidence from the third parties referred to by Microsoft. We consider the articulation of a view different from our findings by a handful of third parties, especially on points where the CMA has relied on a large body of evidence,[122] is generally unlikely on its own to give rise to an SR.

96. In any event, we consider that none of the testimony cited by Microsoft undermines the findings in the Report, which were grounded in all the evidence available to us:

(a) Google: Google told us during our investigation that [✂].[123] [✂].[124] Microsoft's submission that Mr Zimring 'stated that they sought to have AAA games on their platforms' does not contradict this. While Microsoft submits that Mr Zimring 'did not suggest that these needed to include specific Activision titles',[125] we note that Mr Zimring was not asked about Activision titles or indeed whether any particular AAA titles were important.[126]

(b) SIE: We do not consider that Mr Ryan's statement materially affects the findings in the Report either. Activision content does not have to be the only input of importance to rivals for it to give rise to an ability to foreclose. More than one game may exist whose removal could substantially weaken the range of rival firms.[127]

(c) NVIDIA: Mr Eisler's statement in US proceedings that nothing marked Activision games out as unique 'must-haves' contradicts [✂].[128] [✂].[129] Assessing Mr Eisler's US testimony[130] in the round alongside all the other

[122] This included a consideration of submissions from the parties in which they said that Microsoft would not have the ability or incentive to foreclose, eg at paragraphs 8.289-8.291 and 8.354-8.357.
[123] CMA, Final Report, 26 April 2023, paragraph [✂].
[124] CMA, Final Report, 26 April 2023, paragraph [✂].
[125] Microsoft submission on MCC/SR, 25 July 2023, paragraph 80(b).
[126] *Federal Trade Commission v. Microsoft Corporation*, 3:23-cv-02880-JSC, (N.D. Cal.), transcript of evidentiary hearing (Volume 2, 23 June 2023), 476:20-479:21.
[127] In addition, the claim in Microsoft's submission that 'each of [these non-Activision games] could presumably have comparable pulling power to e.g., Call of Duty' appears (as indicated by the word 'presumably') to come from Microsoft rather than directly from Mr Ryan's testimony. Microsoft submission on MCC/SR, 25 July 2023, paragraph 80(c).
[128] CMA, Final Report, 26 April 2023, paragraph [✂].
[129] CMA, Final Report, 26 April 2023, paragraph [✂].
[130] We further note that this testimony was given after NVIDIA had entered an agreement with Microsoft, which may have impacted its perspective. See CMA, Final Report, 26 April 2023, paragraph 8.336 and footnote 1190.

evidence from NVIDIA, we do not consider that it materially affects our reasoning in the Report.

(d) Microsoft witnesses: Microsoft was able to make submissions to the CMA in relation to ability and incentive, and these were taken into account in the final report.[131] The points made in this testimony are not new and were made to the CMA in its investigation, including the claim made in Microsoft's submission[132] that the cost of streaming to Microsoft was higher than the revenue it gained from streaming.[133] These submissions had therefore already been taken into account in the Report.

Conclusion on the material from FTC court proceedings

97. As outlined above, we consider that the material disclosed through litigation between Microsoft and the FTC in the US has no material impact on any of the reasoning or conclusions set out in the Report. We therefore find that it does not, individually or cumulatively, constitute an MCC/SR for the purposes of section 41(3) of the Act. In any event, it does not cause us to reach a different remedy decision.

Material from CMA disclosure

Summary of Microsoft's submission

98. Microsoft's submission contains extracts from the CMA's file on market definition and the ability to foreclose (including new analysis by an economist of some of the data in relation to the ability to foreclose).

99. The evidence on market definition consists of:[134]

(a) Excerpts from notes of two calls between the CMA and [✂], which included statements that [✂] and that [✂].[135] It also included [✂] response to a hypothetical SSNIP[136] question.

(b) A witness statement submitted by [✂].'

100. The evidence on ability to foreclose consists of:

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[131] See Final Report, 26 April 2023, paragraphs 8.289-8.291 for Microsoft's views on the importance of Activision content. See, also, CMA, Final Report, 26 April 2023, paragraphs 8.354-8.357 for Microsoft's views on the incentive to foreclose.
[132] Microsoft submission on MCC/SR, 25 July 2023, paragraph 81.
[133] CMA, Final Report, 26 April 2023, paragraph 8.13(d).
[134] Microsoft submission on MCC/SR, 25 July 2023, paragraph 84.
[135] Microsoft submission on MCC/SR, 25 July 2023, paragraph 84 a.
[136] SSNIP stands for 'small but significant non-transitory increase in price'.

