

2 March 2023

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

MICROSOFT'S RESPONSE TO THE CMA'S PROVISIONAL FINDINGS

This is Microsoft's response to the CMA's Provisional Findings dated 8 February 2023 regarding the anticipated acquisition of Activision Blizzard, Inc. ("**Activision**") (the "**Merger**"). Defined terms are the same as those used in the Provisional Findings unless otherwise specified.

1. EXECUTIVE SUMMARY

- 1.1 The Provisional Findings set out concerns that Microsoft may withhold Activision content, in particular *Call of Duty* ("**CoD**"), from console and cloud gaming rivals post-Merger. Those concerns are misplaced. For Microsoft, the Merger has never been about acquiring titles like *CoD* and making them exclusive to the Xbox platform. To the contrary, since the day the Merger was announced, Microsoft has focused on using the acquisition to bring more games to more people on more platforms and devices, thereby bringing more competition into gaming than ever before.¹
- 1.2 Since the Provisional Findings were issued, Microsoft has entered into legally binding, 10-year, agreements with Nintendo and NVIDIA to bring *CoD* to millions of additional gamers on both console and cloud gaming services, if the Merger is approved. UK gamers stand to benefit significantly from these agreements – which prove conclusively that Microsoft is incentivised to distribute Activision content widely – as well as the Merger more broadly.
- 1.3 As acknowledged in the Provisional Findings, the benefits to consumers include the inclusion of *CoD* and other Activision content in Game Pass on a 'day and date' basis post-Merger. Microsoft estimates on a conservative basis that the total benefits to UK consumers will exceed \$[<] (£[<]). Globally, the benefits to consumers will, on a conservative basis, be at least \$[<] (£[<]).²

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

² [<]. See further section 3 below.

- 1.4 Microsoft stands ready, as it has since day one, to enter an agreement with Sony to ensure that *CoD* remains on PlayStation. Microsoft has repeatedly committed to do so both publicly and privately. Unlike Nintendo and NVIDIA, however, Sony has steadfastly refused to reach an agreement with Microsoft, calling instead for the Merger to be prohibited. Sony has more than double the installed base and sales of consoles than Microsoft globally. Sony's position must be seen for what it is: a self-serving attempt to protect its dominant market position, rather than one founded on genuine concerns regarding its continued access to *CoD* - which it could have secured months ago.
- 1.5 Vertical concerns based on input foreclosure are rare and the CMA has found a substantial lessening of competition (“SLC”) on such a basis in only three Phase 2 cases.³ In each case, the merger involved the protection of substantial market power. Input foreclosure has never been found in a case where one merging party was the smallest player in the downstream market and the other was one of more than a dozen suppliers competing in the upstream market. Given this context, the Provisional Findings fall well short of providing the evidence required to establish that a hypothetical withholding of *CoD*, or any other Activision content could give rise to a SLC in any market in the UK.

A No SLC in console gaming

- 1.6 Under its first theory of harm, the CMA provisionally concludes that Microsoft would have the ability and incentive to foreclose Sony by withholding *CoD* post-Merger (the “Console SLC”).
- (i) **Sony cannot be foreclosed as a result of the loss of one game**
- 1.7 This concern is predicated on the view that withholding a single game could lead to foreclosure of the PlayStation console platform. This concern must be placed in proper context. PlayStation is significantly larger than Xbox, and has much more exclusive content. Looking at the two consoles in isolation, PlayStation has been the larger console for more than 20 years, accounting for ~[X]% of installed base, sales and monthly active users worldwide, as compared to ~[X]% for Xbox. In these circumstances, the CMA requires the most compelling evidence to establish, on the balance of probabilities, that Sony could be “foreclosed” by the loss of just one of the thousands of games available on the PlayStation platform.
- 1.8 A finding of foreclosure in this context requires the CMA to do more than merely show that Sony may suffer some ‘harm’. Rather, the CMA must show that there would be a

³ *Intercontinental Exchange / Trayport* (2017), *Tobii / Smartbox Assistive Technologies* (2019) and *Facebook (Meta Platforms) / Giphy* (2021 and on remittal 2022).

“*substantial weakening*” of PlayStation’s ability to compete.⁴ The Provisional Findings present no such evidence. Despite numerous flawed attempts to show *CoD*’s importance to PlayStation, the CMA ultimately finds that, at most, only [X]% of PlayStation users would actually leave the console if *CoD* was not available based on its consumer survey (the “**CMA Survey**”). In reality, the likely diversion rate is much smaller. A YouGov survey commissioned by Microsoft (the “**YouGov Survey**”), which draws from a wider pool of eligible respondents, confirms that the likely diversion rate is **only ~3%**. Even assuming that the levels of user diversion highlighted by the Provisional Findings are accurate, PlayStation would suffer an impact to its total console installed base of only [X]% and a reduction in consumer spend of at most [X]%.

1.9 It is simply not plausible that an SLC could arise in these circumstances. It is clear that the “*loss of sales by competitors is not problematic in and of itself*”⁵. The Parties are unaware of any precedent in which a competition authority has found that a dominant provider could be substantially weakened through losing of 3% (or even [X]%) of its customers. This is not a *substantial weakening* of PlayStation’s position. Such a conclusion would be irrational and cannot be sustained.

(ii) Neither does Microsoft have any incentive to remove *CoD* from PlayStation

1.10 Microsoft has no intention of withholding *CoD* from PlayStation. Its recent actions clearly demonstrate that its incentives are to widen distribution of *CoD* on consoles (as well as other devices). In present value terms, anticipated future revenues from *CoD* on PlayStation account for approximately [X]% (~\$[X]) of the overall value of the deal for Microsoft. A withholding strategy would involve immediately forgoing this substantial revenue stream, [X]. Yet the CMA is unable to point to a single piece of evidence to suggest that Microsoft has even considered such a strategy, let alone plans to pursue it. That is because no such evidence exists.

1.11 The Provisional Findings attempt to overcome this absence of documentary evidence through financial modelling and vague but unsubstantiated references to “long-term strategic benefits” Microsoft might hope to achieve. Both are flawed.

(a) The CMA’s primary financial modelling is based on the Life Time Value (“**LTV**”) of customers that might divert to Xbox. However, the CMA’s LTV calculation contains a fundamental and obvious error: in calculating the ‘gains’ to Microsoft of a withholding strategy, the calculation uses a **five-year** gross profit figure, but in assessing the ‘losses’ side, it uses a figure that measures losses for only a **single year**. Comparing gains on a five-year basis to losses on

⁴ Provisional Findings, paragraph 7.364.

⁵ CMA Merger Assessment Guidelines, paragraph 7.23.

a one-year basis massively skews the results. Once this error is corrected it is clear there is no incentive to withhold. Likewise, the Provisional Findings' attempts to use 2021 data actually shows that in [X] out of [X] scenarios Microsoft has no incentive to withdraw *CoD* from PlayStation. [X], when properly calculated, also shows no incentive.

(b) Considering any so-called "strategic benefits", many of which are in any event already captured in the CMA's financial modelling, does not alter this conclusion. Long-term strategic benefits are, by their nature, speculative and uncertain. There would therefore need to be particularly clear evidence on strategic benefits to even act as some sort of counterweight to the other evidence which clearly points against any incentive to foreclose. As it is, the real long-term strategic benefits to Microsoft in this deal lie in cross-device distribution of games.

1.12 Nor can the CMA place reliance on Microsoft's "past behaviour" following acquisitions of smaller studios/publishers to question the clearly articulated strategy in relation to this deal. *Minecraft* remains the closest analogue to *CoD* in terms of Microsoft's previous acquisition. *Minecraft* has remained on all platforms post-acquisition, in addition to being made available on many new platforms, including Nintendo. This is entirely consistent with the strategy Microsoft has repeatedly set out in relation to this Merger.

B No SLC in cloud gaming

1.13 Under its second theory of harm, the CMA provisionally concludes that Microsoft would have the ability and incentive to foreclose rival cloud gaming providers by withholding Activision content post-Merger (the "**Cloud Gaming SLC**").

(i) The theory of harm emphasizes facts which the CMA accepts are not relevant

1.14 The CMA has spent much of its investigation trying to establish an unproven concern, unrelated to the Merger, that Microsoft has unrivalled advantages in cloud gaming. Indeed, at Phase I, the CMA's second theory of harm was explicitly presented as "*foreclosure of cloud-gaming service providers through leveraging Microsoft's ecosystem*" and it is only belatedly that the CMA has accepted that its repeated efforts to articulate a novel 'ecosystem' theory of harm were doomed to fail. In the Provisional Findings, the CMA accepts that any "*ability on Microsoft's part to use [its existing 'ecosystem'] assets to foreclose rivals does not form part of this theory of harm*".⁶

1.15 Despite this acknowledgement, the vast majority of the CMA's assessment of the Cloud Gaming SLC remains devoted to assessing Microsoft's alleged "ecosystem

⁶ Provisional Findings, paragraph 8.5.

advantages”. It is not, however, open to the CMA to find that a highly speculative theory of harm results in an SLC based on evidence which the CMA clearly states is irrelevant (*i.e.*, which “*does not form part of this theory of harm*”).

(ii) Activision games would not have been available to cloud gaming services absent the Merger

1.16 The CMA’s revised theory requires, as a basic starting point, that Activision content would have been available to rival cloud gaming services absent the Merger. That is not the case today. And the evidence consistently shows that Activision [§<]. To reach the opposite conclusion, the CMA misinterprets a small number of internal documents and statements by [§<]. This is explained in detail in Activision’s response to the Provisional Findings. Once the proper counterfactual is adopted, it is clear that the Cloud Gaming SLC is not a merger-specific theory of harm.

(iii) No evidence that Activision content would have been an important input for cloud gaming providers

1.17 Even if Activision would have made its content available for streaming absent the Merger, the CMA’s theory rests on its provisional conclusion that “*Activision content, in particular CoD and WoW, would be an important input to cloud gaming services*”.⁷ This claim is not borne out in the evidence.

1.18 In the first instance, the Provisional Findings present no evidence *at all* to suggest that Activision’s content as a whole is important for downstream competition in cloud gaming. Even the evidence the CMA cites regarding *World of Warcraft* (“*WoW*”) is wafer thin – just two isolated and oblique references in internal documents which simply state *WoW* is one among many popular PC games. This is nowhere close to meeting the CMA’s evidentiary standard.

1.19 As regards *CoD*, CMA relies primarily on its assessment of the Console SLC to claim that the franchise would be an important input for cloud gaming services. Yet, in the CMA’s own words, cloud gaming services are aimed at a different customer set to console gamers and “*consumers consider different factors important for cloud gaming as compared to consoles*”.⁸ The CMA’s purported reliance on evidence from console gaming is, therefore, fundamentally flawed.

1.20 Of far greater relevance is evidence regarding *CoD*’s popularity amongst PC gamers. Here, the CMA rightly accepts that “*CoD is less prominent on PC than it is on console – as suggested by the higher number of games which reach a similar or greater level*

⁷ Provisional Findings, paragraph 8.268.

⁸ Provisional Findings, paragraph 5.82.

of engagement to CoD on PC relative to console".⁹ In fact, there is a range of evidence showing that *CoD* is not particularly popular amongst PC games. For example, Windows telemetry data shows that *CoD* accounts for less than [X]% of game-time on Windows PCs.

- 1.21 Nonetheless, the CMA later concludes that "*any alternatives of the same scale and [sic] to CoD would be limited*".¹⁰ This internally inconsistent reasoning, combined with the absence of any evidence indicating *CoD* would be important for cloud gaming services, critically undermines the CMA's provisional conclusions on Microsoft's ability to foreclose through a hypothetical withholding strategy.

(iv) The NVIDIA Agreement addresses the Cloud Gaming SLC

- 1.22 In any event, even under the CMA's (incorrect) counterfactual, the evidence presented in the Provisional Findings indicates that [X]. Microsoft's recent agreement with NVIDIA (the "**NVIDIA Agreement**") [X]. [X]. [X]. It also provides for all of Microsoft's first-party PC content to be placed on GFN [X].
- 1.23 The NVIDIA Agreement produces a far better outcome for NVIDIA, competition in cloud gaming and ultimately gamers, than could conceivably have occurred absent the Merger. As a result, the Merger will *enhance* competition in cloud gaming, not lessen it.

C Microsoft's proposed licensing remedies comprehensively address the CMA's concerns

- 1.24 Even if the CMA confirms the Console SLC and/or Cloud Gaming SLC, Microsoft has proposed a comprehensive package of licensing remedies which (i) guarantee parity between the PlayStation and Xbox platforms in respect of *CoD* and (ii) ensure wide availability of *CoD* and other Activision titles on cloud gaming services. These proposed remedies – set out in Microsoft's response to the CMA's Notice of Possible Remedies dated 8 February 2023 ("**Remedies Notice**") – would protect all gamers in the UK and ensure that the substantial customer benefits flowing from the Merger will be retained.
- 1.25 The criteria for the CMA to accept behavioural remedies of this nature are clearly met in this case. They represent the most proportionate remedial option available to the CMA and must be preferred to prohibition or structural remedies, which would not preserve the relevant customer benefits of the Merger.

⁹ Provisional Findings, paragraphs 8.262 and 8.267.

¹⁰ Provisional Findings, paragraph 8.266.

2. THEORY OF HARM 1: VERTICAL EFFECTS IN CONSOLE GAMING

A Summary

2.1 Pursuant to its first theory of harm, the CMA provisionally concludes that the Merger may result in an SLC in the UK as a result of vertical foreclosure effects in console gaming (the “**Console SLC**”), as a result of a hypothetical withholding of Activision content. The Parties strongly disagree with this finding for the reasons set out below.

(i) The market context shows PlayStation cannot be foreclosed

2.2 The Console SLC is predicated on the view that the purely hypothetical withholding of just one game, *CoD*, could lead to the foreclosure of the entire PlayStation console platform. In doing so, the Provisional Findings rely on the fact that Xbox, the smallest console competitor, is capable of anti-competitively foreclosing the dominant incumbent, PlayStation. This simply does not reflect the market reality. It is clear from the available evidence that, in fact, PlayStation is significantly larger than Xbox. It has a long-term, persistent incumbency advantage on all relevant metrics. Further, although *CoD* is undoubtedly a very successful and popular game, it is only one input amongst many for PlayStation and as such, it would require the clearest evidence to show that Microsoft withdrawing *CoD* would have any adverse effect on competition (or on PlayStation), let alone a substantial one.

2.3 PlayStation is significantly larger than Xbox. Globally, PlayStation holds an advantage over Xbox of approximately [X]% by any relevant measure - revenue, volume, installed base and Monthly Active Users (“MAU”). Although the advantage is slightly lower in the UK, it is still significant – [X]% in favour of PlayStation on most measures. Even with this context, the Provisional Findings adopt the view that the Merger could somehow impair the larger incumbent. This is simply not credible.

2.4 In relation to console game publishing, it is not disputed that *CoD* is a popular game. However, it is simply one popular game amongst many. Yet the Provisional Findings relate PlayStation’s entire competitive viability to this one franchise. Not only is this bizarre, it is also not in line with what the evidence shows. Despite its various attempts to assess *CoD*’s alleged market power and “importance” to PlayStation, the Provisional Findings ultimately show that *CoD*’s upstream market shares are low and that PlayStation derives the [X] ([X]%) and gameplay time ([X]%) from games other than *CoD*. *CoD* just does not have market power, nor is it an important enough input to curtail PlayStation’s competitiveness.

(ii) The Provisional Findings confirm that the vast majority of PlayStation gamers would not leave the console for *CoD*

- 2.5 Despite various attempts to show *CoD*'s significance, the Provisional Findings ultimately confirm that only [X]% of PlayStation users would actually leave the console if *CoD* was not available. In reality, the number of users is likely much smaller. Indeed, a YouGov survey commissioned by Microsoft (the "**YouGov Survey**"), drawn from a wider pool of eligible respondents than the CMA Survey, confirms that the likely diversion rate to Xbox is only ~3%.
- 2.6 Suggestions in the Provisional Findings that the impact of this user switching can be inflated by reference to spend and gameplay time also fail. These are ultimately based on un-evidenced assertions as to how gamers who are not heavily engaged with *CoD* would respond to any hypothetical withholding. The Provisional Findings fail to appreciate a crucial point – it is only those PlayStation gamers who concentrate the majority of their gameplay time around *CoD* that are likely to switch. An analysis of this cohort of engaged *CoD* gamers shows [X]. These potential switchers may be valuable to Activision as a publisher, [X] and the impact of any switching should be adjusted downwards, not upwards. With switching rates of only 3-[X]%, it is implausible that *CoD* has the ability to foreclose PlayStation.

(iii) Microsoft has no incentive to remove *CoD* from PlayStation

- 2.7 Microsoft will not withdraw, withhold or degrade *CoD* on PlayStation. Doing so would destroy a significant portion of the value from the Merger and would undermine Microsoft's hard-won reputation for bringing competition to the gaming industry. The question of incentive is therefore purely hypothetical and – even then – it is not remotely proven. The evidence does not show any incentive to foreclose and the analysis undertaken by the CMA, when using correct figures, clearly indicates a lack of incentive. A number of key calculations in the Provisional Findings' suffer from fundamental errors which, when corrected, show that no incentive exists. The attempt to use LTV of customers suffers from a critical error which means that *none* of the scenarios produces a positive incentive to withhold result. Further, the Provisional Findings' attempts to use 2021 data actually shows that in [X] out of [X] scenarios Microsoft has no incentive to withdraw *CoD* from PlayStation. [X] when properly calculated also shows no incentive. Therefore, overall, the 2021 data analysis does not support an incentive to withdraw. Factoring in any so-called "strategic benefits" do not alter this conclusion.

(iv) Any resulting impact on PlayStation would be minimal

- 2.8 The Provisional Findings engage in only a cursory analysis of effect and, in doing so, fail to address the question of whether PlayStation would be anti-competitively foreclosed. In short, the answer is no. PlayStation would barely experience any competitive impact, much less "harm" that could rise to the level of foreclosure. Moreover, any hypothetical impact would not occur overnight. That is clearly untrue.

Even assuming that the levels of user diversion highlighted by the Provisional Findings are accurate, PlayStation would suffer an impact to its total console installed base of only [X]%. Similarly, the annual revenue impact on PlayStation would at most be only a reduction in consumer spend of [X]%. Further, the impact on the relative difference between PlayStation and Xbox's MAUs would be minimal and PlayStation would still have, at a minimum, [X] more MAUs than Xbox. There is simply no evidence to equate this limited effect on PlayStation to anti-competitive foreclosure. The Provisional Findings also assume that PlayStation is a static competitor with no means of responding: a surprising conclusion in relation to an innovation business with a range of expertise in creative and technology sectors.

(v) There is no legal or factual basis to maintain Theory of Harm 1

2.9 The Provisional Findings do not, therefore, establish the requisite elements of an input foreclosure which would amount to an SLC. There is no ability to foreclose PlayStation using Activision content. The Provisional Findings do not prove that Microsoft would have the incentive to do so, indeed the evidence points the other way. Moreover, PlayStation would not suffer any form of anti-competitive effect. In light of this, there is simply no basis for maintaining a finding that the Merger will result in any lessening of competition, much less one that could be proven to be substantial on the balance of probabilities.

B Legal context

2.10 The legal question for the CMA is whether the Merger may be expected to result in a lessening of competition and, if so, whether it is substantial. In *Global Radio*, the criterion used, and accepted by Competition Appeal Tribunal, was “*significant adverse effects*” on competition.¹¹ The test as set out in the Merger Assessment Guidelines is whether any alleged foreclosure would “*substantially lessen overall competition*”.¹²

2.11 The potential foreclosure issue in this case relates to console purchases by consumers. Consumers currently have a choice of console, each with different games. Post-merger, the same consoles will be available. The question is whether competition between consoles for consumers will be significantly adversely effected if one game franchise is not available on PlayStation.

2.12 In assessing this question the CMA needs to “*consider the effect of a merger on competition in the market rather than on individual competitors*”.¹³ It is clear that the “*loss of sales by competitors is not problematic in and of itself*” and does not equate to significant adverse effects on competition. Rather, as the CMA recognises, this is part

¹¹ *Global Radio Holdings Limited v Competition Commission* [2013] CAT 26, paragraphs 8, 28.

¹² Merger Assessment Guidelines (CMA129), paragraph 7.10(c).

¹³ ME/6920/20, *Anticipated acquisition by Facebook, Inc. of Kustomer, Inc.*, paragraph 293.

of the process of rivalry between firms, which “*creates incentives for firms to cut price, increase output, improve quality, enhance efficiency, or introduce new and better products*”.¹⁴ In the context of a foreclosure theory, the CMA must therefore show that any harm to a competitor is of such a significant degree that it would result in substantial harm to overall competition in the downstream market.

- 2.13 This must be proved on the balance of probabilities. In applying this standard, the CMA must recognise that some things are inherently more likely than others. Where something is inherently less likely, the CMA requires “*more cogent evidence*” to satisfy the balance of probabilities threshold.¹⁵
- 2.14 In the present case, the CMA’s theory of harm alleges that the smallest player in the console market, Microsoft, could foreclose by far the largest, Sony. This is inherently unlikely, particularly where the foreclosed input is just one of many games available on the PlayStation platform. The Parties are unaware of any previous case in which an input foreclosure theory of harm has been upheld where the allegation is of the smallest downstream player foreclosing the largest.
- 2.15 The CMA would, therefore, require the clearest and most compelling evidence to reach a conclusion that on the balance of probabilities not having access to one game (*CoD*) would so hobble the competitiveness of Sony’s PlayStation, the strongest incumbent console platform, that overall competition in console gaming would be substantially lessened. As explained below, the Provisional Findings present no such evidence.

C The Provisional Finding’s assessment fails to take sufficient account of the relevant market context — PlayStation cannot be foreclosed by losing access to just one title

- 2.16 In considering whether PlayStation could be foreclosed by the withdrawal of *CoD* it is important to distinguish the possibility of withdrawal from the likelihood of anti-competitive foreclosure.
- 2.17 The Provisional Findings conflate the potential future conduct (“*exclusives*”) with its effects (“*foreclosure*”). This confusion has plagued the CMA’s analysis throughout its investigation and, while the Parties have highlighted this repeatedly (including at the Issues Meeting), the CMA has persisted with the use of the term “*foreclosure*”. This is wrong in both economics and law (and inconsistent therefore with established practice).
- 2.18 The Provisional Findings continue to refer to “*foreclosure*” to describe Microsoft distributing *CoD* (and ABK’s content more generally) exclusively on its own channels

¹⁴ Merger Assessment Guidelines, paragraphs 2.2 and 7.31.

¹⁵ *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153, paragraph 55: the example of Alsations and lionesses

(Xbox console, Game Pass). This is not “foreclosure”. For “exclusivity” to give rise to “foreclosure” much more needs to be shown. Specifically, it must be shown that the withholding of *CoD* from PlayStation (or an increase in the price of *CoD* to PlayStation) does not just shift some console sales away from PlayStation, but it does so in a manner and to such an extent that PlayStation’s ability to compete effectively in the future and innovate will be materially impaired. It is certainly not enough to argue that there would be “some diversion”, *i.e.*, that a number of would-be PlayStation buyers would “switch” to buying an Xbox instead if they could no longer play *CoD* on their PlayStation. This is competition.

- 2.19 The use of exclusives has been the competitive norm in this market for the past 20 years, with consoles frequently doing deals with developers for a period of exclusivity. The evidence is clear that when that happens there is some effect on the relative share of sale of consoles – but this is modest and short lived. Microsoft provides below ordinary course evidence of the impact of exclusives on the relative share of sales of Xbox vs PlayStation as a function of exclusives.

