MARKET INVESTIGATION INTO CLOUD SERVICES

MICROSOFT'S LICENSING PRACTICES
CFSL SUBMISSION ON ROUTES TO INTERVENTION

CONTAINS BUSINESS SECRETS

May 1, 2025

Executive Summary

1. By the time of the Final Decision in these proceedings, Ofcom and subsequently the CMA will have been reviewing the cloud infrastructure sector for 2 years and 9 months. The findings in the Provisional Decision Report (**PDR**) have reached sound conclusions regarding Microsoft's anti-competitive licensing practices, based on extensive evidence. And the PDR identified proportionate, effective remedies that could bring the identified harms from Microsoft's practices to an end.

2. The stage is therefore set for interventions that will facilitate customer choice of cloud infrastructure providers, support the sector's growth, encourage investment, and allow providers to compete on the merits. However, none of these outcomes will materialise if interventions come too late to make a difference. The sector stands at a critical juncture, with many new customers considering a move to cloud infrastructure for the first time, whilst further Microsoft licensing restrictions are due to take effect in September 2025. Without swift, targeted intervention, the strong, detailed, in-depth work that the CMA has carried out could be in vain.

3. With this in mind, the CFSL disagrees with the PDR's proposal *not* to impose any remedies directly, and instead to rely exclusively on recommending a future investigation under the Digital Markets, Competition and Consumers Act 2024 (**DMCCA**); initially to assess whether Microsoft has 'strategic market status' and, if so, to "*consider imposing appropriate interventions such as those identified in this report*" (PDR, paragraph 9.91(b)).

4. In CFSL's view, this would be an historic mistake. Mere recommendations for DMCCA proceedings – with no near-term intervention – would introduce excessive delay, unnecessary duplication of work, a waste of CMA resources, and uncertainty of outcome. It is, moreover, unnecessary, since the CMA already possesses the tools to intervene swiftly as part of the market investigation under the Enterprise Act 2002. The PDR's concerns that market investigation remedies would be insufficiently comprehensive – or introduce regulatory conflict with the DMCCA – are misplaced. If the CMA nonetheless felt unable to impose remedies as part of the market investigation for some reason, another option (albeit a less suitable one, in CFSL's view) would be to impose interim measures as part of a Competition Act 1998 case.

5. In this paper, Section A explains that the CMA has a sufficient evidential basis for intervention, and further fact-gathering under a DMCCA investigation is unnecessary. Section B explains that the cloud infrastructure sector is at a critical juncture, rendering swift intervention essential. Section C explains that intervention under the DMCCA risks delay, uncertainty of outcome, and duplication of work. Section D explains why direct remedies under the market investigation are warranted. Section E explains that swift intervention under the Competition Act is also possible. Section F concludes.

A. Further Fact-Gathering on Microsoft's Practices is Unnecessary and Would Render the CMA's Prior Efforts Wasted

6. The CMA's findings follow a rigorous assessment of the effects of Microsoft's practices, following an extensive investigation.

   6.1. Based on our members' experiences, the CMA will have processed dozens of requests for information from market participants, many of which focused on the effects of Microsoft's licensing practices.

   6.2. The CMA commissioned interviews with market participants through the Jigsaw market research and held six hearings with Microsoft, AWS and Google Cloud, each of which involved discussions of Microsoft's licensing practices.

   6.3. The CMA produced a 102-page working paper on Microsoft's licensing practices and dedicated 125 pages in the PDR (over a fifth of the total report) solely to this issue.

   6.4. The CMA produced a detailed analysis of Microsoft's market power in related software markets and a methodology paper for analysing SPLA input costs.

   6.5. The CMA even extended the statutory deadline for the investigation by 4 months, on the basis that the CMA needed additional time to *"ensure a thorough and appropriate consideration of the* [licensing practices theory of harm]".[1]

7. Moreover, Ofcom also received submissions and evidence as part of its market study, which informed the CMA's decision to investigate the "*exact nature of the licensing practices*" from the outset of this investigation.[2]

8. Accordingly, any suggestion that Microsoft's licensing practices require yet further investigation is wrong and would be an unnecessary use of the CMA's resources given the careful attention that the CMA has paid to the issue already. It would effectively render the CMA's current efforts in the Cloud MIR a waste of resources. It could also cause observers to lose faith in the UK competition regime's effectiveness and ability to take action. At a certain point, the analysis has to conclude and remedies have to be brought forward. That moment is now.

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1 Notice of extension of inquiry period dated 19 September 2024, CMA Cloud Market Investigation.

2 See eg. paras. 32-35 of the CMA's original Issues Statement dated 17 October 2023, noting that the CMA received submissions relating to Microsoft's pricing-related, quality-related and interoperability practices, which Ofcom considered could risk dampening competition in cloud services.