(a) New analysis by Dr Foschi, an economist advising Microsoft, on the top 10 games during [✂]. Firstly, Dr Foschi implicitly suggests that the CMA was wrong to place limited weight on the fact that CoD rarely featured in the top [✂] games,[137] and secondly submits that there was significant churn across the top titles during the testing phase.[138] He concludes that the data on top games does not necessarily support the conclusions taken by the CMA in the Final Report.[139]

(b) New analysis of the [✂] 'most requested games' data, where Microsoft submitted that [✂].[140]

(c) Excerpts from third party evidence in the CMA's file (and specifically evidence from [✂], [✂], [✂], [✂], [✂] and [✂]) suggesting, according to Microsoft, that Activision content was not 'special' among AAA games.[141]

Our assessment

101. As an initial observation in relation to this claimed MCC or SR, we note that this submission principally relates to evidence from the CMA's file which has come into Microsoft's possession through the litigation relating to this case. Given that this evidence was already before us when we took the decisions in the Report,[142] we consider it cannot give rise to an MCC because there is no change of circumstances.

102. Microsoft's submission concerns a selection of short extracts from the evidence in the CMA's file. However, the CMA assessed the evidence in its file in the round and considered the weight it was appropriate to place on different pieces of evidence in light of the specific context of the case. Such a submission is generally unlikely to give rise to an SR unless, for example, a significant error in the CMA's reasoning or conclusion is identified.

Market definition evidence

103. We believe that Microsoft's submission does not accurately reflect the CMA's [✂] call note. Specifically, in the excerpt of the call where Microsoft submits that [✂],[143] [✂] was referring to [✂].[144] In the context of substitution for market

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[137] Microsoft Second Expert report of Dr Matteo Foschi, 17 July 2023, paragraphs 15 to 20.
[138] Microsoft Second Expert report of Dr Matteo Foschi, 17 July 2023, paragraphs 21 to 24.
[139] Microsoft Second Expert report of Dr Matteo Foschi, 17 July 2023, paragraph 11.
[140] Microsoft submission on MCC/SR, 25 July 2023, paragraph 87. Microsoft refers to this as Dr Foschi's analysis. However, this is not contained within the Second Expert Report of Dr Foschi.
[141] Microsoft submission on MCC/SR, 25 July 2023, paragraph 93.
[142] The one exception is the [✂], quoted in Microsoft submission on MCC/SR, 25 July 2023, paragraph 84(b), which was submitted to the CMA after the publication of the Report alongside Microsoft's Notice of Application in the litigation related to this case.
[143] Microsoft submission on MCC/SR, 25 July 2023, paragraph 84 a.
[144] [✂] call note, [✂].

definition purposes the correct question is whether, when users' consoles are dated and not capable of playing the latest games, they will seriously consider *buying a new console* instead of cloud gaming.

104. In the excerpt where [✂] said '[✂]', this was in relation to [✂].[145] This view is not in line with Microsoft's position on market definition (as Microsoft has not argued that '[✂]' constitutes a single market). We consider the quote is more plausibly interpreted as a comment about the universe of entertainment options available to consumers than a proposed market definition for merger analysis. This evidence was before the CMA and does not change the reasoning or conclusions in the Report on market definition.

105. During our investigation, [✂] told the CMA categorically that it could not answer hypothetical questions on substitutability.[146] We consider this demonstrates the difficulties for third parties answering direct questions on market definition for this dynamic and nascent market, and [✂] later statements should be approached with appropriate caution given this context. We do not in any event consider that the statement now relied on by Microsoft materially affects our assessment of market definition.

Evidence on ability

[✂] analysis

106. The Report contained a wide range of evidence on Microsoft's ability to foreclose cloud gaming rivals, spanning 30 pages.[147] Each of the two [✂] analyses (on most requested game data and [✂] trial data) formed only a small part of our reasoning in the Report. Our starting point is therefore that it would be unlikely for any submission on the [✂] analysis to constitute an SR in isolation.

