

31 October 2022

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

MICROSOFT'S RESPONSE TO THE CMA'S ISSUES STATEMENT

This submission is made by Microsoft in response to the CMA's issues statement published on 14 October 2022 (the "**Issues Statement**"). Defined terms are the same as those used in the Issues Statement unless otherwise specified.

1. Executive Summary

- 1.1 Today mobile is, by far, the most popular gaming platform, with 94% of all gamers globally playing on mobile devices. Consumers spend far more hours gaming on Android and Apple mobile devices than on any other platform, and mobile continues to be the fastest-growing segment of gaming. As it stands, Xbox has no material presence in mobile and its ability to reach gamers on mobile is impeded by Apple and Google's effective duopoly in the provision of mobile app stores.
- 1.2 The acquisition of Activision provides Xbox with capabilities and content on mobile, which it currently lacks, while creating new distribution options for game developers outside of the mobile app stores. More than half of Activision's revenues in the first half of 2022 came from the King mobile gaming division and titles such as *Call of Duty: Mobile*. [§<] of the Activision's gaming community are mobile gamers. By giving people more ways to play wherever they are on the device of their choice, the Merger [§<].
- 1.3 **The Merger is fundamentally pro-competitive because it increases competition in a market long dominated by Sony.** Xbox plans to make the *Call of Duty* franchise available to more gamers in more ways than would have been the case in the counterfactual. The Merger is in no way about foreclosing any console provider, but will increase competition in a market long dominated by Sony. The suggestion that the incumbent market leader, Sony, with clear and enduring market power, could be foreclosed by the smallest of the three console competitors, Xbox, as a result of losing access to one title, is not credible. Sony's PlayStation has been the largest console platform for over 20 years, with an installed base of consoles and market share more than double the size of Xbox.¹
- 1.4 The addition of Activision's content to Xbox will, if anything, increase Xbox's chances of being able to compete more successfully with Sony's PlayStation. Given

¹ PlayStation's installed base of consoles (151.4 million in 2021) is more than double the size of Xbox's (63.7 million in 2021). PlayStation's share of console sales both worldwide and in the UK was around [§<]% in 2021, more than double that of Xbox.

Activision's limited share in console publishing (even when combined with Xbox's own content) is less than [20-30]% worldwide and in the UK combined. It is far from certain that the Merger would succeed in challenging Sony's market power in any meaningful way. The addition of Activision's content to Game Pass is good for gamers and would not be possible without the Merger. If Game Pass is more attractive to gamers, it makes Xbox which is at third place, more competitive against PlayStation and Switch, and expands the overall gaming market.

1.5 **Activision content is popular and loved by millions of gamers worldwide. That said, neither Activision nor *Call of Duty* have significant market power or the status of an "important input".** All of the CMA's theories of harm in this case are premised on one overarching concern: that Activision's game catalogue – in particular the *Call of Duty* franchise – is so important that it will enable Xbox to foreclose its competitors in gaming. But that is false by any objective measure.

- Activision's share in console game publishing is very low, at ca. [10-20]%.
- Activision's share based on monthly active users ("MAUs") for console games is similarly only ca. [10-20]%.
- Activision published only two of the top 20 console titles in the UK in 2021 and its share of so-called 'AAA' console games is equally low.
- Even focussing narrowly on the 'shooter' genre, Activision would not have the necessary market power to foreclose the downstream market, as the genre accounts for less than a quarter of console publishing revenues.
- Given the incredible array of popular and diverse gaming content that is available to market participants, no title or publisher has ever had sufficient market power in the 30-plus years of console gaming to lead to competitive foreclosure.

1.6 Nor is *Call of Duty* unique, as compared to the many other games which are loved by gamers worldwide, as evidenced by user, industry and social media rankings. To name just a few examples:

- *Call of Duty* is consistently outranked in user polls on PlayStation (e.g., Sony's annual "game of the year" poll has consistently named games other than *Call of Duty* as their "game of the year" or "most anticipated game").
- *Call of Duty* is consistently outranked on Metacritic scores (e.g., *Call of Duty: Black Ops Cold War* was ranked number 18 in 2020 (no. 126 in all-time scores) and *Call of Duty: Vanguard* was ranked number 73 in 2021 (no. 159 in the all-time scores)).
- *Call of Duty* is consistently outranked in industry reviews of the top games (e.g., reviews published by IGN, USA Today, Business Insider, Game Rant and others).

- *Call of Duty* does not drive social media conversations. There were more than 2.4 billion tweets about gaming in 2021 and yet, no *Call of Duty* title made it into the top ten “*Most Talked About Video Games*” on Twitter last year.

1.7 Even if Microsoft were to withdraw or degrade *Call of Duty* from/on PlayStation (*quod non*), the Panel would have to believe that Sony would – as a result of the loss or degradation of one game franchise on its console – go from being the clear market leader for over two decades to being placed at “*such a disadvantage that [its] ability to compete is substantially limited*”. This is not plausible.

- In addition to being the dominant console provider, Sony is also a powerful game publisher.** Sony is roughly equivalent in size to Activision and nearly double the size of Microsoft’s game publishing business. Sony publishes iconic first-party franchises, such as *God of War*, *The Last of Us*, *Marvel’s Spider-Man*, *Uncharted*, *Ghost of Tsushima*, *Horizon Zero Dawn*, and *Days Gone*, as well as the recently acquired *Destiny 2*, and has minority shareholdings in Epic Games, the publisher of *Fortnite* and From Software, the publisher of *Elden Ring*. There were over 280 exclusive first- and third-party titles on PlayStation in 2021, nearly five times as many as on Xbox.
- PlayStation has more than double the MAUs (close to 60 million more) of Xbox. Less than [X]% of PlayStation’s MAUs play *Call of Duty*.** Even if it were to lose all of its *Call of Duty* gamers, a highly improbable outcome, the PlayStation gamer base would remain significantly larger than Xbox. Sony would need to lose a substantially higher number of non-*Call of Duty* gamers than actual *Call of Duty* gamers for its total MAUs to fall to Xbox’s current level (*i.e.*, [X] million MAUs). This is not credible, and yet even in such an unrealistic scenario the CMA could not conclude that Sony would be likely to be foreclosed, given that Xbox is a viable competitor today at this same level of MAUs.
- Most gamers on consoles do not play *Call of Duty*.** Xbox gamer data shows that [X]% of Xbox gamers did not play *Call of Duty* for more than 1 hour in 2021 – and [X]% did not play for more than 5 hours. Even including all gamers who “launched” a *Call of Duty* title on their console (without imposing the additional requirement of them playing the game) at least once in a given year, ca. [X]% of all Xbox users did not launch *Call of Duty* at all (*i.e.*, 0% of their total game time was spent on *Call of Duty*). The data shows that PlayStation gamers [X].
- Call of Duty* gamers are neither ‘special’ nor ‘unique’ in terms of either their spending or user engagement as compared to gamers that favor other popular franchises.** *Call of Duty* does not drive spend on PlayStation and accounts for only [X]% of Sony’s digital revenues worldwide. In 2022, *Call of Duty* gamers spent essentially the same time on Xbox as *FIFA*, *Fortnite*, *Grand Theft Auto*, *Minecraft*, *NBK 2K*, and *Rocket League* gamers. Importantly, they also spent around the same proportion of time playing other franchises. This is inconsistent with *Call of Duty* having a greater ability to drive consumption of non-*Call of Duty* content on consoles than other popular franchises.

- (e) **Call of Duty does not drive platform adoption.** Xbox data shows that between 2016 and 2022, only [X]% of gamers played *Call of Duty* as their first game on their new Xbox console and some [X]% of new Xbox gamers never played or purchased *Call of Duty* content. *Fortnite* is the most common first played game, with *FIFA*, *Grand Theft Auto* and numerous other titles being similarly often played first.
- (f) **For the vast majority of gamers, Call of Duty is a small component of their overall gaming consumption.** Amongst those gamers that do play *Call of Duty*, the majority only do so for a short period of time. In particular, among gamers who played at least one hour of *Call of Duty* in 2021, more than [X]% played it for less than [X]% of their total gaming time and [X]% of *Call of Duty* gamers spent less than [X]% of their gaming time on the game.
- (g) **Sony was not foreclosed when certain Call of Duty content was exclusive to Xbox.** There is no indication, based on *Call of Duty*'s prior history of differentiation between versions of *Call of Duty* on Xbox and PlayStation, that this could in any way affect rival consoles' ability to compete effectively. Sony's share of console sales grew in the period from 2005-2015 when Xbox had certain exclusive rights. There are many more popular games available in the market in 2022 than there were between 2005 and 2015 (*i.e.*, including *Fortnite*, *PUBG*, *Apex Legends*, *Elden Ring* and many others). If anything, *Call of Duty*'s importance as a franchise was greater in 2005-2015.
- (h) **Similarly, highly successful gaming platforms like Nintendo and Steam have prospered without access to Call of Duty.** Nintendo's console business is highly successful, without a single version of *Call of Duty* being available to play on its latest console, the Nintendo Switch. A further example of a platform that has succeeded without *Call of Duty* is Steam, which is the largest digital storefront, with a [40-50]% share of PC game digital sales in the UK. Steam has not carried any newly released Activision games for the last three years following Activision's commercial decision to only sell its PC games on Battle.net. This has not affected Steam's leading position.
- (i) **It is therefore inherently implausible that withholding or degrading one game could have a foreclosing effect on downstream console competition, i.e.,** in the sense that it could undermine to an appreciable extent the ability of Sony to remain competitive going forward.

1.8 **It is equally implausible that withholding from or degrading Activision content on competing multi-game subscription services would have anticompetitive effects on any markets concerned by the Merger.**

- (a) **Multi-game subscription services are a means of payment – not a market.** Developers and publishers view multi-game subscription services as just one monetization model for gaming content. Similarly, gamers see subscription services as one of the many ways in which gaming content is paid for. The gaming content that is available on multi-game subscription services is also available to purchase on a standalone buy-to-play basis and there is no additional or new content offered via multi-game subscriptions. This evidence is

consistent with gamers perceiving subscription and buy-to-play purely as alternative payment methods to access the same content.

(b) **Without the Merger, Activision content would not be available on multigame subscription services.** The Merger can therefore not make competitive conditions worse, under any circumstances.

- Activision does not make its games (including *Call of Duty*) available in any meaningful sense to *any* multi-game subscription services, nor is there any evidence that this is likely to change in the foreseeable future.² It is therefore not possible that Activision games are an “important input” for subscription services or that such services could be “foreclosed” by not having access to them post-Merger.
- Activision’s ordinary course internal business documents, as well as the sworn testimony of its executives, has made clear that there are no plans to do so in the future absent the Merger. Activision is concerned that participation in subscription services could impact its [X] and would lead to brand dilution and cannibalisation of buy-to-play sales (especially of new releases). This reflects Activision’s view that even if the subscription business model were to grow, the [X]. This has been a fundamental impediment to publishers more generally agreeing to place their content on subscription services, a stance which is not going to change in the future.

(c) **Even if Microsoft could, in theory, foreclose PlayStation Plus (*quod non*) it would have no effect on competition because Microsoft’s Game Pass and PlayStation Plus are primarily and predominantly a way to access games on their respective consoles.** The largest subscription service on consoles, PlayStation Plus, and the equivalent Nintendo service, Nintendo Switch Online, are *not* on Xbox. And Game Pass is not on PlayStation or Nintendo.

- Simply put, Microsoft cannot foreclose Sony’s competing multi-game subscription service, PlayStation Plus, because PlayStation Plus is primarily and predominantly available on Sony’s PlayStation console, where Microsoft’s own multi-game subscription service, Game Pass, is not available.
- Because of PlayStation’s dominant position, it is equally irrational to consider that such conduct would have an indirect effect, namely that fewer people would buy Sony’s PlayStation consoles because PlayStation Plus has hypothetically become less attractive compared to Game Pass.
- Further, even if Microsoft succeeds in growing Game Pass with the addition of *Call of Duty*, the CMA also would have to satisfy itself that

² Historically, a very limited number of Activision titles have featured on PlayStation Plus, but these titles have always been older releases that have been provided to PlayStation Plus many years after their initial release via buy-to-play, and are only made available for a limited time. Activision has never published any newer content on multi-game subscription services and has no intention to do so in the future.

Sony could not respond through investments or improvements in its service. It is clear that Sony has a range of options to maintain or improve the competitive position of PlayStation Plus. At a minimum, Sony could include additional first- and third-party releases in PlayStation Plus on the “day and date” release. Sony’s first-party exclusives not currently included in PlayStation Plus include prominent titles such as *The Last of Us*, *God of War*, *Spiderman* and the *Final Fantasy VII Remake*. The inclusion of such titles would be beneficial for gamers.

- If Sony no longer had access to *Call of Duty (quod non)*, it could shift the marketing payments it has been making to Activision under the *Call of Duty* agreements to attract competing titles to its console, exclusively or not. Sony could also easily increase its marketing investments in *FIFA*, *Grand Theft Auto*, another shooter franchise like *Battlefield* or *Destiny* (developed by Bungie, which Sony has recently acquired), or any other popular title to attract further subscribers to PlayStation Plus.
- (d) **Other established and prominent subscription services are offered by gaming companies with significant and popular first-party content on both console and PC.** Each of these services – including Amazon Prime Gaming / Luna, Apple Arcade, EA Play, Nintendo Switch Online, Nvidia GeForce Now, and Ubisoft+ – has a diversified content offering that has proven attractive to gamers and have achieved this without access to Activision content.
- (e) **The Merger’s impact on multi-game subscription services is yet another example of its pro-competitive nature.** A key benefit of the Merger for gamers lies in Xbox’s plan to make Activision content available on Game Pass on the day of the game’s release (*i.e.*, “day and date”). The difference between the two scenarios is stark. With the Merger, Activision content will be available on at least one subscription service day and date, without the Merger, on none. This matters from a consumer welfare perspective, because the more content consumers can access through subscription services, the lower the average prices of individual games. Absent the Merger, every consumer who wants to play *Call of Duty* or another Activision title would need to purchase the game at full price.
- (f) **In any event, the reality is that Game Pass has no market power, a prerequisite for any hypothetical foreclosure strategy.** Game Pass accounted for ca. [0-5]% of digital distribution of gaming content globally. Even just looking at multi-game subscription services alone, it is *Sony’s PlayStation Plus* which is larger than Game Pass (both in terms of number of subscribers and in revenues). Sony has by far the largest subscriber base of any multi-game subscription service and Sony markets itself as having “*built the world’s largest game subscription service*”.

1.9 **Alleging that competitive harm would result from the Merger disregards input foreclosure case law.**

- (a) **Input foreclosure cases that the CMA has brought over the last six years have in each case involved the acquisition of substantial market power.**

Input foreclosure has never been found in a case where one party, here Xbox, was the smallest player in the downstream market and the other party, in this case Activision, was only the fifth largest competitor, out of more than a dozen established suppliers, competing in the upstream market.

- (b) **Xbox’s and Activision’s market shares are well below market share levels that have given rise to concerns in previous CMA Phase 2 input foreclosure decisions.** Xbox is the smallest of the three console competitors with less than [20-30]% share worldwide and less than [30-40]% in the UK. The other party, in this case Activision, is only the fifth largest competitor of more than a dozen suppliers competing in the upstream market with less than a [20-30]% share worldwide and in the UK.
- (c) **The CMA even acknowledges that the Merger does not give rise to concerns on the basis of market shares.** The alternative metrics proffered instead as allegedly evidencing the special or ‘must-have’ nature of Activision content, including *Call of Duty*, do not withstand scrutiny either. User and critic reviews, as well as gaming industry publications, among other sources, show that there are many other “popular”, “iconic”, “award-winning” or otherwise special, gaming titles out there that are not made by Activision. Similar cases, such as the acquisition by Amazon of MGM studios with its “*bounty of iconic brands, legendary films and television series*” (including franchises such as James Bond), have not raised issues.

1.10 Finally, the CMA’s allegation that because Microsoft will own *Call of Duty* it could foreclose cloud gaming rivals by leveraging its cloud and PC operating system businesses has no basis in fact or law.

- (a) ***Call of Duty*, and Activision games more generally, are not important enough to make or break cloud gaming competitors.** Just as is the case with respect to console rivals, Microsoft’s cloud gaming competitors, including Nvidia, Amazon and Netflix, will continue to have access to a large, diverse, and high-quality pool of content for their cloud streaming services. Nvidia GeForce Now has partnered with multiple PC digital storefronts, including Steam, Epic Games Store, GOG.com and Ubisoft Connect, to make over a thousand games available. Amazon has its own first-party games, as well as over a hundred third-party titles including *Assassin’s Creed: Valhalla*, *Far Cry 6*, *Immortals Fenyx Rising*, *Resident Evil*, *A Plague Tale* and many others.
- (b) Activision games are even less important for cloud gaming than they are for console gaming because Activision titles, such as *Call of Duty* are inherently challenging titles to stream. Minimising latency is critical to the gamer experience and high latency can have a significant detrimental effect on the quality of gameplay, particularly for competitive multiplayer gameplay – a central element of the appeal of *Call of Duty*. Activision has determined that [REDACTED].
- (c) While Activision has [REDACTED]. [REDACTED], in late 2019 and early 2020, Activision participated in a closed environment beta test of Nvidia’s GeForce Now cloud gaming service, but Nvidia made Activision’s content available on Nvidia’s live platform without ABK’s consent. Activision required Nvidia remove access to

its content, which Nvidia did. Nvidia was not foreclosed by the withdrawal of Activision titles and instead pointed customers to the wide array of alternative content available on its service – “we have over 1,500 games that developers have asked to be on-boarded to the service. Look for weekly updates as to new games we are adding”.³

- (d) Given the technological limitations described above, Activision has never distributed its content on any cloud streaming platform, and its titles are not authorized on any cloud streaming platform today. Nor does Activision have any plans to make its content available on third-party cloud gaming services. For that reason alone, the Merger cannot possibly foreclose any cloud gaming rivals. Activision content would not be available to them absent the Merger.
- (e) **In any event, while the CMA alleges that Microsoft has an advantage over rivals in cloud gaming by having a broad “multi-product ecosystem”, including a leading cloud platform (Azure) and PC operating system (Windows). Microsoft’s cloud gaming service Xbox Cloud Gaming does not use either of these offerings.** Instead, it uses bespoke Xbox console infrastructure which is not provided by Azure. Azure does not have an infrastructure-as-a-service (“IaaS”) offering for cloud gaming [§]. Azure is incentivized to provide IaaS to cloud gaming providers in order to secure economies of scale and scope, but has only a limited number of customers which multi-source from other IaaS providers. Microsoft licenses Windows to cloud computing providers predominantly through resellers and prices do not depend on the industry and use-case.

1.11 **The Issues Statement fails to recognise that the Merger aims to facilitate the adoption of an innovative service, cloud gaming, for which there is currently no proven consumer demand.** It also fails to recognise the challenges involved in bringing cloud gaming to market. Cloud gaming is small and uncertain to succeed. It is a new and immature technology which faces significant challenges.

- By 2025, Xbox expects cloud gaming to account for only [§]% of the total consumer spend on gaming. Gamers will continue to download the vast majority of the games they play on PC and console. Xbox supports cloud gaming as a means of delivering games to additional devices (e.g., mobile devices, smart TVs). [§].
- Similarly, Google—an early entrant into the cloud gaming space, with extremely deep pockets—recently announced that it is shutting down its Stadia cloud gaming service on 18 January 2023. Despite having had a head start over Microsoft, Nvidia and Amazon, Google determined that there is not enough gamer interest in its Stadia service to justify continuing to support it. Google’s experience with Stadia shows that cloud gaming is still an experimental business model and that there is no guarantee it will ever catch on with users.

³ Nvidia GFN Announcement, “Activision Blizzard games on GeForce NOW”, 12.02.2022 (link available [here](#)).

2. Background and Transaction rationale

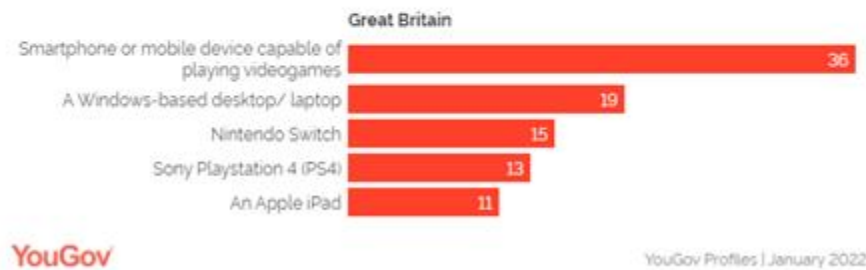
- 2.1 Microsoft has been present in the gaming industry for over twenty years, following the launch of the original Xbox console in 2001. With a primary focus on console gaming, Xbox has been the number three player behind Sony and Nintendo in each successive console generation. Far from having any market power, Xbox has been a challenger which has consistently had to offer gamers additional value and champion new propositions, such as multi-game subscriptions and cross-platform play, in order to remain competitive.
- 2.2 While Microsoft developed the Windows operating system (“OS”) for PC, the open nature of the Windows platform has fostered vibrant competition in PC game publishing and distribution. Microsoft has a global share of less than [5-10]% in PC game publishing, as well as PC game distribution. The “multi-product ecosystem” alleged by the CMA has not given Microsoft any advantage in PC game distribution, with Microsoft sitting in seventh place globally, well behind leading distributors of PC games.
- 2.3 The proposed acquisition of Activision occurs in the context of an industry that has been expanding beyond PCs and consoles to mobile devices, where Xbox has no material presence. Today, mobile is, by far, the most popular gaming platform, with 94% of all gamers globally playing on mobile devices. Consumers spend far more hours gaming on Android and Apple iOS mobile devices than on any other platform, and mobile continues to be the fastest-growing segment of gaming. A recent YouGov survey of the most popular gaming devices provides an indication of the challenge facing Xbox. The survey in January 2022 shows that 36% of UK consumers surveyed played games on their smartphone, with 15% using Nintendo Switch and 13% using PlayStation 4. Xbox is not listed among the top 5 gaming devices.⁴

⁴ YouGov, “*Global: Most popular gaming devices*”, 01.02.2022 (link available [here](#)).

Figure 1: Extract from YouGov survey: most popular gaming devices, January 2022

Global: The five most-used gaming devices in various markets

Which, if any, of the following devices do you "personally" play games on once or more per month? Please select all that apply. (% adults who play video games on either PC, console, cellphone or other handheld devices for at least 30 minutes weekly)



- 2.4 Xbox recognizes that its future depends on moving beyond the current console-centric paradigm and offering a solution that meets gamers where they want to play, with a choice of distribution mechanisms and payment options, while offering third-party developers an alternative means of delivering their content to gamers. Of course, the 200 million gamers who play on consoles will remain a focus of the business, but that alone is insufficient. Xbox's future relevance depends on finding a way to reach the billions of gamers who want to enjoy games regardless of location, socio-economic status, or device ownership.
- 2.5 The emphasis that Microsoft executives placed on mobile [38]. As explained below, the rationale and valuation address two different questions, as the rationale explains why the Merger is being pursued, whereas the valuation explains how it will be paid for.

A. Microsoft has consistently articulated the mobile gaming strategic motivation for the Merger

2.6 [§<].⁵ [§<].⁶, [§<].⁷ Since the Merger was announced, Mr. Spencer has consistently explained⁸ that [§<], stating that “[t]his deal for us really centered around our opportunity to get more mobile engagement ... **We have to break that duopoly of only two storefronts available on the largest platforms [...] We have to find a way to create more engagement and monetization across mobile. It’s imperative for our business.**”⁹

2.7 [§<].¹⁰ [§<].¹¹ [§<].¹² [§<].¹³ [§<].

2.8 Discussions with Activision began [§<].¹⁴ [§<]. From the time that Mr. Spencer first raised the possibility of an acquisition with Activision CEO Bobby Kotick on [§<].¹⁵

B. The Merger gives Microsoft a meaningful presence in mobile gaming [§<]

2.9 Activision has one of the strongest mobile businesses in the gaming industry. Mobile gaming revenues from the King division and titles such as *Call of Duty: Mobile*, as well as ancillary revenue, represented more than half of Activision’s revenues in the first half of 2022.¹⁶ Mobile customers account for around [§<] of the company’s total monthly active users (“MAUs”). Given this strength, Activision will [§<].¹⁷

⁵ [§<].

⁶ Microsoft’s public statements have been consistent with this rationale. Mobile featured prominently in Microsoft’s 18.01.2022 press release announcing the Merger: “*Mobile is the largest segment in gaming, with nearly 95% of all players globally enjoying games on mobile. Through great teams and great technology, Microsoft and Activision Blizzard will empower players to enjoy the most-immersive franchises, like ‘Halo’ and ‘Warcraft,’ virtually anywhere they want. And with games like ‘Candy Crush,’ Activision Blizzard’s mobile business represents a significant presence and opportunity for Microsoft in this fast-growing segment.*” Microsoft News Center, “Microsoft to acquire Activision Blizzard to bring the joy and community of gaming to everyone, across every device”, 18.01.2022 (link available [here](#)). In the investor call that same day, Mr. Nadella noted the challenges Microsoft faces on mobile and how the Merger begins to address them: “[T]oo much friction still exists today between content, consumption and commerce. We need to make it easier for people to connect and play great games, wherever, whenever and however they want. Today, we face strong global competition from companies that generate more revenue from game distribution than we do from our share of game sales and subscriptions. We need more innovation and investment in content creation and fewer constraints on distribution [...] Critically, this transaction significantly expands our presence in mobile, the largest segment in gaming business”. Microsoft Investor Relations, Transcript, “Microsoft and Activision Blizzard Conference Call”, 18.01.2022 (link available [here](#)).