B. The Cloud Infrastructure Sector is at a Critical Juncture

9. Swift intervention is now critical.

10. Cloud service revenues are seeing sustained year-on-year growth in the UK, and are a key driver of the UK's digital economy.[3] The CMA has rightly acknowledged that cloud services provide vital infrastructure and support businesses and organisations across the UK economy, with spending on cloud services by UK businesses and organisations reaching £9 billion in 2023.[4]

11. Yet, as ever more businesses move to cloud platforms for the first time, customers are being driven to use Azure because of Microsoft's restrictive licensing practices, even where AWS or Google Cloud provide a more compelling offer, and would be their service-provider of choice. And once those customers move to Azure, a switch to another cloud provider – on the CMA's own analysis[5] – would run into material cost-related and other barriers.

12. Matters are only getting worse. From 30 September 2025 onwards, customers will no longer be able to buy and deploy Microsoft licenses from independent managed service providers, if those providers host their services on Listed Providers' clouds (ie. AWS, Alibaba and Google Cloud) (**2022 Changes**).[6] Soon, hosted service providers will no longer be able to run their solutions on the cloud infrastructure of their choice or supply customers with SPLA licences for Microsoft software to be used with their hosted solutions – instead, they will need to run their solutions on Azure to maintain their ability to supply SPLA licences. This change *further* restricts customers' ability to select the IT provider of their choice, resulting in continued and sustained harm to UK customers and a distortion of the UK competitive landscape.

13. Interventions to address Microsoft's practices – and to protect cloud's contribution to the UK's growth mission – are vital for UK customers and the economy[7], and should therefore

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3 TechUK, Cloud computing and the journey to net zero, 24 April 2024. Last accessed 24 April 2025.

4 CMA Cloud services market investigation: provisional findings. Last accessed 24 April 2025.

5 See eg. PDR, Licensing Summary, p. 321 (*"We also considered any differences in the quality of Windows Server and SQL Server when used on Azure compared to non-Azure Clouds... [which] may be a particularly important input in terms of the overall quality or attractiveness of AWS' and Google's competitive offerings")* and (*"We have examined the price and non-price differences between the software Microsoft offers Azure customers and that which it supplies to its rivals [and] found that the wholesale price paid by AWS and Google [is] higher than Microsoft's retail price to its [customers that qualify for Azure Hybrid Benefit].*") See also Jigsaw Research para. 1.4.35 (*"the research did not find many organisations who were Microsoft users, who had initially gone with Azure, and who had then switched away to another provider*") and para 3.7 ("*This [Azure single-cloud customer] is not considering switching provider. He recently evaluated other major cloud providers, like AWS, and could not see any major business benefit to switching given the complexity [of switching from Azure] and cost of switching*").

6 Microsoft, New licensing benefits make bringing workloads and licences to partners' clouds easier, 29 August 2022. Last accessed 29 April 2025.

7 See comments from Doug Gurr, CMA Interim Chair, CMA Annual Plan 2025 to 2026.

be prioritised in line with the UK Government's strategic steer.[8] The CMA's proposed licensing remedies do exactly that; they would promote competition, growth and investment. Delaying intervention at this critical juncture would undermine – not support – UK growth.

C. Deferring Matters to the DMCCA Would Create Delay, Uncertainty and Duplication

14. The PDR sets out the unambiguous (albeit provisional) conclusion that Microsoft's licensing practices give rise to an adverse effect on competition and that the conditions for imposing remedies have been satisfied. If followed through with remedies, Microsoft's licensing practices could be addressed within a few months, creating certainty for all market participants – suppliers and customers alike. *Deferring* the matter to the DMCCA a would cause delay, uncertainty, and duplication of regulatory processes.

i. DMCCA processes could cause delay

15. DMCCA proceedings could result in an approximately 18-month process (or longer) until remedies take effect. This could leave Microsoft free to continue its anti-competitive licensing practices until around August 2026; almost four years after Ofcom's market study into the cloud infrastructure sector began.

15.1. ***Potential ~3-month delay to begin an SMS investigation.*** There is no guarantee that an SMS investigation into Microsoft would begin as soon as the Final Report in the current proceedings is issued. The Inquiry Group can only recommend launching an investigation - it is the CMA board that is the ultimate decision-maker with discretion over whether to launch a DMCCA designation investigation and when to do so. CFSL understands that SMS investigations are resource-intensive, potentially covering a large number of 'activities', particularly in Microsoft's case. And in circumstances where the CMA will have three existing SMS investigations at an important phase, it is unclear whether the Digital Markets Unit would have capacity to open a new SMS investigation into Microsoft straight away. It seems possible, therefore, that an SMS investigation might not be opened until October when the current SMS investigations are due to conclude, instead of July when the Final Report is due to be issued.