Figure 1: Microsoft’s ordinary course assessment of the impact of exclusivity.¹⁶

[REDACTED]

Source: Xbox

- 2.20 This Figure shows that the impact of PlayStation exclusive releases on Xbox console sales is [REDACTED]. This applies for “big” titles like *God of War* or *Superman*. There has never been evidence that exclusivity of one single franchise can drive console sales [REDACTED].
- 2.21 It is important not to mix up potential conduct with its effects. “Foreclosure giving rise to adverse effects on competition” can only refer to a precise effect: materially undermining PlayStation through withholding *CoD* in a way that hobbles competition in the future and ultimately harms consumers. Some “shift in share” is not enough. There needs to be a persistent material shift large enough that PlayStation would be losing major ground, and be unable to recover through any competitive response.
- 2.22 The competitive landscape of the relevant markets both upstream and downstream shows why anti-competitive foreclosure is implausible. Microsoft recognises that the CMA considers market definition is not determinative of competitive assessment issues and is often referred to as a “tool” in competition analysis.¹⁷ Nonetheless, assessments of market shares using relevant metrics and consideration of relative market positions can provide important evidence of the existence (or otherwise) of market power.

¹⁶ See [REDACTED].

¹⁷ Merger Assessment Guidelines, paragraph 9.1.

- 2.23 It is well recognised that in the context of vertical arrangements, unless the merging entity has market power at both levels of the market, the likelihood of any adverse effect is materially diminished. This is recognised in both economics and in law. Indeed, the CMA’s Merger Assessment Guidelines consider the presence of upstream market power and whether one of the merger firms has a degree of market power in the downstream market as part of its input foreclosure analysis.¹⁸
- 2.24 It is clear from the available evidence that in fact, PlayStation is significantly larger and more powerful than Xbox. It has a long-term, persistent incumbency advantage on any relevant metric. Further, although *CoD* is undoubtedly a very successful and popular game, it is one input amongst many for PlayStation and as such it would require the clearest evidence to show that Microsoft not only could withdraw *CoD* so to have any adverse effect on competition (or on PlayStation) let alone a substantial one.
- (i) PlayStation holds a significant incumbency advantage over Xbox**
- 2.25 PlayStation is significantly larger than Xbox in the UK by any relevant measure, including revenue, volume, and installed base.¹⁹ This remains true even assuming the Provisional Finding’s unduly narrow focus in its competitive assessment, which sidelines Nintendo on the basis that it is a “*differentiated product*” and “*weaker constraint*” on Xbox than PlayStation.²⁰ The fact that Nintendo is a weaker constraint does not mean it can be ignored. It has significant advantages over Xbox and PlayStation in particular in relation to its portability: you can take Nintendo Switch with you when you move meaning you have the key ability to play games away from your home base.
- 2.26 The Provisional Findings acknowledge that there are multi-national and global elements to console competition.²¹ The Parties agree that this is the most appropriate measure when evaluating any hypothetical harm to PlayStation. However, it is clear that PlayStation holds a superior position over Xbox on a global basis, roughly [X<] % across value, volume, and installed base:

¹⁸ Merger Assessment Guidelines, paragraphs 7.14(a) and 7.21.

¹⁹ Based on IDG data for 2021, Microsoft’s share of console hardware sales in 2021 was [X<] % in the UK, with Sony and Nintendo at [X<] % and [X<] % respectively. Microsoft’s share of console hardware sales by volume in 2021 was [X<] %, with Sony and Nintendo at [X<] % and [X<] % respectively.

²⁰ Provisional Findings, paragraph 7.358.

²¹ Provisional Findings, paragraph 5.75.

Figure 2: Global shares of console hardware by revenue, volume and installed base (2021) ²²

[REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

Source: IDG data

Source: IDG data

Source: IDG data

2.27 Even focussing only on the UK, PlayStation remains well ahead of Xbox on each individual measure. This shows that the gap between the two consoles remains significant.

Figure 3: UK shares of console hardware by revenue, volume and installed base (2021) ²³

[REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

Source: IDG data

Source: Omdia data

Source: Omdia data

2.28 As the Provisional Findings note, MAU is also a useful metric for comparison and assessment.²⁴ With regards to MAU, Sony public financials indicate that the Sony PlayStation network had more than 100 million average MAU in 2021, while Xbox telemetry shows that the total average MAU in 2021 for Xbox was [REDACTED] million. This advantage reflects a share of MAUs of approximately [REDACTED]% in favour of PlayStation on a global basis. The estimated figures for the UK are [REDACTED]%.²⁵

²² Note: PlayStation includes PlayStation 4 and PlayStation; Xbox comprises of Xbox One and Xbox Series S & X. Using Omdia data for installed base also provides an equivalent share of [REDACTED] in favour of PlayStation over Xbox.

²³ Note: PlayStation includes PlayStation 4 and PlayStation; Xbox comprises of Xbox One and Xbox Series S & X. Equivalent shares using IDG data show a [REDACTED]% split in favour of PlayStation by revenues and show the same [REDACTED]% split by installed base.

²⁴ Provisional Findings, Appendix C, paragraph 7.

²⁵ Source: Xbox data, Sony, Q3 FY 2022 results, 02.02.2023, page 9, (link available [here](#)). For the UK, MAU shares are approximated based on Installed Base data from Omdia. Each party's worldwide MAU figure is scaled down by the ratio of its UK Installed Base relative to its Worldwide Installed Base for 2022.

Figure 4: Worldwide (left) and UK (right) shares of MAU (2021)

[REDACTED] [REDACTED]

Source: Microsoft data, Sony financials

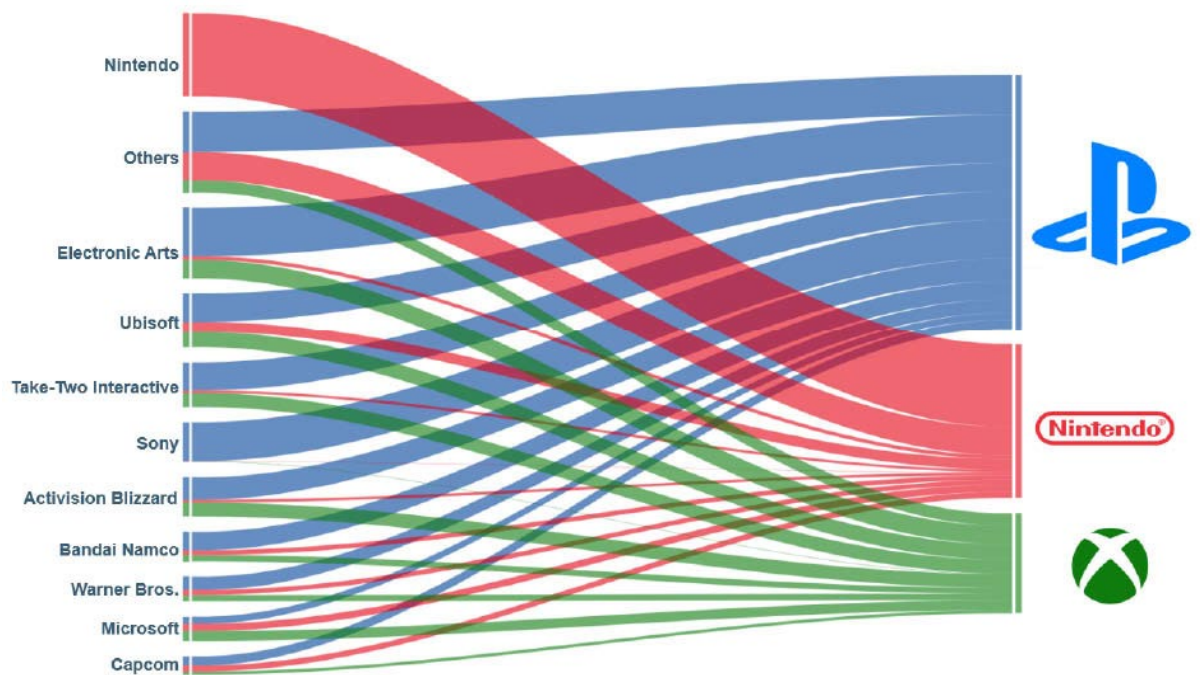
- 2.29 It is important to recognise that this substantial disparity between PlayStation and Xbox has persisted over time. The chart below measures share of installed based over the previous 5 years and captures two subsequent console generations (Generations 8 and 9). As illustrated, PlayStation has maintained a clear lead over Xbox, which has increased over time.

Figure 5: Share of Installed Base (2017-2022)

[REDACTED]

- 2.30 The starting point for any consideration of relevant evidence, therefore, is that this is a vertical merger (implying a lower likelihood of adverse effects) and the potential harm is being considered as flowing from the *smaller* entity anti-competitively foreclosing the *much larger* one. That is clearly an unlikely outcome absent compelling evidence.
- 2.31 The idea that the loss of a single content ‘input’ would render Sony an ineffective competitor such that competition in the market is substantially lessened simply does not make sense given that Sony’s platform is more than twice the size of Xbox on a global basis. It would require the strongest evidence to show that at their next point of choosing, very large numbers of console customers *would not choose Sony and would instead choose Xbox*, such that there could be any plausible SLC. That evidence does not exist.
- (ii) It is implausible that one game is critical to effective competition**
- 2.32 Microsoft has consistently stated that it will not withhold *CoD* from PlayStation. However, even if it engaged in any such strategy, the notion that PlayStation could not compete without access to just one title is not credible.

Figure 6 – Distribution of game sales volume of publishers across platforms



Source: [36]

- 2.33 Figure 6 above is an illustration of the relationships between game publishers and the three consoles which the CMA identifies as part of the same console market.²⁶ The top 10 game publishers are separately identified. It is compiled by reference to global game sales in 2021 and is approximately to scale. The diagram does not include free-to-play games such as *Fortnite* but, if included, the same points of principle (and scale) could be made.
- 2.34 As can be seen from Figure 6, PlayStation gamers buy games from a large range of publishers to play on their console. EA is the largest supplier of games to PlayStation, followed by Ubisoft and Take Two.
- 2.35 Sony itself is the fourth largest game publisher in the world and the fourth largest supplier to PlayStation. The fact that the blue band running from Sony to PlayStation is so wide is an indication of the extent to which Sony keeps its own published games almost entirely exclusive to PlayStation. In fact Sony has 286 games which are exclusive to PlayStation including some of the most successful and popular titles such

²⁶ Whilst it is noted that Nintendo is provisionally found to be a less close competitor, it remains part of the market and an important part of the overall analysis.

as *God of War*,²⁷ *Spider-Man* and *Last of Us* (which Sony – through its media production business – has recently turned into a hugely successful TV series²⁸).

- 2.36 Activision is only the fifth largest game publisher. Activision is, therefore, smaller than a number of other game publishers such as EA and Take Two and smaller than Sony’s own publishing business. It has worldwide share of [X]% by revenue. Nintendo is consistently the second largest publisher. In recent years, Activision has been either the third-placed or, in 2020, fourth-placed publisher (behind Sony), with Take-Two and Ubisoft following closely.²⁹
- 2.37 The proposition that would need to be proved, therefore, is that if a substantial chunk of the blue band running from Activision to PlayStation were to disappear and the green band from Activision to Xbox were to grow proportionally, the huge blue console on the right hand side – PlayStation – would be so unable to compete that there would be a substantial lessening of competition in the market. The graphic puts the question in context. There would need to be overwhelmingly clear evidence to prove that that was the case.
- 2.38 Even focussing only on game publishing on consoles in the UK, it is clear that the shares of supply of Activision are vastly smaller than any share on any metric which would indicate market power. Activision accounts for only [X]% by revenue, [X]% by digital downloads and [X]% by gameplay time in the UK in 2021.³⁰ By way of comparison, shares by revenue in the UK in 2021 for EA, Nintendo, Take-Two, Ubisoft, and Sony are [X].³¹ In the UK the leading publisher by far is [X] and [X].
- 2.39 A single input accounting for these low shares of engagement and revenue cannot be considered as giving “market power”. The Provisional Findings offer no evidence to support such a claim. In circumstances where none of the orthodox criteria for an assessment of market power suggest that it exists, it would take very clear and compelling evidence to conclude it does. The Provisional Findings do not provide that sort of evidence. The attempt to place special significance on *CoD* by stating that it is one of a limited number of games that can be considered “important” (with only [X] generating comparable levels of spend and gameplay time³²) is no justification for ignoring the clear evidence that there is no upstream market power here. The fact that

²⁷ See, for example, UKIE, “*God of War Ragnarok returns to the top of the UK boxed game charts*”. 12 December 2022 (link available [here](#)), “*God of War Ragnarok is the first chart-topper of 2023*”. 03 March 2023 (link available [here](#)), “*God of War Ragnarok back at the top of the UK Boxed Game charts for another week of 2023*”, 9 January 2023 (link available [here](#)), [X].

²⁸ The show has been a critical success, being cited as “*one of the finest TV shows you will see this year*” and with over 7.5 million viewers watching as of February 6, 2023. The success of the television series has translated into considerable video game sales.

²⁹ Microsoft is far smaller, eighth, down at the bottom of the diagram.

³⁰ Provisional Findings, paragraph 7.153.

³¹ Provisional Findings, paragraph 7.153. EA ([X]%), Nintendo ([X]%), Take-Two ([X]%), Ubisoft ([X]%), and Sony ([X]%)

³² Provisional Findings, paragraph 7.157.

other games are successful and “important” does not suggest that each or any of them has market power which could underpin a necessary element of any anti-competitive foreclosure finding.

2.40 Even looking only at Sony, Activision’s share of supply of games to PlayStation are inconsistent with *any* level of upstream market power.

- (a) Globally, *CoD* accounts for only [X]% of PlayStation’s total annual sales.
- (b) In 2021, Activision content accounted for only [X]% of consumer spend on PlayStation both globally and in the UK (with *CoD* comprising [X]% of this).³³ Focussing on gameplay time, the Provisional Findings state that *CoD* accounted for [X]% in the UK and [X]% globally.³⁴ Put differently, the Provisional Findings confirm that PlayStation generates approximately [X]% of its revenues and [X]% of its gameplay from titles other than *CoD*.
- (c) In fact MAU figures are more informative. In any given month, only a limited number of PlayStation gamers globally played *CoD* at all.³⁵
 - In 2021, globally, *CoD*’s penetration rate of PlayStation MAU amounts to only [X]%.³⁶ This level of engagement is much lower than suggested in the Provisional Findings – based primarily on Yearly Active Users (“YAU”). In the UK, *CoD*’s share of PlayStation MAU is only [X]% (and [X]% worldwide).³⁷
 - The Provisional Findings claim that *CoD* has a large and fairly engaged audience on PlayStation, accounting for [X]% of yearly active users and [X]% of devices played in 2021.³⁸ Those figures are not informative. The numbers are estimated on the basis of YAU without applying any form of minimum threshold to capture engagement. In other words, for a gamer to be “counted” as a *CoD* YAU, it is enough for that gamer to have launched a *CoD* title on PlayStation for however short a period. This significantly overestimates the relevance of a franchise on a platform as gamers who played the title for only 1 hour, 1 minute or 1 second are included. The same is true for devices played in a year.

³³ Provisional Findings, paragraph 7.156(a).

³⁴ Provisional Findings, paragraph 7.156(b).

³⁵ Sony’s published financials report that PlayStation had 100+ million MAU in both 2021 and 2022. Based on Activision telemetry data, *CoD* MAUs on PlayStation were [X] 2021 (see Microsoft Issues Statement Response, Figure 25) and [X] in 2022.

³⁶ PS MAUs for 2021 are estimated at 107.3 million based on [Sony’s Supplemental Information to its financial report](#). *CoD* MAUs on PS are estimated at [X] million based on Activision data.

³⁷ Based on Newzoo data. [X].

³⁸ Provisional Findings, paragraph 7.163.

- 2.41 As shown in the YouGov Survey, when identifying titles that are likely to influence past and future console choice, PlayStation gamers placed no special significance on *CoD* and instead identified a range of first-and-third party titles. These include: *Assassin's Creed*, *Grand Theft Auto*, *The Last of Us*, *The Witcher*, *Gran Turismo*, *God of War* and *Spiderman* (see Tables 1 and 2 below).
- 2.42 It is noted that although the CMA (rightly) does not consider that the upstream market should be segmented by genre, the Provisional Findings also assess shares in the hypothetical sub-segment encompassing games with shooter elements. The Provisional Findings' conclusion that games compete across genres and that such distinctions are arbitrary – a conclusion consistent with the Parties' submissions to date – means that this material cannot provide a compelling base of evidence of market power.³⁹

(iii) The nature of Sony's strength means anti-competitive foreclosure is implausible

- 2.43 There are a range of further reasons why PlayStation would be extremely difficult to foreclose even if the Merged Entity had market power either at the upstream or downstream levels:
- (a) As discussed above, PlayStation's console strength is significant – both globally and in the UK. It is not credible that this dominance and sizeable lead over Xbox could be eroded by just one game.
 - (b) Further, Sony also has significant strength as a game publisher. It is larger than Activision today and, as the Provisional Findings themselves note [redacted].⁴⁰
 - (c) In addition, its first-party library is supported by a portfolio of high-quality exclusive third-party content. Sony also has exclusive agreements for many of the most highly anticipated third-party releases in 2023, such as *Final Fantasy XVI* and *Forspoken* both from Square Enix, with whom Sony has a decades-long relationship.⁴¹ Industry commentators note that Sony is “*the dominant platform that publishers like Square Enix simply can't afford to ignore*”.⁴² Sony could easily retaliate if Microsoft were to make *CoD* exclusive post-Merger, including by making more popular games exclusive to PlayStation.
 - (d) Sony is a dynamic competitor and continues to grow the PlayStation console. It continues to acquire more studios, including minority stakes in big publishers. Sony's Corporate Report 2022 refers to Sony as a “*world-leading creator of*

³⁹ Provisional Findings, paragraphs 5.126-5.128.

⁴⁰ Provisional Findings, paragraph 7.133(b).

⁴¹ Sony, “*PlayStation in 2023: Highlights*”, 15.12.2022 (link available [here](#)).

⁴² TweakTown, “*Square Enix's global aspirations hindered by PlayStation exclusivity*”, 04.01.2023 (link available [here](#)). Square Enix has “*signed multiple lucrative exclusivity deals with PlayStation*” to “*continue Sony's so-called virtuous cycle where success brings more success over time*”. See also [redacted] and [redacted].

*innovative videogames and network products and services” and a “category leader in gaming brands”. It also states that through “[e]xtensive investment and company acquisitions have built a portfolio of leading global game development studios, best in class technology, and flagship franchises”.*⁴³ The idea that PlayStation would be a passive competitor that took no steps protect its dominant position in response to hypothetical withholding of one game is not credible. It already looks to strengthen itself *today*.

D Only a very small proportion of PlayStation users would actually switch away from the console to play *CoD*

2.44 The Provisional Findings rely on the CMA Survey to quantify the potential impact of any hypothetical withholding strategy on PlayStation. In doing so, the Provisional Findings clearly state that only [X]% of PlayStation gamers would move away from the console if *CoD* were not available.⁴⁴ There is no defensible basis on which an input that “drives” adoption for only [X]% of the underlying platform can be considered important in overall competition terms. As discussed below in the context of effects, it cannot lead to any meaningful form of “foreclosure” when assessing the resulting impact on PlayStation’s user numbers and revenues.

2.45 The CMA has arrived at this user diversion rate based on responses to its own survey. This survey was flawed in its methodology as it only canvassed responses from “engaged” *CoD* gamers (defined as those who played the game for more than ten hours in a year and/or spent more than \$100 in-game purchases). This methodology significantly distorts the pool of potential respondents and reduces the ability to draw conclusions about the wider PlayStation user base.⁴⁵ In contrast, the YouGov Survey canvassed responses from a wider, unrestricted group of PlayStation users (*i.e.*, not limited to ‘engaged’ *CoD* gamers). This is much more informative of the likely diversion as it is more representative of the wider PlayStation user base. Using the YouGov Survey, Microsoft has calculated the likely diversion rate to be even lower, at only ~3% of PlayStation gamers.⁴⁶

⁴³ These include: (i) a minority stake in Epic Games, publisher of Fortnite; (ii) the acquisition of five studios in 2021 (Housemarque, Nixxes Software, Firesprite, Bluepoint, and Valkyrie Entertainment); (iii) a minority interest of 14.9% in FromSoftware, the developer of the biggest game of 2022, Elden Ring and other hit games; (iv) the acquisition of Bungie in 2022, the developer of the popular online game, Destiny 2; and (v) additional acquisitions in 2022, including Haven Studios, Lasengle, and Savage Games.

⁴⁴ In response to the CMA’s Survey, 24% of respondents would have bought an Xbox, PC or no gaming device at all (Provisional Findings, paragraph 7.173). The CMA adjusted this figure to account for all PlayStation users, not just survey respondents.

⁴⁵ The Parties also note that based on [X], [X]% of PlayStation gamers played *CoD* for more than 10 hours among those sampled in the survey. This number is *not* recognised by the Parties. Telemetry data from Activision shows that ~[X]% of gamers on PlayStation who played *CoD* in the period chosen by the CMA for its sampling (July 2021 – June 2022).

⁴⁶ See [X].

- 2.46 Regardless of the methodology used, in either case the diversion rate is minimal and well below the levels at which withholding *CoD* could be considered to have the ability to foreclose PlayStation. Simply put, if Microsoft were to engage in a withholding strategy post-Merger (*quod non*), PlayStation would still retain between [X]% of its user base even if that shift were to happen immediately. As further illustrated below in section 2.G, however, even this impact would be gradual over time and therefore attenuated.
- 2.47 It is simply not credible to maintain that *CoD* has any sort of upstream market power or that it is an important input to PlayStation in light of such low switching rates.

E The *CoD* gamers who would switch are unlikely to be particularly valuable to PlayStation – the various attempts to inflate their value are not credible

- 2.48 With apparent recognition that the switching rate is very low, even with the CMA Survey focussed on *CoD* gamers, the Provisional Findings then inflate the impact of this switching by reference to consumer spend and gameplay time. This is done in two steps.
- (a) First, the proportion of PlayStation users who may hypothetically switch is converted to a [X]% share of spend and [X]% of gameplay time.
- (b) Second, the Provisional Findings further argue that the potential total impact could amount to [X]% on spend and [X]% on gameplay time as a result of reduced engagement from retained *CoD* gamers.
- 2.49 Both of these steps are unjustified and wrong and betray a fundamental misunderstanding of the basic economics of a console platform and gamers' behaviour.
- (i) PlayStation gamers who are likely to switch play less and spend less than those who would stay on PlayStation – not the other way around**

- 2.50 The initial conversion in the Provisional Findings of the [X]% switch rate to a [X]% share of spend and [X]% of gameplay time is based on the assertion that “*average ‘non-casual’ CoD gamer in 2021 spent between 1.6 and 1.8 times more than the average gamer that did not play CoD on PlayStation*” and games 2.1 times as much.⁴⁷ A non-casual *CoD* gamer is defined as playing at least [0-5]% of their gameplay time on *CoD* (a “casual” *CoD* gamer spends less than [0-5]% of their gametime on *CoD*).
- 2.51 This approach is flawed in a number of ways. First, as a matter of basic computation the “grossing up factors” of 1.6-1.8 for spending and 2.1 for gameplay time, the CMA

⁴⁷ Provisional Findings, paragraph 7.174. This calculation is made on the basis that globally the average “non-casual” *CoD* gamer (defined as a gamer who spent more than [0.5]% of this gametime on *CoD*) spent between 1.6-1.8 times more than the average non-*CoD* gamer (defined as a gamer who did not play *CoD* at all) and gamed 2.1 times more.

compares gamers who play more than [0-5]% of their gameplay time on *CoD* with those who spend none. In doing so, the approach entirely ignores, without any explanation, the [X]% of all PlayStation gamers who do play *CoD* but spent less than [0-5]% of their gameplay time on it. The CMA simply assumes that these so-called “casual” *CoD* gamers play and spend the same amount as gamers who never play *CoD*. There is no justification for this. In fact, including these casual gamers together with the gamers who did not play *CoD* at all (as they would likely not switch), reduces the diversion to [X]% of spend, and [X]% of gameplay time.