107. Furthermore, several of the points made by Microsoft and new analysis by Dr Foschi, an economist advising Microsoft, were known to the CMA in reaching its decision in the Report. Indeed, we noted that [✂] during the [✂] in the Report.[148] We also recognised and explained the difficulties with the [✂] data, taking this into account in determining how much weight to place on this analysis.[149] As part of this assessment, we also took into account Microsoft's submissions.[150]

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[145] [✂] call note, [✂].
[146] [✂] response to CMA RFI, [✂]
[147] Not including the extensive analysis of Microsoft's ability to foreclose SIE in console gaming (which formed a part of our reasoning).
[148] CMA, Final Report, 26 April 2023, paragraph 8.301.
[149] See, for instance, CMA, Final Report, 26 April 2023, paragraphs 8.304 and 8.305.
[150] CMA, Final Report, 26 April 2023, paragraph 8.303.

108. Microsoft's submissions therefore essentially constitute further analysis on points which were already considered in the Report. As explained above, re-arguing part of the case on the merits cannot constitute an SR within section 41(3) of the Act.[151] Microsoft having received further underlying evidence from the CMA's file – in circumstances where the CMA had already fully discharged its duty to consult in providing the gist in its Provisional Findings and Report – does not change this position.

109. Finally, while Dr Foschi argues that his analysis suggests CoD is not a critical input or of critical importance to cloud gaming,[152] as noted below and as described in the Report,[153] our SLC finding was not dependent on CoD being a critical input, 'must-have', or the *most* sought-after game. Rather we considered Activision content to be 'particularly important.'[154]

110. In any case, we consider the points made by Microsoft and Dr Foschi regarding the two [✂] analyses are very marginal and have little impact on the specific analyses, let alone the conclusion, on ability. Therefore, for the reasons given above, we do not consider Microsoft's submissions on the [✂] analyses change our assessment of ability. In any case, we have considered the submission in more detail in the Annex to this decision and, even in the absence of the above points, we find that these submissions do not materially change our assessment of the [✂] analyses. In these circumstances, they do not have a significant impact on the reasoning in the Report.

Third party evidence

111. We do not consider that any of the extracts from third-party evidence in Microsoft's submission reveal material new information or errors in relation to the Report's reasoning and conclusions on the importance of Activision's content to cloud gaming.[155] As such, they do not constitute an MCC or SR. As noted above, the CMA assessed the evidence in its file (including all evidence referred to in paragraphs 8.287-8.328 of the Report) in the round and considered the weight it was appropriate to place on different pieces of evidence in light of the specific context of the case. The extracts Microsoft picks out in isolation must be seen in that context.

112. In any event, to the extent Microsoft is suggesting Activision games need to be the most popular games when arguing that this evidence shows 'that Activision games

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[151] *Groupe Eurotunnel S.A. v CMA* [2015] CAT 1, [95].
[152] Microsoft Second Expert report of Dr Matteo Foschi, 17 July 2023, paragraphs 14, 20, 21, 24 and heading between paragraph 11 and 12.
[153] CMA, Final Report, 26 April 2023, paragraph 8.346.
[154] CMA, Final Report, 26 April 2023, paragraph 8.346.
[155] This can be found in CMA, Final Report, 26 April 2023, paragraphs 8.287-8.328.

are not "special" amongst AAA games',[156] we note our SLC finding was based on an assessment that Activision content would be 'particularly important' in cloud gaming.[157] In other words, Activision content did not need to be critical or the most sought-after games for the purposes of the analysis. Instead, we found that Activision games were sufficiently important that rivals would be weakened as competitors if they no longer had access, and this weakening of rivals was sufficient to harm competition overall. This would be the case even if other AAA games not produced by Activision were also as popular.

113. Further, and in any case, assessing each of the specific excerpts of evidence cited by Microsoft from [✂],[158] [✂],[159] [✂],[160] [✂],[161] [✂],[162] and [✂],[163] we do not think that any of these excerpts, individually or combined, undermine or significantly affect the analysis or conclusions reached in the Report.

Conclusion on CMA disclosure material

114. We consider that the CMA disclosure material Microsoft cites has no material impact on any of the reasoning or conclusions set out in the Report. Dr Foschi's submission comprises further analysis of points already made in the Report along with an alternative interpretation of the data, and disputes points we did not make in determining our SLC finding. In any case, the [✂] analysis was of limited significance to our overall conclusion on ability. None of the third-party statements on either market definition or the importance of Activision games reveals material new information or errors in reasoning in the Report. Therefore, we find that these matters do not, individually or cumulatively, constitute an MCC or SR for the purposes of section 41(3) of the Act. In any event, they would not cause us change to the remedy decision.