⁷ [§<].

⁸ Axios, “Microsoft’s Phil Spencer: Activision deal ‘well beyond anything I’ve ever done’”, 04.02.2022 (link available [here](#)). “The board of Microsoft, on the day that we got approval for ZeniMax, asked, ‘What was next? And the constant conversation had always been about mobile and casual.” Bloomberg Studio 1.0, Interview with Phil Spencer, 24.08.2022 (link available [here](#)). “We don’t have a lot of creative capability that has built hit mobile games. We really started the discussions, internally at least, on Activision Blizzard, on the capability they had on mobile, and then PC with Blizzard. Those were the two things that were really driving our interest.”

⁹ WSJ Tech Live, “Xbox Box Phil Spencer Wants to Sever Apple-Google Duopoly in Mobile Games”, 26.10.2022 (link available [here](#)).

¹⁰ [§<].

¹¹ [§<]; see also [§<].

¹² [§<]; see also [§<].

¹³ [§<].

¹⁴ [§<].

¹⁵ Activision Proxy Statement at 33-34 (link available [here](#)).

¹⁶ Activision’s 2022 10-Q filing, 01.08.2022 (link available [here](#)), page 26. Eurogamer, “Activision Blizzard’s mobile games make more money than console and PC sales combined”, 06.08.2022 (link available [here](#)).

¹⁷ [§<].

2.10 Mr. Spencer [REDACTED].¹⁸ [REDACTED].¹⁹ [REDACTED].²⁰

2.11 [REDACTED].

Figure 2: [REDACTED]²¹

[REDACTED]

2.12 [REDACTED].

C. Microsoft’s financial valuation accounts for [REDACTED] while the existing business provides [REDACTED]

2.13 Activision’s market capitalization is high because it is a well-established business with predictable revenues and communities of gamers around its three main game series, *Call of Duty*, *World of Warcraft* and *Candy Crush Saga* (which together account for over three-quarters of its net revenues, and a significantly higher proportion of its operating income).²² [REDACTED]. Discontinuing distribution of Activision Blizzard’s titles on other platforms would cost Microsoft around USD [REDACTED] billion in revenues in 2024 alone, growing to ca. USD [REDACTED] billion by 2032.

Figure 3: [REDACTED]

[REDACTED]

2.14 The [REDACTED] source of value is based on Microsoft’s Game Pass model. Based on experience with adding content to Game Pass since 2017, Microsoft was able to model that the addition of Activision titles to Game Pass would increase the Game Pass subscriber base across console and PC by around [REDACTED] million subscribers worldwide in FY 2024 and [REDACTED] million by FY 2032.²³ While this is another significant source of value that could be used to support the purchase price, the increase is modest in the context of the global population of console gamers (850 million) and PC gamers (1.45 billion).²⁴ And as the financial model shows, adding Activision content to Game Pass is not without cost to the existing business, which suffers a [REDACTED]% cannibalization rate of Xbox game sales.

2.15 As Mr. Spencer explained because of “[REDACTED].”²⁵ In particular, the concept of a next-generation game store that operates across a range of devices (“**Universal Store**”) is risky.²⁶ Moving consumers away from the Google Play Store and Apple App Store on mobile devices will require a major shift in consumer behaviour. Microsoft hopes that

18 [REDACTED].

19 [REDACTED].

20 [REDACTED].

21 [REDACTED].

22 Activision’s 2021 10-K filing (link available [here](#)) states at page 20: “We follow a franchise model, and a significant portion of our revenue has historically been derived from products based on a relatively small number of popular franchises. These products are also responsible for a disproportionately high percentage of our profits. For example, in 2021, revenues associated with the *Call of Duty*, *Candy Crush*, and *World of Warcraft* franchises, collectively, accounted for approximately 82% of our net revenues—and a significantly higher percentage of our operating income. We expect that a relatively limited number of popular franchises will continue to produce a disproportionately high percentage of our revenues and profits.”

23 The subscriber based projections in the counterfactual are [REDACTED].

24 **FMN, Annex 002.62** - [REDACTED].

25 [REDACTED].

26 [REDACTED].

by offering well-known and popular content, gamers will be more inclined to try something new. But this is far from guaranteed and also depends on proposed regulations and legislation in the U.S., and around the world, that would require Apple and Google to make their platforms and app stores more open to third-party stores and commerce platforms. As such, in seeking approval from its Board of Directors as a public company, Microsoft leadership could [X]. Nevertheless, as Mr. Spencer confirmed, Microsoft will measure the strategic success of the Merger on [X].²⁷

3. Theory of Harm 1 – no prospect of a substantial lessening of competition through input foreclosure of rival console gaming platforms (excluding multi-game subscription services)

3.1 Theory of Harm 1 concerns the potential for a substantial lessening of competition in gaming consoles (together with their digital storefronts) as a result of Microsoft engaging in full or partial input foreclosure strategies.²⁸

A. Input foreclosure findings in Phase 2 are exceptional

3.2 The CMA has found a substantial lessening of competition on the basis of input foreclosure in only three Phase 2 cases.²⁹ Such cases are exceptional – accounting for less than 1% of the CMA’s merger decisions³⁰ – and have in each case 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 merging party was one of more than a dozen suppliers competing in the upstream market.

3.3 Taking the example of the CMA’s recent decision in *Facebook / Giphy*, the CMA found that the target, Giphy, had a high market share in the upstream market for GIF provision (60-70%) and that the acquirer, Meta, had a high market share in the downstream market for social media (>70%).³¹ The CMA concluded that “*the effect of such foreclosure would be the weakening of the competitive constraints exerted by Facebook’s existing and future rivals in the supply of social media services, thus further strengthening Facebook’s already significant market power in the supply of social media services*”.³² The CMA’s conclusions are summarised in Figure 4 below.

²⁷ [X].

²⁸ Issues Statement, paragraph 29.

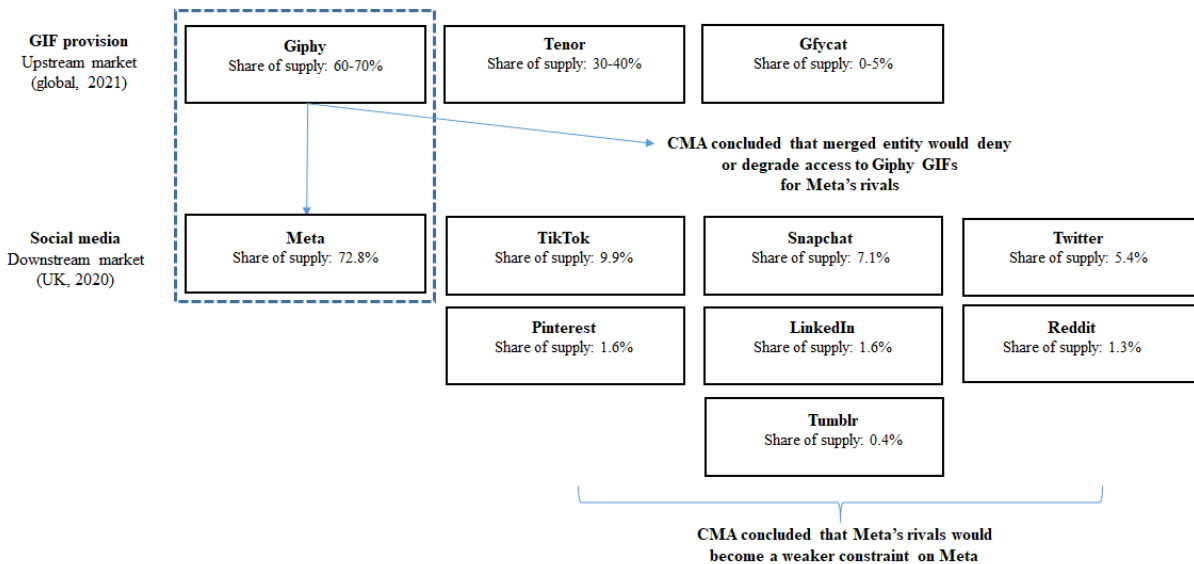
²⁹ *Intercontinental Exchange / Trayport* (2017) (link available [here](#)); *Tobii / Smartbox Assistive Technologies* (2019) (link available [here](#)); and *Facebook (Meta Platforms) / Giphy* (2021 and on remittal 2022) (link available [here](#)). Potential input foreclosure concerns were identified in one further case abandoned following provisional findings: *Thermo Fisher Scientific / Roper Technologies (Gatan business)* (2019 – merger abandoned) (link available [here](#)).

³⁰ The CMA has been active in considering potential vertical issues in merger cases, actively considering vertical theories of harm in over 130 cases since 2014.

³¹ Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc. (“*Facebook / Giphy*”), Final report on the case remitted to the CMA by the Competition Appeal Tribunal, 18.10.2022, paragraphs 5.87 and 5.144.

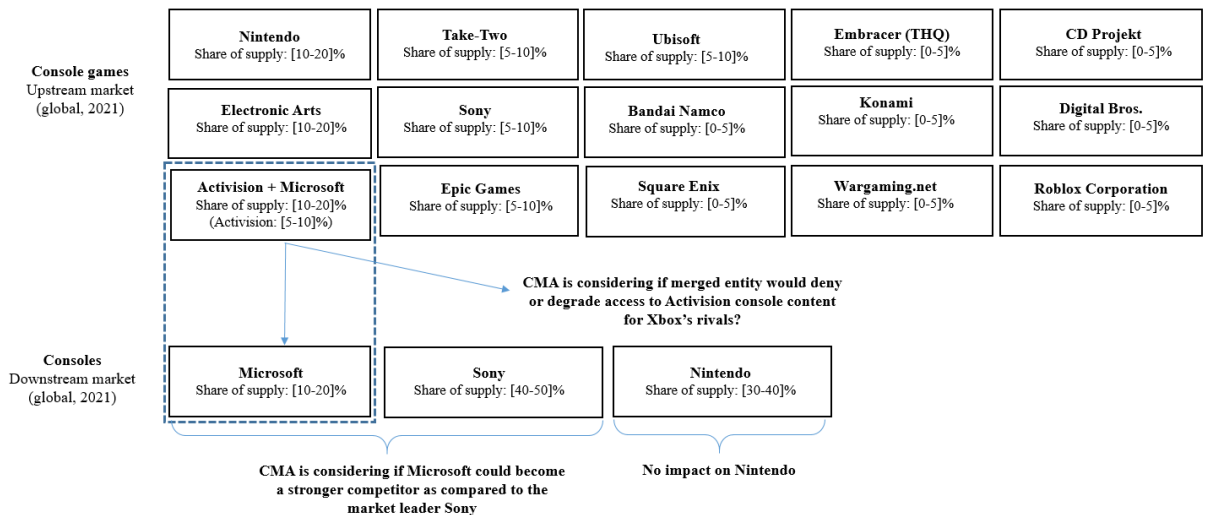
³² *Facebook / Giphy*, paragraph 8.184.

Figure 4: Overview of the CMA’s conclusions on market structure and input foreclosure in Facebook / Giphy



3.4 The current case is completely different. Activision is currently the fifth largest console game publisher with a share of [5-10]% globally in console game publishing.³³ Following the Merger, the Merged Entity will be the third largest publisher with a share of only [10-20]% globally, reflecting the highly fragmented nature of game publishing.³⁴ On the downstream market, Xbox is the third placed player (with a global share of [10-20]%), seeking to innovate and compete with two strong competitors, with much larger installed bases of consoles and strong content portfolios.

Figure 5: Overview of the market structure and questions in this case



3.5 Competition is a process of rivalry, and changes in market shares over time are an indicator of healthy competition.³⁵ Microsoft, as the smallest player in the downstream market, becoming a stronger competitor relative to the established market leader Sony,

³³ FMN, Table 14.
³⁴ FMN, Table 14.
³⁵ Merger Assessment Guidelines, paragraph 2.2.

is an increase in “*overall competition in the downstream market*” (emphasis added) to the benefit of consumers.³⁶ Similar cases, such as the acquisition by Amazon of MGM studios with its “*bounty of iconic brands, legendary films and television series*” (including franchises such as *James Bond*), have been cleared unconditionally by the European Commission and not even reviewed by the CMA.³⁷

- 3.6 Microsoft does not intend to remove *Call of Duty* from PlayStation or to degrade access to the franchise – a fact that is supported by a consistent body of evidence.³⁸ However, even if Microsoft were to withdraw *Call of Duty* from PlayStation (*quod non*), the Panel would have to believe that Sony would as a result of the loss of one game franchise from the many thousands available on its console go from being the clear market leader for over two decades to being placed at “*such a disadvantage that [its] ability to compete is substantially limited*”.³⁹
- 3.7 As such a conclusion is inherently unlikely, and has never been found in any previous cases, the evidence required to allow the Panel to reach such a conclusion on the balance of probabilities would need to be clear and compelling. As noted by Lord Hoffman in *Rehman*, “*it would need more cogent evidence to satisfy one that the creature seen walking in Regent’s Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian*”.⁴⁰ As set out below, such a cogent body of evidence does not exist in this case.

B. No ability to foreclose Sony

- 3.8 The Issues Statement suggests that the Merged Entity may have the ability to foreclose rival console gaming platforms on the basis that: (i) the Merged Entity would have significant upstream market power in publishing of games for consoles; (ii) Activision’s content is an “important input” for Sony; (iii) there are few if any alternative franchises with *Call of Duty*’s brand awareness and popularity amongst gamers; (iv) Sony is Microsoft’s closest competitor in gaming consoles; and (v) Sony’s existing contractual protections (from existing arrangements with Activision) would not undermine Microsoft’s ability to engage in partial or total foreclosure.⁴¹ This is incorrect and fails to take account of the way competition operates in the upstream market for games and the downstream market for gaming consoles.
- 3.9 At the upstream level, while Activision publishes popular titles with established communities, it does not have significant market power. Gaming is a hit-driven business where a new title like *Fortnite* can enter the market in 2017 and within a matter of months become an enduring global phenomenon.⁴² Similarly, established franchises can have releases which underperform, such as *Call of Duty: Vanguard* which saw

³⁶ Merger Assessment Guidelines, paragraph 7.9. This is reflected in previous CMA cases which acknowledge that the CMA must “*consider the effect of a merger on competition in the market rather than on individual competitors*” (emphasis added). See ME/6920/20, *Anticipated acquisition by Facebook, Inc. of Kustomer, Inc.*, paragraph 293.

³⁷ Amazon, “*MGM joins Prime Video and Amazon Studios*”, 17.03.2022 (link available [here](#)).

³⁸ Initial Submission, paragraph 3.2.

³⁹ ME/6920/20, *Anticipated acquisition by Facebook, Inc. of Kustomer, Inc.*, paragraph 290.

⁴⁰ *Secretary of State for the Home Department v. Rehman* [2001] 3 WLR 877 at [55], as cited by the Competition Appeal Tribunal in *Durkan v Office of Fair Trading* [2011] CAT 6 at [94] and *BGL (Holdings) Limited v Competition and Markets Authority* [2022] CAT 36 at [56].

⁴¹ Issues Statement, paragraph 30.

⁴² Wired, “*How Fortnite, a 'Gamer's Game,' Took Over the World*”, 16.05.2018 (link available [here](#)); GameRant, “*Fortnite 5 Years Later - Becoming a Worldwide Phenomenon*”, 16.09.2022 (link available [here](#)).

Activision lose millions of gamers within a matter of months. Social media platforms, such as Twitch, the leading live video streaming platform in gaming with more than 180 million MAU and an estimated 24 billion hours watched in 2021, have a critical role in popularizing games. When *Rocket League* was launched in 2015, the combination of football played with cars proved a hit on Twitch, rapidly boosting sales of the game, which remains a top 10 game today.⁴³ Given the growth in gaming, there is no lack of investment in new content by established studios, new entrants, including Amazon⁴⁴, Facebook and Netflix⁴⁵, and new studios backed by venture capital.⁴⁶

- 3.10 At the downstream level, there is no one single game that is an “important input” in the sense that it shapes console competition.⁴⁷ Console competition has involved differentiated content offerings for decades, with each console vying to preserve and enhance adoption by offering at least some content on an exclusive basis for some period. It is, however, inherently implausible that withholding one game could have a *foreclosing effect* on downstream console competition (*i.e.*, in the sense that it could undermine to an appreciable extent the ability of Sony to remain competitive going forward).⁴⁸ With an installed base of over 150 million consoles and a console share of nearly [§<] % (more than double that of Microsoft), it is not credible that PlayStation would be caught, surpassed and marginalised by the loss of *Call of Duty* (or any other Activision content).
- 3.11 Indeed, the history of recent mergers shows that no participant in the console market believes that it can be better off by withdrawing a popular cross-platform game from competing platforms post-acquisition. Following the acquisition of Mojang, Microsoft kept the popular game, *Minecraft*, on Sony and expanded distribution on Nintendo. Similarly following the recent acquisition of Bungie, Sony has said it is keeping *Destiny 2*, another highly popular game, on Xbox. Without any realistic prospect of a foreclosing effect, it is rational to distribute popular titles, with established communities, across as many differentiated platforms as possible – which is what Microsoft and Sony have both done.
- 3.12 As such, for the reasons explained below, Microsoft has no ability to bring about full or partial foreclosure of Sony in the distribution of rival console games.

(i) The Merged Entity will not have significant upstream market power

- 3.13 Based on the ‘realistic prospect’ standard in Phase 1, the CMA found that the Merged Entity may have significant upstream market power in the publishing of games for

⁴³ M.R. Johnson and J. Woodcock, “The impacts of live streaming and Twitch.tv on the video game industry”, Media, Culture & Society, December 2018 (link available [here](#)).

⁴⁴ Amazon Game Studios, “Q&A with Andrea Cutright, marketing director at Prime Gaming”, 23.09.2022 which states that “Amazon is really invested in building a solid games organization” and “We’ve also been able to leverage the power of Amazon as a whole to provide our customers with amazing benefits. Take this year’s Prime Day as an example: Prime Gaming gave away 30+ free games to Prime Members worldwide. We also launched *Lost Ark* in the Netherlands at TwitchCon Amsterdam, combined with in-game content via Prime Gaming. It was a win-win-win collaboration—*Lost Ark* and Prime Gaming working in sync at a Twitch event”.

⁴⁵ BBC, “Netflix plans to launch its own video game studio”, 27.09.2022 (link available [here](#)).

⁴⁶ Forbes, “Video Game Industry Wins Record Investment, M&A In Second Quarter”, 28.07.2022 (link available [here](#)).

⁴⁷ Merger Assessment Guidelines, paragraph 7.14(b).

⁴⁸ Nintendo owns the games which drive the vast majority of consumer spend on its platform. [§<].

consoles.⁴⁹ However, such a finding cannot be made ‘on the balance of probabilities’ in a case where:

- (a) Activision has a limited number of console games, with *Call of Duty* being the only game of any material size.
- (b) Nintendo and Sony are both large players in the upstream market.
- (c) There is no evidence of significant market power based on market shares.
- (d) Even focussing narrowly on ‘shooter’ games does not provide evidence that Activision has significant market power.
- (e) *Call of Duty* does not confer market power, as *Call of Duty* gamers are not special compared to other popular franchises.
- (f) Evidence from *Call of Duty: Vanguard* shows that viable alternatives exist.

Activision has a limited number of console games

3.14 Activision publishes a limited number of console games. These are listed in Table 1 below with associated revenues and average MAUs for 2020 and 2021.⁵⁰ The only Activision console game of any material size is *Call of Duty*. As no other Activision game has a share of more than [0-5]%, no foreclosure concerns can arise even hypothetically in relation to such games and they are not considered further in this submission.

Table 1: Activision console games, worldwide revenue, share of supply and average MAUs

Activision console game	2020			2021		
	Revenue (\$m)	Share of supply (%)	Average MAU (m)	Revenue (\$m)	Share of supply (%)	Average MAU (m)
<i>Call of Duty</i>	[<]	[5-10]%	[<]	[<]	[5-10]%	[<]
<i>Crash Bandicoot</i>	[<]	[0-5]%	[<]	[<]	[0-5]%	[<]
<i>Diablo</i>	[<]	[0-5]%	[<]	[<]	[0-5]%	[<]
<i>Overwatch</i>	[<]	[0-5]%	[<]	[<]	[0-5]%	[<]
<i>Tony Hawk</i>	[<]	[0-5]%	[<]	[<]	[0-5]%	[<]
<i>Spyro</i>	[<]	[0-5]%	[<]	[<]	[0-5]%	[<]
<i>Sekiro</i> ⁵¹	[<]	[0-5]%	[<]	[<]	[0-5]%	[<]
<i>Prototype</i> ⁵²	[<]	[0-5]%	[<]	[<]	[0-5]%	[<]
<i>Destiny</i> ⁵³	[<]	[0-5]%	[<]	[<]	[0-5]%	[<]

⁴⁹ Issues Statement, paragraph 30(a).

⁵⁰ Other Activision titles, including *World of Warcraft* and *Candy Crush*, are not available on console.

⁵¹ *Sekiro: Shadows Die Twice* is a 2019 game developed by FromSoftware and published by Activision.

⁵² *Prototype* is a 2009 game developed by Radical Entertainment and published by Activision.

⁵³ *Destiny* is game developed by Bungie and previously published by Activision. *Destiny* is now self-published by Bungie after separating from Activision in 2019. *Destiny 2* was published by Bungie. Bungie was recently acquired by Sony.

Activision console game	2020			2021		
	Revenue (\$m)	Share of supply (%)	Average MAU (m)	Revenue (\$m)	Share of supply (%)	Average MAU (m)
<i>Other</i>	[REDACTED]	[0-5]%	[REDACTED]	[REDACTED]	[0-5]%	[REDACTED]
Total	[REDACTED]	[5-10]%	[REDACTED]	[REDACTED]	[5-10]%	[REDACTED]

Source: [REDACTED]

The market structure is not consistent with Activision having significant market power

3.15 The starting point in assessing whether there is enough market power that could be leveraged following a merger is the structure of the market.⁵⁴ In this case, the upstream market for console game publishing is fragmented with a large number of competitors (see Figure 5 above). Microsoft’s downstream console competitors, Nintendo and Sony, are themselves major publishers of console games. The fact that Nintendo and Sony are major players in the upstream market is strong evidence against the Merged Entity having the ability to foreclose.

3.16 Nintendo is the largest publisher globally (with a share of [10-20]%).

- Nintendo publishes many of the industry’s most iconic franchises, including *Super Mario*, *The Legend of Zelda*, *Pokémon*, and *Donkey Kong*.⁵⁵
- First-party titles account for ca. [REDACTED]% of consumer spend on the Nintendo console,⁵⁶ with exclusive titles (including first and third-party titles) accounting for ca. [REDACTED]% of consumer spend.⁵⁷
- Nintendo also has a portfolio of high-quality exclusive third-party content, including *Bayonetta*, *Monster Hunter Rise*, and *Astral Chain*.
- As *Call of Duty* is not currently shipped on the Nintendo Switch, no foreclosure concerns can arise even hypothetically in relation to Nintendo. This submission will, therefore, focus on Sony.

3.17 Sony is the fourth largest publisher globally (with a share of [5-10]%), roughly equivalent in size to Activision and nearly double the size of Xbox.

- Sony publishes iconic first-party franchises, such as *God of War*, *The Last of Us*, *Marvel’s Spider-Man*, *Uncharted*, *Ghost of Tsushima*, *Horizon Zero Dawn*, and *Days Gone*, as well as the recently acquired *Destiny 2* and its minority shareholdings in Epic Games, the publisher of *Fortnite* and From Software, the publisher of *Elden Ring*, the biggest game of 2022.
- First-party titles account for ca. [REDACTED]% of consumer spend on PlayStation (compared to approximately [REDACTED]% on Xbox)⁵⁸, with exclusive titles (including

⁵⁴ Merger Assessment Guidelines, paragraph 7.14(a).

⁵⁵ FMN, paragraph 15.10.

⁵⁶ [REDACTED].

⁵⁷ Parties’ response to RFI dated 12 April 2022, Question 22.

⁵⁸ [REDACTED].

first and third-party titles) accounting for ca. [3<] % of consumer spend on PlayStation.⁵⁹

- Sony has announced plans to increase the number of first-party titles and has stated that its growth both organically and through acquisitions places Sony in “a virtuous cycle where success begets success”.⁶⁰
- Sony also has a portfolio of high-quality exclusive third-party content including *Final Fantasy 16*, *Bloodborne*, *Sackboy: A Big Adventure*, *Street Fighter V*, *Sifu* and the *Silent Hill 2* remake.

Market shares are not consistent with Activision having significant market power

3.18 However one views the market, the lack of significant market power is confirmed by Activision’s upstream market share. Activision’s share is consistently low on any basis of calculation.