- 2.52 Second, and fundamentally, even these (lower) inflated figures are not meaningful as to the potential impact on PlayStation of the withdrawal of *CoD*. The “non-casual *CoD* gamer” definition includes a huge range of *CoD* gamers from those for whom the game is a tiny part of their overall gaming to those who play obsessively. Yet it does not assess whether those PlayStation gamers who are more likely to switch away from PlayStation spend more on the console than those who would not. That is important when you are inflating revenue impacts from switching as the Provisional Findings do.
- 2.53 It is clear from the data that the gamers who are *more* likely to switch to Xbox play *less* and spend *less* than other gamers. It is uncontroversial to assume that those gamers who are likely to switch to Xbox as a result of *CoD* withholding from PlayStation, are those whose gameplay time is concentrated around *CoD*. Analysis of *CoD* gamers shows that [X]. [X]. This is in direct contrast with the CMA’s assumption. Whilst these gamers may be valuable to Activision as a publisher, [X].
- 2.54 This is depicted in Figure 7 below. The figure uses 2022 Xbox telemetry data to show the relative value of *CoD* gamers to a console platform depending on their level of engagement with *CoD*.⁴⁸ [X]. Going from left time right, [X].⁴⁹ [X]. This is in stark contrast with the CMA’s conclusion that the [X]% of gamers who could potentially switch would [X]. To the contrary, it is clear evidence that [X] – which would suggest that the true value of the [X]% of switchers should be [X].

Figure 7: Average spending and gametime of *CoD* gamers, 2022

[X]

Source: Xbox telemetry data Note: This analysis excludes gamers with less than 5 hours of *CoD* gameplay time in 2022.

- 2.55 This is consistent with other parts of the Provisional Findings which confirm that PlayStation gamers who spent more than 80% of their time on *CoD* accounted for just [X]% of total platform spend and [X]% of total gameplay time. Further, gamers with

⁴⁸ Although this analysis is based on Xbox telemetry data, the position is unlikely to be materially different on PlayStation. This is [X]. See also [X].

⁴⁹ As the data shows, for example, a gamer that spends [X]. [X].

more than 80% of their annual gameplay time centred on *CoD* accounted for just [X]% of all PlayStation gamers in 2021.⁵⁰ Likewise, gamers who spent more than 50% of their time on *CoD* accounted for only [X]% of total platform spend and [X]% of total gameplay time.⁵¹ This shows that those *CoD* gamers most likely to switch as a result of *CoD* being unavailable account for only a minimal share of overall platform spend and gameplay time.

2.56 In the circumstances, even the computationally corrected inflated figures are unjustified. The small number of gamers which the CMA's own survey suggests might switch are likely to be the least valuable. The impact on PlayStation's revenue (and, in fact, gameplay time overall) is likely to be diminished to *less* than the [X]% used.

(ii) The Provisional Findings fail to provide any logical explanation as to why broader consumer spending on PlayStation would be reduced

2.57 The Provisional Findings subsequently argue that the potential total impact could amount to even [X]% on spend and [X]% on gameplay time as a result of reduced engagement from retained *CoD* gamers.⁵² This is a significant overstatement based on the misapprehension that following any hypothetical withholding, gamers who played *CoD* on PlayStation but would not switch would subsequently reduce their gaming spend and hours to the same levels as those who do not play *CoD* at all. There is no basis in any of the evidence presented by the Provisional Findings that this would be the case, yet it has significant impact on the Provisional Findings' conclusion.

2.58 It relies on the unjustified, speculative assumption that any gamer who played *CoD* in a year, irrespective of the duration, would reduce their engagement level across PlayStation more broadly to the average gameplay time of gamers who never played *CoD*. In doing so, the Provisional Findings seemingly assume that gamers would stop playing a significant amount of *other* games, hugely depleting their gameplay time and spending for no reason whatsoever.

2.59 This is in direct contrast with how gamers actually behave on a console. It assumes that gamers who do not switch to Xbox following the withholding of *CoD* would lose most of their interest in gaming and scale back their total spend and gameplay time significantly.⁵³ There is no justification for this.

⁵⁰ See Appendix G, tab Annex 7.3 RFI 30-9.

⁵¹ Provisional Findings, paragraph 7.169(b). To the extent that the CMA considers that gamers who spent more than 20% of their time playing *CoD* accounted for a greater proportion of platform spend and gameplay time, such gamers are unlikely to be highly engaged *CoD* gamers and therefore less likely to switch.

⁵² Provisional Findings, paragraph 7.175(a).

⁵³ While the Parties do not have PlayStation telemetry, a comparison of ABK telemetry across PlayStation and Xbox shows that [X].

2.60 To the contrary, the [REDACTED]. In other words, the [REDACTED]% of PlayStation gamers who play a little *CoD* [REDACTED]. There is no reason at all to consider that [REDACTED].

2.61 [REDACTED].⁵⁴

2.62 [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. It is pure speculation.

Table 1 – [REDACTED]

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

Source: [REDACTED]

2.63 Finally, the Provisional Findings claim that gamers who did not play enough *CoD* to meet the bar for the CMA’s survey would nonetheless switch to continue playing with their more hardcore *CoD* playing friends that have switched, thereby increasing overall diversion.⁵⁵ That is not borne out by the data above and is highly speculative - no evidence is provided to support this assertion. Implicit in the Provisional Findings’ view is that both casual *CoD* gamers and engaged *CoD* gamers are playing games together other than *CoD*, which anchors them to the console. The Provisional Findings do not address the extent to which non-*CoD* titles – in particular PlayStation exclusives – may serve to bind casual *CoD* gamers to PlayStation or contribute towards their overall spend. At the same time, the Provisional Findings simply assume that if they do switch, hardcore *CoD* gamers will be followed to other platforms by casual *CoD* players (*i.e.*, that is entirely one-way). No consideration is given to the extent to which casual *CoD* gamers may keep more hardcore *CoD* gamers tethered to PlayStation. Again, if anything, the impact of non-*CoD* gamers is likely to dampen the impact of diversion, not inflate it.

⁵⁴ See Appendix G.
⁵⁵ Provisional Findings, 7.175(b).

(iii) The Provisional Findings fail to account for the switching costs gamers face

- 2.64 Notwithstanding the fact that only a small number of gamers may potentially switch in response to any hypothetical withdrawal of *CoD* (at most [X] % based on the CMA’s survey), the Provisional Findings completely fail to account for any switching costs that gamers may face. Instead, the CMA adopts the unlikely scenario that gamers are more likely to abandon their PlayStation entirely, rather than accounting for the many investments in the console that gamers actually care about.
- 2.65 These investments not only include the significant monetary investment required to purchase a next-generation console, but also include wider investments in a gamer’s digital library of games, entitlements (e.g., achievements and trophies that have been earned through gameplay time), as well as intangible investments such as familiarity with the console hardware and controller, navigation of the console ecosystem, and connections to the broader gamer network that keeps gamers engaged with the PlayStation console. On the latter point, the Provisional Findings concede that there are direct network effects that operate at the platform level, while never managing to measure how those direct network effects might serve to insulate PlayStation.⁵⁶
- 2.66 A PlayStation gamer who would switch to an Xbox would incur between \$240 - \$500 on a next generation console. In addition to this, if they decided to sell their PlayStation to cover the cost of the new console, they would need a significant investment to replace their PlayStation library of games. Based on Xbox telemetry data, gamers who played *CoD* on Xbox purchased digitally [X] games in 2022. Assuming an average price of \$70 per game this would be a cost of \$[X] just to replace the games they purchased in one year.⁵⁷ The cost to replace their entire library of games would be materially higher.
- 2.67 Not only are these costs likely to dampen the switching rates for *CoD* gamers, they also act as a huge disincentive to the wider PlayStation user base to follow their friends to Xbox. The Provisional Findings do not provide any evidence to explain how the hypothetical withholding of one piece of content would result in meaningful numbers of gamers being willing to incur these switching costs.

(iv) Gamer preferences show that *CoD* is not an important input to PlayStation’s “range” of titles

- 2.68 The Provisional Findings claim that the loss of a single title, *CoD*, would represent a meaningful net reduction in PlayStation’s overall ‘range’ of games.⁵⁸ In reaching this view, the Provisional Findings miss two crucial aspects of console competition. First, no single title is sufficiently important to a console such that its hypothetical loss could

⁵⁶ Provisional Findings, paragraph 7.27.

⁵⁷ Cost could be less if some of these are PlayStation exclusive titles.

⁵⁸ Provisional Findings, paragraphs 7.249-7.253.

diminish the console’s overall competitiveness. Second, to the extent that *CoD* is part of PlayStation’s range offering, there are other titles that gamers consider to be of greater or equivalent importance to this range, as evidenced by the YouGov Survey and other measures of game popularity on PlayStation. As shown below, PlayStation’s exclusive titles are part of the brand proposition valued by gamers.

2.69 The YouGov Survey asked gamers to identify titles that are of importance to both previous and future console choices. In each instance, the survey results showed that [X], not *CoD*, was the game reporting the highest level of diversion, both in terms of past console purchases ([X]%) and future purchases ([X]%). Even with a game as popular as [X], it cannot be credibly maintained that losing approximately [X]% of past or future sales would result in the diminishment of PlayStation’s competitiveness, emphasizing that no single title can result in foreclosure of a gaming platform. This is particularly so, as consoles are durable goods that are unlikely to be replaced instantly. Therefore, the actual annual loss is likely to be a fraction of the overall diversion rate (see discussion in section 2.129 below). Further, as shown in the tables below, the YouGov Survey also confirms that in both instances, *CoD* falls squarely in the middle of the pack of games available on PlayStation that would prompt diversion, which in any event is minimal across all games.

Table 2 – Past diversion rate of all PlayStation gamers if the game were not available on PlayStation

Game	Diversion Rate
[X]	[X]
[X]	[X]
[X]	[X]
<i>Call of Duty</i>	2.4%
[X]	[X]
[X]	[X]
[X]	[X]
[X]	[X]
[X]	[X]

Source: YouGov Survey. [X]

Table 3 – Future diversion rate of all PlayStation gamers if the game were not available on PlayStation

Game	Diversion Rate
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
Call of Duty	3.0%
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

Source: YouGov Survey. [REDACTED]

- 2.70 This highlights the fact that there are numerous popular titles that gamers care about on PlayStation. These include [REDACTED]. As the above clearly illustrates, there are a sufficient number of popular and differentiated titles in Sony’s range that the removal of *CoD* could not substantially diminish this. In contrast to actual evidence of gamer preferences, the Provisional Findings place an unduly narrow focus on the constraint that other shooter titles place on *CoD* on PlayStation. This analysis unfortunately misses the point – gamers value a broad range of popular content on PlayStation and there is simply no evidence to suggest that this should be limited to a particular type of genre.
- 2.71 This is also consistent with the fact that PlayStation gamers consistently replace *CoD* with other games in the PlayStation library, both with shooter elements and otherwise. For instance:
- (a) **PlayStation gamers consistently rank other games above *CoD* on PlayStation.** *CoD* does not stand out among its competitors in terms of PlayStation user scores, in particular the franchise’s latest releases have received mixed reviews. The 2022 release, *Call of Duty: Modern Warfare II*, earned a user score of 5.0 out of 10, which is generally considered as mediocre, while the 2021 release, *Call of Duty: Vanguard*, obtained an even lower score of only 3.6. This is in comparison to other recent popular releases such as Sony’s most recent *God of War Ragnarok* (2022) with a score of 7.9, *Ghost of Tsushima* (2020) with a score of 9.1, *Resident Evil* (2019) with 9.0 and *Marvel’s Spider-Man* (2018) with 8.7. As observed from the table below, *Call of Duty: Modern Warfare II* (2022) is not even listed on the Top 20 Metacritic PlayStation user rankings for PlayStation 5 of all time.

Table 4: Metacritic PlayStation user rankings for PlayStation 5⁵⁹

No.	2022
1	<i>Astro's Playroom</i> (9.2)
2	<i>Hogwarts Legacy</i> (9.1)
3	<i>It Takes Twos</i> (9.1)
4	<i>Uncharted: Legacy of Thieves</i> (8.7)
5	<i>Final Fantasy XIV</i> (8.7)
6	<i>Marvel's Guardians of the Galaxy</i> (8.7)
7	<i>Dead Space</i> (8.6)
8	<i>GhostWire: Tokyo</i> (8.6)
9	<i>Tales of Arise</i> (8.6)
10	<i>Hades</i> (8.6)
11	<i>Judgment</i> (8.6)
12	<i>Sackboy: A Big Adventure</i> (8.6)
13	<i>Ys VIII: Lacrimosa of DANA</i> (8.5)
14	<i>Stray</i> (8.5)
15	<i>MADiSON</i> (8.5)
16	<i>Lost Judgment</i> (8.5)
17	<i>Kena: Bridge of Spirits</i> (8.5)
18	<i>Ratchet & Clank: Rift Apart</i> (8.5)
19	<i>SD Gundam Battle Alliance</i> (8.4)
20	<i>Metro Exodus: Complete Edition</i> (8.4)

Source: Metacritic

- (b) **Xbox gamers also consistently rank other games above *CoD* on Xbox (Xbox Series X).** *CoD* does not stand out among its competitors in terms of Xbox user scores here either. In particular, it does not even appear in the list of Top 20 games by User Score. The 2022 release, *Call of Duty: Modern Warfare II*, earned a user score of 6.5 out of 10, while the 2021 release, *Call of Duty: Vanguard*, obtained an even lower score of only 5.0. In comparison, *Destiny 2: The Witch Queen*, a Bungie (*i.e.*, Sony) game, ranks in the Top 10 on Xbox and received a user score of 8.0.⁶⁰
- (c) **Metacritic's ranking of top 20 game releases in a particular year by user score (PlayStation 5, 2020-2023),** *CoD* is only ranked once, *Call of Duty: Black Ops CW* in 2020 with 76/100 user score, which is much lower than games as *Elden Ring* with 96/100 and *God Of War: Ragnarök* with 94/100 on their release year, or even *Dead Space* that came out on 27 January 2023 and is already at 88/100 user score.

⁵⁹ Metacritic, (link available [here](#)).

⁶⁰ Metacritic, Xbox Series X First-Person Shooter Games (link available [here](#)).

Table 5: Metacritic’s ranking of top 20 game releases (PlayStation 5, 2020-2023)⁶¹

No.	2020	2021	2022	2023
1	<i>Demon’s Souls</i> (92)	<i>Hades</i> (93)	<i>Elden Ring</i> (96)	<i>Dead Space</i> (88)
2	<i>Devil May Cry 5</i> (89)	<i>Tony Hawk’s</i> (90)	<i>Witcher 3</i> (94)	<i>Monster Hunter Rise</i> (87)
3	<i>Mortal Kombat 11</i> (88)	<i>Final Fantasy XIV</i> (90)	<i>God of War: Ragnarök</i> (94)	<i>Hogwarts Legacy</i> (86)
4	<i>Marvel’s Spider Man</i> (85)	<i>Final Fantasy VII</i> (89)	<i>Persona 5 Royal</i> (91)	<i>A Space for the Unbound</i> (82)
5	<i>Warframe</i> (85)	<i>Disco Elysium</i> (89)	<i>Stanley Parable</i> (89)	<i>SEASON: A Letter to the future</i> (77)
6	<i>Assassin’s Creed</i> (84)	<i>Ratchet & Clank</i> (88)	<i>Last of Us</i> (88)	<i>Vengeful Guardian: Moonrider</i> (77)
7	<i>Overcooked!</i> (84)	<i>It Takes Two</i> (88)	<i>Horizon Forbidden West</i> (88)	<i>Raiden IV x Mikado Remix</i> (76)
8	<i>Astro’s Playroom</i> (83)	<i>Deathloop</i> (88)	<i>Gran Turismo 7</i> (87)	<i>One Piece Odyssey</i> (74)
9	<i>WRC 9 FIA</i> (82)	<i>Ghost of Tsushima</i> (87)	<i>Uncharted</i> (87)	<i>Breakers Collection</i> (73)
10	<i>Planet Coaster</i> (81)	<i>Nioh Collection</i> (87)	<i>Destiny 2</i> (87)	<i>Deliver Us Mars</i> (68)
11	<i>DIRT 5</i> (80)	<i>Guilty Gear</i> (87)	<i>Inscription</i> (87)	<i>Neptunia</i> (65)
12	<i>Sackboy</i> (79)	<i>Chicory</i> (87)	<i>Cult of the Lamb</i> (86)	<i>Forspoken</i> (65)
13	<i>NBA 2K21</i> (79)	<i>Tales of Arise</i> (87)	<i>Tactics Ogre: Reborn</i> (86)	-
14	<i>Observer: System Redux</i> (77)	<i>Crash Bandicoot</i> (86)	<i>Atari 50</i> (86)	-
15	<i>The Pathless</i> (77)	<i>Yakuza</i> (86)	<i>Tunic</i> (86)	-
16	<i>Immortals Fenyx Rising</i> (77)	<i>Returnal</i> (86)	<i>Return to Monkey Island</i> (85)	-
17	<i>Puyo Puyo Tetris 2</i> (76)	<i>Chivalry 2</i> (85)	<i>Crusader Kings III</i> (85)	-
18	<i>Call of Duty: Black Ops CW</i> (76)	<i>Control</i> (85)	<i>OlliOlli World</i> (84)	-
19	<i>Bugsanx</i> (75)	<i>Forgotten City</i> (85)	<i>Valkyrie Profile</i> (84)	-
20	<i>FIFA 21 NXT LVL</i> (74)	<i>Death Stranding</i> (85)	<i>Stray</i> (83)	-

⁶¹ Metacritic (link available [here](#)).

- (d) **CoD is consistently outranked in Sony’s own polls for best games on PlayStation.** As set out in the table below, PlayStation gamers voting in the end of year “game of the year” poll run by Sony have consistently chosen games other than *CoD* or any other Activision Blizzard game (such as *Diablo* and *Crash Bandicoot*) as their game of the year or most anticipated game.

Table 6: PlayStation.Blog game of the year poll of PlayStation gamers

No.	PlayStation.Blog PS4 Game of the Year	PlayStation.Blog PS5 Game of the Year	Most anticipated game
2013	<i>Assassin’s Creed IV Black Flag</i>	n/a ⁶²	<i>inFAMOUS Second Son</i>
2014	<i>Destiny</i>	n/a	<i>Uncharted 4: A Thief’s End</i>
2015	<i>The Witcher 3: Wild Hunt</i>	n/a	<i>Dark Souls III</i>
2016	<i>Uncharted 4: A Thief’s End</i>	n/a	<i>The Last of Us Part II</i>
2017	<i>Horizon Zero Dawn</i>	n/a	<i>God of War</i>
2018	<i>God of War</i>	n/a	<i>Kingdom Hearts 3</i>
2019	<i>Death Stranding</i>	n/a	<i>Cyberpunk 2077</i>
2020	<i>The Last of Us Part II</i>	<i>Marvel’s Spider-Man: Miles Morales</i>	<i>New God of War title</i>
2021	<i>Resident Evil Village</i>	<i>Ratchet & Clank: Rift Apart</i>	<i>Marvel’s Spider-Man 2</i>

Source: PlayStation.Blog Game of the Year Poll.

2.72 The fact that gamers value a broad range of popular titles on PlayStation is also consistent with [X]. In particular, the Provisional Findings show that other publishers such as [X] ([X]%) and [X] ([X]%) are [X] to Activision ([X]%) when measuring share of spend.⁶³ This again highlights that [X]% of consumer spend on PlayStation is generated by titles other than Activision games. This is also the case when assessing individual franchises. Approximately [X]% of gamer spend on PlayStation comes from franchises other than *CoD*.⁶⁴ Likewise, alternative franchises account for approximately [X]% of gameplay time.⁶⁵ This is the reality of gamer behaviour. Simply put, all of the evidence shows that *CoD* is just one popular game that competes with many other popular games on PlayStation.

F Microsoft has no incentive to withhold *CoD* from PlayStation – the Provisional Findings’ flawed analysis ignore commercial realities

2.73 Any conclusion that Microsoft has an incentive to withhold *CoD* from PlayStation is purely theoretical. Microsoft has been absolutely clear that it will continue to make

⁶² PlayStation 5 was released only in 2020.
⁶³ Provisional Findings, paragraph 7.227.
⁶⁴ Provisional Findings, paragraph 7.230(a).
⁶⁵ Provisional Findings, paragraph 7.230(b).

CoD available on PlayStation on equivalent terms to Xbox (including the same content, features and release date).⁶⁶

- 2.74 Microsoft has a legally binding agreement to bring *CoD* to Nintendo including [REDACTED]. It is Microsoft's intention that post-Merger, *CoD* will be available on more consoles, not fewer.
- 2.75 The cross-platform and cross-device strategy which Microsoft is pursuing with this deal does not involve withdrawing, withholding from or degrading *CoD* on PlayStation. Not only would this directly contradict Microsoft's strategy, it would undermine Microsoft's hard won reputation for bringing competition to the gaming world and would come at vast cost to Microsoft. It is certain that if Microsoft were to withdraw *CoD* from PlayStation it would result in foregone anticipated revenue of approximately \$[REDACTED] per year.⁶⁷
- 2.76 In present value terms, anticipated future revenues from *CoD* on PlayStation account for approximately [REDACTED]% (~\$[REDACTED]) of the overall value of the deal for Microsoft. To close the Merger and [REDACTED] by pulling *CoD* from PlayStation would mean [REDACTED]. This goes against [REDACTED]. [REDACTED]. It was not, because Microsoft has no such plans. The Provisional Findings do not cite a single internal document or testimony from Microsoft employees to suggest otherwise. That is because they do not exist. The reality is that [REDACTED] will be best served by a strategy that allows the *CoD* franchise to be enjoyed by as many gamers as possible.
- 2.77 In order for Microsoft to have an incentive to incur a certain loss of \$[REDACTED] per annum, it would need to be very sure that it would recover at least that amount of money in the future. Any benefits of such strategy would need to be clear and extensive: marginal and speculative would not be sufficient.
- 2.78 In the present case, it is not simply that the supposed benefits of withholding are merely marginal or speculative. Instead the available evidence is that there are no such benefits. To the contrary, the certain losses would be very large, even when accounting for the implausible assumptions in certain of the sensitivities used by the CMA in its arithmetic.
- 2.79 This section considers the two methods of incentive calculation used by the CMA in the Provisional Findings. It is explained how the first, using the LTV of customers, includes a fundamental error which means that *none* of the scenarios produces a positive result *i.e.* net incentive, and, in any event, only finds positive figures in scenarios which

⁶⁶ This is evidenced by (i) [REDACTED], (ii) internal documents, (iii) consistent public statements over the past 12 months, (iv) sworn testimony to the FTC, (v) unequivocal written and oral evidence to the CMA and European Commission and (vi) discussions with Sony (including a binding contractual offer).

⁶⁷ [REDACTED]. [REDACTED].

are not accurate or plausible. The second, using 2021 data actually shows in [REDACTED] out of [REDACTED] scenarios that Microsoft has no incentive to withdraw *CoD*. Therefore overall, the 2021 data analysis does not support an incentive to withdraw. In any event, [REDACTED] is based on an unjustified assumption. In addition to dealing with the two calculation methods, it is explained why so-called “strategic benefits” do not alter the conclusion and why Microsoft’s “real world” incentives are to monetize *CoD* as broadly as possible.

(i) The Provisional Findings’ LTV model does not support any incentive to foreclose – to the contrary it evidences a lack of incentive

2.80 The Provisional Findings present an incentive analysis based on gamer’s LTV in an attempt to measure the potential gains and losses from any hypothetical withholding strategy. In essence it takes the CMA’s survey material and considers the losses and gains to Microsoft from withdrawing *CoD* from PlayStation over a five year period.