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[156] Microsoft submission on MCC/SR, 25 July 2023, paragraph 93.
[157] CMA, Final Report, 26 April 2023, paragraph 8.346.
[158] [✂], in the quoted excerpt, was describing [✂] (see for instance paragraph [✂] of the Final Report).
[159] [✂] is not a participant in the cloud gaming market and in any event we consider the view provided implies an unrealistically wide market that encompasses all forms of media and entertainment.
[160] The quoted excerpt from [✂] expresses [✂] view in general terms about the level of competition in the market, rather than on the importance of Activision games.
[161] In its response to the RFI that Microsoft cited in its submission, [✂] did note that it was unable to differentiate between the importance of specific games. However, in that same response [✂] also told the CMA that 'Activision is an important content provider for any cloud gaming service'. [✂] response to the CMA's RFI [✂].
[162] As noted by Microsoft itself in its submission, [✂] internal documents describe Activision as having a 'critical IP portfolio' (see, relatedly, Final Report, paragraph 8.300(a)).
[163] The [✂] excerpt quoted in Microsoft's submission is ambiguous, stating that Activision games are [✂] but also describing Activision's content as [✂] and describing Activision games such as CoD as being [✂]. (Microsoft submission on MCC/SR, 25 July 2023, paragraph 93(a).) We also considered internal documents showing that [✂] (Final Report, paragraphs 8.300(b) and 8.300(c)).

Modified RMS proposal

115. In addition to the submissions considered above, Microsoft noted it intends to put forward a proposal for a modified RMS to that considered in the Report and the proposed Order would be 'superseded'. Microsoft notes that, while such an arrangement *might* itself be considered an MCC or SR under section 41(3) of the Act, Microsoft's position is that it would amount to a new RMS within the meaning of section 33 of the Act.[164] Accordingly, a submission relating to a proposed restructure was not before the Group at the time of this decision for the purposes of deciding the question under section 41.

116. One third party [✂] has submitted that the MCC/SR assessment relates to the RMS as considered in the Report, and that it would be inconsistent with the Act and the merger control system for a restructured transaction (or a 'disguised remedy') to be considered under section 41(3).[165] However, given the lack of detail or a submission for the Group to assess for the purposes of section 41(3) of the Act, it is not necessary for this to be determined in the present circumstances.

Overall conclusion on MCC/SR

117. As explained above, while there is some impact on certain aspects of the reasoning in the decision arising from the Cloud Agreements and the Sony Agreement, these developments do not affect a significant aspect of the analysis in the Report or impact our decisions either individually or cumulatively. As a result, they do not constitute MCCs/SRs for the purposes of section 41(3) of the Act, and they would not lead the CMA to decide the remedies question differently.

118. Given our conclusions that the material from the FTC court proceedings and CMA disclosure has no material impact on the reasoning or conclusions set out in the Report, and would not result in a change to the remedy decision, we do not consider that when these points are all considered cumulatively the position is any different.

119. In these circumstances, we find that the developments submitted by Microsoft do not individually or cumulatively constitute an MCC or SR under section 41(3) of the Act such that it is necessary or appropriate to depart from our decision in the Report to prohibit the Merger.

Assessment of impact on remedy decision/implementation

120. For the reasons set out above, we do not consider that any of the developments raised by Microsoft amount to MCCs since the preparation of the Report or

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[164] Microsoft submission on MCC/SR, 25 July 2023, paragraphs 9 and 98.
[165] [✂] response to the CMA's MCC/SR consultation, 4 August 2023, pages 11-14.

otherwise constitute an SR, either individually or cumulatively, for the purposes of section 41(3) of the Act.

121. In circumstances where we have not found an MCC/SR, the Tribunal has been clear that we should not re-open our remedies decision (in this case, prohibition of the Merger).[166] The remedies decision and our reasons for it are already assessed in Chapter 11 of the Report and, absent an MCC/SR, this decision stands and should not be re-opened.

122. Notwithstanding this, even if the developments raised by Microsoft did require us to revisit our remedies decision, we do not consider that any of the developments discussed above, including the limited impact on certain parts of the reasoning resulting from the Cloud Agreements and Sony Agreement, would lead to a different decision on remedies.

(a) First, our assessment of the effectiveness of prohibition is unchanged[167] and our assessment of the effectiveness of the Microsoft Cloud Remedy is largely unaffected.[168] Even taking account of the potential effects of the Commission Commitments on the circumvention risks outlined in the Report, our other concerns as set out in the Report remain,[169] and the Microsoft Cloud Remedy would therefore remain ineffective.

(b) Second, the proportionality assessment in the Report is unaffected.