- **Low share of console game publishing:** Activision’s share in console game publishing is just [5-10] % by value globally ([10-20] % in the UK).⁶¹ The combined share is [10-20] % globally ([10-20] % in the UK).
- **Low share of console digital downloads:** Activision’s share of digital downloads of console games (excluding free-to-play games) is only [10-20] % globally ([10-20] % in the UK).⁶² The combined share is [10-20] % globally ([10-20] % in the UK).
- **Low share of console MAU:** Activision’s share based on MAU for console games is only [10-20] % globally. The combined share is [10-20] %.⁶³ In the UK Activision’s share is [10-20] %, with the combined share totalling [10-20] %.
- **Low share of so-called ‘AAA’ console games:** Activision’s shares of ‘AAA’ console games is [5-10] % by value globally ([10-20] % in the UK).⁶⁴ The combined share is [10-20] % globally ([10-20] % in the UK).
- **Low share of game-time on Xbox consoles:** Activision’s share of game-time minutes on Xbox consoles is only [10-20] % globally ([10-20] % in the UK).⁶⁵ The combined share of game-time on Xbox consoles does not reflect the Merged Entity’s market power, as many historical Microsoft franchises are only

⁵⁹ Parties’ response to RFI dated 12 April 2022, Question 22.

⁶⁰ Game Developer, “Sony will keep acquiring game studios to sustain “virtuous cycle” of success”, 04.04.2022 (link available [here](#)).

⁶¹ FMN, Tables 14 and 15.

⁶² FMN, Tables 18 and 19.

⁶³ The Parties’ submission in relation to vertical merger analysis, submitted on 28 July 2022, paragraph 2.14.

⁶⁴ FMN, Tables 14 and 15. The Parties have noted that ‘AAA’ is an inherently subjective descriptor and lacks any industry-standard definition—it is simply in the eye of the beholder. Some industry participants may use ‘AAA’ in reference to the size of the game’s development or marketing budget, the complexity of the game’s development, the game’s anticipated financial success, and/or the game’s actual popularity after release. The Parties’ ordinary course materials confirm that any distinction based on ‘AAA’ is of little practical use, given the lack of nexus to actual commercial success.

⁶⁵ FMN, Tables 16 and 17.

available on Xbox. Microsoft's share on its own platform is, therefore, higher than on other console platforms.⁶⁶

3.19 These shares of supply are not consistent with upstream market power. Nor are they in line with the upstream market shares in previous Phase 2 input foreclosure decisions.⁶⁷

Even focusing narrowly on 'shooter' games does not indicate that Activision has significant market power

3.20 The Phase 1 Decision notes that Activision has a higher share in one genre of games, namely 'shooter' games.⁶⁸ Narrow genres are of limited value in considering the viability of an input foreclosure strategy. This is because:

- Genre classifications are loosely grouped and fluid categories, with different digital storefronts making different decisions as to which games belong to which genre(s).⁶⁹
- Many games have adopted elements of multiple genres and games compete across genre for the attention of gamers.⁷⁰
- Consoles provide access to many genres of games, with no console focussing only on one genre.

3.21 Genre shares are not, therefore, an appropriate way in which to measure upstream market power for the following reasons:

- (a) **Gamers play games across multiple genres:** An analysis of Xbox gamers' playing choices shows that most gamers play games in multiple different game genres. Gamers that played more than three genres accounted for approximately [90-100]% of total game-time, and gamers that played only one genre in 2021 accounted for only [0-10]% of total game-time.⁷¹
- (b) **Gamers switch between genres in response to new releases:** Gamers change their gaming behaviour when a new game is released and switch to games in

⁶⁶ Phase 1 Decision, paragraph 173 suggests that Microsoft and Activision account for [30-40]% of minutes played on consoles in the UK in 2021. This is wrong. This estimate, as submitted in response to the CMA RFI dated 26 May 2022, refers to the minutes played by gamers *on Xbox* and not on consoles overall. As Microsoft's main first-party titles are historical franchises (*Halo*, *Forza*, *Gear of War*) exclusive to Xbox, it is of course the case that game publishing shares restricted to Xbox alone will severely overstate Microsoft's position across consoles.

⁶⁷ In *Intercontinental Exchange / Trayport* (2017) the CMA found that "although the exact proportion varied by asset class, in all cases a substantial proportion of OTC executed trades were initiated through [Trayport's] Joule/Trading Gateway" – as much as 60-70% (see *Intercontinental Exchange / Trayport*, Final Report, 17.10.2016, paragraph 7.134 and Table 5 (link available [here](#))). In the upstream markets in *Tobii / Smartbox Assistive Technologies* (2019), the CMA found that [50-60%] of dedicated AAC solutions sold in the UK included the Smartbox's Grid software and that Tobii's global market share of eye gaze cameras used in AAC applications was over [70-80%] by volume and over [60-70%] by value globally (see *Tobii AB / Smartbox*, Final Report, 21 August 2019, paragraphs 7.28 and 7.148-7.149 (link available [here](#))). As noted above, in *Facebook / Giphy* (2021 and on remittal 2022) the CMA found that the target, Giphy, had a high market share in the upstream market for GIF provision (60-70%) (link available [here](#)).

⁶⁸ Phase 1 Decision, paragraph 173(a).

⁶⁹ *Grand Theft Auto* is, for example, included in the "shooter category" by some digital storefronts (e.g., Steam), but not others (e.g., Microsoft Store). The Activision share is conservative as it excludes *Grand Theft Auto*. [3<].

⁷⁰ Phase 1 Decision, paragraph 102. [3<].

⁷¹ [3<].

different genres. Figure 6 shows that following the release of [X], there was a clear reduction in game-time from other games towards [X], including for games of all genres and not just ‘shooters’.⁷²

Figure 6: [X]

- a) [X]
[X]
- b) [X]
[X]

Notes: [X].

Figure 7: [X]

- a) a) [X]
[X]
- b) [X]
[X]

Notes: [X].

- (c) **Gamers’ playing choices are heterogeneous:** Two gamers who have a common favourite franchise, may have a very different second most-played game.⁷³ There is a very long tail of game franchises that are the second favourite franchise of *Call of Duty* gamers, with 621 second favourite franchises and 30 second favourite franchises that are second favourite for at least 0.5% of gamers.⁷⁴ As shown by Figure 8 below, [X]. This evidence shows that *Call of Duty* gamers are not more likely to switch to other ‘shooter’ games over games of different genres.

Figure 8: Distribution of second favourite franchises for gamers whose favourite franchise was *Call of Duty* (bars) and favourite franchises for other players (line), 2021

[X]

Source: [X].

- (d) **Activision’s internal documents shows that *Call of Duty* competes against a wide range of games:** Activision’s competitor monitoring for *Call of Duty* recognizes a broad range of franchises as constraints. Activision has recognised that the release of titles across many different genres has the ability to impact *Call of Duty*. This is consistent with the fact that gamers are drawn to the “next big” title and play multiple games across genres.

72 [X].
73 [X].
74 [X].

Figure 9: Activision assessment of key competitors

[REDACTED]

Source: [REDACTED]

Figure 10: Activision tracking of competitor pre-orders

[REDACTED]

Source: [REDACTED]

3.22 Even if the CMA were to look narrowly at a shooter genre, the Merged Entity would not have the necessary market power to foreclose downstream rival consoles for the following reasons:

- (a) **The ‘shooter’ genre is not the most popular in the UK:** Third-party surveys consistently show that ‘shooter’ games fall well behind other more popular genres in the UK, such as action-adventure, puzzle and sports games.⁷⁵ [REDACTED].

Table 2: Revenues by genre, UK, 2021

Genre	Total publishing revenue (\$m)
Action-adventure	[REDACTED]
Sports	[REDACTED]
Shooter	[REDACTED]
Kids and family	[REDACTED]
Role playing game	[REDACTED]
Racing and flying	[REDACTED]
Strategy	[REDACTED]
Fighting	[REDACTED]

Source: [REDACTED].

- (b) **The ‘shooter’ genre is not the most popular on PlayStation in the UK:** Based on third-party data sources, shooter is only the [REDACTED] largest genre on the PlayStation platform by revenue.

⁷⁵ Statista, “*Video game preferences by genre in the UK in 2022*”, 18.05.2022 (link available [here](#)). The displayed data on video game preferences by genre shows results of the Statista Global Consumer Survey conducted in the UK in 2022. Some 36% of respondents answered the question “In general, which types of video games do you play?” with “Action (e.g., platform games, fighting games)”. In addition, 34% responded with “Action-adventure”, 31% with “Adventure”, 30% with “Shooters (e.g., first-person shooters)” and 29% with “Sports”. See also Curry’s, “A Nation of Gamers” 10.11.2020 (link available [here](#)) which found that “sport” was the most popular genre, with “action” second and “first person shooter” in eighth position. Another survey by Opinium, “Understanding the impact of Coronavirus on the Video & Mobile Gaming industry” 10.09.2020 (link available [here](#)) has puzzle games first (44%), followed by action (25%), adventure (21%), shooter (19%) and sports (19%).

Table 3: Split of PlayStation revenues by genre, UK, 2021

Genre	Proportion of revenue on PlayStation platform
Action & adventure	[X]
Sports	[X]
Shooter	[X]
Role playing game	[X]
Racing	[X]
Fighting	[X]
Strategy	[X]
Kids and family	[X]

Source: [X]

- (c) **Activision’s share, even on this narrow basis, is not consistent with significant market power:** Activision’s share of console games with a ‘shooter’ element is only [20-30]% globally ([30-40]% in the UK). On Xbox consoles, Activision’s share of revenues in the ‘shooter’ genre is [30-40]% globally ([30-40]% in the UK) and its share of game-time minutes is [30-40]% globally ([30-40]% in the UK).⁷⁶ These shares are well below the upstream market shares found in previous Phase 2 input foreclosure decisions and reflect the fact that there are many high profile and popular games with a ‘shooter’ element.
- (d) **Console platforms have a range of viable alternative options:** Even on this narrow view, Sony would have a wide variety of alternative options including:
- **Epic Games**, which publishes *Fortnite*, the most popular game franchise in the world with over 400 million registered users.⁷⁷ *Fortnite* is the number one title on the Xbox console (across all genres) by hours played and is available on PlayStation and Nintendo Switch.⁷⁸ *Fortnite* has a positive Metacritic score of 85%⁷⁹ and has won numerous awards since its release in 2017.⁸⁰ Sony recently acquired a minority shareholding in Epic Games.⁸¹
 - **Electronic Arts**, which publishes *Apex Legends*, a game that was lauded upon its release as the “best shooter of 2019”⁸², with more than 100 million unique users and a positive Metacritic score of 88%.⁸³ *Apex Legends* is a consistent top 10 title on the Xbox console (across all

⁷⁶ Parties’ response to RFI dated 19 July 2022, Tables 11.9 and 11.10 and Parties’ response to RFI dated 26 July 2022, Tables 7.9 and 7.10.

⁷⁷ IGN, “*Fortnite Made \$9 Billion in Two Years, While Epic Games Store Has Yet to Turn a Profit*”, 03.05.2021 (link available [here](#)).

⁷⁸ **Annex ISR001** - Top 20 titles played on Xbox in 2021 and 2022 (January-March) by millions of hours played.

⁷⁹ Metacritic website (link available [here](#)).

⁸⁰ *Fortnite* has won numerous awards since its release including 5 awards at the Gamer’s Choice Awards in 2018 (link available [here](#)), 2018 ‘ultimate game of the year’ and 2019 eSports game of the year at the Golden Joystick Awards (link available [here](#)).

⁸¹ Epic Games, “*Sony and KIRKBI Invest in Epic Games to Build the Future of Digital Entertainment*”, 11.04.2022 (link available [here](#)).

⁸² IGN, “*The Best Shooter of 2019*”, 10.12.2019 (link available [here](#)).

⁸³ The Verge, “*Apex Legends now has more than 100 million players*”, 14.04.2021 (link available [here](#)), Metacritic website (link available [here](#)).

genres) and is also available on PlayStation and Nintendo Switch.⁸⁴ Electronic Arts also publishes other high profile games with a ‘shooter’ element such as the *Battlefield* series.

- **Ubisoft**, which publishes *Tom Clancy’s Rainbow Six Siege*, a game that has over 80 million players to date with a positive Metacritic score of 74%.⁸⁵ *Tom Clancy’s Rainbow Six Siege* is a consistent top 20 title on the Xbox console (across all genres) and is also available on PlayStation, Stadia and Luna.⁸⁶ Ubisoft also publishes other high-profile games with a ‘shooter’ element such as the *Far Cry* series.
- **Sony**, which following the acquisition of Bungie publishes *Destiny 2*, a game that is considered one of the best ‘multi-player shooter games’ in 2022 with a Metacritic score of 85%.⁸⁷ *Destiny 2* is [X] and is also available on PlayStation and Stadia.⁸⁸ Following the acquisition by Sony, Bungie has confirmed *Destiny 2* will remain as a multi-platform game with full cross-play and that they “want to maintain the same great experience you already have on your platform of choice”.⁸⁹ Sony also publishes other popular franchises with a ‘shooter’ element such as the *Uncharted* franchise.
- **Studio Wildcard**, which publishes *ARK Survival Evolved*, which is [X] and is also available on PlayStation and Nintendo Switch.⁹⁰
- **Take-Two Interactive** which publishes *Grand Theft Auto V*, remains [X] many years after its release in 2013, and *Red Dead Redemption 2*, [X].⁹¹ The highly anticipated *Grand Theft Auto VI* is expected to be released in 2024.⁹² Both games are considered by major digital storefronts, such as Steam, to have shooter elements. *Grand Theft Auto V* is also available on PlayStation, whereas *Red Dead Redemption* is also available on PlayStation and Stadia.

Call of Duty does not have the kind of market power that needs to be present for leveraging to be even a remote possibility – as *Call of Duty* gamers are not special compared to other popular franchises.

3.23 In the absence of any evidence of market power, the Phase 1 Decision suggests that the Merged Entity would have significant upstream market power, since “overall publisher shares do not present a complete picture of the importance of ABK content”.⁹³ It makes

⁸⁴ **Annex ISR001** - Top 20 titles played on Xbox in 2021 and 2022 (January-March) by millions of hours played.
⁸⁵ Gaming Bolt, “*Rainbow Six Extraction Exceeds 5 Million Players, Rainbow Six Siege Crosses 80 Million*”, 17.02.2022 (link available [here](#)); Metacritic website (link available [here](#)).
⁸⁶ Parties’ response to RFI dated 26 May 2022, paragraph 7.25.
⁸⁷ The Gamer, “*10 Best Multiplayer Shooters*”, 24.07.2022, (link available [here](#)); Metacritic website (link available [here](#)).
⁸⁸ **Annex ISR001** - Top 20 titles played on Xbox in 2021 and 2022 (January-March) by millions of hours played.
⁸⁹ Gamesradar, “*PlayStation and Bungie complete acquisition, commit to Destiny 2 staying multiplatform*”, 15.07.2022 (link available [here](#)).
⁹⁰ Parties’ response to RFI dated 26.05.2022, paragraph 7.25.
⁹¹ **Annex ISR001** - Top 20 titles played on Xbox in 2021 and 2022 (January-March) by millions of hours played.
⁹² Tech Radar Gaming, “*GTA 6 gameplay, leaks, news and rumors*”, October 2022 (link available [here](#)).
⁹³ Phase 1 Decision, paragraph 151.

this claim on the basis that “some ABK games, and CoD in particular, are especially important for attracting gamers to a platform” and that “these gamers go on to play other games available on that platform, increasing that platform’s overall revenues”.⁹⁴

3.24 While these assertions are central to the case for referral, they are not supported by any evidence.⁹⁵ Instead, the Phase 1 Decision relies on high level points such as “CoD is currently one of the largest game franchises”, “has a high level of awareness amongst gamers” and “has been consistently successful for nearly a decade”.⁹⁶ These points may all be true (as they are equally for other popular games), but do not show that the franchise is critical to attracting gamers to a console platform, nor that the loss of that one franchise would foreclose the console in question from the downstream market. No evidence has been provided to suggest that other Activision titles have any degree of market power. As above, the share of these titles is minimal ([0-5]% or less).

3.25 The evidence shows that *Call of Duty* gamers cannot be considered ‘special’ or ‘unique’ as compared to other popular franchises:

- (a) **Call of Duty does not drive platform adoption:** Xbox data shows that between 2016 and 2022, [X]% of new Xbox gamers never played or purchased *Call of Duty* content and only [Y]% of gamers played *Call of Duty* as their first game on their new Xbox console. These numbers are inconsistent with the idea that *Call of Duty* drives platform adoption. Figure 12 shows [X] is the game that most gamers play first after purchasing an Xbox console in the period 2016-2022 [Y] and numerous others are similarly often played first.

Figure 11: Share of gamers playing on Xbox for the first time that played Call of Duty as their 1st, 2nd, 3rd, etc. game

[X]

Source: [X].

Figure 12: Ranking of first played games after Xbox purchase

[X]

Source: [X].

- (b) **Call of Duty gamers play the same amount of time across all franchises in a year as gamers of other franchises:** The time that *Call of Duty* gamers spend playing *Call of Duty* or other games on the Xbox console is in line with other popular franchises. Figures 13 and 14 show that *Call of Duty* gamers spent essentially the same time on Xbox as [X] gamers in 2022. [Y].

Figure 13: Average total hours played on Xbox by gamers of various franchises

[X]

Source: [X].

Note: [X].

⁹⁴ Phase 1 Decision, paragraph 151.

⁹⁵ As the arguments put forward relate to *Call of Duty*, that is the focus of Microsoft’s response below. For the avoidance of doubt, these arguments are rejected in relation to all of the Activision console titles.

⁹⁶ Phase 1 Decision, paragraph 151(a)-(c).

Figure 14: Share of gamers on Xbox by number of franchises played

[X]

Source: [X].
Note: [X].

- (c) **Call of Duty does not drive spend:** *Call of Duty* represents only [X]% of Sony's digital revenues worldwide.⁹⁷ *Call of Duty* gamers do not consistently spend more than other franchise gamers on game and in-game purchases. Figure 15 shows the average spend of *Call of Duty* gamers and gamers of other franchises on Xbox. *Call of Duty* gamers have [X].

Figure 15: Average annual spend by gamers of major franchises

a) Game and in-game content

[X]

b) In-game content only

[X]

Source: [X].
Note: [X].

- (d) Combining the above with the analysis of average game-time, one can also compute a different metric of monetization: dollars spent per hour played. Again, *Call of Duty* gamers are in line with other franchise gamers.

Figure 16: Average spend per hour by gamers of major franchises

a) Game and in-game content

[X]

b) In-game content only

[X]

Source: [X].
Note: [X].

- (e) **Call of Duty gamers have similar preferences to other gamers:** *Call of Duty* gamers show preferences in line with gamers of other franchises. As Figure 17 below shows, the ranking of second most played game is [X]. As such, they are not 'special' in terms of the type of content they purchase and consume.

Figure 17: Second most played franchise by share of time spent on Call of Duty, 2021

[X]

Source: [X].
Note: [X].

- (f) **Call of Duty gamers' split of game-time between Call of Duty and other games is in line with that of gamers of other franchises.** *Call of Duty* gamers spent around [X]% of their time on their most played franchise, in line with other popular franchises. This suggest that *Call of Duty* gamers are unlikely to

⁹⁷ FMN, paragraph 19.10.

have major spill-over effects on engagement with non-*Call of Duty* content as compared with other franchises.

Figure 18: Splits of game-time by gamers of major franchises

[REDACTED]

Source: [REDACTED].

- 3.26 All of this evidence is inconsistent with *Call of Duty* having a greater ability to drive consumption of non-*Call of Duty* content on the console platform than other popular franchises.⁹⁸

Evidence from *Call of Duty: Vanguard* shows that alternatives exist

- 3.27 *Call of Duty*'s popularity varies over time and does not equate to market power. For example, *Call of Duty: Vanguard* which was released in November 2021 was heavily criticized by the trade press and gamers alike, resulting in significantly lower sales than reflected in the internal documents cited in the Phase 1 Decision.⁹⁹ This is consistent with gamers having ample set of alternatives to choose from and engaging with the console beyond *Call of Duty* as evidenced above.
- 3.28 *Call of Duty: Vanguard*'s unpopularity has seen gamers switch to other franchises, resulting in a significant reduction in MAUs across the entire *Call of Duty* franchise. This is reflected in Activision's most recent update to investors, which states that MAUs fell across the entire Activision game portfolio, primarily as a result of the poor performance of the *Call of Duty* franchise following the launch of *Vanguard*:

*“Average MAUs decreased by 47 million or 12% for the three months ended June 30, 2022, as compared to the three months ended June 30, 2021. The decrease was primarily due to lower average MAUs for Activision, driven by the Call of Duty franchise”.*¹⁰⁰

- 3.29 As explained by Activision CEO, Bobby Kotick, [REDACTED].¹⁰¹ A third-party survey of 671 gamers in the UK and US conducted by Gamesindustry.biz, EGX and PAX shows that 55% of respondents who did not purchase *Call of Duty: Vanguard* did so because they were playing other games. A further 34% did not buy the game as they had tired of the *Call of Duty* franchise.¹⁰²

⁹⁸ This is consistent with the fact that no other Activision titles could possibly have sufficient “importance” so as to give rise to hypothetical foreclosure concerns.

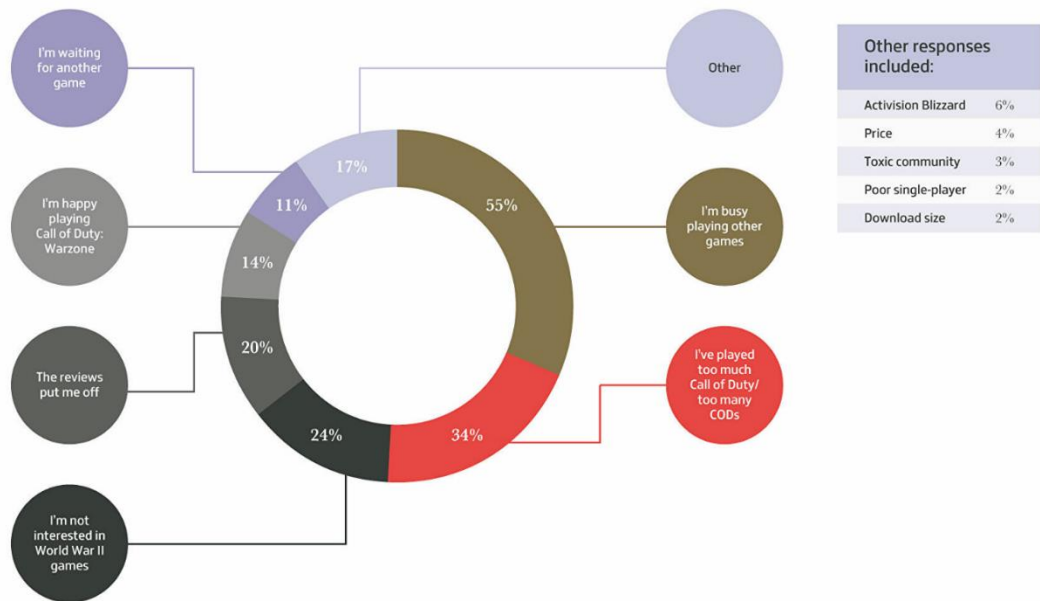
⁹⁹ Phase 1 Decision, paragraphs 142 – 144.

¹⁰⁰ Activision 10-Q, 30.06.2022, pp. 38-39.

¹⁰¹ [REDACTED].

¹⁰² Gamesindustry.biz, “Why didn't people buy Call of Duty this year? | GI Asks”, 29.11.2021 (link available [here](#)).

Figure 19: Survey conducted by Gamesindustry.biz with EGX and PAX for reasons why they did not purchase *Call of Duty: Vanguard*



Source: Gamesindustry.biz (link available [here](#)).

3.30 Data on *Call of Duty: Vanguard*'s popularity across Xbox gamers shows that in the month of release, the number of MAU for *Call of Duty: Vanguard* was [X] the users who played *Call of Duty: Modern Warfare* upon release, approximately [X] than those who played *Call of Duty: Black Ops Cold War* and [X]% of those who played *Call of Duty: Black Ops 4*.¹⁰³ A similar comparison holds for game-time hours and unit sales. In the UK, total sales of *Call of Duty* by volume [X] million units [X] million units [X].¹⁰⁴

Figure 20: Total MAU and game-time hours by premium *Call of Duty* titles in the first four months after release on Xbox

a) Total MAUs

[X]

b) Total game hours

[X]

Source: [X].

3.31 *Call of Duty: Vanguard* also displays higher churn rates on both Xbox and PlayStation than previous *Call of Duty* titles. Among those gamers who played a *Call of Duty* title in their month of release in the last four years *Call of Duty: Vanguard* gamers churned almost [X] as fast. In the three months post release, almost [X]% of gamers who purchased *Call of Duty: Vanguard* in the month of release churned. In the case of *Call of Duty: Warzone* approximately [X]% of gamers churned three months post release,

¹⁰³ Parties' presentation at the Issues Meeting slide 21.

¹⁰⁴ Based on Game Sales Data.

[§<]% for *Call of Duty: Black Ops Cold War* and *Call of Duty: Modern Warfare*. Churn rates on Xbox are [§<].

Figure 21: Share of gamers who continue playing various *Call of Duty* games months after release on PlayStation

[§<]

Source: [§<].

Figure 22: Share of gamers who continue playing various *Call of Duty* games months after release on Xbox

[§<]

Source: [§<].