15.2. ***At least a 9-month investigation to determine SMS.*** In principle, the CMA could conclude its SMS investigation into Microsoft before the 9-month deadline. This seems unlikely, though, in view of (i) the large number of Microsoft products that will need to be considered; (ii) the extensive consultation that occurs as part of SMS investigations; and (iii) the fact that none of the CMA's currently open

[8] Strategic steer to the CMA, 13 February 2025. Last accessed 24 April 2025. ("*In all areas where the CMA has discretion over which reviews, studies or investigations to commence, and in all cases where the CMA is considering remedies, the CMA should give appropriate consideration to: prioritising pro-growth and pro-investment interventions [...]*")

investigations is due to conclude earlier than the 9-month statutory deadline.[9] The CMA is therefore no more likely to conclude the putative SMS investigation *early* than it is to *extend* the SMS investigation by 3 months (per section 104(1) DMCCA), particularly given that the CMA needed to extend the Cloud MIR by 4 months, given the complexities arising, and despite having investigated for approximately 12 months at that stage.

15.3. ***Potential ~3 to 4-month delay to consult on conduct requirements.*** There is no statutory time-limit to impose conduct requirements under the DMCCA. The CMA's current practice – as described in a speech from the CMA's Chief Executive in March 2025 – is to defer consultation on conduct requirements until after the SMS investigation has completed.[10] While there is no fixed deadline in place, a 3- or 4-month period seems like the minimum time that would be needed to prepare a list of potential remedies, launch a consultation, give participants a reasonable period of time to respond, consider feedback received, and decide on which remedies (if any) to pursue. Moreover, this assumes that the potential SMS firm will embrace the CMA's call for a collaborative and participative approach[11] - whereas Microsoft's strategy in the Cloud MIR has been to fight the CMA at every corner, with baseless arguments that the CMA was nonetheless duty-bound to consider, even though it was apparent such arguments would fail. We explore the likelihood of Microsoft repeating this approach further at paragraph 22.

15.4. ***Potential 2-3-month implementation period.*** Remedies do not necessarily come into effect immediately. Instead, firms may be given an 'implementation period' to come into compliance with conduct requirements. While the CMA's Digital Markets Guidance does not indicate how long these periods will be, previous cases suggest that a 2-3 month period is plausible.

15.5. ***Potential further delays if the CMA treats licensing issues as a PCI.*** It is possible that the CMA may decide that interventions should take the form of a PCI rather than a conduct requirement,[12] which could only occur *after* a PCI investigation[13]. And PCI investigations cannot start until *after* a firm is designated with SMS (the result being that the earliest an AEC can be found under the DMCCA is at least 18

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9 For example, the indicative timetable proposed in the SMS designation process for Apple is nine months, despite Apple already responding to the CMA's market investigation into mobile browsers and cloud gaming. See CMA Indicative Timetable, last accessed 25 April 2025.

10 See comments from Sarah Cardell, Promoting Competition and Protecting Consumers in the Digital Age, 13 March 2025.

11 See eg. evidence from Sarah Cardell to UK Parliament Communications and Digital Committee, in response to Q10, on 7 January 2025 ("*Our starting point is that, absolutely, we would like, we expect and we hope to pursue a participative approach; this is the conversation [Sarah Cardell and Will Hayter] have both had with a number of firms*").

12 For example, because pro-competition orders under the DMCCA can contain any provision that can be imposed following a market investigation reference (DMCCA Guidance, para. 4.65) whereas CRs must fall within a permitted category.

13 DMCCA Guidance, para. 4.1.

months after an SMS investigation has been launched). This would add at least a further 9-month delay for a PCI investigation, plus the additional time required to trial and test interventions. Although it is the CFSL's position that the proposed remedies can be imposed as CRs, the Digital Markets Unit would need to consider Microsoft's arguments without pre-judging them as a principle of law. The outcome would necessarily be uncertain.

16. Adding unnecessary delay would contravene one of the CMA's 'four Ps' – pace – which means ensuring that the CMA's "*work in digital markets is developed and implemented at a pace that keeps up with market dynamics – and avoids creating protracted uncertainty that could chill investment and innovation*."[14] Delaying action where there is a clear problem to be solved, and an immediate remedy available to address it, also runs counter to the CMA's ambitions to enhance business and investor confidence in the UK's competition regime by moving "*as quickly as possible to get to the right decisions*".[15] This is particularly pertinent given there is a real risk that interventions, which the CMA has already identified as necessary, will be made less effective if there are delays in implementation.

ii. DMCCA processes would create significant uncertainty

17. Deferring the issue of Microsoft's licensing practices to DMCCA proceedings renders the outcome highly uncertain. There is no guarantee that the carefully evaluated conclusions and remedies set out in the PDR will be maintained.

a) *DMCCA remedies could give Microsoft undue latitude.*

18. Under the DMCCA, the CMA can impose either conduct requirements (**CRs**) or pro-competitive interventions (**PCIs**). Conduct requirements are requirements as to how an SMS firm must conduct itself in relation to a relevant digital activity,[16] and the CMA's aim is to "*set standards of conduct to ensure positive outcomes for businesses and consumers*."[17] The starting point is that CRs will initially take the form of "*higher-level requirements*"[18] to allow for greater flexibility in the specific steps an SMS firm needs to take. CRs can be imposed from the date on which a firm is designated with SMS.