2.81 The basic mechanics are to look at the levels of switching away from PlayStation that the CMA survey identifies and ask whether the benefits of that switching to Microsoft are greater than the amount it would lose from not continuing to have *CoD* on PlayStation. In order to calculate levels of switching, the Provisional Findings use diversion ratios taken from the CMA Survey, weighted to take account of switching customer revenue.⁶⁸

2.82 The Provisional Findings then apply two additional steps to these diversion ratios:

- (a) First, they use two different LTVs figures for the gains to Microsoft of customers: \$[REDACTED] (“**Base LTV**”); and \$[REDACTED], based on the Parties’ estimates (“**Parties LTV**”).⁶⁹ These are the benefits Microsoft may potentially gain from switching individual users to Xbox.
- (b) Second, two additional assumptions are applied to the calculation in relation to gamers not captured by the CMA Survey.⁷⁰ The first is to assume that all gamers who are not captured by the CMA Survey switch to Xbox at the same time as those captured by the Survey (which seems highly implausible). Alternatively,

⁶⁸ Provisional Findings, paragraph 7.333 and Appendix E, paragraph 62 – use of revenue weighting not stated in text but clear from underlying data modelling.

⁶⁹ CRA, “*Assessing the risk of input foreclosure in console gaming*” submitted on 27.07.2022.

⁷⁰ It will be recalled that the survey sampled gamers based on whether they played *CoD* more than 10 hours – or spent more than \$100 on the game – during a twelve-month period between July 2021 and June 2022. The Parties have already expressed their concerns with this approach (see Annex 3 of Microsoft’s Responses to the Working Papers, Comments on the CMA Survey. In addition, as explained below, the Parties do not recognise the share of gamers on PlayStation that fall within this category to be accurate).⁷⁰ The CMA Survey did not gather any information about non-*CoD* gamers or, more importantly, *CoD* games who play less than 10 hours per year. That is precisely what the YouGov Survey sought to do and showed very low switching rates.

a second assumption is made that these gamers did not switch at all (which seems much more plausible).

2.83 The results of this are captured in the following table.

Table 7: Net financial incentive for Microsoft to withhold *CoD* from PlayStation based on the Provisional Findings §7.333 and Appendix E - uncorrected for errors

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

2.84 As indicated in the table, using the Parties LTV, it is clear that Microsoft has no incentive to foreclose given the losses incurred. It is only when using the CMA’s calculations (*i.e.*, relying on the so-called Base LTV) that the results would be read to suggest a financial incentive. Not only does Microsoft consider the Base LTV to be untenable, it has identified an even more fundamental flaw in the calculation.

(a) The CMA’s calculation of the LTV of *CoD* contains a fundamental error - correcting for this mistake shows no incentive to withhold *CoD* from PlayStation

2.85 The Provisional Findings’ analysis is conducted by comparing (i) the gross margin from foregone sales of *CoD* content to the [X] MAUs who played *CoD* on PlayStation in 2021; against (ii) the recouped gross margin from gamers buying a new Xbox or switching to playing *CoD* on an existing PC or Xbox.⁷¹

2.86 When the two figures are compared, the error is obvious: on the gains side, the calculation uses a 5 year gross profit figure, on the losses side, it uses a figure for only a single year. Making a single correction for this mistake and extending the analysis to a 5-year *CoD* LTV reverses the results of the analysis in the Provisional Findings. The analysis now shows that there is no incentive for Microsoft to withhold *CoD*.

2.87 More details are provided in **Annex 1**. However, in simple terms, if the losses to Microsoft are extended beyond a single year (*i.e.*, the mistake made in the Provisional

⁷¹ More specifically, to compute the gains to Microsoft, the Provisional Findings rely on the diversion ratios estimated by the CMA Survey and then assign to each new Xbox gamer either the base LTV (\$[X]) or the Parties’ LTV (\$[X]). Each gamer who switches to playing *CoD* on an existing PC or Xbox is ascribed the same LTV as for a *CoD* gamer on PlayStation. Both of these LTVs calculate gross profit accrued over a five year period (as is rational in such an exercise). To compute the loss to Microsoft, the Provisional Findings multiply the number of *CoD* MAU on PlayStation by an average amount of gross profit they would make for the *CoD* game publisher. A figure for 2021 of \$[X] is used (Appendix E, paragraph 26).

Findings is corrected), the results clearly show that there is no incentive to withhold. The table below sets out the corrected results. This demonstrates that the calculations in the Provisional Findings cannot be relied upon as evidence that Microsoft has any incentive to withhold.

Table 8: Net financial incentive for Microsoft to withhold *CoD* from PlayStation based on the Provisional Findings LTV analysis – correcting for the error on the *CoD*LTV calculation

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

2.88 Table 9 below shows the permutations using the CMA’s LTV calculation methodology without the necessary corrections. It is noted that, save in relation to gameplay time weighting (considered further below) on the Parties’ LTV, there is no incentive indicated.

Table 9: Net financial incentive for Microsoft to withhold *CoD* from PlayStation based on the Provisional Findings LTV analysis – uncorrected for the error on the *CoD*LTV

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

2.89 Table 10 shows the same analysis correcting only for the CMA’s calculation methodology error and using a 5-year LTV for *CoD* gamers.

Table 10: Net financial incentive for Microsoft to withhold *CoD* from PlayStation based on the Provisional Findings LTV analysis – correcting for the error on the *CoD*LTV calculation methodology

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

2.90 The conclusion is this: under no circumstances contemplated by the CMA in any of its data, let alone those referred to in the Provisional Findings would Microsoft have the financial incentive to withhold *CoD* from PlayStation. This is even without correcting for other errors in the CMA analysis which supposedly make withholding more attractive to Microsoft – as summarised further below.

(b) LTV error

2.91 In addition to the methodological error, the Base LTV used in the Provisional Findings is not tenable for two broad reasons: (i) one relating to the methodology of calculating the Base LTV; and (ii) the nature of potential switchers. These are discussed below.

2.92 First, the CMA continues to use the wrong and outdated Base LTV for its calculations. As already noted, use of the Base LTV is critical to the findings of incentive (even ignoring the calculation methodology issue considered above). As explained in **Annex 1** and past submissions, ordinary course LTVs are estimated [X].⁷² The Base LTV used in the Provisional Findings relies upon is based on a [X] estimate prepared in March 2022. As Microsoft requires at [X] to estimate LTVs, for the March 2022 LTV

⁷² See Annex 1 [X].

the inputs were from purchasers who purchased an Xbox [REDACTED]. However, [REDACTED]. These gamers are greatly more valuable than later adopters.

2.93 The result is that the LTV figures for these early adopters would be very high (particularly when calculated at the start of their new console usage) as that is when they are most likely to buy more new games. [REDACTED]. As **Annex 1** shows, ordinary course documents on the value of new Xbox console sales show [REDACTED]. The CMA simply cannot ignore that reality. This decrease in LTV stems from three broad causes:⁷³

- (a) First, as already noted, [REDACTED].
- (b) Second, [REDACTED]. As set out in **Annex 1**, the latest weighted average LTV for the gamers who formed the basis of the cohort relied upon the CMA is no longer \$[REDACTED] but \$[REDACTED]. In other words, [REDACTED] (around [REDACTED]%).
- (c) Third, in the context of the period 2020-2021 people spent more time at home and played games more due to the restrictions imposed by the pandemic. It is not possible to quantify the effect that people having to spend more time indoors in late 2020-2021 on their gaming spending. This is a further reason why the LTVs for the cohort that the CMA focuses on are unduly high.

2.94 The figure below shows [REDACTED]. As can be seen [REDACTED].

Figure 8: [REDACTED]

[REDACTED]

Source: [REDACTED]

2.95 In fact, [REDACTED] ([REDACTED]⁷⁴) [REDACTED].⁷⁵

- (a) [REDACTED]
- (b) [REDACTED]
- (c) [REDACTED]
- (d) [REDACTED]

2.96 Microsoft has previously explained why the Parties LTV is more appropriate. The Provisional Findings refer to it as “curated”.⁷⁶ To the extent that such language might suggest that it has been massaged or distorted, that is wrong. As explained, the Parties LTV is Microsoft’s best estimate for the purpose of the analysis. If the CMA chooses

⁷³ There is a fourth reason. As noted in Annex 1 [REDACTED] which affects the LTV calculation.

⁷⁴ [REDACTED].

⁷⁵ [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].

⁷⁶ Provisional Findings, paragraph 7.333.

not to use that measure in its analysis it is noted that, as set out in **Annex 1**, the latest weighted average LTV across Xbox Series X and S for January 2022 is \$[REDACTED]. The weighted average across the whole period November 2020-January 2022 is \$[REDACTED]. The use of the Base LTV of \$[REDACTED] is not justifiable.

- 2.97 Second, as to the nature of potential switchers, the reasoning already set out is reinforced by the fact that Xbox LTVs are computed [REDACTED]. However, [REDACTED] the PlayStation gamers who are likely to have reported they would switch to Xbox if *CoD* were not on PlayStation. As described above, the more dedicated gamers are to the *CoD* franchise, [REDACTED]. [REDACTED]. Indeed, as estimated by the Parties, the LTV of a PlayStation gamer who would switch to Xbox with the sole intent of playing *CoD* is likely to be [REDACTED] the average LTV.⁷⁷ Equally, the LTV of a PlayStation gamer who would switch to Xbox with the sole intent of playing *CoD* and Xbox's exclusives is likely to be approximately [REDACTED].⁷⁸

(c) Non-surveyed switching – assumption of switching parity unjustified

- 2.98 The Provisional Findings include a scenario in which non-surveyed *CoD* gamers are assumed to be as likely to divert to another console to follow *CoD* gamers as those who are surveyed. This implies that the Provisional Findings are assuming that gamers who spent as little as 1 minute on *CoD* in the whole 12-month period are as likely to divert on average as those who played more than 10 hours. That is not a plausible assumption. The CMA proffers no data or evidence to support this implausible approach.

(ii) The CMA 2021 and survey data modelling shows Microsoft would *not* have an incentive to withhold *CoD*

- 2.99 The Provisional Findings use the CMA Survey together with data from Activision and Sony from 2021 to carry out a further incentive analysis. Whilst the Provisional Findings consider [REDACTED] different possible scenarios, in only [REDACTED] does it find that Microsoft has an incentive to withhold.⁷⁹ There is not any good evidence of incentive to withhold. Even in the case of [REDACTED], it is suggesting a gain of only, \$ [REDACTED]. For the reasons outlined above, the idea that such a small potential gain could ever act as a real incentive is fanciful particularly when the average loss from withholding across each of the other [REDACTED] scenarios is \$ [REDACTED].

⁷⁷ *Ibid.*

⁷⁸ CRA, "Assessing the risk of input foreclosure in console gaming" paragraph 69 and the accompanying back up calculations, as submitted 27.07.2022.

⁷⁹ The Provisional Findings at Appendix E also include three types of sensitivities giving rise to five sets of calculations. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. The Parties note that [REDACTED]. [REDACTED]. [REDACTED].

Table 11: Net financial incentive for Microsoft to withhold *CoD* from PlayStation based on the CMA survey

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

2.100 The CMA Survey data analysis for 2021 therefore shows that withholding *CoD* from PlayStation would [X].

2.101 The Provisional Findings assert that the results “*straddle zero*”.⁸⁰ For the reasons outlined, a single small positive data point is not the basis for finding an incentive. Furthermore, the metrics used are not accurate as the Provisional Findings seem to be mixing revenue with gross margins in its assessment.⁸¹ Correcting for these errors increases the shares computed by the Provisional Findings to a maximum loss equivalent to [X] % of Xbox total gross margin in 2021 and a maximum gain equivalent to [X] %. [X], the Provisional Findings would implicitly conclude that Microsoft is ready to risk [X] % of its yearly gross margin, with the hope of gaining just [X]%. This makes no commercial sense whatsoever.

2.102 In any event, in relation to the one case that suggests a positive incentive there are two fundamental flaws. First, the assumption of equal switching by non-surveyed *CoD* gamers (as discussed above). Second, gameplay time weighting. Correcting either error reverses the outcome.

2.103 In relation to weighting by reference to gameplay time, that works on the basis that the greater proportion of time players spent on *CoD*, the more valuable they were and the greater any revenue shift would be.⁸² As set out above, that working assumption is not correct. [X]. [X]. [X]. [X].

2.104 Correcting for this fundamental misunderstanding, it is clear that more dedicated *CoD* gamers [X]. [X]. This is shown in Figure 7 above and expanded further in the table below based on Xbox data (as above, the Parties have no reason to believe this should

⁸⁰ Provisional Findings, paragraph 7.335

⁸¹ [X]. [X]. [X].

⁸² Provisional Findings, Appendix E, paragraph 35.

be significantly different on PlayStation).⁸³ In 2022, gamers with a higher share of gameplay time accounted for by *CoD*:

- (a) [REDACTED];
- (b) [REDACTED];
- (c) [REDACTED];
- (d) [REDACTED];
- (e) [REDACTED]; and
- (f) [REDACTED].

2.105 There is simply no reason to consider, as the Provisional Findings do, that inducing these gamers to switch would be the ultimate goal of Microsoft's strategy. This is implausible.

⁸³ The table focuses on [REDACTED].

Table 12: Platform engagement levels of Xbox gamers by minimum share of gametime accounted for by CoD

2022 Data	Minimum share of gametime on CoD				
	>5%	>20%	>40%	>60%	>80%
[REDACTED] ⁸⁴	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED] ⁸⁵	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED] ⁸⁶	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Source: [REDACTED].

2.106 Further, it is unclear why a weighting for gameplay time in this context would make any sense in a financial analysis. Gameplay time is often considered in the industry (and indeed in some of the Parties’ past submissions) as a proxy for the ability of the platform to monetize on the gamer. The implicit assumption is that gamers who play a specific title more will then spend more on that specific title. However, this assumption is only relevant in the absence of an actual metric to measure revenue generation. This is not the case for the Provisional Findings, which present a revenue-weighted estimate. The efforts by the Provisional Findings to weight respondents “by gametime” is evidently a last resort deployed to identify [REDACTED] scenario in which the CMA Survey would show a financial incentive to withhold, however small. Indeed, the Provisional Findings themselves concede that game-time should not be considered an informative metric compared to other readily available metrics.⁸⁷

⁸⁴ Microsoft [REDACTED].

⁸⁵ [REDACTED]

⁸⁶ A gamer is defined as subscribed to Game Pass [REDACTED].

⁸⁷ Provisional Findings, Appendix C – Shares of Supply. Paragraph 7(a).

(iii) Longer-term strategic objectives do not provide Microsoft an incentive to foreclose

- 2.107 The Provisional Findings also place reliance on alleged “longer-term strategic benefits” that would accrue to Microsoft. Specifically, the Provisional Findings cite: (i) the potential to acquire new loyal customers, (ii) Microsoft’s plans to grow Game Pass, and (iii) “*reputational benefits*” from owning a console with exclusive or superior *CoD* content.⁸⁸ The Provisional Findings assert that such strategic benefits are not accounted for in any financial modelling of Microsoft’s incentives and there may therefore be an underestimation of incentives in the modelling.⁸⁹
- 2.108 First, for the reasons given the modelling as it stands does not provide good evidence of incentives to foreclose. To the contrary, it provides strong evidence against any incentive to foreclose when any of the relevant corrections are made.
- 2.109 Second, long-term strategic benefits are, by their nature, speculative and uncertain. In circumstances where there is a standard of proof that has to be met, the CMA has to be cautious about speculation and prognostication. That is particularly so where the available evidence both of strategy and intent as well as ability and incentive point against any foreclosure. There would need to be particularly clear evidence on strategic benefits to even act as some sort of counterweight to this other evidence. As it is (and set out further below) the real long-term strategic benefits to Microsoft in this deal lie in cross device distribution of games.
- 2.110 Third, the modelling that has been done in fact takes into account the key issues raised as potential long-term strategic benefits. In particular, given the multi-year timeframe of the LTV calculations set out above, these calculations account for any longer-term benefits from a foreclosure strategy. Taking each alleged strategic benefit in turn:
- (a) New loyal customers: The LTV covers a period over five years so, to the extent that Activision content can be used for this strategic benefit, it is already being captured into the medium term in the LTV calculation.
 - (b) Growing Game Pass: Again, given the five-year period captured by the LTV any incremental growth of Game Pass is being captured in the LTV calculation.
 - (c) Reputational benefits: Given that withholding *CoD* would directly contradict Microsoft’s public statements, the effect would be likely to be very negative given the significant gamer backlash that would inevitably occur following such a reversal. Insofar as the suggestion is that those reputational harms would be

⁸⁸ Provisional Findings, paragraph 7.351. The CMA states that it places “particular weight” on such strategic considerations.

⁸⁹ Provisional Findings, paragraph 7.352.

outweighed by having *CoD* on Xbox, there is no good evidential basis for that conclusion. To the extent that *CoD* causes switching, however, the five-year horizon in the LTV again likely means that any reputational benefits are captured in the calculation.

2.111 Accordingly, general references to “strategic objectives” do not assist the CMA. They do not suggest that there is some significant underestimation of material incentives to Microsoft. To the extent they exist they are captured in the financial modelling which, as set out above, conclusively demonstrates that Microsoft has no incentive to foreclose. Moreover, the Provisional Findings’ consideration of Microsoft’s strategic objectives for the Merger is heavily one-sided. As Microsoft has explained, and evidenced through internal documents, its strategic rationale for the Merger is about moving the Xbox business beyond the narrow world of consoles.

(iv) Microsoft’s “real-world incentives” are to monetize *CoD* as broadly as possible

2.112 As explained in prior submissions, exclusive games are not uncommon in the games industry and other market participants have access to their own exclusive content. Microsoft’s console rivals, Nintendo and Sony, offer their gamers a broad catalogue of first- and third-party exclusive content that cannot be accessed on Xbox. Historically, exclusives have accounted for a much smaller share of games sales and in-app purchases on Xbox compared with PlayStation and Nintendo.

2.113 The Provisional Findings ignore commercial realities by myopically focussing on static economic modelling and the “unstated commercial incentives” of exclusivity strategies. What is much more informative is to look at what Microsoft actually does with its popular content.

2.114 Microsoft currently has 58 games available on PlayStation and, [REDACTED].⁹⁰ Microsoft is, [REDACTED].⁹¹ [REDACTED].⁹²

2.115 [REDACTED]. The commercial reality is that Microsoft is looking to monetize *CoD* as much as possible, and thus Microsoft’s clear incentive is to expand access to the franchise, as its deals with Nintendo and NVIDIA evidence.

(v) The Provisional Findings mischaracterizes Microsoft’s incentives following previous acquisitions

⁹⁰ New York Times, “*Microsoft to Lay Off 10,000 Workers as It Looks to Trim Costs*,” 18 January 2023 (link available [here](#)); IGN, “*Xbox Hit by Layoffs on Anniversary of Activision Blizzard Announcement*,” 18 January 2023 (link available [here](#)).

⁹¹ See [REDACTED]; [REDACTED].

⁹² For example, see [REDACTED].

- 2.116 The Provisional Findings suggest that “*Microsoft’s past behaviour [is] indicative of its broader commercial strategy in gaming*”, namely that “*Microsoft’s typical strategy is to honour existing contractual agreements with rival consoles, but to redirect the efforts of any acquired studios to produce Xbox exclusives*”.⁹³
- 2.117 However, the Provisional Findings also acknowledge that *CoD* is not a “typical” game. Accordingly, conclusions drawn from Microsoft’s behaviour following acquisitions of smaller studios/publishers are not a good basis on which to question the clearly articulated strategy in relation to this deal.
- 2.118 In any event, all of Microsoft’s previous statements and behaviour is consistent with the strategy it has in relation to this Merger. *Minecraft* remains the closest analogue to *CoD*. *Minecraft* has remained on all platforms post-acquisition, in addition to being made available on many new platforms, including Nintendo.⁹⁴
- 2.119 As noted previously, *Minecraft*, like *CoD*, is a globally popular multi-player franchise with a strong player community and social element that was available on multiple platforms when Microsoft acquired it. The Provisional Findings even concedes that *Minecraft* has similar levels of engagement on the PlayStation platform to *CoD*.⁹⁵ However, the Provisional Findings’ attempt to differentiate *Minecraft* due to its so-called “legacy monetisation model” is nonsensical. Monetisation from subscription payments for multi-player functionality, merchandise, and game-enhancing DLC are increasingly common in the majority of games these days (including in *CoD*). The Provisional Findings seemingly misunderstand that the *CoD* franchise, similar to *Minecraft*, also has monetisation in the form of: (i) subscription payments for multi-player functionality (seasonal battle passes); (ii) merchandise (from its dedicated online *CoD* Shop); and (iii) game enhancing features (such as player skins and map packs).⁹⁶ The Provisional Findings fail to explain why Microsoft, having seen a successful cross-platform approach with *Minecraft*, would not apply a similar approach to *CoD*.
- 2.120 The Provisional Findings also fail to take account of a key difference between this Merger and previous Microsoft gaming deals. Here, unlike in previous acquisitions, Microsoft senior leadership has publicly committed to making a specific game, *CoD*, available on other platforms. This did not occur in ZeniMax, nor in any other deal flagged by the CMA. Again, unlike in previous deals, Microsoft has backed up that promise with pre-close contractual offers to license *CoD* to those other platforms. Nintendo has accepted a deal. So has NVIDIA. Valve indicated it did not see the need

⁹³ Provisional Findings, paragraph 7.291.

⁹⁴ *Minecraft* has annual revenues of more than \$[><] and peak MAU of more than [><] players worldwide.

⁹⁵ Provisional Findings, paragraph 7.232.

⁹⁶ For battle passes, see *CoD*, “*Season 02 Battle Pass*”, link available [here](#); Official *CoD* shop includes t-shirts, mugs and other accessories, link available [here](#); in relation to map packs, in relation to paid map packs, see Twitter, (link available [here](#)).

to enter into a contract for *CoD* as it trusted Microsoft to keep the game available on Steam. It is only Sony that, despite [REDACTED], has refused Microsoft's offer. None of these facts were present in previous gaming acquisitions by Microsoft. The failure of the Provisional Findings to take them into account is yet another fatal flaw in its assessment.

F No anticompetitive effect – PlayStation will not be foreclosed by the loss of only a small number of gamers

- 2.121 The Provisional Findings claim that any hypothetical withholding of *CoD* would likely lead to substantial harm to PlayStation's competitiveness and therefore to competition as a whole. This is on the basis that there would be hypothetical "*reduction to PlayStation's range relative to pre-Merger*".⁹⁷ Consumers allegedly would be harmed, for example, through "*switching from CoD to a less-preferred alternative game, consumers reducing their total amount of game time on their chosen console, or even changing to a less-preferred console*".⁹⁸ As discussed above, this alleged harm occurs from the loss of only a small number of PlayStation gamers ([REDACTED]% at most) [REDACTED].
- 2.122 This harm is also said to occur against the backdrop of PlayStation's incumbent position as the clear market leader in consoles both in the UK and globally. In this context, it is just not credible to maintain that this hypothetical withholding of *CoD* could somehow result in "*substantial harm to overall competition in the downstream market*".⁹⁹
- 2.123 As the case law dictates, any assessment of the anti-competitive effects of a vertical merger must be based on credible engagement with the evidence in order to find a 'substantial' lessening of competition on the balance of probabilities.¹⁰⁰ However, the Provisional Findings do not provide any credible evidence as to how PlayStation's ability to compete will be meaningfully affected. Instead, the Provisional Findings undertake a cursory review of effects and equate the purely hypothetical lack of availability of one single piece of content to foreclosure of an entire downstream market in which the foreclosed party is massively advantaged today. As shown below, there is no way in which PlayStation's competitiveness may be harmed by any withholding strategy such that its "*ability to compete is substantially limited*".¹⁰¹ Indeed no evidence is provided to suggest that any reduction in competition would be significant

⁹⁷ Provisional Findings Report, paragraph 367.

⁹⁸ Provisional Findings Report, paragraph 368.

⁹⁹ Merger Assessment Guidelines, paragraph 7.21.