3.32 Evidence also suggests that gamers who churned from *Call of Duty: Vanguard* played non-*Call of Duty* content more than gamers who churned from previous *Call of Duty* releases. As the figure below shows, early adopters of the last two *Call of Duty* releases (*Call of Duty: Black Ops Cold War* and *Call of Duty: Vanguard*) were seen to dedicate the same share of their time to *Call of Duty* before the release of the new *Call of Duty* title and on the month of purchase/release. In the following months, however, not only did *Call of Duty: Vanguard* players churn faster as described above, but they also turned away from the overall *Call of Duty* franchise more than gamers of [§<].¹⁰⁵ This shows that *Call of Duty* gamers are not uniquely loyal and will switch to other franchises where the game-play experience does not meet their expectations.

Figure 23: Time spent on *Call of Duty* as a share of total time played on Xbox by gamers who played a *Call of Duty* title in their month of release

[§<]

Source: [§<].

(ii) Activision’s content is not an “important input” for Sony

3.33 The Issues Statement states that Activision’s content may be an important input for PlayStation as “an economically significant number of PlayStation gamers could switch to Xbox if Activision’s content were no longer available (or not available on equal terms) on PlayStation”.¹⁰⁶ Such a finding cannot be made ‘on the balance of probabilities’ as there is no one game franchise that could cause an “economically significant” shift that forecloses Sony. Nor is there evidence that *Call of Duty* shapes downstream console competition.¹⁰⁷ In particular:

- (a) Past *Call of Duty* exclusive arrangements with Microsoft and Sony have not foreclosed either console.
- (b) Sony has overstated the importance of *Call of Duty* to its viability.

¹⁰⁵ The Parties note that results for *Call of Duty: Modern Warfare* are not comparable as *Call of Duty: Warzone* was not released at the time such that gamers were focusing *Call of Duty* game-time around the new release almost exclusively.

¹⁰⁶ Issues Statement, paragraph 30(b).

¹⁰⁷ Merger Assessment Guidelines, paragraph 7.14(b).

- (c) Even if *Call of Duty* were to have some amount of market power, *quod non*, gamers on PlayStation would not suddenly divert away from their console to other devices as a result of its loss.
- (d) The success of platforms without *Call of Duty* lays bare the fallacy of the Sony theory of harm.
- (e) Microsoft lacks the ability to engage in partial foreclosure.
- (f) Sony has viable alternatives.¹⁰⁸

Past *Call of Duty* exclusive arrangements with Microsoft and Sony have not foreclosed either console

3.34 First, past experience clearly shows that exclusivity arrangements covering *Call of Duty* content is not enough to marginalise – let alone exclude – rival console platforms. Xbox and PlayStation have at one time or another, each benefited from various forms of exclusivity in relation to *Call of Duty* content over the past two decades. These have not foreclosed the console market. Indeed, PlayStation currently benefits from *Call of Duty* marketing exclusivity, without any impact on Xbox’s ability to compete effectively in the market.¹⁰⁹

- (a) **Consoles compete by offering differentiated content:** Consoles traditionally compete by offering a differentiated portfolio of games and gaming experiences to consumers, including some on an exclusive basis. Exclusivity has not to date resulted in console foreclosure, as there are at any one time multiple titles with comparable appeal available to rivals and gamers can and do multi-home if they want access to an exclusive title. This has been the case even with bestselling titles; Sony will typically have from one to four top 20 bestselling titles which are exclusive to PlayStation.¹¹⁰
- (b) **Sony grew its console market share while Xbox had *Call of Duty* marketing exclusivity:** Xbox had marketing exclusivity in relation to *Call of Duty* titles between 2005 and 2015.¹¹¹ Sony was not foreclosed as a result of this

¹⁰⁸ *Intercontinental Exchange, Inc. v Competition and Markets Authority* [2017] CAT 6 at [67], *Tobii AB v Competition and Markets Authority* [2020] CAT 1 at [301].

¹⁰⁹ In September 2015, Activision signed a deal with Sony for 30 days of PlayStation platform timed exclusivity for *Call of Duty: Black Ops 3 DLC*. The multi-player beta for the game launched on PlayStation 4 before any other platform (link available [here](#)). In April 2015, Activision signed a deal with Sony for 30 days of PlayStation platform timed exclusivity for certain *Call of Duty* downloadable content map packs and 30 days of exclusivity on the single player remasters of *Modern Warfare 1* and *2*. The multi-player beta for the game launched on PlayStation 4 before any other platform. In addition, *Call of Duty: Modern Warfare* featured a game mode “Spec Ops Survival Mode” that was exclusive to the PlayStation platform for one year. See GameRant, “*Call of Duty: A History of Exclusivity Leading up to Modern Warfare 2 Campaign Remastered*”, 02.04.2020 (link available [here](#)).

¹¹⁰ For example in 2020 Sony had 4 of the bestselling console titles worldwide exclusive to PlayStation (*i.e.*, *The Last of Us Part II*, *Ghost of Tsushima*, *Marvel’s Spider-Man: Miles Morales* and *Final Fantasy VII Remake*). In 2021, Sony had one of the bestselling console titles worldwide exclusive to PlayStation (*i.e.*, *Marvel’s Spider-Man: Miles Morales*). Microsoft does not have any top 20 titles which are exclusive to Xbox.

¹¹¹ As part of this arrangement, Activision granted Microsoft certain exclusive rights to have Xbox console branding appear in ads for *Call of Duty* for a period of time. Microsoft also received time-limited priority access to certain downloadable content (“DLC”) (*i.e.*, multi-player maps and certain add-on map packs). In 2010, Microsoft and Activision signed a multi-year agreement to bring *Call of Duty* game add-ons and map packs first to Xbox Live. The agreement began with *Call of Duty: Modern Warfare 2* map pack and *Resurgence* in June 2010 (link available [here](#)).

arrangement. In fact, Sony maintained and grew its lead over Xbox with respect to console sales and market share, as shown in Figure 24 below.

Figure 24: PlayStation and Xbox sales and share 2010 – 2015

[REDACTED]

Source: [REDACTED]

- (c) **Microsoft [REDACTED] *Call of Duty* exclusivity:** Microsoft’s exclusive arrangements for *Call of Duty* content expired at the end of 2015. [REDACTED].¹¹² [REDACTED].¹¹³
- (d) **Microsoft did not expect [REDACTED].¹¹⁴** Microsoft did not [REDACTED], but does not believe this agreement [REDACTED]. Microsoft was not foreclosed as a result of the agreement.

Sony has overstated the importance of *Call of Duty* to its viability.

3.35 Second, Sony’s regulatory submissions have vastly exaggerated the importance of *Call of Duty* to its continued viability. Sony’s obvious self-interest in this case means that its submissions must be carefully scrutinised.

- (a) ***Call of Duty*’s revenues and user engagement on PlayStation is limited:** *Call of Duty* represented only [REDACTED]% of Sony’s digital sales worldwide and *Call of Duty* MAUs represented less than [REDACTED]% of PlayStation’s total MAUs in 2021.¹¹⁵ Even accounting for any discrepancy between definitions of MAUs between console platforms and publishers (as discussed below) *Call of Duty* MAUs would account for at most [REDACTED]% of PlayStation’s total MAUs in 2021.
- (b) ***Call of Duty* gamers are not ‘unique’ compared to other popular franchises:** The Phase 1 Decision states the CMA “has received evidence that *CoD* has higher levels of user engagement and revenue spend on PlayStation than the Parties estimated”¹¹⁶, without providing further details. As shown above, *Call of Duty* gamers do not spend more or engage more in terms of hours played on Xbox compared to gamers of other franchises. While Microsoft does not have PlayStation telemetry data to carry out a similar analysis on *Call of Duty* gamers’ behaviour on PlayStation, it has no reason to believe that *Call of Duty* gamers’ behaviour would be materially different on PlayStation than on Xbox. [REDACTED] data from Activision on *Call of Duty* gamers on PlayStation and Xbox [REDACTED].
- (c) **The available evidence shows that *Call of Duty* does not drive console platform adoption, game-time or gamer spend:** As shown above between 2016 and 2022, [REDACTED]% of new Xbox gamers never played or purchased *Call of Duty* content and only [REDACTED]% of gamers played *Call of Duty* as their first game on their new Xbox console. These numbers are inconsistent with the idea that *Call of Duty* drives platform adoption. Moreover, as shown above based on Xbox data and below based on Activision data, *Call of Duty* does not drive

¹¹² Annex ISR002 – [REDACTED].

¹¹³ Annex ISR003 – [REDACTED].

¹¹⁴ Annex ISR003 – [REDACTED].

¹¹⁵ Based on data the CMA has on *Call of Duty* sales and user engagement on PlayStation, as well Sony’s financial reports which are available [here](#). See, in particular, Sony FY21 Q4 Supplemental Report.

¹¹⁶ Phase 1 Decision, paragraph 170.

game-time or gamer spend relative to other franchises. Even if the revenues and levels of user engagement were somewhat higher on Sony than Microsoft's estimates suggest ([§] Activision data on PlayStation), they could not be so high that Sony's viability could depend upon retaining them. This is particularly the case as any higher engagement or revenue on PlayStation (if any) would be fuelled by Sony's efforts to market *Call of Duty* on PlayStation —it would be misleading to compare *Call of Duty* with games Sony does not market on its platform.

- (d) **Even if all *Call of Duty* gamers were to leave PlayStation it would still be bigger than Xbox:** PlayStation currently “has a substantial number of non-*CoD* MAU”.¹¹⁷ Even if all of PlayStation's MAUs that play *Call of Duty* were, hypothetically, to leave PlayStation it would still have significantly more MAUs than Xbox has today – by Microsoft's estimate by some [§] million.¹¹⁸ This holds true even in the purely hypothetical and unrealistic scenario where all these users would switch to Xbox – PlayStation would still have [§]% ([§] million) more users than Xbox – and even when considering any discrepancies between how gaming consoles and publishers track MAUs¹¹⁹ – PlayStation would still have [§] million more users than Xbox. The CMA cannot conclude that PlayStation would not be viable with [§] million MAUs (*i.e.*, if it hypothetically lost all *Call of Duty* MAUs) when Xbox is clearly viable today with [§] ([§] million) – regardless of what lost gamers will do. See Figure 25 below.

Figure 25: PlayStation *Call of Duty* and non-*Call of Duty* MAUs vs total Xbox MAUs

[§]

- (e) **Network effects are weak and have not foreclosed the market:** The Issues Statement suggests that “given the importance of [*Call of Duty*] to Sony PlayStation and the existence of strong direct and indirect network effects, any foreclosure strategy could have a significant impact on Sony's revenues and user base”.¹²⁰ It is, however, simply implausible to assume that network effects failed to foreclose a console provider like Microsoft, which trails Sony by more than 2-to-1, but they would instead risk foreclosing the largest console platform in the world as a result of a single franchise being turned exclusive to it. Industry characteristics also suggest that network effects are weak and unlikely to lead to tipping in console gaming.
- Gaming is a “hit-driven” industry, where platforms can attract gamers by offering a small number of exclusive titles. Indeed, this is how Xbox entered the market in 2001 and how it succeeded in remaining relevant despite the smaller size of its user base. This suggests that network

¹¹⁷ Phase 1 Decision, paragraph 173(b)(iii).

¹¹⁸ Response to Issues Letter, Figure 7.

¹¹⁹ The Parties note that the way publishers and console platforms track active users and game-time is different for the following reasons – Xbox records [§]. [§].

¹²⁰ Issues Statement, paragraph 32.

effects are weak not strong in the gaming industry, as also observed by the literature.¹²¹

- Gamers’ multi-homing across consoles suggest that smaller platforms can thrive and gain scale despite the user base disadvantage. This limits the scope for tipping as a result of network effects.
- Similarly, the fact that the vast majority of games on PlayStation and Xbox are *not* exclusive suggests that publishers have an incentive to distribute broadly and that despite the cost of porting games – or developing for more than one platform – publisher still have an interest to distribute on smaller ones.
- More generally, network effects are “problematic” from a competition perspective only when the leading platform is the one that expands. If it is the smaller console platform that expands, developers will not “lose” interest in the leading console and will continue to distribute broadly (if not increase the breadth of their distribution) to the benefit of gamers.

(f) **Sony PlayStation would have to lose all *Call of Duty* gamers and a [X] proportion of non-*Call of Duty* gamers before it would be the same size as Xbox:** The Issues Statement also suggests that “*an economically significant number of PlayStation gamers could switch to Xbox if Activision’s content were no longer available (or not available on equal terms) on PlayStation*”.¹²² No evidence is put forward to support this proposition and the evidence presented below contradicts this claim.

- The proportion of gamers who play *Call of Duty* for a meaningful amount of time and, might therefore be more likely to switch, represent a small minority of *Call of Duty* gamers.
- In any event, even if this were true to some extent, Sony would need to lose a [X] higher number of non-*Call of Duty* gamers than actual *Call of Duty* gamers for its total MAU to fall to Xbox’s current level (*i.e.*, [X] million MAUs).
- This is patently not credible, and yet even in such an unrealistic scenario the CMA could not conclude that Sony would be likely to be foreclosed, given that Xbox is clearly a viable competitor today at this level (and the CMA does not suggest otherwise).

Even if *Call of Duty* were to confer some amount of market power, *quod non*, gamers on PlayStation would not suddenly divert away from their console to other devices.

3.36 In order for a PlayStation gamer to consider diverting to Xbox, they would need to (i) place material weight on *Call of Duty* versus other content (including all of the

¹²¹ See M. Iansiti and F. Zhu “Why some platforms thrive and others don’t” Harvard business review, 2019 and “Entry into platform markets”, Strategic Management Journal, 2012 and Lee, R. (2013), “Vertical integration and exclusivity in platform and two-sided markets,” *American Economic Review*, page 2987.

¹²² Issues Statement, paragraph 30(b).

bestselling exclusive titles available on PlayStation) and services available on the platform and (ii) be willing to bear the switching costs involved with diverting to another gaming console – regardless of the point at which the “switch” occurs within a console generation lifetime. This is at odds with the evidence.

3.37 First, data on Xbox users shows that console gamers are likely to have interests that stretch far wider than just *Call of Duty* and are unlikely to change platform if the franchise were not available on their console any longer.

- (a) **Most gamers on consoles do not play *Call of Duty*:** Xbox gamer data shows that [X]% of Xbox gamers did not play *Call of Duty* for more than 1 hour and 5 hours respectively in 2021.¹²³ Even including all gamers that “launched” a *Call of Duty* title on their console – without imposing the additional requirement of them playing the game – at least once in a given year, ca. [X]% of all Xbox users did not launch *Call of Duty* at all (*i.e.*, 0% of their total game time was spent on *Call of Duty*).
- (b) **Those that *did* play *Call of Duty* did so for a small share of their total game-time:** Amongst those gamers that do play *Call of Duty*, the majority only do so for a short period of time. In particular, among gamers who played at least one hour of *Call of Duty* in 2021, more than [X]% played it for less than [X]% of their total gaming time and [X]% of *Call of Duty* gamers spent less than [X]% of their gaming time on the game. For the vast majority of gamers, *Call of Duty* is a small component of overall gaming consumption.¹²⁴

Figure 26: Distribution of gamers who played *Call of Duty* on Xbox by the share of total gaming hours spend on *Call of Duty* in 2021

- a) [X]
[X]
- b) [X]
[X]

Source: [X].

- (c) **Very few gamers play *Call of Duty* for a meaningful amount of time:** Almost [X] of *Call of Duty* actual “gamers” spent less than 10 hours on *Call of Duty* in 2021, another [X]% played it for at most 50 hours – less than 1 hour a week – and another [X]% played it for less than 100 hours – less than 2 hours a week. Overall, only [X]% played it for over 250 hours in the year – approximately 5 hours a week. It is unreasonable to expect that gamers who spent just a few hours in a whole year playing *Call of Duty* would be willing to pay the switching costs of purchasing a new device simply in response to hypothetically not having access to a single franchise.
- (d) **Gamers that do play more *Call of Duty* than other are also likely to spend a lot of hours on other games:** For example, gamers that spend between [X] and

¹²³ [X].

¹²⁴ The Parties’ submission in relation to vertical merger analysis, submitted on 28 July 2022, paragraph 2.19.

[§<] hours on *Call of Duty* in 2021, also spent [§<] hours – more than [§<]% more than *Call of Duty* hours – on other games. The same holds for other groups of more committed *Call of Duty* gamers. *Call of Duty* is one game within a gamer’s far broader consumption set and the data implies that it is not important enough to induce a material set of gamers to change their platform of preference as a result of its hypothetical absence from that platform. And Sony has a wide variety of other popular games, including bestselling PlayStation exclusives.

Figure 27: Distribution of gamers who played *Call of Duty* on Xbox by number of hours spend on *Call of Duty* and other games in 2021

[§<]

Source: [§<].

3.38 Second, data from Activision shows that, [§<]. This suggests that the conclusions above would hold also for PlayStation gamers.

- (a) **While most *Call of Duty* gamers are on PlayStation, data suggests that a smaller share of PlayStation gamers play *Call of Duty* compared to Xbox:** Activision data suggests that on average in 2021 there were [§<] million MAU of *Call of Duty* across PC, Xbox, and PlayStation, [§<]% of which (approximately [§<] million) were on PlayStation and [§<]% of which (approximately [§<] million) on Xbox. While the Parties recognise that there might be differences in the way publishers and console owners measure active users¹²⁵, this suggests that PlayStation has approximately [§<]% more *Call of Duty* gamers than Xbox. Publicly available data suggests that PlayStation MAUs in 2021 are more than double Xbox MAUs (107 million¹²⁶ versus [§<] million¹²⁷). Based on this data, Microsoft estimates that *Call of Duty* was played by approximately [§<]% to [§<]%¹²⁸ of all PlayStation users – this includes any gamer, including those who launched (but not necessarily played) the game only once in a given month.
- (b) **Gamers on PlayStation spend the [§<] on *Call of Duty* than gamers on Xbox:** While the Parties have no data on what PlayStation gamers play on their console beyond *Call of Duty*, data from Activision shows that [§<]. In 2021, more than [§<]% of *Call of Duty* gamers on PlayStation played online matches for less than [§<] hours in the whole year, more than [§<]% played for less than [§<] hours (approximately [§<] a week) and more than [§<]% played for less than [§<] hours (approximately [§<] hours a week). [§<]. There is nothing *special* about *Call of Duty* on PlayStation to suggest mass-diversion following any hypothetical loss of *Call of Duty*.

¹²⁵ The way publishers and console platforms track active users and game-time is different for the following reasons – Xbox records [§<]. [§<].

¹²⁶ Based on Sony’s publicly released financial reports (see here – Sony 201 Q4 Supplemental Report). See Issues Meeting Slides, slide 19.

¹²⁷ Xbox telemetry data. See Microsoft’s response to Phase 1 Decision, paragraph 3.19.

¹²⁸ As above, given the differences in which platforms and publishers compute MAU, (i) the lower bound of this range is computed as MAU on PlayStation according to [§<], (ii) the upper bound of this range is computed as [§<]. The underlying assumption is that the ratio between platform and publisher observed MAU would be the same across Xbox and PlayStation.

Figure 28: Distribution of gamers who played *Call of Duty* on Xbox and PlayStation by number of hours spent in online matches on *Call of Duty* in 2021 according to Activision data

[X]

Source: [X].

- (c) **Similarly, gamers on PlayStation also spend similar amounts on in-game purchases for *Call of Duty* to gamers on Xbox:** Overall, approximately [X]% of *Call of Duty* gamers on each platform spent less than USD [X] on in-game purchases for *Call of Duty* on both consoles. Even excluding gamers who made no in-game purchases in 2021, the distribution remains consistent across consoles.

Figure 29: Distribution of gamers who made in-game purchases for *Call of Duty* on Xbox and PlayStation in 2021 according to Activision data (all gamers)

[X]

Source: [X].

Figure 30: Distribution of gamers who made in-game purchases for *Call of Duty* on Xbox and PlayStation in 2021 according to Activision data (excluding non-spenders)

[X]

Source: [X].

- (d) **The average number of *Call of Duty* titles played on PlayStation is [X] Xbox:** On average, PlayStation *Call of Duty* gamers played [X] titles of the four *Call of Duty* games released between October 2019 and September 2022.¹²⁹ The average for Xbox gamers [X]. This is consistent with all of the evidence cited above, suggesting that PlayStation and Xbox *Call of Duty* gamers are not distinctly different from one another.

3.39 Third, there are a number of additional reasons why existing (and prospective) PlayStation gamers are unlikely to switch *en masse* to Xbox and abandon their existing PlayStation as a result of a withholding of *Call of Duty* content.

- (a) **A share of *Call of Duty* gamers on PlayStation is likely to already own an Xbox or a PC:** Third-party data suggests that even at the very beginning of generation 9, [X]% of PlayStation 5 users also owned an Xbox Series X|S and ca. [X]% played also on PC.¹³⁰ Activision survey data suggests that in the five months following *CoD: Vanguard's* release date until April 2022, [X]% of PlayStation owners aged 13-54 also owned an Xbox Series X|S.¹³¹ These gamers would not need to abandon their PlayStation in the event of a hypothetical withholding of *Call of Duty*, but would be able to continue playing on it while retaining access to *Call of Duty* through other devices. This also suggests that any hypothetical withholding of *Call of Duty* from PlayStation could increase “multihoming” as opposed to inducing direct switching.

¹²⁹ These were *Call of Duty: Vanguard*, *Call of Duty: Black Ops Cold War*, *Call of Duty: Warzone*, and *Call of Duty: Modern Warfare*. These games [X] based on Activision MAU data.

¹³⁰ Of these PCs, [X]% are likely to allow gamers to play *Call of Duty*. Evidence gathered among gamers in the US between October and December 2020. [X].

¹³¹ [X].

- (b) **Switching consoles entails costs for PlayStation gamers:** Regardless of the point at which gamers would switch over the course of a console generation lifetime, a PlayStation gamer intending to “switch” to Xbox will need to adapt to a new controller and user interface and will forego being able to play their existing PlayStation game library on their new console. They may also have friends who play on PlayStation and find that certain multi-player games they wish to play with these friends are unavailable on Xbox (e.g., PlayStation exclusive titles). Existing PlayStation gamers who wish to purchase an Xbox console within generation have an opportunity cost of spending an additional USD 400 (on average) on top of the investment already made in their PlayStation.

The success of platforms without *Call of Duty* lays bare the fallacy of the Sony foreclosure theory of harm.

3.40 Third, there is clear evidence from the market today that a platform’s competitiveness is not affected by an inability to offer *Call of Duty* to gamers.

- (a) **Nintendo has a highly successful console without *Call of Duty*:** Nintendo’s console business is highly successful, without a single version of *Call of Duty* being available to play on its latest console, the Nintendo Switch, launched in 2017. The last *Call of Duty* game to be released on a Nintendo console was *Call of Duty: Ghosts*, which was released for the Nintendo Wii U on 5 November 2013. This shows that the overall quality and appeal of a console platform are ultimately far more important to its success than any particular game being available on it. It also suggests that if a console rival were hypothetically to lose access to *Call of Duty*, that rival would have the ability to offer a viable alternative to Xbox and compete effectively for gamers.
- (b) **Steam is the most successful PC digital storefront without *Call of Duty*:** Steam is a further example of a platform that has succeeded without *Call of Duty*. Steam, which is owned by Valve Corporation, is the largest digital storefront with a [40-50]% share of PC game digital sales in the UK. Steam has not carried *any* newly released Activision games since 2018, following Activision’s decision to only sell its PC games on Battle.net but this has not affected Steam’s leading position.
- Prior to 2018, Activision offered *Call of Duty* PC games on Steam. But beginning with the release of *Call of Duty: Black Ops 4* in 2018, Activision stopped publishing new *Call of Duty* PC games on Steam and instead made them exclusive to Battle.net. In making *Call of Duty* games exclusive to Battle.net, Activision hoped to [§<] and [§<].¹³²
 - Activision released five new *Call of Duty* PC games exclusively on Battle.net between 2018 and 2022: *Call of Duty: Black Ops 4* in 2018; *Call of Duty: Modern Warfare* in 2019; *Call of Duty: Warzone* and *Call*

¹³² [§<].

of *Duty: Black Ops Cold War* in 2020; and *Call of Duty: Vanguard* in 2021. [§<].

- Battle.net also [§<], Steam’s MAUs grew by 30 million despite not having access to *Call of Duty*. And by March 2022, Steam reported growing its MAUs even further to 132 million overall—nearly 50% more users than it had in 2018 when Activision made *Call of Duty* exclusive to Battle.net.¹³³
- [§<].¹³⁴

Figure 31: [§<]

[§<]

- [§<].¹³⁵
- [§<].¹³⁶ [§<].¹³⁷
- [§<].¹³⁸ ¹³⁹ [§<].¹⁴⁰ These findings led Activision to decide to resume selling *Call of Duty* [§<] with its upcoming launch of *Modern Warfare 2* on 28 October 2022.
- [§<], then it is irrational to expect that gamers would incur the much higher costs of switching consoles if *Call of Duty* were made fully or even partially exclusive to Microsoft Xbox.