19. Given that the DMCCA Guidance indicates a preference to impose higher-level CRs initially (at least in principle), it is reasonable to assume that Microsoft will argue that it should be given the opportunity to test higher-level CRs before more detailed CRs are imposed. And each time the CMA wanted to iterate, it would need to consult on a new or

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14 See comments from Sarah Cardell, Promoting Competition and Protecting Consumers in the Digital Age, 13 March 2025.

15 See CMA blog post by Sarah Cardell, New CMA proposals to drive growth, investment and business confidence, 13 February 2025.

16 DMCCA Guidance, para. 3.5.

17 DMCCA Guidance, para. 3.24.

18 See eg. Principle 3, DMCCA Guidance, para. 3.29(c).

revised CR, adding months of delays, allowing Microsoft to entrench its position further each time and never bringing a definitive end to its practices.

20. While the CMA could alternatively impose a PCI, which might involve more detailed obligations that give Microsoft less latitude, that would entail significant delay (as explained at paragraph 15.5). Again, therefore, this avenue would represent both uncertainty and delay.

21. Microsoft has steadfastly refused to accept that its licensing practices are harmful, despite the concerns being raised for many years in the UK and by regulators across the world. Its refusal to engage has also required the CMA (and third parties) to unnecessarily dedicate significant resources to demonstrate that its practices are unfair and restrictive, while refusing to offer concessions at any stage. Far from engaging in a collaborative spirit, Microsoft has chosen to do the opposite. There is no evidence to suggest that this will change under the DMCCA.

b) ***DMCCA gives Microsoft a chance to relitigate key issues.***

22. Relatedly, an SMS investigation would give Microsoft the chance to relitigate key issues where its arguments have already failed or it failed to raise them at the appropriate time.

23. For example, Microsoft's Response to the Licensing Working Paper was inconsistent with the legal framework for finding an AEC, and urged the CMA to use an artificial, ill-conceived analysis that disregarded the impact of its conduct and evidence of foreclosure effects. The PDR examined the issue in detail and the CMA has - correctly - dismissed Microsoft's analysis. There is no reason to re-litigate this issue, nor is there a reason to defer licensing remedies to a separate investigation. And yet a new DMCCA investigation would hand Microsoft precisely that opportunity, with the CMA being forced to reconsider the issues afresh.

24. The need for concrete action to address Microsoft's harmful software licensing restrictions is especially visible as Microsoft has engaged in a pattern of behaviour of agreeing targeted deals and assurances with specific complainants that ultimately fail to provide the freedom and fairness customers deserve. Indeed, the licensing changes made in October 2022, were only introduced by Microsoft as part of its private settlement with OVHcloud, Aruba and the Danish Cloud Community in exchange for their withdrawal of their antitrust complaint filed with the European Commission on 10 June 2021. More recently Microsoft agreed a USD 21.7 million settlement agreement with the Cloud Infrastructure Services Providers in Europe ("**CISPE**") on 11 July 2024.[19] However, the European Cloud Computing Observatory, an organisation set up to review progress on the settlement agreement, has classified the overall status of the action points for Microsoft to do as part of the settlement agreement with CISPE as "*off-track*".[20] For example, price rises for Windows Server under

[19] See eg. https://fairsoftwarelicensing.com/news/statement-on-microsofts-private-settlements-with-european-cloud-providers/.

[20] See eg. https://cispe.cloud/website_cispe/wp-content/uploads/2025/02/ECCO-first-report-Microsoft-FINAL.pdf.

the SPLA have not been reflected in prices rises for Windows Server on Azure, which contravenes Microsoft's commitment to avoid any price discrimination in SPLA prices. Ensuring a lengthy further delay under the DMCCA will therefore only embolden Microsoft to continue restricting customers' freedom to select IT providers of their choice by negotiating specific settlement agreements with complainants, without following through on the actions required under the settlement agreement and ultimately leaving complainants at the mercy of Microsoft.

25. Furthermore, Microsoft continues to demonstrate that it will not change its practices voluntarily. Microsoft announced on 30 April 2025 that it would provide 'new' European digital commitments, but that it would not end the software licensing practices that the CMA has provisionally found to give rise to an AEC.[21]

iii. Deferring Microsoft's licensing practices to the DMCCA would create unnecessary duplication

26. If an SMS investigation was launched in August 2025, the DMU case team would not necessarily have access to the knowhow of the current Cloud MIR case team, creating unnecessary delays and duplication, and resulting in an unnecessary use of CMA resources. Even if the Cloud MIR team were to transfer over submissions and evidence from the Cloud MIR, the DMU team are not permitted to 'pre-judge' the outcome of any SMS investigation – effectively, they must re-start the inquiry.