(i) RCBs: we consider that the assessment[170] set out in the Report in relation to the claimed Nintendo RCB, the claimed Mobile Gaming RCB and the claimed Game Pass RCB[171] would not change if the developments outlined above required the CMA to revisit its decision on remedies. We have already addressed the impact on the Cloud Gaming RCB above, and we consider that the key reasons that these agreements do not qualify as an RCB under the Act still stand. For instance, we still do not consider that the claimed Cloud Gaming RCB meets the requirements of section 30(3)(b) of the Act.[172]

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[166] See *Ryanair Holdings plc v Competition and Markets Authority* [2015] CAT 14, [110] discussed in the Legal Framework section above. One third party [✂] made a similar observation in its submission to us, quoting this same paragraph of the Tribunal's *Ryanair* judgment. [✂] response to the CMA's MCC/SR consultation, 4 August 2023, page 6.
[167] CMA, Final Report, 26 April 2023 paragraphs 11.36-11.38.
[168] CMA, Final Report, 26 April 2023 paragraphs 11.78-11.132.
[169] See paragraph 46 above.
[170] CMA, Final Report, 26 April 2023 paragraphs 11.195-11.212, 11.217-11.226, 11.233-11.263.
[171] We note that Microsoft has increased the price of Game Pass since the Report, which in any event can be expected to reduce the impact of the Game Pass RCB – the only RCB found to qualify in the Report. At paragraph 11.256 of the Report, we found that even a small price increase would have a significant effect on the scale of benefits. See further: Eurogamer 'PSA: Xbox Game pass prices go up today', 6 July 2023 accessed by the CMA on 17 August 2023.
[172] CMA, Final Report, 26 April 2023 paragraphs 11.173-11.189.

(ii) Proportionality of prohibition: we consider that the reasons and conclusions set out in the Report[173] would not change if the developments outlined above required the CMA to revisit its decision on remedies. As set out above, the developments submitted by Microsoft do not affect a significant aspect of the analysis in the Report or impact our decisions either alone or cumulatively, ie the SLC decision set out in the Report remains unchanged. We therefore still consider that there would be substantial adverse effects arising from the Merger and these adverse effects are likely to endure and grow over time as the market for cloud gaming services develops. We also still consider the costs of the remedy by forgoing the claimed Game Pass RCB are significantly outweighed by the scale of the harm expected to arise from the SLC.[174]

(iii) International context: we consider that the reasons and conclusions set out in the Report[175] would not change if the developments outlined above required the CMA to revisit its decision on remedies. As part of the proportionality assessment in the Report, we had regard to the international context of the Merger and the Tribunal's comments that 'the demands of comity do require the CMA to be at least conscious of the international dimension' and that 'in international cases, regard needs to be had (even if it is not determinative or even immaterial) to the wider context'.[176] The only relevant development since the Report in this regard is the Commission's decision to accept the Commission Commitments. If we were required to revisit our decision on remedies, the reasoning on this point in the Report would still support our decision to prohibit the Merger. For instance, we maintain the view that, in circumstances where we have found that the only effective remedy to address the SLC and its adverse effects in the UK is prohibition, the fact that this will necessarily have an impact outside the UK does not conflict with the principles of international comity. The statutory basis under section 86 of the Act for imposing remedies that extend to a person's conduct outside the UK if that person is carrying out business in the UK is also still relevant. The Commission's subsequent decision to accept the Commission Commitments does not therefore change our conclusion that prohibition is a proportionate remedy that respects the principles of international comity, notwithstanding its extra-territorial effects.

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[173] CMA, Final Report, 26 April 2023 paragraphs 11.283-11.296 and 11.307.
[174] CMA, Final Report, 26 April 2023 paragraphs 11.289, 11.296. See also footnote 171 above regarding the development in the Game Pass RCB in this regard.
[175] CMA, Final Report, 26 April 2023 paragraphs 11.297-11.303.
[176] *Meta Platforms Inc. v CMA* [2022] CAT 26, 14 June 2022, at [127(1)] and [129].

123. Microsoft also made certain submissions relating to the precise terms of the proposed Order. These submissions are not related to the question of whether there has been a material change of circumstances or special reason for deciding differently under section 41(3) of the Act. These submissions are discussed in our Notice of making the Final Order.

124. Section 41(3) of the Act is clear that where there has been no MCC or SR for deciding differently, we must implement remedial action that is consistent with the decision in the Report. In Chapter 11 of the Report, we decided that prohibition of the Merger would be an effective and proportionate remedy to address the SLC in the market for cloud gaming services in the UK and its resulting adverse effects.[177] We have accordingly decided to implement a Final Order to effect prohibition of the Merger.