(c) **Steam has launched a new console without *Call of Duty*:** The Steam experience is also directly relevant to console, as Steam has recently launched a new console, the Steam Deck, without *Call of Duty*. The Steam Deck is a handheld console which has a docking station that allows it to be plugged into a television or used as a PC.¹⁴¹ The console runs on a Linux-based operating system and allows gamers to access Windows PC games through the Steam digital storefront. In the words of Valve, “[t]he Proton translation layer allows most Windows games to run with equal or better performance on Steam OS without requiring game developers to do any heavy porting work to get their games running”.¹⁴² This means that there are thousands of games available to play on the Steam Deck – and as explained above this does not currently include *Call of Duty*. Valve has promoted the Steam Deck using a range of other popular titles (including a number of Sony first-party titles) – see Figure 32 below.

¹³³ Steam, “*Steam – 2021 Year in Review*”, 08.03.2022 (link available [here](#)).

¹³⁴ [§<].

¹³⁵ See, e.g., [§<].

¹³⁶ See, e.g., [§<].

¹³⁷ See [§<].

¹³⁸ [§<].

¹³⁹ [§<].

¹⁴⁰ [§<]; see also [§<].

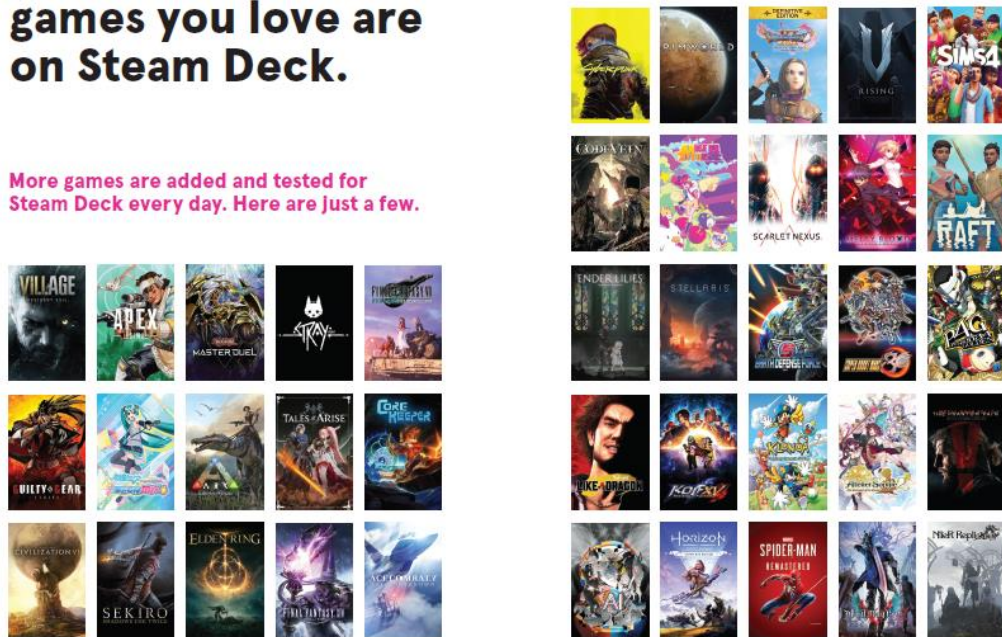
¹⁴¹ Steam Deck website (link available [here](#)).

¹⁴² Valve, “*Steam Deck Booklet*”, 25.08.2022, page 16 (link available [here](#)).

Figure 32: Games used to promote the new Valve Steam Deck¹⁴³

**Thousands of the
games you love are
on Steam Deck.**

More games are added and tested for
Steam Deck every day. Here are just a few.



3.41 Indeed, the Phase 1 Decision in general overlooks the vast array of gaming content which is available to console providers (and multi-game subscription service providers). Just by way of example, there are over 4,000 games available on PlayStation alone, with new games continually being released. The suggestion that just a handful of games belonging to one franchise can make or break a console’s success is not supported by the evidence.

The Merged Entity will lack the ability to engage in partial foreclosure.

3.42 The Merged Entity will also lack the ability to bring about the partial foreclosure of rivals by making certain features of Activision’s games exclusively available on Xbox, and/or degrading performance of and/or withholding technical support for Activision’s games on rival console platforms.

- (a) **Past *Call of Duty* exclusive arrangements have not foreclosed either console:** *Call of Duty* has provided exclusive or timed-exclusive downloadable content for either Sony or Microsoft since *Call of Duty 2* in 2005. These arrangements have not resulted in either Sony or Microsoft being remotely impaired in their ability to compete at times when the other had a limited exclusive.
- (b) **Even though Activision has faced a strong incentive to monetize every form of exclusivity which makes sense for *Call of Duty*, there has been no foreclosure:** Activision has had a strong incentive to come up with different forms of content and marketing exclusivity which it could monetize in its negotiations with Microsoft and Sony. Since 2005 these marketing arrangements have included: (i) exclusive console marketing arrangements

¹⁴³ Valve, “*Steam Deck Booklet*”, 25.08.2022, page 20 (link available [here](#)).

following the release of new titles and downloadable content; (ii) priority access to new maps (until these were phased out following the introduction of cross-platform play); (iii) exclusive access to the online alpha version of the game and access to the beta version of the game 5 days earlier than gamers on Xbox consoles or PC; (iv) game bonuses such as extra “tier skips” on the battle pass; (v) the ability to access additional “experience points” (e.g., through exclusive events); and (vi) certain in-game character customisations and content bundles.

Figure 33: Call of Duty exclusive benefits for PlayStation gamers



Source: *Call of Duty Modern Warfare II* website (link available [here](#))

- (c) None of these have foreclosed Xbox in the console market. It is not credible to suggest that there are further forms of exclusivity which Activision has not considered which could have a material impact on downstream competition. If there were alternative forms of exclusivity which Activision could have monetized, it has a strong pre-Merger incentive to do so.
- (d) **Past practices to steer users towards PlayStation have had little impact:** Past attempts by Activision to steer users towards PlayStation to play *Call of Duty* had very little impact on Xbox. Between *Call of Duty: Black Ops 3* (2015) and *Call of Duty: Modern Warfare* (2019), Xbox maintained around [3<] % of *Call of Duty* gamers, despite Activision’s efforts to promote PlayStation instead.¹⁴⁴ Evidently, the attempt to steer gamers towards Sony’s platform did not have a foreclosure effect on Xbox.
- (e) **Additional content provides benefits for gamers:** In the present case, nothing is “taken away” or withdrawn from rival consoles’ players. In fact, if the Merger results in the Merged Entity having increased incentives to invest in new content to attract additional user engagement – even if hypothetically some or all of that content is only made available to Xbox users – that would represent a benefit to consumers.

¹⁴⁴ Activision is incentivized to prioritise the most profitable platforms to distribute its content. This includes both consoles with which it has better financial terms, and its own vertically integrated store front, Battle.net, for PC distribution.

Sony has viable alternatives.

3.43 The CMA must take account of the wide range of options available to Sony to respond to a hypothetical foreclosure strategy, as well as the steps it has taken to bolster its gaming business even in the short period since the Merger was announced.

- (a) **Sony was not foreclosed when *Call of Duty* was exclusive to Xbox:** There is no indication, based on *Call of Duty*'s prior history of differentiation between versions of *Call of Duty* on Xbox and PlayStation, that this could in any way affect rival consoles' ability to compete effectively. Sony's share of console sales grew in the period from 2005-2015 when Xbox had certain exclusive rights to *Call of Duty* content. There are many more popular games available in the market in 2022 than there were between 2005 and 2015 (including *Fortnite*, *PUBG*, *Apex Legends*, *Elden Ring* and many others). If anything, *Call of Duty*'s importance as a franchise was greater in 2005-2015. When Xbox decided not to continue with the *Call of Duty* co-marketing agreement in 2015, it simply found other ways to market and promote its platform. Sony, as the market leading console with an extensive first-party and third-party exclusive game catalogue, is even better placed to do the same.
- (b) **Sony has large studio footprint and has made recent studio acquisitions:** Sony has over 20 game studios. In 2021, it bought game studios Housemarque, Nixxes Software, Firesprite, Bluepoint, and Valkyrie Entertainment.¹⁴⁵ In 2022, Sony acquired additional game studios - including Bungie, developer of the popular online game *Destiny 2*¹⁴⁶, Haven Studios, Lasengle and Savage Games¹⁴⁷ – and a minority interest in FromSoftware, the developer of the biggest game of 2022, *Elden Ring* and other hit games.¹⁴⁸ This complements Sony's existing USD 1 billion minority shareholding in Epic Games, publisher of *Fortnite*. Sony's Corporate Report 2022 refers to Sony as a “world-leading creator of innovative videogames and network products and services” and a “category leader in gaming brands”.¹⁴⁹ 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”.¹⁵⁰ Sony executives have made it clear that there are more acquisitions to come.¹⁵¹

¹⁴⁵ Sony, Corporate Strategy Meeting, 18.5.2022, slide 27 “Ongoing M&A Activities: FY 21 to date” (link available [here](#)).

¹⁴⁶ The Verge, “*Bungie is now officially part of Sony*”, 15.07.22 (link available [here](#)).

¹⁴⁷ PlayStation Blog, “*Welcoming Savage Game Studios + Expanding Our Community*”, 29.08.22 (link available [here](#)).

¹⁴⁸ Eurogamer, “*Elden Ring is still the best-selling game of 2022*”, 16.07.22 (link available [here](#)).

¹⁴⁹ Sony, Corporate Report 2022, page 39 (link available [here](#)).

¹⁵⁰ Sony, Corporate Report 2022, page 39 (link available [here](#)).

¹⁵¹ For example, SIE's President and CEO, Jim Ryan has stated “*We're growing our studios organically and we're growing through acquisition. We acquired five studios during the course of 2021, we're in discussions with Bungie and we have more planned. This is getting us into a cycle, a virtuous cycle, where success begets success.*” See TechRadar, “*Sony has more studio acquisitions planned, says PlayStation's Jim Ryan*”, 02.04.2022 (link available [here](#)).

Figure 34: Extract from Sony Corporate Report 2022

Market Position and Business Strengths

- World-leading creator of innovative videogames and network products and services
- Position as the category leader in gaming brands¹
- Extensive investment and company acquisitions have built a portfolio of leading global game development studios, best in class technology, and flagship franchises
- PSS™ unit sales reached 11.5 million in FY2021 with sustained, high levels of interest²
- Brand power of PlayStation® cultivated through the accumulation of user trust and the sharing of technology and know-how with creators
- Technologies such as state-of-the-art consoles and next-generation VR systems offer consumers the immersive game experience of the future
- Established, loyal game communities that connect users and creators
- End-to-end planning and development that bring together devices, technologies and business models, and global sales capabilities
- Newly enhanced, multi-tiered PS Plus subscription service offering engaging, high quality, and increasingly diverse content

PlayStation®4 (PS4™) hardware cumulative units sold-in globally:

more than 117.2 million³

PSS™ hardware cumulative units sold-in globally:

21.7 million³

PSN monthly active users:

102 million³

PS Plus paid subscribers:

47.3 million³

- (c) **Sony has a strong catalogue of first and third-party exclusive games:** Sony publishes iconic first-party franchises, such as *God of War*, *The Last of Us*, *Marvel's Spider-Man*, *Uncharted*, *Ghost of Tsushima*, *Horizon Zero Dawn*, and *Days Gone*, as well as the recently acquired *Destiny 2* and its minority shareholdings in Epic Games, the publisher of *Fortnite* and From Software, the publisher of *Elden Ring*. Many of these games are bestselling titles. Sony also has a portfolio of high-quality exclusive third-party content including *Genshin Impact*, *Final Fantasy 16*, *Bloodborne*, *Sackboy: A Big Adventure*, *Street Fighter V*, *Sifu* and the *Silent Hill 2* remake. The strength of the Sony catalogue has been trumpeted by Sony itself – without any mention of *Call of Duty* (see Figure 35 below).

Figure 35: Extract from Sony Corporate Strategy Meeting Slides - May 2022



Source: Sony, Corporate Strategy Meeting, 18.5.2022, slide 11 (link available [here](#)).

- (d) **Sony has announced plans to launch even more first-party games:** Sony already has an extensive first-party game catalogue and exclusive arrangements with third-party publishers. There were over 280 exclusive first- and third-party titles on PlayStation in 2021, nearly five times as many as on Xbox. Sony has announced plans to launch “*more than ten live service games from PlayStation Studios by FY2025*”¹⁵² and to significantly increase investment in new games.¹⁵³ Sony has stated that its growth both organically and through acquisitions places Sony in “*a virtuous cycle where success begets success*”.¹⁵⁴
- (e) **There are a wide range of studios that have produced a hit title:** Sony will also continue to have the ability to work with third-party developers. Studios that have produced hit games include (among others): Epic Games (*Fortnite*); Riot Games (*League of Legends*); EA (*Apex Legends*, *Battlefield*, *FIFA*); BioWare (*Dragon Age*, *Mass Effect*); Konami (*Metal Gear*, *Silent Hill*); Take-Two Interactive (*2K*, *Grand Theft Auto*, *Red Dead Redemption*); Ubisoft (*Far Cry*, *Assassin’s Creed*); Sega Games (*Bayonetta*, *Sonic the Hedgehog*); Square Enix (*Final Fantasy*, *Life is Strange*); Capcom (*Resident Evil*, *Monster Hunter*, *Street Fighter*); Embracer (*Borderlands*, *Valheim*, *Deus Ex*, *Tomb Raider*); Bandai Namco (*Elden Ring*, *Dragon Ball Z*); Deep Silver (*Dead Island*, *Saints Row*); Warner Bros. Interactive (*Harry Potter*, *Mortal Kombat*, *Batman*); Koei Tecmo (*Attack on Titan*, *Dynasty Warriors*); CD Projekt (*Cyberpunk 2077*); DICE (*Battlefield*); Remedy Entertainment (*Max Payne*); and Valve Corporation (*Dota*, *Left 4 Dead*, *Counter-Strike*).

¹⁵² Sony, Corporate Report 2022, page 10 (link available [here](#)).

¹⁵³ Sony, Corporate Strategy Meeting, 18.05.2022, slide 29 “Expanding Our IP: Increasing New IP Investment” (link available [here](#)).

¹⁵⁴ Game Developer, “Sony will keep acquiring game studios to sustain “virtuous cycle” of success”, 04.04.2022 (link available [here](#)).

- (f) **New titles often reach the top of game-time charts:** In addition to a wide range of existing popular games (see below), evidence from Xbox telemetry data shows that new titles often reach the top of game-time charts. Figure 36 below shows how many of the top 25 Xbox games each month are first-time newly released titles. Each month, at least [X] new titles are released on Xbox, and over the past five years almost [X] of those new titles rose into the top 25 games, [X]% within [X] of their release. Examples include [X]. Microsoft believes that the same would be true of PlayStation. There is no reason to believe that Sony, which has a larger installed base and higher active user counts, would not be able to invest in or acquire similarly popular new content.

Figure 36: First time and newly released titles appearing in the top 25 most played list by month on Xbox

[X]

Source: [X].

- (g) **Sony has more than ample time to adapt its commercial strategy:** With access to *Call of Duty* guaranteed through to [X] under the existing contract with Activision (and through at least the end of 2027 if it were to accept Microsoft's current contractual offer), Sony has more than sufficient time to ensure that its console platform and content portfolio is competitively positioned to withstand any impact from a hypothetical foreclosure strategy.

- (iii) ***There are many alternative franchises with Call of Duty's brand awareness and popularity amongst gamers***

3.44 The Phase 1 Decision suggests that there are few, if any, alternative franchises with *Call of Duty's* level of brand awareness and popularity amongst gamers.¹⁵⁵ This is not supported by the evidence. In particular:

- (a) ***Call of Duty is not the most popular franchise:*** *Fortnite* has consistently been the most popular game globally since its entry into the market in 2017. *Call of Duty's* popularity changes significantly over time, depending on the relevant release. And there are many other franchises in addition to *Fortnite*, such as *Grand Theft Auto*, *Tom Clancy*, *FIFA* and *NBA 2K* that have matched *Call of Duty*.

Figure 37: Top 7 franchises on Xbox over-time

[X]

Source: [X].

- (b) ***Call of Duty is consistently outranked in Metacritic user rankings:*** Metacritic, the leading provider of game rankings, provides user score rankings by platform for games released each year.¹⁵⁶ *Call of Duty* is consistently outranked by other games in reviews on PlayStation. For example, since the PlayStation 5 was launched in 2020, *Call of Duty: Black Ops Cold War* was ranked number 18 in 2020 (no. 126 in all-time scores) and *Call of Duty:*

¹⁵⁵ Phase 1 Decision, paragraph 173(c).

¹⁵⁶ Metacritic website (link available [here](#)).

Vanguard was ranking number 73 in 2021 (no. 159 in the all-time scores). *Call of Duty* similarly does not fall in the top 20 titles for PlayStation 4.

Table 4: Metacritic user rankings and scores for PlayStation 5

No.	2020	2021	2022 (YTD)
1	Demon's Souls (92)	Hades (93)	Elden Ring (96)
2	Devil May Cry 5 (89)	Tony Hawk's (90)	Stanley Parable (89)
3	Mortal Kombat 11 (88)	Final Fantasy XIV (90)	Last of Us (88)
4	Marvel's Spider Man (85)	Final Fantasy VII (89)	Horizon Forbidden West (88)
5	Warframe (85)	Disco Elysium (89)	Gran Turismo 7 (87)
6	Assassin's Creed (84)	Ratchet & Clank (88)	Uncharted (82)
7	Overcooked! (84)	It Takes Two (88)	Destiny 2 (87)
8	Astro's Playroom (83)	Deathloop (88)	Inscription (87)
9	WRC 9 FIA (82)	Ghost of Tsushima (87)	Cult of the Lamb (86)
10	Planet Coaster (81)	Nioh Collection (87)	Crusader Kings III (85)
11	DIRT 5 (80)	Guilty Gear (87)	OlliOlli World (84)
12	Sackboy (79)	Chicory (87)	Stray (83)
13	NBA 2K21 (79)	Tales of Arise (87)	A Plague Tale: Requiem (83)
14	Observer: System Redux (77)	Crash Bandicoot (86)	Two Point Campus (82)
15	The Pathless (77)	Yakuza (86)	Lego Star Wars (82)
16	Immortals Fenix Rising (77)	Returnal (86)	This War of Mine (82)
17	Puyo Puyo Tetris 2 (76)	Chivalry 2 (85)	Tinykin (82)
18	Call of Duty: Black Ops CW (76)	Control (85)	GTA V (81)
19	Bugsanx (75)	Forgotten City (85)	FAR: Changing Tides (81)
20	FIFA 21 NXT LVL (74)	Death Stranding (85)	SIFU (81)

Source: Metacritic

- (c) **Call of Duty is consistently outranked in user votes of best games on PlayStation:** PlayStation gamers voting in the end of year “game of the year” poll run by Sony have consistently chosen games other than *Call of Duty* as their game of the year or most anticipated game. As set out in the table below, PlayStation gamers have in most years voted for games which are Sony first- or third-party exclusive games.

Table 5: 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</i>	<i>n/a</i>	<i>inFAMOUS Second Son</i>
2014	<i>Destiny</i>	<i>n/a</i>	<i>Uncharted 4: A Thief's End</i>
2015	<i>The Witcher 3: Wild Hunt</i>	<i>n/a</i>	<i>Dark Souls III</i>
2016	<i>Uncharted 4: A Thief's End</i>	<i>n/a</i>	<i>The Last of Us Part II</i>
2017	<i>Horizon Zero Dawn</i>	<i>n/a</i>	<i>God of War</i>
2018	<i>God of War</i>	<i>n/a</i>	<i>Kingdom Hearts 3</i>
2019	<i>Death Stranding</i>	<i>n/a</i>	<i>Cyberpunk 2077</i>
2020	<i>The Last of Us Part II</i>	<i>Marvel's Spider-Man: Miles</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. Sony PlayStation exclusives are highlighted in grey.

- (d) **Call of Duty is consistently outranked in reviews of best games:** *Call of Duty* is consistently outranked by other publishers' games in reviews of best games. For example:

- **IGN ranking “The Top 100 Video Games of All Time”:** The IGN ranking compiled the list using the following key metrics: “*how great a game it was when it launched, how fun it is to still play today, and how much the game reflects the best in its class.*”¹⁵⁷ *Call of Duty 4: Modern Warfare* is listed only at number 63.
 - **Business Insider’s ranking of “The 50 best video games of all time, according to critics”:** *Call of Duty* is not ranked.¹⁵⁸
 - **USA Today’s “100 best video games of all time, ranked”:** *Call of Duty* is ranked as a distant ninety-one. The best three games identified in this list are *Shadow of the Colossus* (Sony), *Castlevania: Symphony of the Night* (Konami) and *Metal Gear Solid* (Konami).¹⁵⁹
 - **GameRant list of “10 Franchises With The Most Games In Metacritic's Top 200 List”:** *Call of Duty* is not ranked.¹⁶⁰
 - **Fiction Horizon’s “45 Best Cross-Platform Games (Free & Paid)”:** *Call of Duty* does not make it to the top of the list and is ranked as number nine.¹⁶¹
 - **Wikipedia:** Wikipedia lists games “*that multiple reputable video game journalists or magazines have considered to be among the best of all time*” from 1971 to 2018. *Call of Duty* was last mentioned in 2007.¹⁶²
- (e) **Sony and Nintendo have more best-selling games in the UK:** While *Call of Duty* is a popular title, industry reports show that other buy-to-play titles such as *FIFA* consistently sell more units in the UK. In addition, *Grand Theft Auto* consistently matches sales of *Call of Duty*. Indeed, looking at the last 3 years, Sony (6 titles) and Nintendo (8 titles) have more titles in the list of UK top buy-to-play titles than Microsoft (0 titles) and Activision (3 titles).
- In 2022, Sony had 2 titles (*i.e.*, *Horizon Forbidden West* and *Gran Turismo Sport*), Nintendo had 3 (*i.e.*, *Nintendo Switch Sports*, *Pokemon Legends* and *Mario Kart 8 Deluxe*), whereas Microsoft and Activision had none.

Figure 38: Extract from IDG August 2022 Games Report

[]

Source: []

- In 2021, Sony had 1 title (*i.e.*, *Spider-Man: Miles Morales*), Nintendo had 3 (*i.e.*, *Mario Kart 8 Deluxe*, *Pokemon Brilliant Diamond*, *Animal*

¹⁵⁷ IGN, “*The Top 100 Video Games of All Time*”, 21.05.2022 (link available [here](#)).

¹⁵⁸ Business Insider, “*The 50 best video games of all time, according to critics*”, 07.03.2022 (link available [here](#)).

¹⁵⁹ USA Today, “*The 100 best video games of all time, ranked*”, 10.09.2022 (link available [here](#)).

¹⁶⁰ GameRant, “*10 Franchises With The Most Games In Metacritic's Top 200 List, Ranked*”, (link available [here](#)).

¹⁶¹ Fiction Horizon, “*45 Best Cross-Platform Games (Free & Paid)*”, 16.10.2022 (link available [here](#)).

¹⁶² Wikipedia, “*List of video games considered the best*” (link available [here](#)).

Crossing: New Horizons), Microsoft had none and Activision had 2 (i.e., *Call of Duty: Vanguard* and *Call of Duty: Black Ops Cold War*).

Figure 39: Extract from IDG March 2022 Games Report

[✂]

Source: [✂]

- In 2020, Sony had 3 titles (i.e., *The Last of Us*, *Ghost of Tsushima*, and *Final Fantasy VII* remake as a PlayStation exclusive), Nintendo had 2 titles (i.e., *Mario Kart 8 Deluxe* and *Animal Crossing: New Horizons*). Microsoft had none and Activision had 1 (i.e., *Call of Duty: Modern Warfare*).

Figure 40: Extract from IDG Console Gaming Market Update

[✂]

Source: [✂]

- (f) **Call of Duty does not drive social media conversations:** 2021 “was another record year for gaming chatter on Twitter, as Twitter continued to serve as the go-to place for game publishers, gaming media, popular streamers and entertainers, esports leagues, teams, players and commentators”. There were more than 2.4 billion tweets about gaming in 2021. And yet, as the figure below shows, no *Call of Duty* game made it to the top ten “Most Talked About Video Games” on Twitter last year.¹⁶³ Similarly looking across other widely used social media channels, *Fortnite* and *Grand Theft Auto*, as well as more recently *Elden Ring* are really driving social media interaction.

Figure 41: Most tweeted-about games in 2021



Source: Twitter

¹⁶³ Twitter Blog, “A banner year for gaming on Twitter in 2021”, 10.01.2022 (link available [here](#)).

- 3.45 The evidence shows how games like *Fortnite* in 2017, *Apex Legends* in 2019 and *Elden Ring* in 2022 can rapidly become worldwide hits on the back of social media commentary on platforms such as Twitter, YouTube, and Reddit.