27. Moreover, even if the CMA was minded to recommend that an SMS investigation into Microsoft is opened, that does not necessitate closing every aspect of *this* investigation, nor does it preclude from the CMA prioritising licensing remedies as soon as possible. The CMA can (and should) address Microsoft's licensing practices now (though market investigation orders) and still be free to separately investigate whether to designate Microsoft as having SMS in respect of its productivity software, or any *other* Microsoft practices that may warrant intervention.

28. Finally, the DMU may also choose to explore concerns that were not fully considered in the Cloud MIR. For example, the DMU could focus on whether to impose CRs in relation to (i) Microsoft's artificial technical barriers and IAM services; (ii) Microsoft's leveraging of its market power and dominant position in other markets, such as productivity software; (iii) the tying of Microsoft 365 products (such as OneDrive; SharePoint; Defender; Azure Active Directory and Intune; and Teams) to its cloud service offerings; and (iv) Microsoft's bundled discounts on software (all of which were initially raised by CFSL in its response to the Issues Statement in October 2023).

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[21] Microsoft Blog, Microsoft announces new European digital commitments, 30 April 2025. See Commitment 1, 'We will help build a broad AI and cloud ecosystem across Europe'. ("*A third aspect of our work involves our collaboration with European cloud providers to offer Microsoft applications and services on their local cloud infrastructure. This partnership provides these European providers with the opportunity to run Microsoft applications on more favourable terms than we make available to Amazon and Google*").

D. Direct Remedies under the Market Investigation are Warranted

29. The CMA's detailed and evidence-based analysis reaches the sound conclusion that Microsoft's anti-competitive licensing restrictions are having an adverse effect on competition, which has a direct impact on UK customers and unfairly distorts competition in the UK.[22] As these restrictions are purely the result of contractual licensing restrictions rather than complex technical issues, there is a clear and straightforward solution available to the CMA under the market investigation process, *i.e.* requiring Microsoft to strike the anti-competitive contractual licensing restrictions. For example, the CMA could mandate the removal of the concept of Listed Providers (or any equivalent term) from Microsoft's licensing terms under the market investigation process. This is a simple change and involves simply striking the Listed Provider term from the licensing conditions.

i. Imposing a contractual remedy under the market investigation procedure would be straightforward, effective and proportionate

30. The PDR concludes that remedies are warranted, identifying a series of effective and proportionate measures; It identifies a series of remedies that would be effective in addressing the most damaging parts of Microsoft's conduct; namely (a) ensuring parity of performance and functionality of Microsoft software, regardless of which cloud infrastructure it is deployed on; and (b) enabling customers to deploy previously-purchased software on the cloud of their choice.

31. These remedies are also proportionate – they would go no further than restoring the position that prevailed before Microsoft introduced the challenged licensing practices. They would not require Microsoft to build new infrastructure, sacrifice its IP, or take other costly measures.

ii. Interim and final remedies could be imposed swiftly

32. The statutory timeline for orders arising from a market investigation is 6 months, other than in exceptional circumstances (Section 138A of the Enterprise Act 2002). This is already a much faster timeline than the process involved in a DMCCA proceeding, as described above.

33. However, the CMA does not *have to* use the full 6-month period to impose remedies. In this case, the proposed remedies would be relatively easy to finalise and implement. As noted above, they would not require Microsoft to build new tools, products or infrastructure. Instead, all that would be required are amendments to Microsoft's licence terms and policies; simple contractual changes that can be managed in a short time horizon.

34. Moreover, neither the PDR (nor Microsoft) identify any 'relevant customer benefits' from Microsoft's licensing practices, which would be implicated in any changes. This excludes any real likelihood of the contemplated changes leading to adverse consequences that might complicate or extend the CMA's analysis. On the contrary, since Microsoft's practices

[22] PDR, paragraph 6.543.

entail a straightforward scheme to raise rivals' costs (and degrade rivals' quality), remedies reversing these practices would be unequivocally pro-competitive and straightforward to implement.

35. Finally, the CMA could impose an interim order to prevent Microsoft from taking pre-emptive action that might undermine any final order – for example, by ordering Microsoft not to proceed with the planned restrictions that are set to proceed in September 2025, as described in paragraph 12 (Section 158 of the Enterprise Act 2002).

iii. Concerns about proceeding with market investigation orders are misplaced

36. The PDR does not deny that the remedies it identifies could address Microsoft's licensing practices; instead it merely expresses a concern that any remedies "*would not result in as comprehensive a solution as is reasonable and practicable*" compared to interventions under the DMCCA (PDR, para. 9.64). The CFSL urges the CMA not to defer the matter to the DMCCA regime in the pursuit of some vague notion of a "perfect" remedy, while ignoring the option of a perfectly "sufficient" remedy imposed directly under the market investigation. UK customers are keen for this issue to be resolved and rightfully expect the CMA to deliver a swift and decisive remedy as the first regulatory organisation to correctly identify that Microsoft's licensing restrictions are anti-competitive.