[177] CMA, Final Report, paragraph 11.311.

Annex

125. We explained in paragraphs 106-110 the key reasons why we consider Microsoft submissions regarding the [✂] analysis do not change our assessment of ability. This Annex contains further assessment of the detail on those submissions.

126. Dr Foschi's report submitted that some of the reasons given by the CMA for why little weight was placed on the [✂] analysis were inconsistent with the evidence. In particular, Dr Foschi's report submitted that the data was inconsistent with the CMA's view that some gamers may not have decided to invest in an expensive game like CoD, given there was no certainty the service would have continued after the testing phase.[178] This is because:

(a) [✂]% of [✂] games in the top 10 during the period were pay-to-play (P2P) and it was unclear why the reasoning would be different for [✂];[179] and

(b) Xbox telemetry data shows that CoD gamers concentrate their gametime in a short period of time.[180]

127. However, we found that most games in the top 10 list by playtime were *either* [✂].[181] This is in contrast with CoD, which is [✂].

128. In our view it is also not clear why the fact that [✂]% of gametime occurs on average in [✂] would mean customers would feel comfortable spending £[✂] on a game when they do not know if or when the service would shut down.[182] First, users may not know in advance when most of their game-time would occur, and second, it seems an unrealistic assumption that users would have no problem purchasing a game they may be able to [✂].

129. Dr Foschi's report also did not engage with the evidence on Overwatch, an Activision game, which consistently features in the top [✂] played games during the [✂],[183] and was the [✂] during most of the period.

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[178] Dr Foschi's report also agreed that [✂] users with a gaming PC may simply play CoD natively, but stated this is evidence of substitution between native gaming and cloud gaming. We disagree that it is evidence of substitution. It is likely there are gamers who already have CoD and a gaming PC and wanted to test out [✂]. The fact they try it and move back to playing on their PC is not evidence of substitution however, as *they already own the gaming PC.* In the context of substitution for market definition purposes the correct question is whether, when their gaming PC is dated and not capable of playing the latest games, will they seriously consider *buying/upgrading* a gaming PC instead of using [✂]. In addition, Dr Foschi did not engage with all of the reasons we gave for placing limited weight on the [✂] analysis. For instance, in 8.304 (e) of the Final Report we noted that data was at the game rather than franchise level and so it was possible that the CoD franchise overall may have appeared in the top [✂] list more frequently even if individual games did not.
[179] Microsoft Second Expert report of Dr Matteo Foschi, 17 July 2023, paragraph 17.
[180] Microsoft Second Expert report of Dr Matteo Foschi, 17 July 2023, paragraph 18 to 20.
[181] [✂] response to the CMA's RFI [✂] and CMA analysis, [✂].
[182] Or even if not shut down, how much it would cost once the trial ends.
[183] As referred to in paragraph 8.305 of the Final Report.

130. Dr Foschi's report argues that the data from the [✂] shows that there was significant churn amongst the top titles (and as such no single game drives platform adoption).[184] However, in our view, a game can be very important and still see some weekly and monthly fluctuation in ranking. Moreover, we do not consider Dr Foschi's report shows that churn is significant. The alleged churn could also be attributable to specific factors like games becoming available on [✂], significant price changes (including becoming F2P), and the growth of [✂] displacing games similar to it during that period. In addition, there were games that stayed consistently at the top of the rankings, like [✂].

131. Finally, Microsoft submitted that [✂] were generally more highly requested.[185] However, we note that the difference between [✂] most requested game rankings are small. CoD was [✂], but often [✂]. Therefore, even if it the UK market were more like [✂] than [✂], this would make a marginal difference to our assessment, given whether CoD is [✂] does not materially change our view.[186]

[184] Microsoft Second Expert report of Dr Matteo Foschi, 17 July 2023, paras 21 to 24.
[185] Microsoft submission on MCC/SR, 25 July 2023, paragraph 87.
[186] Microsoft also submitted that the most requested game data is unrepresentative of the wider cloud gaming customer base in the UK and the actual number of requested games accounts for a tiny proportion of MAUs. We agree that the data is unlikely to be representative and accounts for a very small proportion of MAUs. However, we have not sought to take percentages, or other statistical inferences away from this evidence. We consider the fact that people pro-actively mention CoD as one of the [✂] most requested games as relevant evidence – ie simply that it is one of the most popular games not currently on [✂], rather than suggesting what percentage want a certain game.