Figure 42: Analysis of selected franchise mentions and timeline

[§<]

Source: [§<]

(iv) Sony is Microsoft's closest competitor in gaming consoles

- 3.46 The Issues Statement suggests that Sony is Microsoft's closest competitor in gaming consoles. By contrast, the Issues Statement contends that Nintendo offers differentiated hardware and content aimed primarily at a different (e.g., more 'family-friendly') customer segment.¹⁶⁴ The suggestion that Xbox, PlayStation and Nintendo are not close competitors is incorrect.¹⁶⁵

(a) **Nintendo offers a broader range of mature content than Xbox:** The CMA has mischaracterised the Nintendo Switch as being predominantly for families. Such a characterisation neglects the fact that more mature/adult games are available on the Switch and are actively marketed, including on Switch's YouTube channel. These games include *Apex Legends*, *The Witcher 3*, *Doom Eternal*, *Wolfenstein II: The New Colossus*, *Cult of the Lamb*, *NieR: Automata The End of YoRHa Edition*, *Alan Wake Remastered*, *Crysis Remastered*, *Outlast*, *Little Nightmares*, *Five Nights at Freddy's* and *Life is Strange*.

(b) **Recent Switch exclusives have received mature ratings:** Several of Nintendo Switch's latest exclusives have been distinctly non "family-friendly" games. *Bayonetta 3*, a third-party action game by Platinum Games, was rated as Mature by the Entertainment Software Rating Board ("ESRB") for violence, blood and gore, partial nudity and strong language.¹⁶⁶ Likewise, third-party exclusive *Shin Megami Tensei V*, released in November last year, was rated Mature by the ESRB for blood, partial nudity, sexual themes and violence, noting that "[t]he game depicts several female monsters with partially exposed breasts and buttocks; one creature appears with a phallic-shaped head and torso. A handful of demons (e.g., Succubus, Incubus) are described with sexual characteristics The words "f**k" and "sh*t" appear in the game."¹⁶⁷ Despite this content clearly not being "family-friendly", both games have been actively marketed by Nintendo including at Nintendo Direct presentations where the company markets and presents its latest content. This is evidence that Nintendo Switch is not just a console aimed at the family friendly customer segment but more broadly at a diverse group of gamers across all demographics.¹⁶⁸

¹⁶⁴ Issues Statement, paragraph 30(d).

¹⁶⁵ In particular, the different console platforms compete intensely for largely the same target audience. Indeed, the CMA's position in the Phase 1 Decision is contradicted by its statement elsewhere that "*Xbox operates in a market which is concentrated with three leading providers*". [§<].

¹⁶⁶ Nintendolife, "*Bayonetta 3 Gets "Mature" ESRB Rating For Nudity, Gore, And In-Game Purchases*" 12.07.2022 (link available [here](#)).

¹⁶⁷ ESRB, "*Shin Megami Tensei V*", (link available [here](#)).

¹⁶⁸ The Parties further note that Sony's suite of first-party exclusives also features games marketed as "family-friendly" such as *Astro's Playroom*, *Ratchet and Clank A Rift Apart*, *Sackboy: A Big Adventure*, *Concrete Genie* and *Kena and the Bridge of Spirits*.

Figure 43 – screenshot from the latest *Bayonetta 3* game



- (c) **Nintendo offers a broad range of popular console games:** While *Call of Duty* has not been released on the Nintendo Switch, other major games such as *Apex Legends*, *Fortnite* and *Doom Eternal* have released on the Nintendo Switch and Phil Spencer announced that he would “love to see [*Call of Duty*] on Switch.”¹⁶⁹ Nintendo has recently partnered with Ubitus to release Capcom’s recent action horror game, *Resident Evil Village* on the Nintendo Switch, utilising Ubitus’ cloud streaming technology to play the game on the Nintendo Switch with levels of graphical fidelity comparable to that found on a high-level PC, PlayStation 5 or Xbox Series X.¹⁷⁰ Other games available via Nintendo Switch Cloud include *Marvel’s Guardians of the Galaxy*, *A Plague Tale: Requiem* and *Dying Light 2: Stay Human*.
- (d) **Other consoles also offer different ways of playing games:** In addition, the CMA’s assertion that Nintendo competes less closely with either of Sony or Microsoft because of its focus on “innovative ways of playing (eg the *Wii Fit Board*)” does not acknowledge that: (i) the *Wii Fit Board* was an accessory for the Nintendo Wii, Nintendo’s console offering in 2007; (ii) while the Nintendo Switch does offer innovative ways of playing, Sony has offered similar innovations, including advertising fitness games via its PlayStation VR;¹⁷¹ and (iii) the Nintendo Switch nevertheless has a focus on being “the home console gaming experience.”¹⁷² Nintendo’s use of innovation should not detract from the fact that it is still offering a console experience that competes with Xbox and Sony, and has been able to successfully do so without *Call of Duty* being on its platform (despite previous Nintendo consoles having *Call of Duty* content).
- (v) ***Sony’s existing contractual protections (from existing arrangements with Activision) would not undermine Microsoft’s ability to engage in partial or total foreclosure***

¹⁶⁹ NME, “Phil Spencer would “love” to bring ‘Call of Duty’ to Nintendo Switch”, 27.10.2022 (link available [here](#)).
¹⁷⁰ PRNewsWire, “Capcom collaborates with Ubitus, bringing Resident Evil Village to Nintendo Switch, 13th Sept preorder starts”, 28.10.2022 (link available [here](#)).
¹⁷¹ PlayStation, “Work up a sweat with great fitness games for PS4 and PS5” (link available [here](#)).
¹⁷² See the Nintendo Switch homepage (link available [here](#)).

3.47 While the CMA has acknowledged that the existing contracts may provide Sony with some protection at least in the short term.¹⁷³ The Issues Statement suggests that Sony's existing contractual protections (from existing arrangements with Activision) would not undermine Microsoft's ability to engage in partial or total foreclosure on the basis that such contractual protections (i) may not account for all the possible foreclosure mechanisms that could be available to the Merged Entity, (ii) may be renegotiated or terminated early, or (iii) may not be enforced depending on the respective parties' respective bargaining positions.¹⁷⁴ The CMA cannot however entirely disregard Sony's existing contractual protections, which have proven effective in the context of previous acquisitions and which Sony itself has relied upon.

- (a) **Microsoft complied with the contractual protections under the agreements between ZeniMax and Sony:** As a result of the contractual protections in the agreements with Sony, the first two ZeniMax titles launched post-acquisition were released only on PlayStation and PC. *Deathloop* was released on PlayStation on 14 September 2021, with a high Metacritic rating of 88.¹⁷⁵ Microsoft complied with the exclusivity period in its contract with Sony and only launched *Deathloop* on Xbox on 20 September 2022. *Ghostwire: Tokyo* was released on PlayStation on 22 March 2022 and has not yet launched on Xbox.
- (b) **Contractual protections give Sony the ability to protect its position:** Conduct following the ZeniMax acquisition shows that Sony, as the largest console platform, is able to protect its commercial position, even where circumstances change. As part of its exclusivity agreement for *Deathloop* and *Ghostwire: Tokyo*, Sony [S&]. Sony did not include *Deathloop* in PlayStation Plus Extra/Premium until September 2022.
- (c) **Sony expects Microsoft to abide by its contractual agreements:** The CMA must give appropriate weight to Sony's public statements that "[w]e expect that Microsoft will abide by contractual agreements and continue to ensure Activision games are multiplatform".¹⁷⁶

C. No incentive to withdraw *Call of Duty*

3.48 The Issues Statement suggests that the Merged Entity may have the incentive to foreclose rival console gaming platforms on the basis that: (i) financial modelling of the Merger suggests that the Merged Entity's incentive to foreclose Sony may be considerably stronger than suggested by the Parties; (ii) Microsoft's past business practices suggest that it may be willing to make losses in the short term in order to build scale and increase its user base; (iii) Microsoft could engage in a partial foreclosure strategy, which would allow it to capture the most dedicated *Call of Duty* gamers, whilst continuing to generate revenues from less dedicated PlayStation *Call of Duty* gamers;

¹⁷³ Phase 1 Decision, paragraph 175.

¹⁷⁴ Issues Statement, paragraph 30(e).

¹⁷⁵ Metacritic website (link available [here](#)).

¹⁷⁶ The Wall Street Journal, "Sony Expects Microsoft to Keep Activision Games Multiplatform", 20.01.2022 (link available [here](#)).

and (iv) Microsoft may not be deterred from engaging in total or partial foreclosure strategies by the prospect of reputational damage to Xbox or *Call of Duty*.¹⁷⁷

3.49 As noted above, Microsoft’s incentives to continue distributing *Call of Duty* to Sony are clear from the deal valuation, its public statements and correspondence with Sony, public statements by Sony, the strategic rationale for the Merger, and Microsoft’s internal documents in relation to the Merger. The Phase 1 Decision fails properly to consider the evidence that Microsoft’s commercial incentives are to continue broadly distributing *Call of Duty*.

(i) Microsoft’s incentives are evidenced by its valuation model, internal documents, public and private statements

3.50 First, Microsoft does not intend to remove *Call of Duty* from PlayStation or to degrade access to the franchise. The evidence on this is clear and includes Microsoft’s deal valuation, strategic rationale for the Merger, internal documents, public statements and correspondence with Sony. There is no evidence that Microsoft has considered withdrawing *Call of Duty* from PlayStation, as it has not.

(a) **Microsoft’s deal valuation assumes that it will continue to ship *Call of Duty* on PlayStation:** It is clear from Microsoft’s valuation model that Microsoft’s intent is to [REDACTED].¹⁷⁸ [REDACTED].¹⁷⁹

(b) **Microsoft’s deal rationale is about moving the Xbox business beyond consoles [REDACTED]:** The head of Microsoft’s Gaming Business, Phil Spencer has spoken to the CMA on numerous occasions to explain the strategy behind the Merger.

- [REDACTED], Phil Spencer has consistently explained it is imperative for Microsoft to establish a presence in mobile gaming and why the Merger is a key part of this strategy, particularly given Activision’s King division and the success of *Call of Duty: Mobile*.¹⁸⁰ Phil Spencer has also articulated this strategy publicly.¹⁸¹
- The trends underpinning Microsoft’s strategy are well-understood across the gaming industry. Sony is also pursuing an “aggressive” mobile strategy.¹⁸²

¹⁷⁷ Issues Statement, paragraph 31.

¹⁷⁸ FMN, Annex 002.2 - [REDACTED] and Annex 002.3 – [REDACTED].

¹⁷⁹ [REDACTED].

¹⁸⁰ [REDACTED].

¹⁸¹ Microsoft #TechTalk: The gaming industry in Europe, 07.10.2022 (link available [here](#)); Wall Street Journal, “Microsoft’s Videogame Boss Seeks to Break the ‘Duopoly’ of Apple, Google”, 26.10.2022 (link available [here](#)).

¹⁸² Sony, Corporate Strategy Meeting, 18.05.2022, slide 9 “Gaming Category Growth” and slide 35 “Mobile Strategy: Aggressive Growth Plans” (link available [here](#)). Sony acquired Savage Game Studios, a mobile games studio marking the official launch of its PlayStation Studios Mobile division. PlayStation blog, “Welcoming Savage Game Studios + Expanding Our Community”, 29.08.2022 (link available [here](#)).

- This strategy involves significant risk and uncertainty given the gate-keeper roles which Apple and Google play in respect of mobile gaming.¹⁸³
 - It is clear from the deal rationale and the deal valuation model, [§<].
 - It would not be rational for Microsoft to [§<].
- (c) **Microsoft’s internal documents in relation to the Merger confirm this:** [§<].¹⁸⁴
- (d) **Deal rationale is relevant to a consideration of incentives:** This evidence is overlooked entirely in the Phase 1 Decision. However, as the Merger Assessment Guidelines make clear, in assessing incentives to foreclose the CMA must take an undertaking’s “*business strategy*” and “*deal rationale*” into account. Just as “*if the merger firms’ internal documents show that it would be strategically beneficial to stop supplying rivals, it may not be necessary to try to infer their behaviour from their financial incentives*”, it is equally the case that where internal documents evidence a strategic rationale and intent to continue supplying rivals this must be given significant weight in the CMA’s assessment.¹⁸⁵
- (e) **Microsoft’s public statements are consistent and must be given weight:** Microsoft has no intention to take *Call of Duty* away from gamers and senior Microsoft executives have repeatedly and publicly committed not to do so.
- Brad Smith, President & Vice Chair of Microsoft stated: “*we have committed to Sony that we will also make [Call of Duty and other popular Activision titles] available on PlayStation **beyond the existing agreement and into the future** so that Sony fans can continue to enjoy the games they love*” (emphasis added).¹⁸⁶
 - Phil Spencer, CEO Microsoft Gaming stated: “[*h*]ad good calls this week with leaders at Sony. I confirmed our intent to honor all existing agreements upon acquisition of Activision Blizzard **and our desire to keep Call of Duty on PlayStation**” (emphasis added).¹⁸⁷
 - Matt Booty, Xbox Studios head stated: “*If we acquire a game that comes with a big community across a number of platforms, the last thing we want to do is take something away. If anything, we feel that it’s our job to be caretakers, to be shepherds, to continue to build and nurture that community, not to cut it up into pieces and try to take some of it away*”.¹⁸⁸

¹⁸³ CMA, *Mobile Ecosystems: Market Study Final Report*, 10.06.2022 (link available [here](#)).

¹⁸⁴ For example, **FMN, Annex 002.1** - [§<].

¹⁸⁵ Merger Assessment Guidelines, paragraph 7.19(a).

¹⁸⁶ “*Adapting ahead of regulation: a principled approach to app stores*”, 09.02.2022, Brad Smith - President & Vice Chair, Microsoft (link available [here](#)).

¹⁸⁷ Tweet from Phil Spencer, 20.01.2022 (link available [here](#)).

¹⁸⁸ IGN, “*Microsoft’s Activision Blizzard Acquisition: Execs Discuss Exclusives and Game Pass*”, 09.06.2022 (link available [here](#)).

- Phil Spencer stated: *“In January, we provided a signed agreement to Sony to guarantee Call of Duty on PlayStation, with feature and content parity, for at least several more years beyond the current Sony contract, an offer that goes well beyond typical gaming industry agreements”*.¹⁸⁹
 - Frank Shaw, Microsoft’s corporate vice president of communications stated: *“It makes zero business sense for Microsoft to remove Call of Duty from PlayStation given its market leading console position.”*¹⁹⁰
 - Phil Spencer stated: *“The primary thing that attract us to ABK...is honestly their mobile strategy.”*¹⁹¹
 - Phil Spencer stated: *“Call of Duty specifically will be available on PlayStation. I’d love to see it on the Switch, I’d love to see the game playable on many different screens. Our intent is to treat Call of Duty like Minecraft”*.¹⁹²
- (f) The Phase 1 Decision fails to explain why, in the CMA’s view, Microsoft would make such commitments publicly and privately, if it had no intention of honouring them. Microsoft would not do this. The CMA cannot simply brush this substantial and consistent body of evidence aside and must take this into account.¹⁹³
- (g) **Microsoft has backed up its statements with a contractual offer:** Microsoft has backed up its public commitments to Sony with a binding contractual offer to do so.¹⁹⁴
- [§<].¹⁹⁵
 - [§<].
 - [§<].¹⁹⁶
 - [§<].¹⁹⁷
- (h) **Sony’s public statements confirm that Sony expects Microsoft to keep *Call of Duty* on PlayStation:** Following the announcement of the Merger, Sony informed The Wall Street Journal that *“[w]e expect that Microsoft will abide by contractual agreements and continue to ensure Activision games are*

¹⁸⁹ The Verge, *“Microsoft will keep Call of Duty on PlayStation for ‘several more years’ beyond existing deal”*, 02.09.2022 (link available [here](#)).

¹⁹⁰ Wall Street Journal, *“Microsoft’s Real Game With Activision”*, 23.09.2022 (link available [here](#)).

¹⁹¹ Microsoft #TechTalk: The gaming industry in Europe, 07.10.2022 (link available [here](#)); Wall Street Journal, *“Microsoft’s Videogame Boss Seeks to Break the ‘Duopoly’ of Apple, Google”*, 26.10.2022 (link available [here](#)).

¹⁹² IGN, *“Phil Spencer Would ‘Love’ to See Call of Duty on Switch “Our intent is to treat Call of Duty like Minecraft.”*, 26.10.2022 (link available [here](#)).

¹⁹³ Phase 1 Decision, paragraph 175.

¹⁹⁴ The Verge, *“Microsoft will keep Call of Duty on PlayStation for ‘several more years’ beyond existing deal”*, 02.09.2022 (link available [here](#)).

¹⁹⁵ FMN, Annex 004 - [§<].

¹⁹⁶ FMN, Annex 004 - [§<].

¹⁹⁷ FMN, Annex 013 - [§<].

multiplatform".¹⁹⁸ Similarly, former Sony executive, Jack Tretton commented that "I don't think it would make financial sense for them to take a *Call of Duty* and make it exclusive to Xbox platforms" and "the way to maximize ..profitability is to do a multi-platform footprint".¹⁹⁹ In seeking to leverage the merger review process, Sony has more recently stated that Microsoft's offer was "inadequate on many levels". However, Sony has not suggested that Microsoft will not abide by its contractual obligations.

(ii) Microsoft's past business practices are consistent with Microsoft's stated position

- 3.51 Second, as noted in Microsoft's deal model, "continued sales of Activision Blizzard's portfolio on all platforms (console, PC, mobile)" accounted for [X] of the estimated "Value to Microsoft" from the Merger.²⁰⁰ Given that ca. [X]% of *Call of Duty*'s total MAUs (and ca. [X]% of console MAUs) are on PlayStation, a hypothetical foreclosure strategy would involve putting at risk a significant portion of Activision's revenues. The consequences would be even more severe in the EMEA region where ca. [X]% of *Call of Duty*'s total MAUs (and ca. [X]% of console MAUs) are on PlayStation. This would be a commercially irrational strategy, in particular in circumstances where Microsoft could not conceivably expect to foreclose Sony from the market.²⁰¹

The Phase 1 Decision misrepresents the traditional console business model as an indicator that Microsoft would withhold *Call of Duty* despite financial losses

- 3.52 The Phase 1 Decision does not respond to these basic, intuitive points, instead focusing its attention on a critique of the financial modelling put forward by Microsoft (addressed further below) and basing its overall assessment of Microsoft's incentives on the high-level assertion that "Microsoft has shown itself to be willing to make losses in the short term in order to build scale and increase its user base".²⁰²
- 3.53 The Phase 1 Decision makes this claim on the basis that Xbox has confirmed publicly that it makes a loss on the sale of console hardware (with this loss made up for through game sales and other transactional revenues).²⁰³ However, as the same article cited by the CMA notes, this "follows the traditional console business model" which has also been adopted by Sony²⁰⁴, whereby profitability depends on earning revenues from the

¹⁹⁸ The Wall Street Journal, "Sony Expects Microsoft to Keep Activision Games Multiplatform", 20.01.2022 (link available [here](#)). Following the announcement of the Merger, Sony Group Corporation informed *The Wall Street Journal* that "[w]e expect that Microsoft will abide by contractual agreements and continue to ensure Activision games are multiplatform".

¹⁹⁹ IGN, "Why Former PlayStation Boss Jack Tretton Is Trying To Buy a Billion Dollar Game Company", 07.04.2022 (link available [here](#)) where the former president of Sony Computer Entertainment America, Jack Tretton, has states that: "I don't think you're going to see titles become platform exclusive...I don't think it would make financial sense for them to take a *Call of Duty* and make it exclusive to Xbox platforms. And they certainly haven't behaved that way in the past and I think that's true of all the other mergers and acquisitions that you see that I think you'll continue to see multi-platform development. It'll just be done under the wing of the acquiring company, but they're looking for that company's business in profitability to be maximized. And the way to maximize that profitability is to do a multi-platform footprint (emphasis added).

²⁰⁰ Issues Meeting Slides, slide 25.

²⁰¹ Windows Central, "Sony knows it won't lose *Call of Duty* to Xbox exclusivity. Here is what it's really about", 15.09.2022 (link available [here](#)).

²⁰² Phase 1 Decision, paragraph 190.

²⁰³ Phase 1 Decision, paragraph 190 and footnote 207.

²⁰⁴ "Microsoft confirms it's never turned a profit on sale of Xbox consoles", 06.05.2021 (link available [here](#)), cited at footnote 207 of the Phase 1 Decision.

sale of first- and third-party games for the console. Indeed, this is a model that has been well known in competition law and economics for the past three decades.²⁰⁵

- 3.54 There is a fundamental difference between the losses that Microsoft is prepared to bear in selling a single console – in the expectation that (some) gamers will purchase enough content and services for Microsoft to turn a profit overall – and a hypothetical decision by Microsoft to forgo revenues of ca. [X] in the hope of recouping some of these selling consoles to those (likely very few) PlayStation gamers willing to purchase an Xbox to retain access to *Call of Duty* – and in the hope that they would engage “enough” with the Xbox to also recoup the losses made on those console sales. Any such proposal would be rejected by [X] as too uncertain and speculative, particularly in the current business environment.²⁰⁶

Past acquisitions confirm Microsoft’s incentives to keep *Call of Duty* cross-platform

- 3.55 Microsoft’s incentives to continue to make *Call of Duty* available cross-platform are also clear from its business strategy following prior acquisitions.

(a) ***Minecraft* is the most comparable franchise to *Call of Duty*:** The most directly comparable game franchise previously acquired by Microsoft is Mojang’s *Minecraft*.

- *Minecraft*, like *Call of Duty*, 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.
- At the time of the acquisition, Phil Spencer stated that “we plan to continue to make *Minecraft* available across platforms – including iOS, Android and PlayStation, in addition to Xbox and PC”.²⁰⁷
- Microsoft not only kept *Minecraft* available on PlayStation after its 2014 acquisition (including new versions), but it has also expanded platform access to the franchise to over 20 devices, with further devices coming in 2023.²⁰⁸
- As well as benefiting gamers, *Minecraft*’s multi-platform strategy has been a significant financial success, with over 275 million copies sold to date and a peak of 141 million MAU players in August 2021.²⁰⁹

²⁰⁵ See the seminal contribution by Shapiro, “Aftermarkets and consumer welfare: making sense of Kodak”, 1995, *Antitrust Law Journal* (link available [here](#)).

²⁰⁶ Financial Times, “Microsoft warns of cloud computing slowdown”, 26.10.2022 (link available [here](#)) states that “Microsoft warned on Tuesday of a marked slowdown in its cloud computing business as large customers pause their spending in the face of a slowing economy, sending its shares down 7 per cent in after-market trading”.

²⁰⁷ Microsoft blog, “Minecraft to Join Microsoft”, Phil Spencer, Head of Xbox, 15 September 2014 (link available [here](#)).
²⁰⁸ In particular: (i) *Minecraft* was released on Nintendo Wii U on 17 December 2015 and subsequently on Nintendo Switch on 12 January 2017; (ii) *Minecraft Dungeons* was released in 2020 on Xbox, PC, PlayStation, and Nintendo Switch; and (iii) *Minecraft Legends* was announced at E3 2022, and will be available on Xbox, PC, PlayStation, and Nintendo Switch. See also Microsoft, Site Visit Slides, 17 October 2022, page 54.

²⁰⁹ Microsoft, “Minecraft: Connecting More Players Than Ever Before”, 18.05.2020 (link available [here](#)); Polygon, “Minecraft PC reaches 15M copies sold, total sales approaching 50M”, 29.04.2014 (link available [here](#)). See also Microsoft, Site Visit Slides, 17.10.2022, page 53.

(b) **Microsoft has complied with the statements it made on the ZeniMax acquisition:** Microsoft has never taken an existing game away from a rival platform post-acquisition and has complied with the statements made in the filings for the ZeniMax acquisition.

- Microsoft stated that it would “*honor all of ZeniMax’s obligations to continue to make its current games available on other gaming hardware, including two planned console exclusive releases for the Sony PlayStation 5: Deathloop and Ghostwire: Tokyo*”.²¹⁰ The games were released on an exclusive basis on PlayStation with high Metacritic ratings.²¹¹
- Microsoft has not taken any existing ZeniMax titles which were shipping on PlayStation on 9 March 2021 (the date when it closed its acquisition of ZeniMax) off PlayStation or other platforms.²¹²

Table 6: Microsoft has continued to ship ZeniMax titles on PlayStation

Game	Available on PlayStation on 9 March 2021?	Still available today?
<i>Fallout 76</i>	Yes	Yes
<i>Elder Scrolls V</i>	Yes	Yes
<i>The Elder Scrolls Online</i>	Yes	Yes
<i>Wolfenstein</i>	Yes	Yes
<i>Doom Eternal</i>	Yes	Yes
<i>Quake Champions</i>	Yes	Yes
<i>Rage 2</i>	Yes	Yes
<i>Dishonoured 2</i>	Yes	Yes
<i>Prey</i>	Yes	Yes
<i>The Evil Within</i>	Yes	Yes

- Microsoft was clear that “[X]”.²¹³ The first Xbox and PC exclusive games will be *Starfield* and *Redfall* (both entirely new games) which are scheduled to be released in 2023 (*i.e.*, some 2 years after the ZeniMax acquisition).

(c) **Decisions regarding mid-sized games are not evidence of Microsoft’s incentives as they relate to *Call of Duty*:** The games that the Phase 1 Decision cites as evidence of prior conduct are fundamentally different to *Minecraft* or *Call of Duty* and cannot be used as evidence of Microsoft’s “broad incentives” as they relate to *Call of Duty*.²¹⁴

²¹⁰ Microsoft/ZeniMax Form CO, paragraph 16.