37. The CMA also cites difficulties with iterating remedies, testing and trialling them, and ongoing enforcement needs (PDR, para. 9.65). However, given these Microsoft's anti-competitive practices are simply the result of arbitrary contractual licensing terms and can be easily addressed through simply contractual amendments, these concerns are misplaced.

    37.1. The straightforward changes to Microsoft's licensing terms and policies do not require testing or trialling.

    37.2. Nor is it apparent that they would require iteration. As a safeguard, though, review clauses could be built in to address any change of circumstances warranting a modification.

    37.3. Monitoring an enforcement would be straightforward, with both customers and Listed Providers being able to identify non-compliant licensing terms and having a strong incentive to report breaches.

    37.4. The CMA would have the same monitoring and enforcement role as it has with respect to dozens of mergers and market remedies at any given point in time. The CMA has considerable experience in using the MIR to address contractual non-technical restrictions[23] – in fact, these licensing restrictions are arguably simpler

[23] For example, the CMA investigated the private motor insurance market, identifying adverse effects on competition due to the separation of cost liability and control in non-fault claims, limited information on add-on products, and the use of wide MFN clauses. Remedies included a ban on wide MFN clauses, which had prevented insurers from offering better prices on other platforms.

than some of the more complex issues the CMA has chosen to resolve and monitor through remedies (both under the MIR and as under the merger process).[24]

37.5. Since breaches would also be actionable by affected parties (such as AWS and Google), the burden of enforcement would not fall solely on the CMA (per Sections 94(3) and (4) of the Enterprise Act 2002).

38. As regards the concern that "*implementing remedies using our market investigation powers in addition to the proposed recommendations to the CMA Board would likely add complexity and the risk of regulatory divergence*" (PDR, para. 9.65), this issue is readily resolved. Although the CFSL considers that Microsoft's restrictive licensing practices can be effectively addressed through simple contractual remedies, imposed by way of a market investigation order, this does not prevent the CMA from later electing to designate Microsoft as having SMS in respect of its productivity software. If the CMA were to ultimately impose a conduct requirement or PCI under the DMCCA, the CMA could then withdraw the market investigation order, thereby removing any duplication or complexity. There is precedent for this approach in the EU, where Apple agreed time-limited commitments with the European Commission to open up NFC access under the *Apple Pay* investigation, notwithstanding equivalent obligations taking effect under the Digital Markets Act.[25] It is not apparent that this has caused undue complexity or work duplication.

39. For all these reasons, any perceived advantage from using the DMCCA regime process will be limited and would be greatly outweighed by the negative impact on pace and certainty that the DMCCA regime process will bring. If the CMA ultimately decides to recommend remedies under the DMCCA regime despite the clear benefits of resolving this issue under the MIR, the CFSL requests that the CMA prioritises Microsoft's SMS designation and consults on potential interventions as soon as possible in order to address Microsoft's harmful conduct. Moreover, if the CMA does opt to implement remedies under the DMCCA, similar to the EC in the *Apple Pay* investigation, the CFSL urges the CMA to consider an interim remedy under the market investigation regime, which would expire once the DMCCA remedies are in place, so as to prevent any further harm to customers while the DMCCA regime process is ongoing.

E. Swift Intervention under the Competition Act is also Possible

40. While remedies following from the CMA's market investigation would be the most appropriate channel for intervention, including for the reasons noted in section A and

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[24] For example, in the Reckitt Benckiser/K-Y brand merger inquiry (August 2015), Reckitt was required to license the K-Y brand and related IP rights on an exclusive, comprehensive and irrevocable basis for a total period of eight years, including a blackout period of at least one year, to enable the licensee to successfully transition from the K-Y brand to its own brand. Additionally, the CMA's PPI market investigation required the largest providers to produce compliance reports and have these verified by an independent third party. This is even true of past proceedings involving Microsoft itself. In the Microsoft/Activision merger review, Microsoft offered – and the CMA accepted – undertakings that involved a complex IP-licensing remedy, which were far more extensive than the remedies that would be needed here.