¹⁰⁰ In *Tobii*, the Competition Appeal Tribunal held that any assessments on the CMA's findings on ability is to identify whether "*whether the CMA had a sufficient evidential basis in light of the totality of the evidence to satisfy itself on the balance of probabilities that the merged entity had the ability to engage in [partial] input foreclosure Tobii AB (Publ) vs CMA [2020] CAT 1, paragraph 427. In Intercontinental Exchange, the Competition Appeal Tribunal stated that conclusions on finding substantial lessening of competition by the CMA must be "based on evidence and it is for the CMA carefully to review the evidence and make such enquiries it considers appropriate in order to reach a rational conclusion"* *Intercontinental Exchange, Inc vs CMA [2017] CAT 6, paragraph 114.*

¹⁰¹ See ME/6920/20, Anticipated acquisition by Facebook, Inc. of Kustomer, Inc., paragraph 290.

enough to “*impact on price, quality and innovation*”.¹⁰² It is improper for the Provisional Findings to equate this speculative harm to “foreclosure”.

(i) The hypothetical impact on PlayStation does not equate to “foreclosure”

2.124 As discussed above, the Provisional Findings rely on the CMA Survey to conclude that only [X]% of UK PlayStation YAUs would move away from PlayStation if *CoD* were not available on the console.¹⁰³ This compares to just 3% of PlayStation users when using the YouGov Survey to calculate possible diversion rates. Irrespective of the methodology used, PlayStation will still retain more than [X]% of its users. Further, the users switching away from PlayStation [X], meaning that it is not the case that PlayStation would lose a disproportionately valuable cohort of gamers. The levels of diversion that may result following any hypothetical withholding, and the related value of gamers, are well below those that could meaningfully impact PlayStation’s ability to compete (*i.e.*, have any sort of anti-competitive effect).

(ii) Any switching away from PlayStation will not occur overnight – this dilutes any impact

2.125 Even accepting that certain existing PlayStation gamers may switch away from the console, they are not going to suddenly and *en masse* abandon PlayStation to purchase an Xbox.

2.126 Gaming consoles are durable goods that are functional for years. Indeed, the CMA’s own survey assumes that a gamer would generate revenue on its existing console for [X] years.¹⁰⁴ Not all gamers who would consider switching to Xbox if *CoD* were not on PlayStation would do so overnight. Likewise, not all gamers would abandon their existing PlayStation in favor of an Xbox. The impact on PlayStation would be significantly smaller and spread over time.

2.127 Third-party IDG data confirms that as of 2022, Sony has an overall installed base of [X] PlayStation 4 and PlayStation 5 consoles and as is expected to sell [X] consoles in 2023.¹⁰⁵ This changes in subsequent years to [X] million consoles in 2024, [X] million in 2025, and [X] million in 2026. In other words, every year Sony looks at selling/replacing approximately [X]% of its installed base. Even assuming, that the diversion estimated by the Provisional Findings were to take place year-on-year, Sony would risk losing less than [X] console sales a year. This reflects [X]% of its total console installed base. It would take [X] for Xbox – [X] – to even catch up, let alone foreclose the dominant platform. Any foreclosure theory would also have to mistakenly

¹⁰² *Ibid.*

¹⁰³ Provisional Findings Report, paragraph 7.173.

¹⁰⁴ This is used by the CMA to “spread” the loss from a new console sale over time. See Provisional Findings Report, paragraph 41, Appendix E.

¹⁰⁵ IDG data.

assume that PlayStation would do nothing to invest in its console platform in the interim period such that gamers may wish to remain on the platform. Again, the Provisional Findings fail to account for any sort of competitive response from Sony in response to this “foreclosure”.

Figure 9: PlayStation installed base forecast

[REDACTED]

(iii) The timing of switching implies that the impact on Sony’s revenues is also well below the level of foreclosure

2.128 As discussed above, the Provisional Findings’ methodology to inflate the [REDACTED]% diversion rate to a [REDACTED]% impact on PlayStation spend is significantly overstated. None of the steps undertaken by the Provisional Findings to gross up the [REDACTED]% diversion into a [REDACTED]% impact is correct or backed up by evidence. In fact, the PlayStation engagement data available to the CMA directly undercuts these calculations.

2.129 However, even if this were correct, it could not possibly relate to the overall spend on PlayStation consoles. As explained above, even if [REDACTED]% of PlayStation gamers could potentially switch to Xbox, this would not happen immediately. As Sony is expected to sell or replace approximately [REDACTED]% of its installed base per annum, this implies that what Sony is actually risking is one tenth of the Provisional Findings’ estimate: not [REDACTED]% of consumer spend but only [REDACTED]% of total consumer spend on PlayStation year-on-year.

2.130 With this minimal annual impact, and in a world where PlayStation retains approximately [REDACTED]% of its annual revenues, it is illogical to conclude that PlayStation could objectively be foreclosed.

(iv) Any share shift will have a minimal impact on Sony’s user population

2.131 Based on its recently reported financial results, PlayStation has approximately 112 million MAUs.¹⁰⁶ This is more than double Xbox’s [REDACTED] million MAUs. Even if [REDACTED]% of PlayStation MAUs were to switch to Xbox overnight, the result would be [REDACTED] in favor of PlayStation and the advantage would remain significant. The Provisional Findings do not engage with this fact and fail to explain how this minimal impact on PlayStation’s user base can equate to an anti-competitive effect. As the Figure below illustrates, there would be no meaningful change to the current competitive landscape.

¹⁰⁶ Sony, Q3 FY 2022 results, 02.0.2.2023, page 9, (link available [here](#)).

Figure 10: PlayStation MAU impact

[REDACTED]

(v) PlayStation gamers are loyal to their console, making the prospect of foreclosure even less likely

2.132 The YouGov Survey also confirms that PlayStation gamers exhibit a higher level of brand loyalty to their console (compared to Xbox gamers), meaning that they are ultimately less likely to switch. This is reflective of the significant brand loyalty that PlayStation has gained from its leadership position over subsequent console generations. Xbox cannot replicate this.

2.133 As Table 13 below shows, when comparing diversion rates across a number of separate AAA titles, [REDACTED]. This is particularly the case for *CoD*, where 2-3% of PlayStation users would switch if it were unavailable on their platform. [REDACTED].

Table 13 – Diversion of past and future planned console purchases for PlayStation and Xbox respondents under withholding of separate game franchises

	Past planned console purchases		Future planned console purchases	
Game	Diversion as a share of all gamers on the console		Diversion as a share of all gamers on the console	
	PlayStation	[REDACTED]	PlayStation	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
CoD	2.4%	[REDACTED]	3.0%	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Source: YouGov Survey

2.134 This loyalty to PlayStation is also reflected in the [REDACTED].¹⁰⁷ [REDACTED]. This brand loyalty will likely act have dampening effect on PlayStation gamers switching console, further lessening the effect of any hypothetical foreclosure strategy.

G Conclusion

2.135 For reasons described above, the Provisional Findings fail to prove the Console SLC. Despite the narrow focus on PlayStation, no credible evidence is provided to suggest that the console will suffer any meaningful competitive harm. The Provisional Findings themselves confirm that only a minimal number of PlayStation gamers would actually

¹⁰⁷ See Microsoft/Activision Blizzard King White Paper, Annex 1, “Keystone / CRA submission, “YouGov survey confirms Sony cannot be foreclosed”, as submitted 30.01.2023.

be motivated to switch away from the console in the event of a hypothetical withholding strategy. The Provisional Findings attempt to inflate this impact fails to withstand further scrutiny. Further, the Provisional Findings' quantitative incentive analysis is subject to fundamental errors which, when corrected, show that no incentive to withhold *CoD* exists. Ultimately, the Provisional Findings show that PlayStation will retain the vast majority of its users, consumer spend and gameplay time, falling well below any notion of "foreclosure". This is not a lessening of competition, much less one that could be considered substantial. For these reasons, the CMA must reverse its provisional conclusion on Theory of Harm 1.

3. THEORY OF HARM 2: VERTICAL EFFECTS IN CLOUD GAMING SERVICES

A Summary

3.1 The CMA provisionally concludes that the Merger may result in an SLC in the UK as a result of vertical foreclosure effects in cloud gaming services (the “**Cloud Gaming SLC**”), as a result of a hypothetical withholding of Activision content from cloud gaming rivals. For the reasons set out below, the Parties strongly disagree with this finding. In any event, the CMA’s concerns are fully addressed by Microsoft’s recent agreement with NVIDIA.

(i) The NVIDIA Agreement resolves the Cloud Gaming SLC

3.2 The CMA provisionally finds that, absent the Merger, Activision would [REDACTED].¹⁰⁸ This is manifestly incorrect, as explained below and in Activision’s response to the Provisional Findings. But even if the CMA maintains this view, the facts underpinning the CMA’s assessment of the Cloud Gaming SLC have materially changed since the Provisional Findings were issued.

3.3 Microsoft has now entered a legally binding agreement with NVIDIA for all of Activision’s PC games to be made available on GFN for at least ten years post-Merger (the “**NVIDIA Agreement**”) – see further section 3.B below.¹⁰⁹

3.4 The NVIDIA Agreement provides NVIDIA with [REDACTED].

3.5 As a result, the Merger will immediately *enhance*, not lessen, competition in cloud gaming services to the benefit of UK customers. It will also result in Activision content becoming available on multiple cloud gaming services (*i.e.*, both NVIDIA GFN and Xbox Cloud Gaming), which would not have occurred even in the CMA’s (incorrect) counterfactual.

3.6 Taken together with the evidential failures set out in this response, the NVIDIA Agreement should lead the CMA to reverse its mistaken provisional conclusions regarding the Cloud Gaming SLC.

(ii) The theory of harm is highly speculative

3.7 The Cloud Gaming SLC – and NVIDIA Agreement – must be considered in their proper context. Cloud gaming is a new and unproven technology for delivering games that provides an alternative to downloading. It is simply a delivery mechanism. Today, uptake is limited. [REDACTED]. Cloud gaming on PC – which is the focus of the CMA’s theory

¹⁰⁸ Provisional Findings, paragraph 8.237.

¹⁰⁹ The NVIDIA Agreement was provided as Annex 2 to Microsoft’s response to the Remedies Notice.

of harm – is *de minimis*,¹¹⁰ accounting for an extremely small proportion of the roughly 18 million PC gamers in the UK (*i.e.*, less than [REDACTED]%).

3.8 Even if cloud gaming grows, Microsoft expects that it will account for only [REDACTED]% of the total consumer spend on gaming by 2025.¹¹¹ The nascent state of cloud gaming means that the CMA’s theory of harm is inherently highly speculative and the Provisional Findings paint an exaggerated and overly optimistic view of the prospects for the segment. As set out in section 3.C below, there is no evidence that cloud gaming is poised to “*alter the future of gaming*”¹¹², certainly not within the five year timeframe within which the CMA must assess the potential impact of the Merger.¹¹³

(iii) The theory of harm emphasizes facts which the CMA accepts are not relevant

3.9 More critically though, the CMA has failed to evidence any merger-specific theory of harm. Instead, it appears to have worked backwards from an unproven concern, unrelated to the Merger, that *Microsoft* has unrivalled advantages in cloud gaming today, to speculate that *Activision* content somehow holds the key to cloud gaming providers’ future success. Yet no cloud gaming provider has access to that content today and Activision has consistently refused to make it available for streaming. This will change as a result of the NVIDIA Agreement, but not if the Merger is prohibited.

3.10 The inherent weakness of this theory of harm is underlined by the way in which the CMA has reformulated its case multiple times over the course of its investigation:

(a) At Phase 1 the theory was presented in the CMA’s Issues Letter as an “ecosystem” theory of harm concerning Microsoft’s ability to leverage its “multi-product ecosystem” to gain advantages not only in cloud gaming but also console and multi-game subscription. By the Phase 1 Decision, the CMA had narrowed its focus to cloud gaming, but the foreclosure mechanism remained “*leveraging Microsoft’s ecosystem*”. The CMA did not state that Activision content was or would be important to cloud gaming rivals.

(b) At Phase 2, the theory remained substantively unchanged in the Issues Statement. But, come the Annotated Issues Statement and Working Papers, the CMA’s focus had switched to a plain vertical foreclosure theory of harm concerning Activision’s content. Nevertheless, the CMA continued to claim

¹¹⁰ Around [REDACTED] users a month access Xbox Cloud Gaming via a PC in the UK (average MAU of Xbox Cloud Gaming in 2022 on PCs), of which [REDACTED] used the service to access *Fortnite* for free. [REDACTED]. [REDACTED]. Provisional Findings, paragraph 5.83.

¹¹¹ Total consumer spend includes gross revenues from PC, console, mobile, browser and cloud game streaming. It excludes advertising and video streaming (*e.g.*, Twitch) revenues. Microsoft bases its estimates on a mix of internal projections and third-party sources (IDG, Newzoo, IDC, PWC, App Annie, S&P Capital IQ, public filings).

¹¹² Provisional Findings, paragraph 75.

¹¹³ Case No: 1429/4/12/21, *Meta v CMA*, [2022] CAT 26 paragraphs 103-104.

that Microsoft’s “multi-product” ecosystem could somehow increase its ability to foreclose cloud gaming rivals.¹¹⁴

- (c) In the Provisional Findings the CMA finally accepts – over a year into its investigation – that “*Any ability on Microsoft’s part to use [its existing] assets to foreclose rivals does not form part of this theory of harm, as Microsoft already benefits from these assets and inputs without the Merger*” (emphasis added).¹¹⁵ In other words, the CMA accepts that Microsoft’s “multi-product ecosystem” is not relevant to assessing the impact of the Merger on cloud gaming rivals.

3.11 Despite this, the vast majority of the CMA’s assessment of the Cloud Gaming SLC – some 57 pages – remains devoted to assessing Microsoft’s alleged “ecosystem advantages”. By contrast, the CMA’s analysis of the critical, Merger-specific, question – whether Microsoft would have the ability to foreclose rivals *using Activision content* – covers just 15 pages, most of which relate to the undisputed point that gaming content is as a general matter important for a gaming service. It is not, however, open to the CMA to find that a highly speculative theory of harm results in an SLC based on evidence which the CMA clearly states is irrelevant (*i.e.*, which “*does not form part of this theory of harm*”).

3.12 As the CMA accepts, Microsoft’s existing alleged strengths in cloud gaming are only relevant to the extent they may increase Microsoft’s incentives to engage in a foreclosure strategy (which must be shown to exist regardless) and/or “*magnify the effect of any such foreclosure strategy*” (see Provisional Findings, paragraph 8.5). The CMA’s claims regarding Microsoft’s alleged pre-existing strengths in cloud gaming are in any event not borne out in the evidence and are addressed in **Annex 4**.

(iv) The CMA provides no evidence that Activision content would be an important input for cloud gaming

3.13 As a result of the CMA’s ‘ecosystem’ focus, it has now presented a theory of harm without sufficient evidence to sustain it. In particular, the CMA’s critical claim that “*Activision content, in particular CoD and WoW, would be an important input to cloud gaming services in the counterfactual*” is fundamentally flawed.¹¹⁶

3.14 First, the CMA adopts a strained interpretation of Activision’s internal documents to claim that Activision would have made its most popular content available ‘day and date’ on rival cloud gaming services absent the Merger. This false claim is addressed in section 3.D below and in Activision’s response to the Provisional Findings. In any

¹¹⁴ Annotated Issues Statement, p.19.

¹¹⁵ Provisional Findings, paragraph 8.5.

¹¹⁶ Provisional Findings, paragraph 8.268.

event, even under the CMA's provisional counterfactual, [REDACTED]. The NVIDIA Agreement provides [REDACTED].

3.15 Second, the CMA's conclusions relate to Activision content *generally*, specifically citing *WoW* in addition to *CoD*. But the CMA fails to present a single piece of evidence suggesting that *WoW* would be important in shaping downstream competition in cloud gaming. The same applies to other, unspecified, Activision content which the CMA seeks to capture in its broad provisional conclusions.

3.16 Third, as regards *CoD*:

- (a) The CMA relies primarily on its assessment of the Console SLC to claim that the franchise would be an important input for cloud gaming services. Yet, on the CMA's own case, cloud gaming services are aimed at a different customer set to console gamers. Indeed, the CMA cites data from [REDACTED].¹¹⁷ Any reliance on the CMA's analysis of the importance of *CoD* to console gamers (which is in any event disputed) is unsound.
- (b) The relevant issue for the Cloud Gaming SLC is *CoD*'s importance on PC. Here the CMA rightly accepts that "*CoD is less prominent on PC than it is on console – as suggested by the higher number of games which reach a similar or greater level of engagement to CoD on PC relative to console*".¹¹⁸ This finding alone undermines the CMA's central conclusion that "*any alternatives of the same scale and [sic] to CoD would be limited*".¹¹⁹
- (c) In fact, there is a range of evidence showing that *CoD* is not particularly popular amongst PC games. Windows telemetry data shows that *CoD* accounts for less than [REDACTED]% of game-time on Windows PCs, and that other games are far more popular amongst PC gamers.¹²⁰
- (d) The only piece of real-world evidence available to the CMA on *CoD*'s performance on a cloud gaming service shows that in the two years [REDACTED]. This evidence clearly indicates that *CoD* would not be an important input for cloud gaming if it were made available again. This evidence is wrongly dismissed in the Provisional Findings.

3.17 The CMA's provisional conclusions in relation to Microsoft's ability to foreclose cloud gaming providers using Activision content are addressed in section 3.E below.¹²¹

¹¹⁷ Moreover, all cloud gaming providers concerned by the CMA's theory of harm, except Sony, are (and will continue to be) streaming PC games, not console games.

¹¹⁸ Provisional Findings, paragraphs 8.262 and 8.267.

¹¹⁹ Provisional Findings, paragraph 8.266.

¹²⁰ Windows telemetry data for October 2022 on Windows 10 and 11 PCs.

¹²¹ [REDACTED]. [REDACTED].

(v) **The CMA’s incentives analysis is undermined by Microsoft’s recent actions**

3.18 Finally, the CMA’s analysis of Microsoft’s incentives to foreclose relies primarily on Microsoft’s past conduct in making its first-party content available on rival cloud gaming services. However, the NVIDIA Agreement provides more recent, and more relevant, evidence which undermines any suggestion Microsoft would seek to make Activision content exclusively available for streaming on Game Pass Ultimate post-Merger. The NVIDIA Agreement provides not only for Activision content to be made available on GFN post-Merger, but also for all of Microsoft’s first-party PC content to be placed on GFN [REDACTED]. See further section 3.F below.

B The NVIDIA Agreement resolves the Cloud Gaming SLC

3.19 The NVIDIA Agreement provides for all of Activision’s PC content to be made available on GFN post-Merger. It also provides for Microsoft’s first-party PC content to be made available on GFN [REDACTED]. The key terms are as follows:

- (a) [REDACTED].¹²² [REDACTED].¹²³
- (b) [REDACTED].¹²⁴ [REDACTED].¹²⁵
- (c) [REDACTED].¹²⁶
- (d) [REDACTED].¹²⁷
- (e) [REDACTED].¹²⁸
- (f) [REDACTED].¹²⁹ [REDACTED].
- (g) [REDACTED]. [REDACTED].¹³⁰

3.20 NVIDIA [REDACTED].¹³¹

3.21 With the NVIDIA Agreement in place, no Cloud Gaming SLC can arise from the Merger. Not only that, the Merger in fact will *enhance* competition in cloud gaming services, delivering an immediate benefit to customers that would not exist absent the Merger. In particular:

¹²² [REDACTED].
¹²³ [REDACTED].
¹²⁴ [REDACTED].
¹²⁵ [REDACTED].
¹²⁶ [REDACTED].
¹²⁷ [REDACTED].
¹²⁸ [REDACTED].
¹²⁹ [REDACTED].
¹³⁰ [REDACTED].
¹³¹ [REDACTED].

- (a) As set out in section 3.D below, [§<]. It is, in any event, clear that [§<].¹³² [§<].¹³³ In particular, it grants NVIDIA rights to [§<]. [§<]. [§<].
- (b) The NVIDIA Agreement comprehensively removes any ability or incentive on Microsoft's part to withhold Activision content from NVIDIA. It shows that Microsoft's allegedly "*uniquely strong position in cloud gaming*"¹³⁴ has not incentivised it to foreclose its leading rival, NVIDIA. The opposite is in fact true. Microsoft has agreed to make its first-party PC games available on NVIDIA GFN [§<]. This reflects Microsoft's incentives to distribute its content widely, including through alternative cloud gaming business models (*e.g.*, BYOG) to its own.
- (c) The NVIDIA Agreement also significantly reduces any incentive on Microsoft's part to withhold Activision content from other cloud gaming providers. In particular, the CMA's assessment of incentives relies heavily on the notion that Microsoft's strategy is driven by making its first-party content exclusively available on Game Pass Ultimate for cloud game streaming.¹³⁵ Having granted streaming rights to Activision content to the leading cloud gaming provider, this alleged strategic driver is removed, *i.e.*, Activision content will not be exclusively available for streaming through Game Pass Ultimate regardless of any foreclosure strategy. Moreover, the potential gains from any hypothetical foreclosure strategy would be significantly reduced (*i.e.*, as consumers would have at least one alternative choice).

3.22 As set out in Microsoft's response to the Remedies Notice, the NVIDIA Agreement ensures that, should the Merger proceed, Activision content will be made available on multiple cloud gaming providers. This would not have occurred absent the Merger, even on the CMA's counterfactual. This will deliver significant rivalry-enhancing benefits, including to customers in the UK (see further section 3.D below).¹³⁶

C The theory of harm is highly speculative

3.23 As the CMA acknowledges, as things stand today cloud gaming "*revenues compared to streaming costs present challenges for profitability*".¹³⁷ Cloud gaming also suffers from quality issues, as the gameplay is inferior to downloaded games and highly dependent on broadband connections. Yet, the CMA's theory of harm is based on the notion that cloud gaming is a "*promising and growing market*" which is "*likely to*

¹³² Provisional Findings, paragraph 8.237.

¹³³ As set out below, [§<].

¹³⁴ Provisional Findings, paragraph 8.298.

¹³⁵ Provisional Findings, paragraph 8.300.

¹³⁶ Response to Remedies Notice, paragraph 2.9.

¹³⁷ Provisional Findings, paragraph 8.48.

become profitable in the next five years”¹³⁸ and has the potential to “*alter the future of gaming*”.¹³⁹

3.24 The evidence presented in the Provisional Findings does not support these findings. Rather, the evidence shows that demand for standalone cloud gaming services is not at a sufficient level to make them economically viable, and a great degree of uncertainty exists as to whether this will change in the future. This uncertainty must be factored in when assessing whether, on the balance of probabilities, the Merger could give rise to competitive harm in cloud gaming services, and the degree of any such harm. This uncertainty cannot simply be discounted on the basis of the overly optimistic and unsubstantiated speculation which forms the basis for the CMA’s assessment of the Cloud Gaming SLC.¹⁴⁰

3.25 Moreover, as explained below, in assessing the evidence of the likely future evolution of cloud gaming services in the next five years it is vital to distinguish between the different platforms on which such services are accessed. The CMA wrongly fails to do so in its analysis.¹⁴¹

(i) No cloud gaming “market”

3.26 The CMA provisionally considers it appropriate to assess the impact of the Merger on the market for cloud gaming services in the UK.¹⁴² The Parties disagree and consider that there is no basis on which the CMA can identify a distinct market for cloud gaming services. Cloud gaming is no more than a feature that provides an alternative means for gamers to access content on a device. [§<].¹⁴³ The CMA has not put forward evidence that other market participants view cloud gaming as a separate market on any platform. Isolated references to a service in internal documents is not evidence of a separate economic market.

3.27 This is particularly clear on console, where cloud gaming cannot be divorced from the console itself, and is no more than another parameter on which consoles compete against each other. It is not even a standalone “product”, let alone a separate “market”. Gamers on PlayStation, Nintendo and Xbox can access cloud gaming as a feature of their existing console experience. PlayStation and Nintendo are “walled gardens”, so gamers cannot use these consoles to access other cloud gaming services. On Xbox Cloud Gaming, around [§<]% of the usage on console is simply to try a game before downloading it.¹⁴⁴ This is also reflected in the feedback which Microsoft receives from

¹³⁸ Provisional Findings, paragraph 8.46.