²¹¹ *Deathloop* was released on Playstation on 14 September 2021 and has a Metacritic rating of 88 (link available [here](#)) and *Ghostwire: Tokyo* was released on Playstation on 22 March 2022 and has a Metacritic rating of 75 (link available [here](#)). Microsoft complied with the exclusivity period in the contract with Sony and only launched *Deathloop* on Xbox on 20 September 2022. *Ghostwire: Tokyo* is not yet available on Xbox.

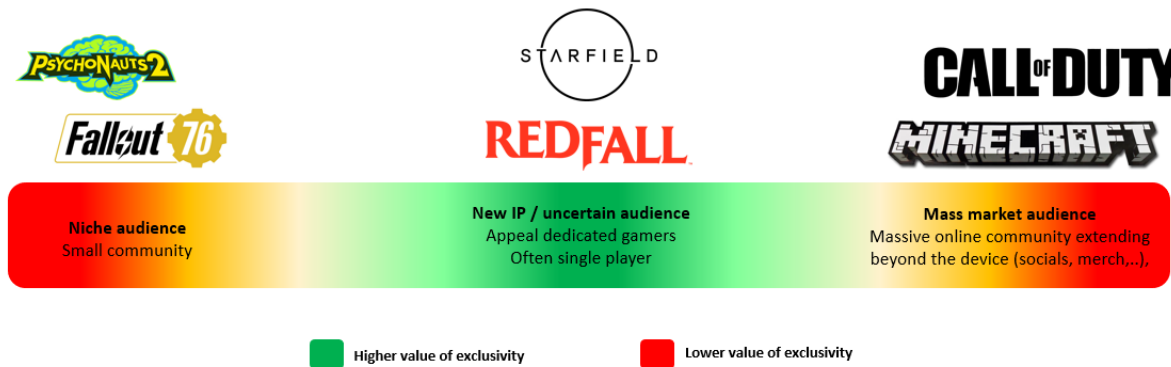
²¹² For additional information related to the availability of ZeniMax games on other platforms, including PlayStation, see Microsoft’s response to CMA S109 dated 26 September 2022, Question 43.

²¹³ Microsoft/ZeniMax Form CO, paragraph 16.

²¹⁴ Phase 1 Decision, paragraph 192.

- Titles such as *Elder Scrolls VI* (which is not expected to be released before [X] with the last instalment in the series being released in 2011), as well as other future titles, will not involve Microsoft forgoing ca. USD [X] per annum of revenue from PlayStation customers or disenfranchising ca. [X] million MAU on PlayStation.
- As shown by Figure 44 below, the value from taking a title exclusive does not have a linear relationship with the popularity of the game.

Figure 44: Stylised relationship between value of exclusivity and size of game



- Sony appears to have recognised this as well. Following the \$3.7 billion acquisition by Sony, Bungie has confirmed that *Destiny 2* will remain as a multi-platform game with full cross-play and that they “*want to maintain the same great experience you already have on your platform of choice*”.²¹⁵

(iii) *Cross-platform play is a powerful disincentive to foreclosure*

3.56 Third, the Phase 1 Decision fails to take account of the importance to gamers of cross-platform play (*i.e.*, the ability for gamers to play together online irrespective of which device each of the gamers playing is using to access the game). While the Phase 1 Decision specifically acknowledges that there are direct network effects between gamers playing the multi-player mode of a game – as gamers want to play games with large communities, and moreover to play with their friends and family²¹⁶ – it completely disregards the fact that *Call of Duty*’s multi-player feature is cross-platform. This implies that direct network effects transcend platform boundaries and operate at the market level, not the individual console or platform level.

(a) **Cross-platform play benefits gamers on all platforms:** Cross-platform play leads to material and measurable improvements in gamers’ user experience. This is because the more gamers that want to play a game online, the more efficient is the “matchmaking” algorithm that places gamers in the same multi-player instance of the game, and which can be based on the skill and the

²¹⁵ SIE press release, “*Sony Interactive Entertainment to acquire leading independent videogame developer, Bungie: PlayStation and Bungie Continue Focus on Growing the Gaming Community, while Bungie Remains Multi-platform*”, 31.01.2022 (link available [here](#)); Bungie, “*Destiny 2: Our Shared Vision*”, 31.01.2022 (link available [here](#)); Gamesradar, “*PlayStation and Bungie complete acquisition, commit to Destiny 2 staying multiplatform*”, 15.07.2022 (link available [here](#)).

²¹⁶ Phase 1 Decision, paragraph 129.

experience of the gamers.²¹⁷ Cross-platform play increases the total gamer base available for matchmaking (*i.e.*, because gamers are not limited to playing with others on the same platform that they are using) thereby amplifying the impact of direct network effects.

- (b) **Cross-platform play is widespread on *Call of Duty*:** *Call of Duty* game titles have allowed gamers to cross-play since 2019. This means that not only can PlayStation gamers play with their friends that use Xbox or PC, they can also be automatically matched by the matchmaking system against Xbox gamers and PC gamers. Data provided to the CMA shows that cross-play on *Call of Duty* is widespread [X]. For example, over the last twelve months, [X]% [X] of *Call of Duty: Modern Warfare* and *Call of Duty: Warzone* had cross-play enabled while playing online, and were therefore able to play with gamers on Xbox and PC.²¹⁸
- (c) **There are clear benefits from cross-platform play for *Call of Duty* gamers:** Data from online matches for *Call of Duty: Warzone* show that there are clear benefits for gamers from cross-platform play. The data show that *Call of Duty* gamers in Europe on PlayStation that allow cross-platform play for their online matchmaking benefit from approximately [X]% [X] ([X]% in North America), [X]% [X] (~[X]% in North America), and approximately [X]% [X] (~[X]% in North America).²¹⁹ An equivalent measure for Xbox players is not available as Activision does not allow gamers on Xbox to turn off cross-platform play in order not to [X] the user experience. This further evidences that Xbox would not have the incentive to suddenly more than halve the pool of gamers that Xbox gamers can be paired with in *Call of Duty* online multi-player matches.
- (d) **Cross-platform play is a powerful disincentive to content withholding:** These network effects provide a powerful disincentive to withhold content from other platforms. As all gamers significantly benefit from cross-play, a hypothetical foreclosure strategy involving withdrawing *Call of Duty* from PlayStation would be self-defeating because it would hurt the whole *Call of Duty* gamer base, including Xbox and PC gamers. This, among other factors, means that any strategy to make *Call of Duty* exclusive to Xbox would inevitably result in significant gamer backlash that would adversely impact both Xbox's and *Call of Duty*'s reputations, upsetting the *Call of Duty* gamer community and tarnishing the *Call of Duty* and Xbox brands. Accordingly, the existence of cross-play strengthens Xbox's incentives to broaden the scope of the *Call of Duty* gamer base as much as possible.
- (e) **Cross-platform play is also a powerful disincentive to partial foreclosure:** At the same time, cross-platform play relies on a consistent experience across the gamer base. Gamers on all sides of a cross-play match need to face the same

²¹⁷ Similarly, gamers who want to play with their friends benefit from direct network effects the more of their friends that join the same game or gaming platform. By combining gamers from multiple platforms into the same pool, the matchmaking is much faster and more accurate. Gamers are matched with other gamers with a similar level of experience, and/or with the best network performance to avoid lag during matches.

²¹⁸ Response to Issues Letter, section 5(B).

²¹⁹ The figures above are based on [X].

‘landscape’ in order for the game to function properly – regardless of the platform they are playing on. Giving some gamers access to special maps or functionalities makes it difficult to deliver a game that both sides can participate in. This makes any “partial” foreclosure strategy unattractive and unworkable. This is exactly why exclusive map-packs are no longer offered to Sony by Activision. In any event, as set out in paragraph 3.34(c) above, Microsoft declined to extend its exclusivity agreement with Activision in 2015 precisely because [X].

- (f) **Past practices to steer users towards PlayStation have had little impact:** Past attempts by Activision to steer users towards PlayStation to play *Call of Duty* had very little impact on Microsoft. Between *Black Ops 3* (2015) and *Modern Warfare* (2019), Xbox maintained around [40-50]% of *Call of Duty* gamers, despite Activision’s efforts to promote PlayStation instead.²²⁰ Evidently, the attempt to steer gamers towards Sony’s platform did not have a foreclosure effect on Microsoft and Xbox.
- (g) **Recent *Call of Duty* experience shows that gamers will switch to other games:** Aside from the impact on Xbox and PC gamers, the lack of commercial incentive to engage in partial foreclosure strategies reflects the fact that hindering PlayStation players by degrading the quality of their experience would have several negative commercial repercussions for Microsoft. It would reduce the success of *Call of Duty* on Sony’s PlayStation with no guarantee that Microsoft would recapture those players on Xbox and would deter players from engaging in cross-play both on PlayStation and on Xbox, as the total number of gamer matches would be reduced. Degrading the quality of the cross-play experience would, naturally, encourage gamers to turn to other games for a better gaming experience – just as they did with *Call of Duty: Vanguard* as discussed above.
- (h) **Any degradation of quality of the PlayStation version of *Call of Duty* would be visible to gamers and result in a gamer-backlash:** Furthermore, as explained above, the gaming community is a vocal one and any action to degrade the experience of PlayStation users would engender negative press coverage and gamer backlash that would adversely impact both Microsoft and *Call of Duty*’s reputation, demoralizing the *Call of Duty* gamer community and tarnishing the brand.²²¹

3.57 Accordingly, the existence of cross-play strengthens Xbox’s incentives to broaden the scope of the *Call of Duty* gamer base as much as possible. The Phase 1 Decision fails

²²⁰ Activision is incentivized to prioritise the most profitable platforms to distribute its content. This includes both consoles with which it has better financial terms, and its own vertically integrated store front, Battle.net, for PC distribution.

²²¹ The Phase 1 Decision rejects this as a relevant consideration (paragraphs 199-200) on the basis that the examples of gamer backlash provided by Microsoft “are not directly relevant to the Merged Entity’s incentives to make ABK games exclusive”. However, it is precisely because of the obvious risk of gamer backlash and switching to other franchises that directly comparable examples of a move to make a game like *Call of Duty* exclusive to a particular platform post-acquisition are not available.

to consider this point, addressing cross-play only in the context of partial foreclosure (see below).²²²

(iv) Contractual protections provide a powerful disincentive to withdraw content

3.58 Fourth, the Phase 1 Decision does not properly take account of Sony’s contractual protections under its existing contracts.

(a) **The CMA must take account of Sony’s contractual protections:** Paragraph 7.15 of the Merger Assessment Guidelines states that, even if the CMA is unlikely to place material weight on contractual protections in assessing the ability to engage in foreclosure strategies, it “*may consider any financial or reputational costs of terminating contracts in its assessment of foreclosure incentives*”. In Phase 1, the CMA gave no consideration to how the financial and reputational costs of breaching or terminating the existing contractual arrangements with Sony would impact Microsoft’s incentives to engage in a hypothetical foreclosure strategy. Nor did the CMA give appropriate weight to Sony’s public statements that “[w]e expect that Microsoft will abide by contractual agreements and continue to ensure Activision games are multiplatform”.²²³

(b) **Microsoft complied with the contractual protections under the agreements between ZeniMax and Sony:** As a result of the contractual protections in the agreements with Sony, the first two ZeniMax titles launched post-acquisition were released only on PlayStation and PC. *Deathloop* was released on PlayStation on 14 September 2021, with a high Metacritic rating of 88.²²⁴ Microsoft complied with the exclusivity period in the contract with Sony and only launched *Deathloop* on Xbox on 20 September 2022. *Ghostwire: Tokyo* was released on PlayStation on 22 March 2022 and has not yet launched on Xbox.

(c) **Contractual protections give Sony the ability to protect its position:** As set out above, conduct following the ZeniMax acquisition shows that Sony is able to protect its commercial position, even where circumstances change.

(d) **The financial and reputational damage arising from non-compliance with Activision’s contracts with Sony would be severe:** Given [X] Activision’s existing contracts with Sony of ca. [X] per annum, the penalties (including damages) for breaching these contracts would be severe. As *Call of Duty* has ca. [X] million MAU on PlayStation, the reputational damage arising from breach would be even worse. For Microsoft to withhold *Call of Duty* from millions of gamers or degrade the quality of their experience would result in an immediate and severe gamer backlash on social media. With cross-platform play, the gaming experience for Xbox and PC gamers on *Call of Duty* would also suffer. For a company that is proudly gamer-centric, this would be a

²²² Phase 1 Decision, paragraph 195-197.

²²³ The Wall Street Journal, “*Sony Expects Microsoft to Keep Activision Games Multiplatform*”, 20.01.2022 (link available [here](#)).

²²⁴ Metacritic website (link available [here](#)).

reputational and public relations disaster. It is simply not credible that Xbox, the smallest console platform with an installed base less than half of Sony, would take such a risk.

(v) Flawed assessment of Microsoft's financial modelling

- 3.59 Finally, Microsoft strongly disagrees with the CMA's critique of Microsoft's financial modelling, which is highly selective and does not properly reflect the number of decidedly conservative estimates used and sensitivities presented in Microsoft's analysis. At root, the CMA's issues with Microsoft's analysis appear to be based on its position that "*the number of gamers that would switch to Xbox if Microsoft made ABK's content exclusive could be significantly higher than the Parties predict, given the importance of ABK's content to gamers, which again would make the model inaccurate*".²²⁵ However, like much of the Phase 1 Decision, no further explanation or evidence is provided to substantiate the CMA's view on the likely extent of switching, with the Phase 1 Decision limited to a one-sided, high-level application of dynamic considerations to a static analysis.
- 3.60 The CMA's unwarranted criticisms do not alter the conclusion that it is highly implausible that a hypothetical foreclosure strategy could bring about sufficient diversion of PlayStation users to be profitable. Microsoft is also seriously concerned that the CMA appears to have placed considerable weight on alternative modelling presented by Sony without providing transparency to Microsoft of the content of that modelling or the assumptions used.²²⁶ The CMA has not given Microsoft access to Sony's alternative modelling or an opportunity to comment on it.

D. Partial foreclosure is a theory of harm without any merit

- 3.61 The Phase 1 Decision contemplates four partial foreclosure strategies that Microsoft could hypothetically engage in post-Merger, in particular: (i) making Activision content available for release on rival console gaming platforms at a later date compared to Xbox (*i.e.*, 'timed exclusivity'), (ii) degrading the quality of such content available on PlayStation, (iii) making features or upgrades of Activision games unavailable to Sony (*i.e.*, 'content exclusivity'), and/or (v) raising the wholesale price of Activision content on PlayStation.²²⁷
- 3.62 Any such strategies would inherently have less impact on the competitiveness of a rival than total foreclosure. Indeed, as the Phase 1 Decision accepts, past timed exclusivity and content exclusivity arrangements in relation to *Call of Duty* – which have historically benefitted both Xbox and, more recently, PlayStation – have never resulted in foreclosure of any rival console platform.²²⁸ In particular, *Call of Duty* has provided exclusive or timed-exclusive downloadable content for either PlayStation or Xbox since *Call of Duty 2* in 2005.²²⁹ Yet, even in the period where these arrangements benefitted

²²⁵ Phase 1 Decision, paragraph 182.

²²⁶ [§<].

²²⁷ Phase 1 Decision, paragraph 152.

²²⁸ Phase 1 Decision, paragraph 176.

²²⁹ CMA RFI 2, Question 22 response; response to Supplementary Issues Letter.

PlayStation, Xbox – which already trailed PlayStation two-to-one in consoles sold – was not foreclosed.

- 3.63 Given this evidence, the CMA appears to concede that its theory of harm in fact only relates to “*partial foreclosure strategies that remain untested*” – in particular degrading the quality of Activision content on PlayStation or raising wholesale prices.²³⁰ However, even in relation to these “untested strategies”, the Phase 1 Decision fails to comply with paragraph 7.12 of the Merger Assessment Guidelines, which states that “[i]n assessing the ability of the merged entity to foreclose its rivals, the CMA will go beyond examining simply whether it could supply its inputs to them on worse terms and will consider **whether it would be able to harm their competitiveness by doing so**” (emphasis added).
- 3.64 The Phase 1 Decision fails to assess the potential impact on Sony of any partial foreclosure strategy in any meaningful way, simply asserting without further explanation that “*these strategies could significantly impact the ability of Sony to compete*”.²³¹ There is no evidence to support such an assertion. On the contrary:
- (a) It is unclear what the Phase 1 Decision means by “*degrading the quality*” of *Call of Duty* on PlayStation. For example, if the CMA means that the version of *Call of Duty* made available on Xbox would have additional features or functionality then this is no different than content exclusivity, which the CMA accepts has never resulted in foreclosure.²³²
- (b) Furthermore, Microsoft would have no incentive to degrade the quality of the game made available on PlayStation.
- In particular, the Phase 1 Decision fails to properly acknowledge the fact that any partial foreclosure strategy of this nature would be extremely costly for Xbox given the increasing importance of cross-platform play (as explained above) which relies on a consistent experience across the gamer base and therefore across platforms.²³³
 - The CMA’s suggestion that “*given the high number of CoD players, high-quality matchmaking would continue to be possible even if cross-play were compromised*”²³⁴ is, again, a simple assertion and reflects a

²³⁰ Phase 1 Decision, paragraph 176.

²³¹ Phase 1 Decision, paragraph 176.

²³² In any event, as explained above it is implausible that Sony could be foreclosed even by losing access to *Call of Duty* altogether. Accordingly, having access to *Call of Duty* but a somehow ‘degraded’ version could not also not result in foreclosure of the market leader.

²³³ In particular, such a strategy would be difficult to implement from a technical perspective because gamers on both sides of a cross-play game need to face the same ‘landscape’ in order for the game to function properly. Giving some gamers access to special maps or functionalities makes it difficult to deliver a game that both sides can participate in. This is exactly why exclusivity in respect of map-packs is no longer offered by Activision. The increasing prevalence of cross-play made such exclusivity unattractive and unworkable.

²³⁴ Phase 1 Decision, paragraph 197.

failure to understand the relevance and importance of cross-play, which goes well beyond improving matchmaking.²³⁵

- The fact that Activision does not allow Xbox and PC players to entirely switch off cross-platform play for *Call of Duty* matches on these platforms shows that it is not the case that the high number of *Call of Duty* players is sufficient to allow smooth cross-platform play.
- (c) As regards potential raising of wholesale prices, any such theory of harm would appear (contrary to the Merger Assessment Guidelines) solely concerned with protecting the profitability of Sony, a company whose gaming business earned revenues of USD 24.4 billion in 2021. It is implausible that paying a higher price for *Call of Duty* could threaten the viability of the market leader, nor has the CMA sought to explain how it could.

E. No anticompetitive effect

3.65 For the reasons set out above, the Phase 1 Decision is wrong to conclude that Microsoft would be incentivised to withdraw (in whole or in part) Activision content from Sony. However, even if it were hypothetically to do so, it is implausible that this could a “material impact on Sony’s ability to compete”.²³⁶ It is therefore not plausible that a substantial lessening of competition could arise as a result of total or partial foreclosure of Sony.

(i) *Anti-competitive foreclosure requires limited differentiation*

3.66 First, it is well understood how in a content-focused industry, exclusivity needs not cause anticompetitive effects and indeed can be welfare enhancing. Anticompetitive foreclosure may possibly occur where there is limited differentiation,²³⁷ but this is not the case in the gaming industry where both Microsoft’s rivals, Nintendo and Sony, offer their gamers a broad catalogue of first- and third-party published exclusive content that cannot be accessed on Xbox.

(ii) *Sony has more exclusive games than Microsoft, many of which are better quality*

3.67 Exclusivity strategies are not uncommon in the games industry and other market participants have access to their own content.²³⁸ Both Sony’s and Nintendo’s exclusive first-party games rank among the best-selling in Europe and worldwide.²³⁹ Current Sony exclusive content includes prominent first-party titles such as *The Last of Us*, *Ghosts of Tsushima*, *God of War*, and *Spiderman*. In addition to having outright exclusive content, Sony has also entered into arrangements with third-party publishers which require the “exclusion” of Xbox from the set of platforms these publishers can

²³⁵ More generally, the Phase 1 Decision does not present evidence to support its assertion that Microsoft could be incentivised to engage in partial foreclosure strategies, nor any “consideration of the magnitude and likelihood of the costs and benefits” this would entail, as required by the Merger Assessment Guidelines, paragraph 7.16.

²³⁶ Issues Statement, paragraph 32.

²³⁷ This scenario has been modelled in the literature by assuming that a platform will be foreclosed if its profits are reduced below a certain minimum level. Please see Section 3.2 of Weeds 2016.

²³⁸ *Microsoft/ZeniMax*, paragraph 105.

²³⁹ *Microsoft/ZeniMax*, paragraph 105.

distribute their games on. Some prominent examples of these agreements include *Final Fantasy VII Remake* (Square Enix), *Bloodborne* (From Software), the upcoming *Final Fantasy XVI* (Square Enix) and the recently announced *Silent Hill 2 remastered* (Bloober team).²⁴⁰ Nintendo’s exclusive content includes well-established globally famous and iconic franchises such as *Super Mario*, *Zelda*, *Xenoblade*, *Pokémon*, and *Animal Crossing*.

- 3.68 Third-party data suggests that in 2021, console exclusives accounted for ca. [10-20]% of Sony’s global game sales on PlayStation, and ca. [10-20]% of the total sales of content on digital stores on PlayStation in 2020.²⁴¹ Over the period from 2018 to 2021, exclusives accounted for [10-20]% of game sales and [10-20]% of total gaming content on PlayStation.²⁴² In contrast, the equivalent figures for Microsoft’s Xbox in 2021 were only [0-10]% and [0-10]%, and over the period 2018-2021 exclusives accounted for [0-10]% of game sales and [0-10]% when including digital in-app purchases. While Nintendo does not generally release its game sales data to third party market research companies, the available data, and the importance of Nintendo’s exclusive first-party portfolio, suggest that these proportions would be even higher for the Switch.²⁴³
- 3.69 Not only is Sony’s exclusive content more successful than Microsoft’s, it also receives better ratings from industry experts: the average Metacritic score for Sony’s top 20 exclusive games in 2021 was 87/100, against 80/100 for Xbox.²⁴⁴ Gamers’ appreciation for these titles is reflected in the rankings of the best-selling games on PlayStation. Three of Sony’s exclusive games – *Spider Man*, *Ghost of Tsushima*, and *Ratchet and Clank* – featured in PlayStations’ top 15 games, as measured by consumer spend on PlayStation game purchases in 2021.

Table 7: Top 15 PlayStation titles by revenue from game sales in 2021 worldwide

[§<]

Source: [§<]

- 3.70 Based on IDG Data, [§<] also featured among the top 10 games by unit sales in the US in 2020 across all platforms, [§<].²⁴⁵ The same report also showed that other Sony’s exclusives – [§<] – were also consistently among the Top 10 console game titles in 2020 for most [§<] geographies.

²⁴⁰ See this [link](#).

²⁴¹ Nielsen data only covers the period 2019-Feb 2021.

²⁴² Nielsen data suggests that console exclusives accounted for [10-20]% of the total value of digital content sales in 2020 on PlayStation, [10-20]% over the period January 2018-February 2021. NPD and GfK data suggest that console exclusives accounted for [20-30]% of total game sales sale in 2020, excluding in-game content sales, [10-20]% over the period January 2018-December 2021.

²⁴³ Nintendo does not directly provide sales data to Nielsen, NPD, and GfK. While the available data suggests that more than [§<]% of revenue on Nintendo was accrued from exclusive titles in 2020, the Parties do not consider this a reliable estimate, but are of the view that Nintendo is likely to rely on famous and exclusive titles for the majority of its gaming revenue.

²⁴⁴ Metacritic is a website that aggregates the main ratings from industry experts in various fields, including gaming, and provides an average “meta” score. Please see <https://www.metacritic.com/>.

²⁴⁵ **Annex 002.29** - [§<].

(iii) It is implausible that Sony, the leading console with a more than 2-to-1 lead, would be foreclosed as a result of not having access to a single franchise

- 3.71 Notwithstanding the gap in content portfolio, it is important to keep in mind that even in the hypothetical scenario in which some gamers were to divert to Microsoft’s platforms as a result of a withholding strategy, it is highly implausible that PlayStation, the established historical market leader for 20+ years, could be anti-competitively foreclosed in a way that would hurt consumers. Sony PlayStation is one of the top 10 consumer brands in the world²⁴⁶ and the most famous gaming brand in the UK.²⁴⁷
- 3.72 As the table below shows, Xbox in 2021 accounts for [20-30]% of the installed base of gaming consoles globally, [30-40]% in the UK, while Sony accounted for [40-50]% globally and [40-50]% in the UK – this is even excluding handheld console devices. Xbox’s share of yearly sales is even lower, suggesting that its share of installed base is likely to decrease against Nintendo and Sony in the near future. The global and UK leader Sony just cannot be foreclosed by losing access to a single franchise among the broad range of alternatives for gamers available on the PlayStation platform.

Table 8: Global share of revenue from the sale of gaming consoles, 2021

Console manufacturer	Installed base		Volume flow		Value flow	
	units (m)	%	units (m)	%	rev (\$b)	%
PlayStation	[<]	[40-50]%	[<]	[30-40]%	[<]	[40-50]%
Nintendo	[<]	[30-40]%	[<]	[40-50]%	[<]	[30-40]%
Xbox	[<]	[20-30]%	[<]	[10-20]%	[<]	[10-20]%
Total	[<]	100%	[<]	100%	[<]	100%

Source: [<]. Note: [<].