[25] Case AT.40452 *Apple – Mobile Payments,* Commission decision of 11 July 2024.

paragraph 16, it is not the only one. If, for any reason, the CMA decided that it was unable (or ought not) to pursue market investigation remedies, another possibility would be to investigate Microsoft's licensing practices as a suspected breach of the Chapter II prohibition under the Competition Act 1998 for amounting to categories of abuse listed in paragraph 43. There is a cognizable theory of harm with a high likelihood of success; interim measures could be deployed to prevent further harm while the CMA investigated; and it would not preclude regulation of Microsoft's practices under the DMCCA in parallel.

i. Microsoft's practices violate the Chapter II Prohibition

41. The evidence uncovered by the market investigation confirms that there is a cognizable theory of harm – and clear evidence – to support an investigation into Microsoft's practices as an abuse of dominance.

42. ***First, Microsoft is dominant in several product areas.*** The PDR found that "*Microsoft has a significant degree of market power in relation to Windows Server, SQL Server, Windows 10/11, Visual Studio and its productivity suites*" citing evidence that "*customers are unwilling or unable to switch away from the product in response to a 5% price rise; there are limited competitive alternatives; the product is differentiated; there are barriers to customers switching; and Microsoft has a moderate to high share of each of the relevant markets*" (PDR, paras. 6.236 and 6.237). All of this provides a reasonable basis for suspecting that Microsoft is dominant in the relevant product markets, thereby engaging the Chapter II prohibition.

43. ***Second, Microsoft's practices conform to well-established categories of abuse.*** The PDR reviewed Microsoft's licensing practices of (i) applying a tax when customers deploy important Microsoft software (Windows Server; SQL Server) on rival cloud infrastructure, and (ii) withdrawing the availability of other important software (*eg* Windows Desktop and Microsoft 365) from rival cloud infrastructure altogether. These practices fall squarely within multiple existing categories of abuse. To give two unambiguous examples:

    43.1. Discrimination: "*applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*" (Section 18(2)(c) Competition Act 1998). In this case, there is no objective difference between a customer deploying its Microsoft software licenses on Azure versus AWS and Google Cloud. There is no dispute that Microsoft treats Azure and AWS/Google Cloud differently to Azure in terms of price and non-price terms. And, as set out below, the CMA has already found that Microsoft's conduct places AWS and Google Cloud at a competitive disadvantage.

    43.2. Mixed bundling: where a dominant company engages in selling two distinct products – both separately and as a bundle – where the sum of the prices when sold separately is higher than the bundled price (*See eg* Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009 as amended). In this case, it is apparent that Windows Server and SQL Server are distinct products from Azure;

they are made available for sale separately or can be taken together; and Microsoft charges a substantially lower effective price when customers take them together (*ie* deploying Windows Server and SQL Server on Azure) rather than separately (*ie* deploying Windows Server and SQL Server on AWS or Google Cloud). As set out below, the CMA has found that these differences in treatment restrict competition.

43.3. Other examples include (i) a refusal to supply (*See eg.* para. 41 *Judgment of 26 November 1998, Bronner, C-7/97, EU:C:1998:569*); (ii) self-preferencing (*See eg* Draft Guidelines on the application of Article 102 to abusive exclusionary conduct by dominant undertakings, 2024); and (iii) margin squeeze (*See eg.* paras. 63-64, *Konkurrensverket v TeliaSonera Sverige AB, Case C-52/09*).

44. ***Third, Microsoft's practices are capable of restricting competition in cloud services.*** The PDR's analysis confirms – in ~100 pages of extensive, quantitative and qualitative analysis – that Microsoft's practices are harming competition in cloud services. In particular:

44.1. The PDR concluded that Windows Server and SQL Server licensing costs are high relative to customer spend; up to *"[100-200]% of the relevant spend denominator across all revenue brackets*" in the case of customers that use both Windows Server and SQL Server (PDR, para. 6.339).

44.2. For these important inputs, the wholesale prices that Google pays for SQL Server and Windows Server and are hundreds or thousands of percent higher (respectively) than the prices Microsoft charges its own Azure customers (PDR, Figures 6.7-6.8 and 6.11-6.12), such that rivals have to absorb "*at least several percentage points' higher cost*" to compete for customers (PDR, para. 6.393). This "*in itself is evidence of the significance of the conduct and the potential for it to disadvantage rivals*" (PDR, para. 6.431).

44.3. These exclusionary effects are compounded by non-price factors: (i) Microsoft's ban on customers with existing licenses bringing Windows Desktop, Microsoft 365, Office and Visual Studio to rival cloud (with limited exceptions); and (ii) Microsoft's ban on customers *without* existing licences purchasing Windows Desktop and Microsoft 365 on AWS or GCP (PDR, para. 6.434).

44.4. The result is to undermine the cloud services of AWS and Google Cloud – Azure's two closest rivals – which in turn undermines competition in cloud services as a whole and hinders customer choice (PDR, paras. 6.535-6.543).