¹³⁹ Provisional Findings, paragraph 75.

¹⁴⁰ [§<]. [§<].

¹⁴¹ This applies equally to the CMA’s market definition analysis and its competitive assessment.

¹⁴² Provisional Findings, paragraph 5.98.

¹⁴³ [§<].

¹⁴⁴ [§<]. [§<]. [§<]. [§<]. [§<]. [§<].

Xbox Cloud Gaming users which shows that [REDACTED]% of users have used cloud gaming to try a game before installing it on a console or PC.

Figure 11: [REDACTED]

[REDACTED]

Source: [REDACTED]

3.28 As the CMA accepts, on the demand side, cloud gaming is primarily aimed at enabling consumers to play high performance games on a “*range of lower-powered devices including mobiles, smart TVs, and low-end PCs*” and thereby avoid paying “*the substantial upfront cost associated with consoles and high-end PCs*”.¹⁴⁵ As such, the CMA must accept that gamers which use cloud gaming features on their console are not the intended customers for cloud gaming service providers. Nor are they relevant to the CMA’s theory of harm.

3.29 As noted above, [REDACTED] of users of Xbox Cloud Gaming ([REDACTED]% in the UK) access the service on console. In such circumstances, the fact that Microsoft is [REDACTED]¹⁴⁶ – [REDACTED] – does not evidence a “*promising and growing market*” for cloud gaming services.¹⁴⁷

(ii) Limited use case for cloud gaming on mobile

3.30 In relation to mobile devices, Microsoft has explored cloud gaming as an alternative way of delivering console games to mobile which can bypass the App Store and Google Play. Cloud gaming has, however, [REDACTED]. As the CMA has acknowledged, the long-standing policies and practices of Apple and Google with regards to their app stores have also impeded discoverability and experience of cloud gaming services on their platforms.¹⁴⁸ Data from [REDACTED].¹⁴⁹ Around [REDACTED] users a month access Xbox Cloud Gaming on mobile devices in the UK, of which approximately [REDACTED]% relates to gamers playing the F2P game *Fortnite*, [REDACTED]. As acknowledged in the Provisional Findings, [REDACTED].¹⁵⁰

3.31 Moreover, with the increasing computational power of mobile devices, many gaming companies are increasingly developing native mobile games of popular console games, such as *CoD Mobile* and *Apex Legends Mobile*.¹⁵¹ As a result, there is unlikely to be material demand for cloud gaming on mobile devices, which also depends on the user having a stable internet connection. The CMA accepts that cloud gaming accessed on

¹⁴⁵ Provisional Findings, paragraph 5.81.

¹⁴⁶ Provisional Findings, paragraph 8.34.

¹⁴⁷ The Provisional Findings acknowledge that [REDACTED] of usage of Xbox Cloud Gaming is on console, but the CMA simply asserts that “[we] expect this to change in the future” (paragraph 5.83). It is not acceptable for the CMA to speculate in this manner without any supporting evidence.

¹⁴⁸ CMA, “*Mobile Ecosystems: Market Study Final Report*,” 06.10.2022; Provisional Findings, paragraphs 8.28 and 8.246(c).

¹⁴⁹ Provisional Findings, paragraph 8.246(c).

¹⁵⁰ Provisional Findings, paragraph 8.34.

¹⁵¹ As set out in Activision’s response to the Provisional Findings, [REDACTED].

mobile devices does not form part of its theory of harm as it dismisses the relevance of Microsoft's *Fortnite* experience on the basis it "*is only relevant to running a cloud gaming service on mobile*" (see further section 3.E below).¹⁵²

(iii) De minimis usage of cloud gaming services on PC

3.32 On PC, which is the focus of the CMA's theory of harm, cloud gaming is [REDACTED]. Around [REDACTED] users a month access Xbox Cloud Gaming via a PC in the UK.¹⁵³ [REDACTED] is estimated to have around [REDACTED] subscribers on PC in the UK in 2022.¹⁵⁴ The CMA has not considered UK shares of supply, but this is an extremely small proportion of the roughly 18 million PC gamers in the UK (*i.e.*, less than [REDACTED]%).

3.33 The CMA relies on forecasts from [REDACTED] and [REDACTED] to suggest that cloud gaming on PC is expected to "*grow and be profitable*".¹⁵⁵ [REDACTED]. [REDACTED]:

(a) [REDACTED].¹⁵⁶

(b) [REDACTED].

(c) [REDACTED].¹⁵⁷

3.34 [REDACTED]. [REDACTED].¹⁵⁸

3.35 There is therefore insufficient evidence for the CMA to conclude, on the balance of probabilities, that cloud gaming is "*likely to become profitable in the next five years*".¹⁵⁹

(iv) Uncertainty over viability of Microsoft's own cloud gaming service

3.36 Microsoft has explained that it [REDACTED], which is borne out in its internal documents.¹⁶⁰ [REDACTED].¹⁶¹

3.37 [REDACTED]. [REDACTED].¹⁶² This evidence is, again, wrongly overlooked in the Provisional Findings.

¹⁵² Provisional Findings, paragraph 8.246 (c): "*We consider the evidence on Microsoft's experience with Fortnite on xCloud mobile is only relevant to running a cloud gaming service on mobile... [t]his suggests that Microsoft's experience with Fortnite on xCloud mobile may not apply to other cloud gaming services*".

¹⁵³ Average MAU of Xbox Cloud Gaming in 2022 on PCs. relies on forecasts.

¹⁵⁴ Based on Ampere Analysis and assuming that [REDACTED]. Provisional Findings, paragraph 5.83. The evidence presented in the Provisional Findings shows that [REDACTED].

¹⁵⁵ Provisional Findings, paragraph 8.38.

¹⁵⁶ [REDACTED].

¹⁵⁷ [REDACTED].

¹⁵⁸ Provisional Findings, paragraph 8.39.

¹⁵⁹ Provisional Findings, paragraph 8.46.

¹⁶⁰ The CMA acknowledges [REDACTED] (paragraph 8.37), [REDACTED]. However, the CMA cannot point to a single piece of evidence suggesting [REDACTED].

¹⁶¹ [REDACTED]. [REDACTED].

¹⁶² Microsoft Main Party Hearing transcript, p.128, lines 12-16.

D Activision content [REDACTED] absent the Merger

3.38 Activision content is not available on any cloud gaming service today. The Cloud Gaming SLC depends on a finding that this would have occurred, absent the Merger. The Provisional Findings rely misinterpret Activision internal documents to find that Activision “*likely would have made its games – including day and date releases – available on cloud gaming services in the next five years*”. For the reasons set out in Activision’s response to the Provisional Findings, the CMA’s position cannot be sustained:

- (a) **Activision’s senior leadership [REDACTED] of putting Activision’s content on cloud gaming.** Commercial decision-making at Activision is governed by clearly defined structures under which any agreement [REDACTED]. None of the internal documents relied upon by the CMA provide any evidence to suggest that [REDACTED] would have approved such an agreement absent the Merger, including with [REDACTED].
- (b) **Activision has clearly explained the reasons the [REDACTED].** The technical limitations of cloud gaming, which risk damaging the gamer experience for Activision games, the lack of scale and the lack of proven demand for cloud gaming services mean that [REDACTED].
- (c) **Activision’s growth strategy is focused on [REDACTED].** The computing power of mobile phones continues to improve, and Activision believes that this renders many of [REDACTED], further constraining the future growth and reach of cloud gaming. Native mobile gaming (*i.e.*, playing a game via an app on a mobile phone) already [REDACTED], and Activision, from its position as an independent company, simply [REDACTED].

3.39 Even on the CMA’s mischaracterisation of the evidence, Activision would have not made its content available to [REDACTED], [REDACTED].¹⁶³ The Provisional Findings present no evidence to suggest otherwise. For example, [REDACTED].¹⁶⁴

3.40 The CMA has also found that strong indirect network effects mean that publishers will not license their content to small providers given the costs involved.¹⁶⁵ This is clear not only from Activision’s internal documents¹⁶⁶ but also evidence provided by third parties.¹⁶⁷ The Provisional Findings provide no evidence to suggest that any cloud

¹⁶³ Provisional Findings, paragraph 8.237.

¹⁶⁴ Provisional Findings, paragraph 8.232.

¹⁶⁵ Provisional Findings, paragraph 8.65. Depending on the level of integration, there are substantial engineering costs involved in providing access to a new cloud gaming provider, even one with a BYOG or B2P model.

¹⁶⁶ See for example Provisional Findings, paragraph 8.233.

¹⁶⁷ For example, [REDACTED] told the CMA that [REDACTED] (paragraph 8.57) and [REDACTED] told the CMA that “[REDACTED] (paragraph 8.59).

gaming service will reach sufficient “scale” to be attractive to major game publishers, including Activision, within the next five years.¹⁶⁸

- 3.41 As set out above, the NVIDIA Agreement ensures [X]. Should the Merger proceed, Activision content would become available on multiple cloud gaming services. This is a clear rivalry-enhancing efficiency arising from the Merger which will produce significant customer benefits (see section 4 below).

E No ability to foreclose cloud gaming rivals using Activision’s content

- 3.42 In assessing whether Microsoft has the ability to foreclose cloud gaming rivals using Activision’s content, the CMA must focus both on whether Microsoft would have upstream market power post-Merger and whether Activision’s content plays an important role in shaping downstream competition.¹⁶⁹

- 3.43 The CMA asserts that it has assessed Activision’s market power upstream in game publishing across console and PC.¹⁷⁰ However, no further consideration of this issue can be found in the Provisional Findings. In fact, the CMA has given no consideration to the “*structure of the upstream market*”, as required by the Merger Assessment Guidelines.¹⁷¹ For this reason alone the CMA has not presented the evidence, or reached the conclusions, required to sustain an input foreclosure theory of harm.

- 3.44 As set out below, the evidence set out in the Provisional Findings does not support the CMA’s central claim that Activision’s content would have been an important input for cloud gaming services absent the Merger. On the contrary, as the CMA accepts that there is a “*higher number of games which reach a similar or greater level of engagement to CoD on PC relative to console*”,¹⁷² it cannot conclude that for cloud gaming services “*any alternatives of the same scale and [sic] to CoD would be limited*”.¹⁷³

(i) The CMA presents no evidence that Activision content *generally* would be an important input for cloud gaming services

- 3.45 Paragraphs 8.244 to 8.265 of the Provisional Findings set out a range of evidence on the ‘importance’ of Activision content, before the CMA summarily concludes:

¹⁶⁸ The evidence also shows that Activision [X] This is consistent with the CMA’s findings that Activision would not have made its content available on MGS services absent the Merger. Indeed, the Provisional Findings specifically focus “*on the importance of [Activision] content for rivals who have, or are likely to have, a BYOG or B2P business model*”. Provisional Findings, paragraph 8.243.

¹⁶⁹ CMA Merger Assessment Guidelines, paragraph 7.14.

¹⁷⁰ Provisional Findings, paragraphs 8.239-8.240.

¹⁷¹ CMA Merger Assessment Guidelines, paragraph 7.14(a).

¹⁷² Provisional Findings, paragraphs 8.262 and 8.267.

¹⁷³ Provisional Findings, paragraph 8.266.

- (a) “Based on the Parties’ internal documents and third party evidence specific to cloud gaming, we provisionally consider that Activision content, **in particular CoD**, would be an important input to cloud gaming services”
- (b) On the basis of the same evidence, taken together with “evidence from console and to some extent PC gaming”, “Activision content, **in particular CoD and WoW**, would be an important input to cloud gaming services in the counterfactual” (emphasis added)
- 3.46 The CMA does not explain which pieces of evidence it has relied on to reach these conclusions. Rather, it simply notes that “*the evidence indicates that CoD and WoW are among the most played games on PC particularly in Western countries (including the UK), although it also suggests that CoD is less prominent on PC than it is on console*”.¹⁷⁴ The Parties are therefore unable to understand on what basis the CMA has reached its provisional conclusions.
- 3.47 The lack of reasoning is particularly stark in relation to Activision content other than *CoD*. For example, the CMA specifically cites *WoW* as being an important input for cloud gaming services, yet the only evidence it cites to support this claim is:
- (a) One Microsoft internal document noting that [REDACTED].
- (b) One Activision internal document showing that [REDACTED].¹⁷⁵
- 3.48 These two isolated references (one of which relates to the US) are very far removed from the level of evidence required to show that the availability of *WoW* “*plays an important role in shaping downstream competition*” in cloud gaming services in the UK. The CMA presents no evidence *at all* which is specific to cloud gaming services. Indeed, as *WoW* is a single-game subscription game, it is not an obvious candidate for inclusion in a BYOG or B2P cloud gaming service.
- 3.49 The CMA also fails to present any evidence that any *other* Activision content, besides *CoD*, is an important input for cloud gaming services. Accordingly, the generic references to “Activision content” being an important input in the Provisional Findings cannot be sustained. They are not supported by any evidence at all and the CMA has not satisfied its duty to consult¹⁷⁶ as regards this broad finding.
- (ii) The evidence in the Provisional Findings does not support the conclusions drawn on the importance of *CoD***

¹⁷⁴ Provisional Findings, paragraphs 8.266-8.268.

¹⁷⁵ Provisional Findings, paragraph 8.262(d).

¹⁷⁶ Section 104 Enterprise Act 2002.

3.50 The evidence presented in the Provisional Findings relates primarily to *CoD*. The CMA fails to explain which evidence it has placed weight on in concluding that *CoD* is an important input. In any event, it is clear there is not a sufficient evidential basis to support the CMA’s conclusion.

(a) The CMA cannot rely on its findings in relation to the Console SLC

3.51 First, the CMA cannot simply rely on its findings in relation to the Console SLC, which relate to *CoD*’s importance to Sony specifically in attracting and retaining console customers (which are disputed for the reasons set out in section 2 above).

3.52 This line of reasoning¹⁷⁷ is wholly inconsistent with the CMA’s market definition analysis. The CMA finds that there is a separate market for cloud gaming services, arguing that, on the demand side, “*cloud gaming [is] attractive to a new pool of consumers*”, separate to console gamers. It also explicitly states that “*consumers consider different factors important for cloud gaming as compared to consoles*” (emphasis added)¹⁷⁸, noting that “*cloud gaming allows consumers to play high performance games that were previously only available on consoles or high-end PCs, on a range of lower-powered devices including mobiles, smart TVs, and low-end PCs*”.

3.53 Further, the CMA adopts the view that even though most usage of Microsoft’s cloud gaming service is currently on console “[w]e expect this to change in the future”, based on the pattern of usage of those providers’ potentially affected by the Cloud Gaming SLC. The CMA cites data from [X], indicating it expects most cloud gaming to take place on PC.¹⁷⁹

3.54 Accordingly, absent evidence specific to cloud gaming, the most pertinent issue is *CoD*’s importance as a PC game. The CMA’s repeated attempts to rely on evidence relating to console gaming is, therefore, unsound. Under the CMA’s own analysis, cloud gaming customers are those that do not want to purchase a console.

(b) *CoD* is not important on PC

3.55 Significantly, the CMA acknowledges that “*CoD is less prominent on PC than it is on console – as suggested by the higher number of games which reach a similar or greater level of engagement to CoD on PC relative to console*”.¹⁸⁰ Yet it fails to draw the correct conclusions from this clear finding.

¹⁷⁷ Expressed most clearly at paragraph 8.267 of the Provisional Findings.

¹⁷⁸ Provisional Findings, paragraph 5.82.

¹⁷⁹ Moreover, all cloud gaming providers concerned by the CMA’s theory of harm, except Sony, are (and will continue to be) streaming PC games, not console games.

¹⁸⁰ Provisional Findings, paragraphs 8.262 and 8.267.

3.56 In fact, there is a range of evidence showing that PC gamers engage with a broad range of content and that there are many alternatives to *CoD* that can and do support cloud gaming services.

- (a) Windows telemetry data analyzed for June 2021 through to December 2022 shows that [REDACTED].¹⁸¹ The Windows telemetry data also shows that [REDACTED] (shown below in Figure 12).¹⁸² [REDACTED]. [REDACTED]. [REDACTED].

Figure 12: [REDACTED]

[REDACTED]

- (b) In the UK, Windows telemetry data shows that [REDACTED]. [REDACTED].¹⁸³
- (c) Steam, which is the largest PC digital storefront, did not carry any new releases of *CoD* for three years until November 2022 following Activision's commercial decision to only sell its PC games on Battle.net. This did not prevent Steam from maintaining its leading position in PC game distribution and increasing its revenues.¹⁸⁴
- (d) Even following *CoD* returning to Steam, it does not appear on the Top 10 list of games played on the platform (see Table 14 below). In fact, the peak number of players for *CoD: Modern Warfare II* (incl. *Warzone II*) on Steam is ~492,000. This is less than half the figure for *Counter-Strike: Global Offensive*, a shooter game that regularly attracts more than a million daily users on Steam.¹⁸⁵

¹⁸¹ [REDACTED]. [REDACTED].

¹⁸² [REDACTED]. [REDACTED].

¹⁸³ [REDACTED].

¹⁸⁴ Activision released five new *CoD* PC games exclusively on Battle.net between 2018 and 2022: *CoD: Black Ops 4* in 2018; *CoD: Modern Warfare* in 2019; *CoD: Warzone* and *CoD: Black Ops Cold War* in 2020; and *CoD: Vanguard in 2021*. [REDACTED]. See Microsoft's response to Issues Statement, paragraph 3.40(b).

¹⁸⁵ See SteamDB, (link available [here](#)).

Table 14: 10 most played games on Steam by peak number of daily active users as of 6 February 2023

Most played games	Revenue model	Publisher	Peak daily active users ('000)
<i>PUBG: Battlegrounds</i>	FTP	Krafton	3,257
<i>Lost Ark</i>	FTP	Amazon	1,325
<i>Counter-Strike: Global Offensive</i>	FTP	Valve	1,309
<i>Dota 2</i>	FTP	Valve	1,295
<i>Cyberpunk 2077</i>	BTP	CD PROJEKT RED	1,054
<i>Elden Ring</i>	BTP	From Software	953
<i>New World</i>	BTP	Amazon	914
<i>Goose Goose Duck</i>	FTP	Gaggle Studios	703
<i>Apex Legends</i>	FTP	EA	512
<i>Valheim</i>	BTP	Coffee Stain	502

Source: Steam DB, captured on February 6, 2023

(a) Industry rankings show that *CoD* is consistently outranked by other publishers' PC games.

- **IGN's ranking of "The 25 Best PC Games to Play Right Now" does not include *CoD*.** Rather, the best game on PC is *Half Life: Alyx* (Valve), followed by *The Witcher 3: Wild Hunt* (CD PROJEKT RED), and *XCOM 2: War of the Chosen* (2K Games).¹⁸⁶
- **Metacritic's ranking does not list *CoD* at the top of its rankings.** Two releases of *CoD*, both over 15 years old, are ranked as distant 37 and 94 on Metacritic's best games on PC list.¹⁸⁷
- **PC Gamer's "top 100 PC games" list does not include *CoD*.** This list features *Disco Elysium* (ZA/UM), *Elden Ring* (Bandai) and *Crusader Kings 3* (paradox interactive) as the top three games.¹⁸⁸

3.57 The evidence from PC gaming clearly does not support the conclusion that *CoD* is important for cloud gaming services. The opposite is true.

¹⁸⁶ IGN, "The Best 25 PC games to play right now", 15.10.2022 (link available [here](#)). Neither is any other, less popular, Activision content listed, including *Diablo* or *Crash Bandicoot*.

¹⁸⁷ Metacritic, "Game Releases by User Score" (link available [here](#)). *Diablo* is ranked only at 19, while *Crash Bandicoot* is not included.

¹⁸⁸ PC Gamer, "The top 100 PC games", 1.10.2022 (link available [here](#)). Neither is any other, less popular, Activision/Blizzard content listed, including *Diablo* or *Crash Bandicoot*.

c) Popular alternatives to *CoD* are available for cloud gaming

- 3.58 The availability of popular alternatives to *CoD* on cloud gaming services is not merely theoretical. In fact, [X] as well as seven of the top 10 most played games on Steam (see Figure 12 and Table 14 above) are already available on NVIDIA GFN.¹⁸⁹ As recognized in the Provisional Findings, some other major publishers like Ubisoft, EA and Epic Games, already offer their games either on their own or on third-party cloud gaming services.
- 3.59 The range of games available for cloud gaming is only likely to increase in the future, at least on the CMA's interpretation of the evidence. In particular, the CMA's counterfactual assumes that game publishers will be increasingly incentivized to place their content on cloud gaming services in the future as those services continue to grow.¹⁹⁰ It would clearly be illogical for the CMA to assume that only Activision would make its games available on cloud gaming services, but that none of the other major publishers would do so.
- 3.60 Accordingly, the CMA must recognize not only that there is a "*higher number of games which reach a similar or greater level of engagement to CoD on PC relative to console*", but also that those games already are – or will be – available to cloud gaming rivals.

(d) The CMA cannot rely on vague references to range/quality without supporting evidence specific to *CoD*

- 3.61 Given the paucity of evidence on *CoD*'s importance for cloud gaming, the CMA appears to place significant weight on the notion that where "*downstream 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*" and that the "*impact is particularly severe where the content making up that relatively small share of supply is particularly important to that range/quality*".¹⁹¹ Indeed, this is the only basis on which the CMA dismisses the relevance of Activision's small shares of supply in game publishing.¹⁹²
- 3.62 However, the CMA fails to actually assess whether *CoD* can be considered particularly important to the range or quality that could be offered by cloud gaming providers absent the Merger. In accordance with the CMA's assessment of the Console SLC, this

¹⁸⁹ Along with other popular franchises, including AAA titles, including *League of Legends* (Riot Games), *Fortnite* (Epic Games), *Destiny 2* (Bungie, now owned by Sony), *The Witcher 3: Wild Hunt* (CD PROJEKT RED), *Doom Eternal* (Bethesda), *Horizon Zero Dawn* (Guerrilla Games), *Final Fantasy* (Square Enix) and *Shadow of the Tomb Raider* (Square Enix).

¹⁹⁰ Provisional Findings, paragraph 8.204.

¹⁹¹ Provisional Findings, paragraph 8.246.

¹⁹² Provisional Findings, paragraph 8.246(b).

requires consideration of whether “*the number and popularity of other games is sufficiently great that the elimination of the CoD franchise from [rival cloud gaming providers’] range would not represent a significant reduction in range in relative terms*”.¹⁹³

- 3.63 No such evaluation has been made in relation to the Cloud Gaming SLC. Instead the CMA simply asserts that “*any alternatives of the same scale and [sic] to CoD would be limited*”.¹⁹⁴ This assertion contrasts starkly with – and is clearly contradicted by – the CMA’s acknowledgement that there are several games with a “*similar or greater level of engagement [to CoD] on PC*”. This inconsistency severely undermines the key conclusions drawn in the Provisional Findings.

(e) Third party evidence indicates CoD would not be an important input for cloud gaming

- 3.64 The Provisional Findings present a selection of evidence received from third parties, most of which relates to the uncontroversial view that content is important for the success of a cloud gaming platform,¹⁹⁵ or unsubstantiated assertions regarding the importance of *CoD*,¹⁹⁶ which must carry limited evidential weight.
- 3.65 By far the most relevant third-party evidence presented in the Provisional Findings relates to the performance of *CoD* during the only period it was on a cloud gaming service, during the [X] testing phase. This provides real world evidence of how important *CoD* was to driving the success of a cloud gaming platform, and should accordingly carry greater evidential weight.
- 3.66 This evidence clearly undermines the CMA’s view that *CoD* is important to cloud gaming services. In particular, the fact that “[X]” (emphasis added)¹⁹⁷ demonstrates that *CoD* cannot be seen as an important game for cloud gaming services. If *CoD* was not popular amongst [X] users [X], the CMA has no basis to assume that it would be in the future if it were hypothetically made available for streaming.
- 3.67 Yet, inexplicably, the CMA seeks to downplay its relevance, stating “*we consider we should place only limited weight on this data and analysis as it is only relevant for the testing phase usage [X]*” and suggesting it is “*not clear whether it would overestimate or underestimate the importance of Activision content to [X]*”.¹⁹⁸ The CMA’s reasoning for not placing weight on this evidence is, however, flawed. In particular:

¹⁹³ Provisional Findings, paragraph 7.214(b).