45. ***Fourth, Microsoft has no plausible objective justification for its licensing practices.*** It is difficult to see any plausible justification for Microsoft's inconsistent treatment of Azure compared to AWS and Google Cloud. The sole effect of its conduct has been to raise the costs – and degrade the quality – of its closest competitors. None of this produces any kind of viable efficiency or customer benefit that might form the basis of an objective justification. Indeed, we note that, save for a misguided and unsubstantiated suggestion relating to its IP rights, Microsoft appears not to have put forward any positive justification

for its licensing practices over the course of the CMA's investigation, instead relying on (flawed and disproven) claims relating to lack of foreclosure effects.

ii. Microsoft's practices warrant interim measures

46. The CMA can impose interim measures upon opening an investigation where the CMA considers interim measures necessary, as a matter of urgency, to (i) prevent significant damage to a particular person or category of person, or (ii) to protect the public interest (Section 35 Competition Act 1998). This damage must be likely to occur in the near future and could not be prevented by action that the CMA could take in the main investigation (e.g. through an infringement decision and a final direction to address the conduct) (*See Decision to issue interim measures directions, Investigation into the Atlantic Joint Business Agreement Case number 50616, 17 September 2020*).

47. In this case, upon opening a Competition Act investigation, the conditions for imposing interim measures would readily be met.

    47.1. There is 'significant damage' to both Google Cloud and AWS, who are suffering serious impediments in their ability to compete for customers moving to cloud infrastructure. Similarly, cloud customers are suffering significant damage in being forced to pay implausibly high fees to redeploy software licenses on the cloud infrastructure provider of their choice.

    47.2. The matter is 'urgent' since the conduct is ongoing and its effect is growing as ever more businesses move from on-premises infrastructure to the cloud. The longer the conduct is allowed to continue, the more competition will be harmed. Microsoft is only a matter of months away from its September 2025 change whereby customers will no longer be able to buy and deploy Microsoft licenses from independent managed service providers if those providers host their services on AWS or GCP.

    47.3. The damage will 'occur in the near future' – indeed it is ongoing and will intensify in the coming months for the reasons set out in paragraph 47.2. Moreover, there are no other steps that the CMA could plausibly take to avoid this damage at the outset of an investigation, given the procedural steps needed – and time that would be required – to reach an infringement decision (including preparing a Statement of Objections, providing access to the case file, organising an oral hearing, and drafting an infringement decision).

48. Therefore, the CMA would have a strong basis to impose interim measures that could prevent further harm and create space to investigate Microsoft's licensing practices as a potential abuse of dominance. These interim measures could (i) apply the same remedies that the CMA has considered in the market investigation, albeit on a temporary basis for as long as the measures remain in place; and (ii) take additional steps as needed to prevent further harm, such as enjoining Microsoft from proceeding with its September 2025 plan to prevent the use of software on Listed Providers' infrastructure by independent service vendors and managed service providers.

iii. A Competition Act investigation would not usurp the DMCCA's function

49. Taking steps to address Microsoft's practices under existing powers (including Competition Act 1998 powers) would not usurp the role of the DMCCA in regulating SMS-designated platforms' future conduct. The Competition Act enables enforcement against past or ongoing conduct that violates competition law. Interventions under the DMCCA are intended to regulate conduct on a forward-looking basis. There is no inherent tension in pursuing both.

50. In any event, it is possible to avoid conflicting remedies since any interim or final directions that the CMA issues in the context of a Competition Act investigation could be subject to a review mechanism. Thus, where there is a material change in circumstances, such as equivalent rules being imposed as conduct requirements or pro-competition interventions under the DMCCA, the CMA could withdraw any conflicting or overlapping directions that it has imposed in a Competition Act case.

F. Conclusion

51. The cloud sector can help power the UK's economic growth mission, facilitate customer choice, encourage investment, and unleash greater competition. But it cannot do so when artificial and unlawful restrictions are imposed. To that end, we welcome the CMA's provisional finding that Microsoft's licensing practices amount to an AEC and are harming competition in cloud services.

52. However, a finding in and of itself will not lead to change - it must be followed up with swift action. Microsoft maintains a unique position in the cloud market due to its market power in relation to Windows Server, SQL Server, Windows 10/11, Visual Studio and its productivity suites. But rather than foster choice and innovation, it has chosen to exploit its power to reduce competition and lock customers into its services. And right now, the UK is well-placed to address Microsoft's conduct and achieve positive changes for UK consumers and businesses.

53. The CMA's proposed remedies are robust and can rectify the most harmful aspects of Microsoft's conduct. They are proportionate and necessary to ensure a well-functioning cloud sector. And the CMA has undertaken an extensive and thorough investigation into Microsoft's practices, and has conclusively dismissed Microsoft's (purported) justifications.

54. There is therefore no reason to defer licensing remedies to an SMS investigation under the DMCCA regime. Doing so would only introduce unnecessary and significant delays, uncertainty and duplication. In the meantime, Microsoft's impending changes will further restrict UK consumers and businesses from choosing between cloud providers. An unduly delayed remedy is as good as no remedy at all.