¹⁹⁴ Provisional Findings, paragraph 8.266.

¹⁹⁵ Provisional Findings, paragraph 8.251 and 8.252.

¹⁹⁶ Provisional Findings, paragraph 8.253.

¹⁹⁷ Provisional Findings, paragraph 8.255(a).

¹⁹⁸ Provisional Findings, paragraph 8.257.

- (a) The fact that [REDACTED]¹⁹⁹ does not suggest it was important. On the contrary, the data referenced above clearly shows that gamers did not stay engaged with Activision games, compared to other content available on [REDACTED]. As set out in Activision’s response to the Provisional Findings, [REDACTED].
- (b) The CMA speculates that “gamers might have decided not to invest in an expensive game like *CoD* in order to use it on [[REDACTED]], given there was no certainty the service would have continued after the testing phase”.²⁰⁰ The CMA has no basis for this speculation beyond the fact that the most played games were [REDACTED]. Given that *CoD* was available on [REDACTED], however, there is no rational basis to assume gamers would have been unwilling to “invest” in it. This also ignores [REDACTED]. Instead, the more natural – and correct – interpretation is that it reflects *CoD*’s limited relevance on PC.
- (c) The CMA speculates *CoD* would have seen greater engagement [REDACTED].²⁰¹ In doing so the CMA states that [REDACTED]. However, it is clear [REDACTED] is not required for a game to perform well in [REDACTED].²⁰² Suggesting that [REDACTED] is therefore tantamount to accepting it does not have the same appeal as other games. Moreover, as noted above [REDACTED], *CoD* does not appear in the top 10 most played PC games based on Windows telemetry and Steam data (see Table 1).
- (d) As Activision makes clear in its response to the Provisional Findings, [REDACTED].

3.68 In fact, as the CMA accepts, the testing phase for [REDACTED] likely contained fewer games than the full [REDACTED] offering. The evidence from the testing phase therefore likely significantly overestimates the importance *CoD* would have in the counterfactual if it was made available on [REDACTED] again.

3.69 Instead of recognising this evidence for what it is, the CMA states that it places more weight on the “[REDACTED]” as well as high level estimates made by [REDACTED] as to the MAUs that *CoD: Warzone* would have had on the [REDACTED] service.²⁰³ This weighting of evidence is unsound:

- (a) [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].
- (b) [REDACTED] estimates for the [REDACTED] would attract was part of [REDACTED]. As such, they are almost certainly an overestimate of [REDACTED] own internal estimates (which the CMA does not appear to have obtained). Moreover, they pre-date the launch of *CoD: Warzone Mobile* which is likely to materially reduce potential demand to play

¹⁹⁹ Provisional Findings, paragraph 8.255(b).
²⁰⁰ Provisional Findings, paragraph 8.256(b).
²⁰¹ Provisional Findings, paragraph 8.256(c).
²⁰² The CMA notes only that [REDACTED], paragraph 8.256(c).
²⁰³ Provisional Findings, paragraph 8.258.

the game through cloud gaming services. [REDACTED] estimates are therefore out of date and unreliable.

3.70 Other evidence obtained by the CMA also does not support the view that *CoD* is seen as particularly important by market participants. For example:

- (a) Evidence obtained from [REDACTED]. [REDACTED]. None of these games are currently on [REDACTED]. [REDACTED].²⁰⁴
- (b) [REDACTED] presented evidence suggesting *CoD* was seen as its “*number one target for content acquisition*” [REDACTED].²⁰⁵ Yet it appears it produced no further documentation suggesting Activision content was seen as important in the intervening years [REDACTED].

(iv) Microsoft’s experience with *Fortnite* demonstrates that [REDACTED]

3.71 Microsoft’s recent experience with offering *Fortnite* on Xbox Cloud Gaming [REDACTED]. [REDACTED]. [REDACTED].²⁰⁶

3.72 [REDACTED]. Minimizing latency is critical to the gamer experience and high latency can have a significant detrimental effect on the quality of gameplay, particularly for competitive multi-player gameplay – a central element of the appeal of *CoD*. In fact, Microsoft’s tests show that [REDACTED].²⁰⁷

3.73 The CMA has not fairly evaluated this evidence. Instead, the CMA seeks to dismiss the relevance of the *Fortnite* experience on the basis that it “*is only relevant to running a cloud gaming service on mobile*”, [REDACTED] “*Microsoft not being able to use the app store to distribute its cloud gaming content, rather than in-gameplay quality aspects such as latency*”.²⁰⁸

3.74 This is a clear misrepresentation of the evidence available to the CMA:

- (a) *Fortnite* is not only relevant to mobile. It is available through Xbox Cloud Gaming on console, PC and mobile.
- (b) The evidence presented in the Provisional Findings show *Fortnite* is one of the most popular games on [REDACTED]²⁰⁹, and that on that service the [REDACTED].²¹⁰ It is simply

²⁰⁴ Provisional Findings, paragraph 8.254(b) and (c).

²⁰⁵ Provisional Findings, paragraph 8.254(a).

²⁰⁶ Issues Statement Response, section 5(A)(iv) and response to Working Papers, ToH 3, slide 13.

²⁰⁷ See CMA Site Visit Slides, 18.10.2022, slide 53.

²⁰⁸ Provisional Findings, paragraph 8.246(c).

²⁰⁹ Provisional Findings, paragraph 8.256(b) and (c).

²¹⁰ Provisional Findings, paragraph 8.246(c).

wrong to suggest it is “*only relevant to running a cloud gaming service on mobile*”.

(c) The CMA’s assertion that [REDACTED] *Fortnite* was not to do with “*in-gameplay quality aspects such as latency*” is wrong and [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].²¹¹

(d) As shown in Figure 11 above, [REDACTED]. [REDACTED]. [REDACTED].

3.75 The *Fortnite* evidence is, therefore, highly relevant to assessing Microsoft’s ability to foreclose using *CoD* and is wrongly dismissed in the Provisional Findings.

(iv) The Provisional Findings fail to provide any assessment of partial foreclosure

3.76 The Provisional Findings state that the CMA has considered whether Microsoft could harm cloud gaming rivals through either total or partial foreclosure. As regards the latter, the Provisional Findings assert that the most likely partial foreclosure strategy “*would be making Activision content available for release on rival cloud gaming services at a later date compared to Xbox (i.e. timed exclusivity)*”, while further potential partial foreclosure strategies are set out in a footnote.²¹²

3.77 However, no further consideration is provided anywhere in the Provisional Findings as to the potential impact of any such partial foreclosure strategies on rival cloud gaming services. In particular, the CMA has not explained whether, and if so how, it considers that a partial foreclosure strategy could have a foreclosure effect.²¹³ The CMA has therefore not satisfied its duty to consult²¹⁴ as regards partial foreclosure and this cannot form part of the CMA’s Final Report.

F No incentive to foreclose cloud gaming rivals using Activision’s content

3.78 As set out in section 3.B above, the recent NVIDIA Agreement conclusively demonstrates that Microsoft does not have incentives to withhold Activision content, or its own first-party content, from cloud gaming rivals. The CMA’s analysis of Microsoft’s alleged incentives, on the other hand, is heavily one-sided and fails to present a balanced view of the evidence. It cannot reasonably be sustained.

(i) Microsoft’s recent actions undermines the CMA’s reliance on Microsoft’s past behaviour, which does not evidence an incentive to foreclose cloud gaming rivals

²¹¹ Issues Statement Response, paragraph 5.13(g).

²¹² Provisional Findings, paragraph 8.2(b) and footnote 605.

²¹³ The CMA also provides no explanation similar to that set out in relation to ToH 1 to explain that its assessment in the Provisional Findings “*does not presuppose any specific foreclosure strategy*” (paragraph 7.125). On the contrary, its provisional conclusions in relation to the Cloud Gaming SLC are expressed only as relating to total foreclosure of Activision content. For example, at paragraphs 8.268 and 8.271 the CMA’s provisionally conclusions are expressed as relating to “*the loss of Activision content*” and rivals “*not having access*” to Activision content, (i.e., total foreclosure), rather than having access at a later date compared to Xbox, or on worse terms.

²¹⁴ Section 104 Enterprise Act 2002.

- 3.79 Microsoft’s recent actions and intention to make Activision content available for streaming on NVIDIA GFN must carry significantly greater weight than the historic evidence relied upon in the Provisional Findings regarding Microsoft’s past behaviour, which the CMA has misrepresented.
- 3.80 The CMA’s assessment relies primarily on the assertion that Microsoft’s biggest games and franchises are not available on rival cloud gaming platforms. However, as the CMA notes, this excludes Bethesda games. The latest titles in all of Bethesda’s main franchises are available on a rival cloud gaming platform.
- 3.81 The CMA offers no explanation as to why, if Microsoft were incentivised to foreclose rival cloud gaming services, it would not have removed these Bethesda titles from rival platforms. All the more so given one of Microsoft’s stated reasons for acquiring Bethesda was to bolster its cloud game streaming offering.²¹⁵ Instead, the CMA focuses on two specific examples where Microsoft did remove Bethesda titles, *Wolfenstein: Young Blood* and *Quake 2 RTX*, from NVIDIA GFN. In doing so, the CMA selectively extracts quotes from Microsoft’s internal documents while largely ignoring Microsoft’s submissions explaining the relevant context and rationale for the removal of the games.
- 3.82 In particular, the suggestion that “*Microsoft did not provide convincing evidence to show the full motives behind Microsoft’s decision*” is simply wrong, as is the claim that “*Microsoft’s submissions do not address the fact that a Microsoft senior employee [REDACTED]*.”²¹⁶
- 3.83 The emails cited in the Provisional Findings were addressed at Microsoft’s Main Party Hearing. [REDACTED]. [REDACTED].²¹⁷ The evidence provided at the Main Party Hearing has been entirely ignored in the Provisional Findings, leading to inaccurate and unsustainable conclusions.
- 3.84 As previously explained²¹⁸, these games were ultimately removed from NVIDIA GFN as there was no valid license agreement in place. The CMA has wrongly disregarded the fact that the final decision was made based on [REDACTED]:
- (a) An email from [REDACTED] on [REDACTED], categorically sets out his position in [REDACTED]²¹⁹ This email is omitted from the Provisional Findings’ account.
 - (b) The above position is then reiterated in an email from [REDACTED]. [REDACTED].²²⁰

²¹⁵ See Microsoft.com, “*Microsoft to acquire ZeniMax Media and its game publisher Bethesda Softworks*”, 21.09.23 (link available [here](#)).

²¹⁶ Provisional Findings, paragraphs 8.295-8.296.

²¹⁷ Main Party Hearing transcript, pp.54-58.

²¹⁸ See Microsoft’s response to RFI 9, dated 4 January 2023.

²¹⁹ [REDACTED].

²²⁰ [REDACTED].

3.85 Given the above, it is unambiguously not the case that Microsoft’s internal documents “*reveal a strategy of not making its first-party titles available on rival cloud gaming platforms*”. Nor are [REDACTED].²²¹ These statements are patently wrong given that several Microsoft first-party titles remain available on rival cloud gaming platforms and it has recently entered an agreement with NVIDIA to expand this to all of its first-party PC titles.²²² Any conclusions drawn on this basis in the CMA’s Final Report would be unsound.

(ii) **The CMA’s incentives analysis rests on speculation about the future direction of cloud gaming**

3.86 Besides misrepresented evidence on Microsoft’s past behaviour, the CMA’s analysis of incentives relies solely on (i) speculation regarding future growth of cloud gaming and (ii) Microsoft’s alleged pre-existing strength in this space. Neither provides a sufficient basis for the conclusions drawn by the CMA.

(a) As set out in section 3.C, the CMA cannot conclude on the balance of probabilities that cloud gaming services will become profitable in the next five years. More generally, the CMA has assumed without evidence that Microsoft would [REDACTED].²²³ However, [REDACTED], there is no basis on which the CMA can conclude that Microsoft would be incentivized to seek to harm rivals by withholding content. On the contrary, the NVIDIA Agreement shows that Microsoft is incentivized to distribute its content widely, including through alternative cloud gaming business models (*e.g.*, BYOG) to its own.

(b) The CMA’s claim that Microsoft “*already holds a strong position in cloud gaming*”²²⁴ is based on a misleading analysis of shares of supply. In particular, the CMA estimates that Microsoft’s share increased from [REDACTED]% in 2021 to [REDACTED]% in 2022. However:

- First, as set out in section 3.C above, [REDACTED]. This is not comparable to subscribers to a service like NVIDIA GFN which is a standalone cloud gaming service and [REDACTED]. This is because being a standalone cloud gaming service signals that registered users, and even more so subscribers, to NVIDIA GFN have actively selected this service for its cloud offering and [REDACTED].
- Second, even using MAUs across all platforms, the CMA’s 2022 estimates are flawed and overstate Microsoft’s share of supply. In

²²¹ Provisional Findings, paragraphs 8.299-8.300.

²²² As set out in section 3.B, [REDACTED].

²²³ Provisional Findings, paragraph 8.276.

²²⁴ Provisional Findings, paragraph 8.285.

particular, while Microsoft's share of supply in terms of average MAUs is calculated based on figures for **January to September 2022**, NVIDIA's share of supply is based solely on its MAUs as of **January 2022**. Given that cloud gaming is a "*growing and promising market*"²²⁵, taking a snapshot of NVIDIA's MAUs as of January 2022 and comparing it to Microsoft's MAUs for a later period is liable to present a heavily distorted view of the market. Comparing like-for-like, using Microsoft's average MAUs as of January 2022 it would have a share of supply of [REDACTED]%. Excluding gamers accessing Xbox Cloud Gaming on console, Microsoft's average MAUs for 2022 are [REDACTED]. However, without figures for NVIDIA and other providers covering the remainder of 2022 it is not possible to accurately estimate 2022 shares of supply based on MAUs.

- 3.87 The CMA's allegation that "*no cloud gaming rival can match Microsoft's cost advantage arising from its ownership of Windows*"²²⁶ is not supported by evidence and [REDACTED]. As explained further in **Annex 4**, given [REDACTED].

G No SLC in cloud gaming services in the UK

- 3.88 Given that Microsoft has no ability or incentive to foreclose rival cloud gaming service providers, the Merger will not have any effect on competition in a hypothetical market for cloud gaming services in the UK. On the contrary, as set out above, as a result of the NVIDIA Agreement the Merger will *enhance* competition in cloud gaming services.
- 3.89 The assessment of effects in the Provisional Findings largely focuses on the strength of different cloud gaming providers. However, the CMA fails to specify which competitors it believes might be affected by a foreclosure strategy, or to what extent. It has therefore not explained what impact on overall competition in the downstream market it considers there would be, never mind establishing that an SLC would arise.
- 3.90 Instead, the CMA relies on the vague conclusion that "*cloud gaming therefore appears likely to be a relatively concentrated market in the UK... [in which] harm to rivals is likely to constitute harm to competition*".²²⁷ However, the Provisional Findings fail to properly assess the competitive landscape in cloud gaming services and, as noted above, artificially inflate Microsoft's share of supply.
- 3.91 In particular, in addition to the four cloud gaming services (Amazon, NVIDIA, Sony and [REDACTED]) referenced in the Provisional Findings there are several other players in the developing cloud gaming segment. These cannot simply be ignored in an assessment

²²⁵ Provisional Findings, paragraph 8.46.

²²⁶ Provisional Findings, paragraph 8.264.

²²⁷ Provisional Findings, paragraph 8.238.

of current and potential competition. This includes the likes of Blacknut, Boosteroid, Game Stream, Netboom, Playkey, Shadow, Utomik, Wiztivi and Rainway. The CMA does not appear to have taken the necessary investigative steps to obtain subscriber numbers for these competitors and therefore cannot safely conclude that “*the market for cloud gaming services is currently concentrated with the top three competitors having over 90% share of supply*”.²²⁸

- 3.92 Finally, the CMA regards the barriers to entry and expansion as being high, on the basis of unsubstantiated claims from two competitors ([§<]) and internal documents from another competitor ([§<]). However, it is important that the CMA views these submissions in light of market realities. As set out above, a large number of companies have entered the cloud gaming space in recent years, utilizing a range of different business models and infrastructures, indicating that barriers to entry are low especially for those offering the BYOG model which is the focus of the CMA’s theory.²²⁹ Cloud gaming providers do not require an extensive catalogue of content to launch, but many providers offer a range of different payment options and, as the CMA has noted, are open to different ways of monetizing their services.²³⁰ Again, the CMA does not appear to have sought views or evidence from the market at large to verify the positions taken in the Provisional Findings.

H Conclusion

- 3.93 In summary, the evidence presented in relation to the CMA’s second theory of harm is inadequate to establish a substantial lessening of competition. In circumstances where Activision content is not even available for cloud gaming today, it is incumbent on the CMA to provide compelling evidence not only that Activision would have changed its consistent policy absent the Merger, but also that its content would have been important in shaping downstream competition had it done so. The Provisional Findings come nowhere close to meeting the CMA’s burden of proof.
- 3.94 In any event, the NVIDIA Agreement is a material change in the evidence before the CMA which, combined with the errors set out in this response, should lead the CMA to reverse its provisional conclusions. The Merger will enhance competition in cloud gaming services, not harm it.

²²⁸ Provisional Findings, paragraph 8.309. The CMA also fails to recognise that Netflix has recently announced its interest in developing a cloud game streaming platform. In October 2022, Mike Verdu, Netflix’s VP of games stated that it was “*very seriously exploring a cloud gaming offering so that we can reach members on TVs and on PCs*”. The Verge, “*Netflix is ‘seriously exploring’ a cloud gaming service*”, 18.10.2022 (link available [here](#)).

²²⁹ The CMA has also disregarded submissions from [§<] (Provisional Findings, paragraph 8.334) without any reasoning. [§<] has noted that barriers to entry in gaming, including cloud gaming, are generally low, different business models provide more options to developers for monetization and named recent competitors including Amazon Luna, Netflix Games, Apple Arcade and Epic Game Store.

²³⁰ Provisional Findings, paragraph 8.10.

4. THE MERGER WILL GIVE RISE TO SIGNIFICANT RIVAL-ENHANCING EFFICIENCIES

- 4.1 The Merger will result in rivalry-enhancing efficiencies that are demonstrable, merger-specific and will benefit customers in the console and cloud gaming markets identified by the CMA. These efficiencies will result in enhanced competition, lower prices, higher quality and greater choice, as well as greater innovation. The efficiencies are substantial and will more than offset any alleged anti-competitive effects identified by the CMA.
- 4.2 The efficiencies result in part from agreements Microsoft has made to distribute *CoD* on Nintendo and NVIDIA's cloud gaming platform, where it would not otherwise be present.
- 4.3 As explained in Microsoft's response to the Remedies Notice, these efficiencies also constitute relevant customer benefits ("RCBs") within the meaning of the Enterprise Act 2002.²³¹ RCBs are not limited to the market in which an SLC is identified.²³² In this case, RCBs also arise in PC and mobile gaming, as set out below.
- 4.4 Microsoft estimates on a conservative basis that the total benefits to UK consumers as a result of the Merger will exceed \$[<] (£[<]). Globally, the benefits to consumers will, on a conservative basis, be at least \$[<] (£[<]).

A Efficiencies in console gaming

- 4.5 Currently *CoD* is only available on PlayStation, Xbox and Windows PC (via Battle.net and Steam).²³³ Gamers on PlayStation have access to additional *CoD* content and timed exclusives. As a result of the Merger, Nintendo will obtain access to *CoD* which will enhance rivalry in the supply of console gaming services, offsetting any SLC identified in this market.
- 4.6 **The availability of *CoD* on Nintendo will enhance competition in console gaming and result in a greater choice of goods and services.** Microsoft entered into a final agreement with Nintendo on [<] February 2023 to publish *CoD* titles on Nintendo post-Merger.
- (a) ***CoD* titles will be available on Nintendo platforms for [<] 10 years.** The agreement provides that Microsoft will develop and publish future native console versions of *CoD* titles for Nintendo platforms for [<] 10 years.²³⁴ Microsoft will publish future *CoD* versions for Nintendo platforms on the same

²³¹ Section 30.

²³² Merger Assessment Guidelines, paragraph 8.23.

²³³ *CoD: Mobile* is available on mobile devices.

²³⁴ [<].

date as the release of those versions on Xbox console platforms; and will maintain feature and content parity to the console versions published on Xbox console platforms, [REDACTED].

- (b) **The efficiencies will accrue within a reasonable time period and will benefit customers in the UK.** Making *CoD* available on Nintendo platforms will enhance rivalry between Nintendo, Microsoft and Sony in console gaming by increasing the range and quality of games available on the Nintendo platform. It will also increase the choice available to Nintendo Switch users.

Around [REDACTED] million Nintendo consoles are sold each year worldwide, of which [REDACTED] million are sold in the UK.²³⁵ Based on third party data, Nintendo has around [REDACTED] million monthly active users.²³⁶

- *CoD* includes both the free-to-play title *Warzone* and buy-to-play releases. The game engine that powers *Warzone* is mature and has been optimized to run on a wide range of hardware devices (ranging from the Xbox One console released in 2015 up to the Xbox Series X). *Warzone* supports PC hardware with GPU cards that were released as far back as 2015 (*i.e.*, prior to the release of Nintendo Switch in 2017).²³⁷
- The Activision development team has a long history of optimizing game performance for available hardware capabilities. The Parties are confident that in addition to *Warzone*, *CoD* buy-to-play titles (*e.g.*, *CoD: Modern Warfare 2*) can be optimised to run on the Nintendo Switch in a timely manner using standard techniques which have been used to bring games such as *Apex Legends*, *DOOM Eternal*, *Fortnite* and *Crysis 3* to the Switch.²³⁸ Activision estimates that this could be done within a period of around [REDACTED] months.²³⁹
- [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

- (c) **The benefits of the efficiency will be substantial.** Even taking into account any technical limitations of the current Nintendo Switch, Microsoft estimates, on a conservative basis, that the net present value of the benefits to Nintendo customers in the UK of having access to *CoD* over 10 years to be at least \$ [REDACTED] (£[REDACTED]). At a global level, the 10-year net present value is estimated to be \$[REDACTED]

²³⁵ IDG data.

²³⁶ Based on the active installed base of Nintendo consoles reported by Ampere Analysis.

²³⁷ Activision also offers a mobile experience of *Warzone* that runs natively on mobile phones which have much lower performance specifications than the Nintendo Switch.

²³⁸ By optimising the display resolution, in-game texture resolution, reducing the rendering speed (*i.e.*, frames per second) and simplifying advanced rendering techniques (*e.g.*, raytracing, shadow, lighting, and antialiasing techniques).

²³⁹ [REDACTED].

(£[§<]).²⁴⁰ By widening access to *CoD*, the Merger will have the added benefit of increasing the pool of gamers able to play the game, improving the cross-play functionality of the game and enabling more gamers to play with their friends.²⁴¹

- (d) **The efficiency is timely, likely and merger-specific.** This efficiency will arise from [§<]. It is also clear that the benefit is merger-specific, as Activision [§<].²⁴²

4.7 **Microsoft’s plans to make Activision content available in Game Pass ‘day and date’ will enhance rivalry in console gaming, increase customer choice and lower the cost of access.** As acknowledged by the CMA, the inclusion of Activision content in Game Pass ‘day and date’ will also benefit Xbox and PC gamers, who [§<] *CoD* gamers in the UK.²⁴³ Indeed, the Provisional Findings “*acknowledge that inclusion of Activision content in Game Pass on a ‘day and date’ basis is a potential benefit for gamers in the UK that would not arise absent the merger. This benefit would mean that gamers could access Activision content such as the most recent releases of CoD as part of Microsoft’s multi-game subscription bundle where, absent the Merger, only older games might have become available*”.²⁴⁴

- (a) **Activision will not place new releases in subscription services day and date.** The CMA accepts that Activision will not make its most valuable games, such as *CoD*, available on subscription services on the date of release absent the Merger.²⁴⁵ As set out in Microsoft’s response to the Remedies Notice, this reflects Activision’s concerns regarding the [§<].²⁴⁶ The CMA accepts that other major publishers do not make their top titles available in multi-game subscriptions on release, given the risk of cannibalisation effects.²⁴⁷
- (b) **The efficiency is likely and timely - Microsoft intends that future Activision releases will be made available on Game Pass on the day of release.**²⁴⁸ As is acknowledged in the Provisional Findings “*it is likely that Microsoft will pursue a strategy of placing Activision’s content on Game Pass on a day-and-date basis post-merger*”. The Parties agree as this is consistent with the Microsoft’s pre-merger plans and its consistent track-record of placing its first-party content on

²⁴⁰ [§<]. [§<]. [§<]. [§<]. [§<].

²⁴¹ Response to ToH 1 Working Paper, slide 52 notes that: [§<], [§<]. As the CMA’s guidance notes, “*Where there are network effects, an increase in the number of access points to the network may result in an increase in the value of the network to customers*”. CMA, Merger Remedies (CMA 87), paragraph 3.23.

²⁴² See Keystone presentation, Analysis of Relevant Customer Benefits: UK, 22 February 2023, and supporting spreadsheet provided to the CMA on 27 February 2023.

²⁴³ Provisional Findings, paragraphs 9.56.

²⁴⁴ Provisional Findings, paragraphs 7.121.

²⁴⁵ Provisional Findings, paragraphs 7.121.

²⁴⁶ See Response to Remedies Notice, paragraph 2.4(a); Provisional Findings, paragraphs 7.119.

²⁴⁷ Provisional Findings, paragraphs 7.120.

²⁴⁸ FMN, paragraph 2.24.

Game Pass day and date.²⁴⁹

(c) **The efficiency is merger-specific.** The CMA accepts that this will not happen without the Merger. Pre-merger, Activision incurs the [§<] of bringing its titles (including *CoD*) to Game Pass, but does not internalize the full benefits of this decision. Post-Merger, Activision content will bring more users into Game Pass and increase engagement with other titles, generating benefits for Microsoft and third-party publishers. Post-transaction, these spill-overs will be internalized because the merged entity will be able to take a more holistic view taking into account the positive effects on Game Pass overall.

- This effect is not just hypothetical, but is proven by the way negotiations have unfolded in the past. The merged entity will always find it optimal to bring a title to Game Pass if the anticipated incremental revenues exceed the cost of cannibalized sales through other channels. By contrast, [§<].²⁵⁰ [§<].
- This effect is a form of “elimination of double marginalization” and is also consistent with standard results in the economics literature which show that negotiations over an asset will often lead to efficient trades failing to take place because the purchaser holds out for a lower sum and the seller for a higher one.²⁵¹ The Merger will cut through this dynamic and mean that *CoD* will be brought to Game Pass on the day of release, something which would not happen otherwise.

(d) **The efficiency will benefit consumers.** As the CMA accepts, this benefit will mean that gamers can access Activision content, such as the most recent releases of *CoD*, as part of Microsoft’s multi-game subscription bundle where, absent the Merger, only older games might have become available for short periods of time.²⁵² Contractual provisions will prevent Microsoft placing new *CoD* releases on Game Pass before [§<].²⁵³ However, other Activision games will be placed in Game Pass earlier. The benefit will therefore accrue within a reasonable time period. Consumers have confirmed this benefit to the CMA starting that “*Microsoft’s plans to add Call of Duty to Game Pass are pro-competitive and will lower the price of accessing games for consumers*”.²⁵⁴

²⁴⁹ Provisional Findings, paragraphs 9.59.

²⁵⁰ [§<].

²⁵¹ For a classic reference see Myerson, RB. Satterthwaite, MA. 1983. “*Efficient mechanisms for bilateral trading*”, *Journal of Economic Theory*. See also, “*Analysis of Incentives in Bargaining and Mediation*”, at this link

²⁵² Provisional Findings, paragraphs 9.56.

²⁵³ Provisional Findings, paragraphs 9.57.

²⁵⁴ Microsoft/Activision Blizzard, CMA summary of responses from members of the public to the issues statement, paragraph 5(g).

Bringing forward release dates is a substantial benefit: a significant proportion of sales of newly-released titles occur in the first days after release. This shows that users strongly value being able to play games on the day of release.²⁵⁵

- (e) **The addition of Activision content to Game Pass will reduce prices.** [X], one of the goals and effects of the Merger is to expand Game Pass faster than would happen in the counterfactual.²⁵⁶ As such, the quality-adjusted price of Game Pass would fall post-Merger. Specifically, the addition of new content to Game Pass is a reduction in the combined price of a bundle consisting of the pre-existing bundle plus the new title. Prior to adding a new title, the price paid by a consumer wanting access to both the bundle and the new title for a year is the annual bundle price plus the purchase price of the title. After adding the title to Game Pass at unchanged prices, the price of the combination is reduced by the price of the new title. The benefits of this price reduction accrue to gamers who choose to purchase the bundle and play the new title. There are several ways gamers may realize this benefit:
- Gamers who would otherwise have purchased both Game Pass and the title, but after purchase only use Game Pass to access the combined content, receive a price reduction benefit of the full avoided price of the new title.
 - Gamers who would have otherwise purchased only Game Pass and not the new title, but after the addition play the combined content, also receive a price reduction up to the full price of the new title.
 - Gamers who would otherwise have purchased only the new title (and forgone the purchase of Game Pass), but after the addition of the title choose instead to purchase only Game Pass, experience a price discount for Game Pass up to the full price of the title.
 - Gamers who currently neither buy *CoD* nor Game Pass but who choose to purchase Game Pass after addition of the new title receive a price reduction of up to the full price of the title.
- (f) **The benefits of the efficiency are substantial:** Microsoft conservatively estimates the net present value of the benefit to UK customers over 10 years to be around \$[X] (£[X]) for Game Pass subscribers on Xbox. Taking into account the terminal value of the benefit, the total net present value is estimated

²⁵⁵ Response to ToH 1 Working Paper, slide 36 notes that: [X]
²⁵⁶ [X].

to be \$[REDACTED] (£[REDACTED]) for UK customers.²⁵⁷ At a global level, the total net present value is estimated to be \$[REDACTED] (£[REDACTED]).

- (g) [REDACTED]. [REDACTED]. The Provisional Findings postulate that the price of Game Pass could go up as a result of the Merger to a degree that offsets the benefits set out above. But no mechanism is put forward to explain why this would be so. The integration of Activision and Microsoft will result in a classic elimination of double marginalization effect because Microsoft will be able to acquire these games at (opportunity) cost and will have incentives to distribute them more broadly and increase the output of Game Pass relative to its counterfactual level. [REDACTED]. This is exactly what Microsoft has done when it has added content to Game Pass in the past with, for example, the ZeniMax transaction resulting in additional content but no increase in Game Pass subscription prices.

This is especially so given that Game Pass users are price sensitive and an increase in the price of Game Pass would affect all users, including those that do not value or play *CoD*. Game Pass subscribers can cancel at any time after a month of play. As *CoD* titles are only released once a year, any impact would be short-lived as gamers who exhaust their enthusiasm for the new version of *CoD* within a few months will churn because of the higher price. As such, [REDACTED] would be counter-productive as it would increase subscriber churn rates [REDACTED].²⁵⁸ This is entirely at odds with the Provisional Finding's assessment of Microsoft's rationale for the Merger.

- (h) **Inclusion of Activision content in Game Pass will spur Sony to invest in its subscription offering:** By enabling Microsoft to compete more effectively against Sony, the Merger can also be expected to push Sony to improve its subscription offering, to the benefit of its more than 46 million subscribers, which would in turn result in lower prices, higher quality and/or greater choice for console customers. This is reflected in the consumer feedback to the CMA which stated that "*the Merger will push Sony to innovate, such as by improving its subscription service*".²⁵⁹ Indeed, Sony has already significantly improved PlayStation+ in response to the announcement of the Merger (introducing new tiers and adding additional content). Even without Sony first-party titles day and date, Sony's monthly prices for PlayStation+ are higher than Game Pass prices.

²⁵⁷ See Keystone presentation, Analysis of Relevant Customer Benefits: UK, 22 February 2023, and supporting spreadsheet provided to the CMA on 27 February 2023.

²⁵⁸ See, for example, [REDACTED].

²⁵⁹ Microsoft/Activision Blizzard, CMA summary of responses from members of the public to the issues statement, paragraph 5(e).

- 4.8 The Parties also note that the CMA has argued in the Mobile Ecosystems Market Study²⁶⁰ that allowing developers to obtain a larger share of their revenues from app sales would lower prices and increase incentives for investment and innovation to increase app quality and choice.²⁶¹ The vertical integration of Microsoft and Activision will mean that the commissions currently paid by Activision for sales on Xbox will be internalized and the same logic implies that this will generate equivalent incentives leading to analogous benefits in terms of increased innovation and choice.
- 4.9 **The availability of existing *CoD* content that is currently exclusive to PlayStation also on Xbox will result in a higher quality of goods and services.** *CoD* is not currently available on “*equal terms*” on PlayStation, Xbox and PC, due to the agreements which Sony has had in place since 2015.²⁶² Following the Merger, benefits which are currently only available to PlayStation gamers would be made available to Xbox (and PC) gamers.
- (a) **Sony has *CoD* content and timed exclusives.** One element of Sony’s acknowledged “content leadership” is the fact that it has *CoD* content and timed exclusives. These include exclusive content, such as extra tier skips on the battle pass, the ability to access additional experience points (*e.g.*, through playing in party and exclusive events), combat packs, certain in-game character customisations, discounted console bundles and exclusive early access to alpha and beta versions of the game.
- (b) **Following the Merger, these benefits will be available to Xbox gamers.** The majority of gamers who play *CoD* each month in the UK ([<]%) are on Xbox ([<]%) and PC ([<]%).²⁶³ PlayStation gamers represent [<]% of *CoD* monthly active users in the UK.
- 4.10 **The efficiencies in console gaming will offset the SLC identified by the CMA.** Taken together, the efficiencies outlined above will significantly enhance rivalry in console gaming between the three major providers, Sony, Nintendo and Microsoft, including in the UK. The efficiencies will directly benefit customers, including the majority of *CoD* gamers, and will spur greater investment and innovation. Microsoft

²⁶⁰ CMA, Mobile Ecosystems, Market Study final report, 10 June 2022 (link available [here](#)).

²⁶¹ See, for example, Mobile Ecosystems, Market Study final report paragraph 7.37 (“*commission[s] charged to certain app developers...may also serve to hold up or prevent some new apps or services from making it onto the platform*”), and 7.68 (“*Consumers might benefit in a range of ways if the level of commission was lower. While some of the savings might be retained by app developers as additional profit, we would expect a material proportion of the savings to either be re-invested, passed through as a saving to consumers in the form of lower prices, or enable an expansion in the range of available apps.*”).

²⁶² These include exclusive access to the online alpha version of the game and access to the beta version of the game five days earlier than gamers on Xbox consoles or PC, game bonuses such as extra “tier skips” on the battle pass, the ability to access additional “experience points” (*e.g.*, through exclusive events), discounted console bundles and certain in-game character customisations and content bundles.

²⁶³ Activision data for 2022. There were [<] million average *CoD* MAU on Xbox and PC in 2021 also representing [<]% of *CoD* MAU in the UK.

submits that this outweighs any possible the lessening of competition identified by the CMA in console gaming.

B Efficiencies in cloud gaming

4.11 Currently Activision content is not available on any cloud gaming service.²⁶⁴ As a result of the NVIDIA Agreement, Activision content will be made available on Nvidia GFN post-Merger.

4.12 **The availability of Activision content, including *CoD*, on NVIDIA GFN will enhance competition in cloud gaming and result in a greater choice of goods and services.**

- (a) **Activision content will be available on NVIDIA GFN [X] 10 years.** Under the NVIDIA Agreement Microsoft provides [X]. [X] (see further section 3.B above).
- (b) **The efficiency is timely and likely.** As a result of the NVIDIA Agreement, should the Merger proceed, Activision content will become available on multiple cloud gaming services, enhancing rivalry in this nascent segment by increasing the range and quality of games available to customers. Under the NVIDIA Agreement, [X].
- (c) **The benefits of the efficiency are substantial.** UK customers will benefit from expanded access to *CoD* and other Activision content. By making this content available for streaming, customers will face a lower cost of accessing Activision's high performance games as they will no longer need to purchase a console or high-performance PC. The Parties estimate there are over 1 billion PC gamers globally (18 million in the UK) that cannot play *CoD* today because they own a low-performance PC, but will be able to post-Merger.²⁶⁵ Other gamers who already play *CoD* will also benefit from expanded access to the game (*e.g.*, while travelling).²⁶⁶
- (d) **The efficiency is merger-specific.** The CMA provisionally considers it likely that [X].²⁶⁷ This is denied for the reasons set out in Activision's response to the Provisional Findings. In any event, even if the evidence in the Provisional Findings shows that [X] [X]. Following signing of the NVIDIA Agreement, the Merger will ensure that Activision content is available on multiple cloud gaming providers, thereby enhancing rivalry compared to the counterfactual and

²⁶⁴ *Cod: Mobile* is available on mobile devices.

²⁶⁵ Based on Newzoo's report that there are [X] PC gamers globally ([X] in UK) and [X].

²⁶⁶ Globally, there are reported to be over 20 million registered users of NVIDIA GFN. PC Mag, "Nvidia's GeForce Now Game-Streaming Service Tops 20 Million Users", 25.08.22 (link available [here](#)).

²⁶⁷ Provisional Findings, paragraph 8.237.

delivering significant benefits to consumers. The NVIDIA Agreement [§], [§].

- 4.13 **The benefits of the efficiency will offset the SLC identified by the CMA.** As set out in above, the cloud gaming segment is de *minimis* in the UK today and is expected to remain so. While cloud gaming may grow, Microsoft expects that it will account for only [§]% of the total consumer spend on gaming by 2025. As such, any SLC will be limited. This is even more so given that in reality the Cloud Gaming SLC [§].
- 4.14 The benefits of this efficiency, by definition, outweigh any potential lessening of competition arising from the Cloud Gaming SLC given that the NVIDIA Agreement places NVIDIA [§]. [§].²⁶⁸ In addition, as a result of the Merger, Activision content will become available on multiple cloud gaming services, further enhancing rivalry beyond what could have been expected absent the Merger.

C RCBs in PC gaming

- 4.15 The efficiencies set out above also constitute RCBs, as explained in detail in Microsoft's response to the Remedies Notice. RCBs are not limited to the market(s) in which an SLC is identified. In this case, significant benefits will also arise for customers in PC gaming.
- 4.16 **Microsoft's plans to make Activision content available in Game Pass 'day and date' will benefit PC gamers.** For the same reasons set out above in relation to console gaming, the inclusion of Activision content in Game Pass 'day and date' will increase customer choice and lower the cost of access for gamers accessing *CoD* on PC.
- 4.17 **The benefits of the efficiency are substantial:** Microsoft conservatively estimates the net present value of the benefit to UK customers over 10 years to be around \$[§] (£[§]) for Game Pass subscribers on PC. Taking into account the terminal value of the benefit, the total net present value is estimated to be \$[§] (£[§]).²⁶⁹ At a global level, the total net present value is estimated to be \$[§] (£[§]).
- 4.18 **The availability of existing *CoD* exclusive content on PC will result in a higher quality of goods and services.** PC gamers will also benefit from exclusive content being made available which is currently only available to PlayStation gamers (see paragraph 4.9 above).

D RCBs in mobile gaming

- 4.19 RCBs also arise in mobile gaming as a result of Microsoft's intention to use the Merger

²⁶⁸ [§].

²⁶⁹ See Keystone presentation, Analysis of Relevant Customer Benefits: UK, 22 February 2023, and supporting spreadsheet provided to the CMA on 27 February 2023.

as a platform to enhance competition in distribution of games on mobile devices.

4.20 **Microsoft will expand in mobile gaming and challenge the existing duopoly over mobile app distribution.** The Merger will also result in benefits to customers in mobile game distribution in the form of lower prices, higher quality greater choice and greater innovation. This includes both end consumers and developers of native mobile games, each of which are relevant customers of mobile app stores.²⁷⁰

(a) **Mobile gaming is the key strategic rationale for the deal.** The key strategic rationale for the Merger is to expand Xbox’s presence in mobile, where its ability to reach gamers is impeded by Apple and Google’s effective duopoly in the provision of mobile app stores. Building on Activision’s existing community of mobile gamers, including *CoD: Mobile*, *Warzone Mobile* and *Diablo Immortal*, Microsoft aims to scale the Xbox Store to create a new mobile game distribution platform, Xbox Mobile Platform. Activision’s attractive content and experience with player engagement and acquisition will help to enhance the discoverability, searchability, and ease of user engagement of the new mobile platform.²⁷¹

(b) **A new mobile game distribution platform will benefit consumers and developers.** By creating a new mobile game distribution platform, the Merger will deliver significant benefits to gamers and developers, which will be provided with additional distribution options outside of the existing mobile app stores. More than [X] billion gamers played games on mobile devices in 2022, of which [X] million are in the UK.²⁷² The CMA has identified that “*weak competition within and between Apple’s and Google’s mobile ecosystems is harming consumers and many small UK businesses*”²⁷³, including through “*acting as a brake on innovation*”, imposing “*prices...above a competitive rate*” and “*degraded*” user experiences.²⁷⁴ By enabling Microsoft to challenge the existing duopoly in mobile game distribution, the Merger has the potential to create substantial benefits for UK consumers and game developers. Indeed, the European Game Developers Federation has expressed its clear support for the Merger, owing in part to the fact it will allow Microsoft to “*challenge Apple and*

²⁷⁰ As set out in the CMA’s market study on mobile ecosystems, since mobile app stores “*serve to connect two different customer groups – users and app developers, they are a two-sided platform*”. CMA, Mobile ecosystems – Market study final report, 10.06.2022, paragraph 4.2.

²⁷¹ [X]. However, this is currently prevented by Apple’s rules while on Android devices, Google’s rules allow Microsoft to distribute Game Pass Ultimate in the Google Play Store as a native app, but only in a limited functionality “consumption-only” mode with all abilities for users to make in-app purchases and monetization disabled.

²⁷² Newzoo Global Games Market Data, January 2023. [X]% of UK gamers played on a mobile device in 2021. See Ofcom Online Nation report 2022, Figure 3.4, p.84 (link available [here](#)).

²⁷³ CMA, Mobile ecosystems – Market study final report, 10.06.2022, paragraph 1.12.

²⁷⁴ CMA, Mobile ecosystems – Market study final report, 10.06.2022, page 255.

Google as dominant mobile game market application stores".²⁷⁵ As noted above, the CMA has argued in the Mobile Ecosystems Market Study²⁷⁶ that allowing developers to obtain a larger share of their revenues from app sales would lower prices and increase incentives for investment and innovation to increase app quality and choice.²⁷⁷

- (c) **The RCB has significant potential value.** By creating the Xbox Mobile Platform Microsoft intends to cut Apple and Google out as middlemen in the mobile gaming distribution chain, and to share the benefits with publishers. Microsoft plans [§<]. Microsoft estimates the net present value of the benefit (including terminal value) to be around \$[§<] (£[§<]) for third party publishers using the Xbox Mobile Platform, with approximately £[§<] estimated to accrue to third party publishers based in the UK.²⁷⁸
- (d) **The process of dynamic competition has economic value in the present.** While Microsoft's ability to break the mobile app store duopoly is not guaranteed, its entry attempt constitutes an efficiency. The CMA accepts that the process of dynamic competition has economic value in the present, even where entry attempts may ultimately be unsuccessful.²⁷⁹ This is because "*where dynamic competition gives customers the chance to benefit from a wider variety of products or a future increase in competition, this represents value to customers even where there is some uncertainty that these products or services will ever ultimately be made available to customers*".²⁸⁰ Moreover, the CMA accepts that existing providers, such as Google and Apple, may "*invest in order to protect future sales from dynamic competitors, and the removal of the threat of entry may lead to a significant reduction in innovation or efforts by other firms*".²⁸¹
- (e) **The RCB is merger-specific.** [§<]. [§<] of Activision's gaming community are mobile gamers. Activision's native mobile content will therefore create "natural onramps" for players on to the Xbox Mobile Platform (e.g., through in-

²⁷⁵ European Games Developer Federation Observations on Microsoft / Activision Blizzard Acquisition, 23.12.2022 (link available [here](#)). The European Games Developer Federation represents over 2,500 game developer studios in 22 European countries, including the UK.

²⁷⁶ CMA, Mobile Ecosystems, Market Study final report, 10 June 2022 (link available [here](#)).

²⁷⁷ See, for example, Mobile Ecosystems, Market Study final report paragraph 7.37 ("*commission[s] charged to certain app developers...may also serve to hold up or prevent some new apps or services from making it onto the platform*"), and 7.68 ("*Consumers might benefit in a range of ways if the level of commission was lower. While some of the savings might be retained by app developers as additional profit, we would expect a material proportion of the savings to either be re-invested, passed through as a saving to consumers in the form of lower prices, or enable an expansion in the range of available apps.*").

²⁷⁸ [§<]. [§<].

²⁷⁹ Merger Assessment Guidelines (CMA129), paragraph 5.20, Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc., Final report on the case remitted to the CMA by the Competition Appeal Tribunal, 18.10.2022 ("*Meta/Giphy*"), paragraph 7.21.

²⁸⁰ Merger Assessment Guidelines (CMA129), paragraph 5.20, *Meta/Giphy*, paragraph 7.22.

²⁸¹ Merger Assessment Guidelines (CMA129), paragraph 5.23, *Meta/Giphy*, paragraph 7.22.

game advertising), which it would not be possible for Microsoft to replicate absent the Merger (*i.e.*, given the restrictions which Google and Apple have imposed on their mobile ecosystems). [X].²⁸² The efficiency will, therefore, accrue within a reasonable time period.

E The Nintendo and NVIDIA agreements will result in the expansion of rivals in console and cloud gaming

4.21 To the extent that the CMA takes the view that the Nintendo agreement and/or NVIDIA Agreement do not represent efficiencies, Microsoft notes that the CMA must in any event take these developments into account as countervailing factors offsetting any lessening of competition identified, in line with the Merger Assessment Guidelines.²⁸³ In particular, by making additional popular content available on the Nintendo and NVIDIA platforms, the Merger will result in these rivals expanding their offering and exerting a stronger competitive constraint on the merged entity.

²⁸² [X].

²⁸³ Merger Assessment Guidelines, paragraphs 8.28-8.30.

5. CONCLUSION

- 5.1 For the reasons set out in this response, Microsoft strongly disagrees with the CMA's provisional conclusions. The evidence presented in the Provisional Findings do not provide any plausible basis on which it could be found that the Merger is likely to give rise to an SLC in any market in the UK. Microsoft's conduct in concluding legally binding agreements with Nintendo and NVIDIA shows that it has neither the ability nor incentive to make *CoD* exclusive to the Xbox platform.
- 5.2 Even if the CMA confirms the Console SLC and/or Cloud Gaming SLC, Microsoft has proposed a comprehensive package of licensing remedies which (i) guarantee parity between the PlayStation and Xbox platforms in respect of *CoD* and (ii) ensure wide availability of *CoD* and other Activision titles on cloud gaming services. These proposed remedies will preserve the substantial customer benefits which will arise from the Merger, estimated to exceed \$[X] (£[X]) for UK consumers, with benefits of \$[X] (£[X]) for gamers globally.
- 5.3 The CMA faces a stark choice. A clear path forward with remedies, which would deliver increased competition and substantial benefits to UK gamers, or a prohibition decision which would squander these benefits in order to protect the position of the dominant console platform.