Table 9: Share of revenue from the sale of gaming consoles in the UK, 2021

Console manufacturer	Installed base		Volume flow		Value flow	
	units (m)	%	units (m)	%	rev (\$b)	%
PlayStation	[<]	[40-50]%	[<]	[40-50]%	[<]	[40-50]%
Xbox	[<]	[30-40]%	[<]	[20-30]%	[<]	[20-30]%
Nintendo	[<]	[20-30]%	[<]	[30-40]%	[<]	[20-30]%
Total	[<]	100%	[<]	100%	[<]	100%

Source: [<]. Note: [<].

- 3.73 For anticompetitive effects to be even on the cards it would have to be the case that a sizeable enough portion of gamers would divert from PlayStation to Xbox and, importantly, abandon PlayStation such that Sony would lose a meaningful amount of its user base – material enough to impede it from competing in the console gaming space. This is simply not credible for the reasons discussed in section 3.B above.
- 3.74 To begin with, as discussed in paragraph 3.38(a) above, based on Activision data combined with Sony’s officially reported data on revenue and active users, the CMA has been provided with an estimate that approximately [<]%, and at the very most

²⁴⁶ Prophet Brand Relevance Index “The brands people can’t live without in 2022” (link available [here](#)).

²⁴⁷ FMN, paragraph 19.14.

[X]%, of PlayStation’s MAU in 2021 played at least one online match of *Call of Duty* on PlayStation. Even in a hypothetical scenario in which all of these users were to divert to Xbox as a result of a withholding of *Call of Duty*, PlayStation would still have approximately [X] million MAU, ~[X]% more than Xbox’s MAU in 2021.

- 3.75 Data on *Call of Duty* gamers on Xbox shows that the share of gamers that would even consider diverting away from a console in the absence of *Call of Duty* would be much smaller than the share of users who simply play *Call of Duty* at least once in a given month or year.
- 3.76 First, gamers that play *Call of Duty* have broad interests. They consume a wide range of gaming content and are unlikely to divert to an alternative platform as a result of losing access to a single franchise – regardless of how famous or important it is in the industry. Building on the evidence presented in section 3.B above:
- (a) [60-70]% of gamers on Xbox did not play *Call of Duty* for more than 1 hour over the entire 2021 – [70-80]% played it for less than 5 hours in a whole year.
 - (b) Those that did play *Call of Duty* on Xbox and PlayStation did so for a short amount of time. Based on Activision data, in 2021, more than [X]% of *Call of Duty* gamers on PlayStation played online matches for less than [X] hours in the whole year and more than [X]% played for less than [X] hours (approximately [X] a week).
 - (c) Even if gamers that spend the majority of their gaming time on *Call of Duty* were to divert to Xbox as a consequence of Microsoft (hypothetically) withholding *Call of Duty* from PlayStation, only a small share of consumer spend would be diverted to Xbox. As the figure shows, contrary to the share of game-time, the share of spend on *Call of Duty* content on Xbox is more evenly distributed across gamers. Gamers who spend more than [X]% of their time playing *Call of Duty* accounted for only [X]% of total spend on *Call of Duty* and [X]% of the total spend on any gaming content from gamers of *Call of Duty*.

Figure 45: Share of gamers, overall spend, and spend on *Call of Duty* content by the share of game-time spent playing *Call of Duty* by gamers, 2021

[X]

Source: [X]. Note: [X].

- (d) This is consistent with evidence presented in section 3.B showing that higher levels of *Call of Duty* game-time are associated with higher levels of engagement with the console as a whole. The figure below offers an alternative approach to reporting the average number of hours gamers spend gaming on their Xbox ordered by the share of days they have played *Call of Duty* as a proportion of all days spent gaming in 2021. The data shows that even the most dedicated *Call of Duty* gamers spent a lot of time on other games. In fact, the average number of hours spent on *Call of Duty* is smaller than the average time spent on other gaming content for all gamers that played *Call of Duty* (up to [X]% of the time they recorded an active day on their Xbox).

Figure 46: Average yearly game time hours by the share of days a gamer logged into their account on an Xbox console, 2021

[REDACTED]

Source: [REDACTED]. Note: [REDACTED].

- 3.77 Microsoft has no reasons to believe that this would materially differ on PlayStation relative to Xbox, and indeed the evidence shown in section 3.B shows that based on Activision data on *Call of Duty* gamers' activity on all platforms, PlayStation gamers are [REDACTED]. This further shows that PlayStation could not be conceivably foreclosed by losing access to a single franchise.
- 3.78 Further, and as discussed above, there are a number of additional reasons why existing (and prospective) PlayStation and Nintendo users are unlikely to switch *en masse* to Xbox as a result of exclusivity strategies.
- (a) **Gamers often multi-home across gaming consoles:** Gamers who multi-home simultaneously own more than one gaming console. Multi-homing gamers who already own an Xbox are not impacted by a withholding of Activision content from PlayStation and/or Nintendo. They are unlikely to “abandon” their PlayStation or Nintendo console and instead simply purchase the exclusive content for their Xbox console. This severely reduces any impact on rival platforms and further hinders Microsoft ability to foreclose rivals. Third-party data procured by Microsoft in the ordinary course of business suggests that at the very least [20-30]% of PlayStation 5 users also owned an Xbox Series X/S and [REDACTED] also gamed on a PC. These metrics are as of December 2020 and are likely to have [REDACTED] at the time of this submission.²⁴⁸
- (b) **Gamers tend to remain loyal to their preferred console:** Even if exclusive games were to play an important role in a gamer's decision regarding which console to purchase, once the choice has been made, gamers tend to remain loyal to their preferred console(s). Rival consoles have built a strong reputation and enjoy a high degree of brand loyalty by players, as demonstrated by a Best SEO Companies' survey.²⁴⁹ Sony in particular has an established base of gamers

²⁴⁸ Microsoft regularly procures third-party data from NPD on console cross-ownership in the USA. The latest available data from NPD shows that in the fall of 2020, ca. [20-30]% of PlayStation 5 users also owned an Xbox Series X/S whereas [10-20]% of Xbox Series X/S users also owned a PlayStation 5. The same data also suggests that [REDACTED] of PlayStation 5 and Xbox Series X/S owners also plays on their PC. The difference in share of cross-owners across consoles is likely to be explained by the ongoing semiconductor shortage caused by the COVID-19 pandemic and the fact that PlayStation 5 has witnessed a higher excess demand compared to the Xbox Series X/S (See What Hi-Fi?, “*Why is the Xbox Series X so much easier to buy than a PS5?*”, 08.04.2022 (link available [here](#))). As the latest available data refers to the very beginning of the console generation, Microsoft expects the share of multi-homing console gamers to have increased materially over the course of the past months.

²⁴⁹ *Microsoft/ZeniMax*, paragraph 120. The Best SEO Companies' survey *Generational Brand Loyalty*, 13.11.2019 (link available [here](#)), shows that approximately 40% of players are loyal users of Sony's consoles, while approximately 31% of players are loyal to Microsoft's consoles and 30% to Nintendo's consoles.

loyal to its brand.²⁵⁰²⁵¹ As such, it is unlikely that a significant number of current PlayStation and Nintendo console users would abandon their loyalties and entirely “switch” to the Xbox console as a result of a hypothetical exclusivity strategy involving Activision’s games.²⁵² It is instead more likely that they would stick to their preferred console or at most become multi-homers.

- (c) **Gamers who do not multi-home face switching costs:** Existing PlayStation and Nintendo gamers that do not multi-home are likely to face switching costs. For example, a current PlayStation 4 player who chooses to upgrade to an Xbox Series X or S rather than a PlayStation 5 will need to adapt to a new controller and user interface and will forego being able to play their existing PlayStation game library on their new console. They may also have friends who play on PlayStation and find that certain multi-player games they wish to play with these friends are unavailable on Xbox (e.g., popular PlayStation exclusive games). Alternatively, a PlayStation 5 player who chooses to purchase an Xbox in response to a change in distribution of *Call of Duty* will need to spend potentially upwards of \$400. These switching costs reduce the likelihood that a given change in distribution strategy will divert gamers from PlayStation to Xbox.
- (d) **Gamers can access content via the web browser on their console – if their console provider allows them to:** Microsoft allows other content services to be accessed on Xbox consoles via the web browser on the console (e.g., Luna, GeForce Now and Stadia can be accessed via Xbox consoles). Other console providers would have the option to do the same and allow gamers using their consoles to access Game Pass through the console browser. In that scenario, gamers would be able to access content which is exclusive to Game Pass without the need to purchase a new Xbox console. From a technical perspective, a gamer on any platform can access Game Pass, as long as the platform supports a modern implementation of a chromium-based browser and does not block the site. Game Pass is available via the browsers on increasing range of other devices, including Valve’s Steam Deck, Razer and Logitech handheld gaming devices, the Meta Quest platform, new Samsung smart TVs, and Google Chromebooks. Sony and Nintendo do not currently allow gamers on their platforms to access Game Pass or other gaming services via the browsers on their consoles – but could easily do so.

3.79 Against this backdrop, it is highly unlikely that a sufficient number of gamers would switch to another console to retain access to Activision content such that Microsoft would have the incentive to withhold its distribution from rival platforms in the first place.

²⁵⁰ The Gamer, “*Study claims PlayStation fans most loyal*”, 23.01.2020 (link available [here](#)).

²⁵¹ In the context of a survey, Microsoft has asked gamers which of their consoles is their “favourite” to play on. Generally, gamers that multi-home across consoles have reported to prefer their PlayStation over their Xbox. More specifically, in response to the question: “Of the consoles you play games on, which one is/was your favourite to play on?”, [60-70]% of gamers owning an Xbox and a PlayStation have reported their favourite console to be a PlayStation – [30-40]% PlayStation 4, [20-30]% PlayStation 5, [10-20]% Xbox Series X, [10-20]% Xbox One. Of the gamers owning all three consoles, [40-50]% have reported their favourite console to be a PlayStation – [30-40]% PlayStation 5, [10-20]% PlayStation 4, [10-20]% Xbox Series X, [10-20]% Nintendo Switch, [10-20]% Nintendo Switch OLED, [0-10]% Xbox One, [0-10]% Nintendo Switch Lite.

²⁵² *Microsoft/ZeniMax*, paragraph 105.

(iv) The next generation of consoles is many years away and any impact from the Activision deal is highly speculative

- 3.80 Finally, the CMA suggests that “*the impact of any foreclosure strategy on Sony may be particularly strong at the launch of the next generation of consoles, when both new and existing users decide which console to buy*”. The Parties do not dispute that some portion of gamers are likely to re-assess their console ownership at the start of a new generation. But they also note that this is an event that only occurs approximately every eight years. Ineed the next new generation of consoles are not expected to be released before the fall of 2028 at the very earliest. The ongoing global shortage of semiconductors and supply chain disruptions have limited the supply of PlayStation 5 and Xbox Series X|S to a point that [§]. If Sony were indeed worried about a hypothetical withholding of Activision content, it would have at the very least *six years* to prepare a competitive response in time for the launch of the next generation of console. Given the backward compatibility of consoles, it is possible to multi-home across console generations (*e.g.*, to use an Xbox Series X to access *Call of Duty* and a new generation PlayStation console to access PlayStation exclusives).
- 3.81 In any case, switching costs associated with a different user interface and console ecosystem are independent of when a gamer decides to divert to a rival platform.

4. Theory of Harm 2 – no prospect of a substantial lessening of competition through foreclosure of multi-game subscription services

- 4.1 Theory of Harm 2 concerns the potential for a substantial lessening of competition in relation to multi-game subscription services as a result of Microsoft engaging in full or partial input foreclosure strategies.²⁵³
- 4.2 As described below, Activision does not currently make its content available on multi-game subscription services to any meaningful extent. As such, Microsoft cannot technically *withhold* Activision content from current rival suppliers of multi-game subscription services, nor is it able to degrade the terms on which Activision content is made available to rivals. To argue for a *prospective* concern the CMA must demonstrate – based on the evidence available to it – that Activision content would have been available on rival subscription services *in future* absent the Merger. For the reasons explained below, Activision has been resistant to making its new releases available on any multi-game subscription services and its reasons for doing so would be likely to persist.
- 4.3 Therefore, to substantiate a *credible* prospective foreclosure concern the CMA would have to show that adding Activision content exclusively to Game Pass post-Merger would give Game Pass an unassailable advantage relative to other subscription services, such that these services would be excluded from the market or severely marginalized.
- 4.4 The reality is that Activision content is present today on multi-game subscriptions only to a very limited extent. For reasons previously explained and reiterated below, publishers like Activision have conflicting incentives when it comes to the economics of placing their content on multi-game subscription services. Moreover, Microsoft

²⁵³ Issues Statement, paragraph 34.

would have to navigate current contractual restrictions to place Activision content into Game Pass. However, the intention of improving Game Pass with the inclusion of Activision content would be to differentiate the service and give gamers the benefit of accessing these titles more cheaply via a subscription. As shown below, there is no distinct “market” for subscription services to be monopolised. Paying for Activision titles as part of a subscription will be purely additive to what already exists today, as gamers will otherwise continue to be able to access Activision content in all the same ways that they could before the Merger.

- 4.5 The question facing the Panel in Theory of Harm 2 is therefore whether the expansion of the payment options available to gamers arising from the Merger could possibly result in a *substantial* lessening of competition. To do so would be to suggest that this benefit to gamers would be outweighed by the purely hypothetical harm arising from Microsoft refusing to supply Activision content to future third-party subscription services (including Sony’s which is presently larger than Game Pass). This theory of harm cannot credibly be sustained, much less to the requisite balance of probabilities standard at Phase 2.

Game Pass supports Microsoft’s gamer-centric strategy

- 4.6 Game Pass is an important component of Microsoft’s gamer-centric strategy to reach gamers where they are and regardless of what device they play on. Game Pass offers gamers access to a curated catalogue of attractive content for a monthly fee, making gaming more accessible and offering developers a diversity of distribution and business models for their games.
- 4.7 The key selling point of Game Pass for gamers is that it enables them to “*discover [their] next favourite game*”. It facilitates the discovery of new games through allowing gamers to try a broader range of content at an accessible price point. Popular games on Game Pass often include breakout hits from independent studios, as well as titles from larger studios. Game Pass empowers developers to bring more games to more players, not fewer. The diversity of the Game Pass catalogue and the ability to play multiple games as part of the curated bundle is a key part of Game Pass’ value proposition for gamers. Microsoft also has found that Game Pass subscribers [X].

Figure 47: Microsoft assessment of subscriber engagement with Game Pass²⁵⁴

[X]

- 4.8 Through increasing the appeal of Game Pass with the additional attractive content, Microsoft aims to [X].
- 4.9 However, Microsoft recognizes that to realize its gamer-centric vision, [X]. While Game Pass and other subscription services are growing, the vast majority of gaming revenues still come from gamers purchasing individual games [X].²⁵⁵ Even with

²⁵⁴ [X].

²⁵⁵ In a recent interview, Phil Spencer stated “*Game Pass as an overall part of our content and services revenue is probably 15 percent...I don’t think it gets bigger than that. I think the overall revenue grows so 15 percent of a bigger number, but we don’t have this future where I think 50–70 percent of our revenue comes from subscriptions.*”, The Verge, “*Microsoft says Xbox Game Pass is profitable as it sees subscription growth slow*”, 26.10.2022 (link available [here](#)). See also The Wall Street Journal, “*Xbox Boss Phil Spencer Wants to Sever Apple-Google ‘Duopoly’ in Mobile Games*”, 26.10.2022 (link available [here](#)).

substantial growth in subscription, this payment model is not expected to surpass the traditional purchase model of game distribution even in the medium term. As also discussed below, Microsoft is by no means alone in investing in this space and it expects to continue to face intense competition from rival services, as well as traditional game distribution.

The addition of Activision content to Game Pass will be beneficial for gamers

- 4.10 Microsoft has publicly stated that it plans to “launch Activision Blizzard games into Game Pass”.²⁵⁶ Microsoft’s intention is that future Activision releases, including *Call of Duty*, will be made available on Game Pass on the day of release, similar to Microsoft’s first-party content.²⁵⁷ This is subject to existing contractual obligations with Activision, which will be honoured.²⁵⁸ [§<]. [§<].²⁵⁹
- 4.11 Any inclusion of *Call of Duty* into Game Pass will benefit gamers. In addition to being able to buy-to-play on their preferred console or PC, gamers will get the option of subscription payments via Game Pass on multiple devices including Xbox console, PC, mobile and certain smart TVs. This would not occur absent the Merger, as Activision would not be likely to proactively place its content on multi-game subscription services.²⁶⁰
- 4.12 Being able to offer gamers a bundle of games at an attractive price point is an important component of Microsoft’s vision for a future in which gamers have access to more games they can play, discover and experiment with. This is unambiguously pro-competitive. [§<], the fact remains that fundamentally: (a) adding a valuable piece of content to a bundle at a low price point is undeniably beneficial to gamers and drives further innovation and competition in the industry; and (b) a theory of harm that is entirely prospective - “foreclosure” of third parties through hypothetical withholding of an input they would not have absent the Merger - requires a high degree of certainty that this would happen in the counterfactual.

B. Microsoft has no ability to foreclose rival multi-game subscription services

- 4.13 The Issues Statement suggests that the Merged Entity may have the ability to foreclose current and future rivals of multi-game subscription services on the basis that: (i) multi-game subscription services are becoming increasingly important and Activision’s content would likely be available on these platforms in the future; (ii) Activision’s

²⁵⁶ Microsoft, “Microsoft to acquire Activision Blizzard to bring the joy and community of gaming to everyone, across every device”, 18.01.2022 (link available [here](#)); Microsoft Blog Post, “Welcoming the Incredible Teams and Legendary Franchises of Activision Blizzard to Microsoft Gaming”, 18.01.2022 (link available [here](#)) where Phil Spencer states: “Upon close, we will offer as many Activision Blizzard games as we can within Xbox Game Pass and PC Game Pass, both new titles and games from Activision Blizzard’s incredible catalog”; IGN, “Microsoft’s Activision Blizzard Acquisition: Execs Discuss Exclusives and Game Pass”, 09.06.2022 (link available [here](#)), where Microsoft Gaming, Corporate Vice President, Sarah Bond put it simply: “We want to put as many titles as possible from Activision Blizzard into Game Pass when they join us”.

²⁵⁷ FMN, paragraph 2.24.

²⁵⁸ Tweet from Phil Spencer, 20.01.2022 (link available [here](#)) which refers to the “intent to honor all existing agreements upon acquisition of Activision Blizzard”. The Parties have provided Board documents which [§<] in FMN, **Annexes 2.1-2.3** and the [§<] in FMN, **Annex 8.1**.

²⁵⁹ [§<].

²⁶⁰ As mentioned, while certain *Call of Duty* titles have been made available for free download as part of Sony’s PS+ Instant Games Collection or PlayStation Now offerings in the past, but these were older titles and were available for very limited periods (*i.e.*, 1-2 months).

content may be as important to multi-game subscription services in the future as it is to consoles today on a buy-to-play basis; (iii) Game Pass is already the strongest provider of multi-game subscription services; and (iv) combining Activision’s content with Game Pass could raise barriers to entry, entrench Microsoft’s position as the leading provider of multi-game subscription services and substantially reduce existing and potential competition.²⁶¹

- 4.14 This assessment of the role of subscription services (and the role of Game Pass in particular) does not reflect the way in which gamers access content or the significant competitive constraint that the traditional buy-to-play payment option will continue to place on subscription services.

Multi-game subscription services are a means of payment – not a market

- 4.15 The Issues Statement indicates the CMA’s intention to assess the competitive effects of the Merger on multi-game subscription services as a separate market. Crucially, such a narrow focus fails to take into account the substantial interplay between different payment methods, as reflected in gamer behaviour.
- 4.16 Developers and publishers view multi-game subscription services as just one monetization model for gaming content. Similarly, gamers see subscription services as one of the many ways in which gaming content is paid for. The gaming content that is available on multi-game subscription services is also available to purchase on a standalone buy-to-play basis and there is no additional or new content offered via multi-game subscriptions. Gamers trade off the cost of an upfront purchase against the ongoing subscription costs when making their decision on how to access content.
- 4.17 In the case of Game Pass specifically, all the games are available to purchase via buy-to-play. Further, an analysis of Xbox telemetry data shows that gamers [X].²⁶² This evidence is consistent with gamers perceiving subscription and buy-to-play purely as alternative payment methods to access the same content.

Xbox telemetry data shows that [X]

- 4.18 As shown in Figure 48 below, between [X]% and [X]% of Xbox gamers continue playing games purchased on a buy-to-play basis in the 12 months after unsubscribing from Game Pass. Further, Figure 49 shows that between [X]% and [X]% of gamers purchase a game on a buy-to-play basis within a year after unsubscribing from Game Pass.²⁶³

Figure 48: % of gamers who continue playing on a buy-to-play basis in the 12 months after unsubscribing from Game Pass

[X]

Source: [X]

²⁶¹ Issues Statement, paragraph 35.

²⁶² For the purpose of this section and the analysis presented, “buy-to-play” refers to any game purchased for an upfront payment or downloaded for free from the Xbox digital store.

²⁶³ [X].

Figure 49: % of gamers who play a buy-to-play game for the first time within a year after unsubscribing from Game Pass by month of churn

[REDACTED]

Source: [REDACTED]

4.19 The telemetry data [REDACTED].²⁶⁴

Figure 50: [REDACTED]

[REDACTED]

Source: [REDACTED]

Figure 51: Change in game-time following release of *Call of Duty: Modern Warfare* – not included in Game Pass

[REDACTED]

Source: [REDACTED]

4.20 Finally, as previously explained, [REDACTED]% of Game Pass customers who had been subscribed to Game Pass for six months or more had bought games on a buy-to-play basis during that period.²⁶⁵

4.21 This evidence is again consistent with subscriptions being just another means to pay for the same gaming content, rather than a “market” from which competitors could be marginalized or excluded.

Microsoft’s internal documents also evidence the constraint of buy-to-play on subscription

4.22 Microsoft’s internal documents [REDACTED].²⁶⁶ For instance, Microsoft internal analyses estimate a [REDACTED]% [REDACTED].²⁶⁷ [REDACTED].²⁶⁸ Microsoft’s documents also make it clear that [REDACTED].²⁶⁹

4.23 Communications among Microsoft and its first-party studios with respect to placing their titles on Game Pass [REDACTED].²⁷⁰ [REDACTED].²⁷¹

Buy-to-play is forecasted to remain a significant constraint on subscription

4.24 In any case, traditional buy-to-play is forecast to remain the primary payment model used by gamers to access gaming content in the foreseeable future. This is the case for both Microsoft’s internal forecasts as well as third-party market research companies. Microsoft estimates that by 2030, subscription revenue will account for [REDACTED]% of its total gaming-related revenue, and [REDACTED]% of its gaming-related transactions (*e.g.*, game sales and in-game purchases).²⁷² This is the exact same share it accounts for today.

²⁶⁴ Similar patterns are observed for other titles released on Game Pass.

²⁶⁵ The Parties’ response to the CMA’s section 109 Notice dated 26 September, Table 29.1.

²⁶⁶ [REDACTED].

²⁶⁷ [REDACTED].

²⁶⁸ [REDACTED].

²⁶⁹ [REDACTED].

²⁷⁰ [REDACTED].

²⁷¹ [REDACTED].

²⁷² See FMN, Annex 2.26: [REDACTED].

However, [X]. Moreover, IDG estimates that subscription revenue will account for only [X]% of total gaming revenue by [X] or [X]% when excluding sales of consoles. This also corresponds to the view shared by Sony, who in an investor presentation in May 2022, forecasted that subscription services will account for only 20% of revenue in the console industry.²⁷³

- 4.25 Accordingly, the evidence clearly indicates that, even on a forward-looking basis, buy-to-play will remain a significant constraint on subscription. The Phase 1 Decision has identified the potential for competitive harm on the basis that subscription services may become important to the point “*that game publishers find it sufficiently attractive to make their best content available on them*”.²⁷⁴ However, this does not reflect the commercial reality that subscription services are expected to coexist and compete alongside other payment models, whilst remaining only a limited segment of the broader gaming industry. Publishers will continue to have multiple avenues through which to make their content available to gamers. Likewise, gamers will continue to have numerous channels through which to access their favorite content. There exists no evidence (no predictions and forecasts, internal or external) to suggest that the ability to pay for *Call of Duty* (or any other Activision content) via subscription will result in wholesale changes to gamer behavior or how publishers may monetize content, or in any way reduce this optionality. The assessment of Theory of Harm 2 must therefore address and account for the significant constraint on subscription services posed by buy-to-play payment options in questioning whether the Merger may result in competitive harm.

No evidence that Activision content is or will be an important input to multi-game subscription services

- 4.26 Microsoft will not have any ability to foreclose rival multi-game subscription services post-Merger through any hypothetical withholding of Activision content.
- 4.27 The Parties do not agree with the CMA’s assertion that “*Activision’s content would likely be available on those platforms in future*”.²⁷⁵ No evidence exists to indicate that Activision will make its new releases available on multi-game subscription services. To the contrary, the evidence available to the CMA indicates that, absent the Merger, Activision content would not be available on multi-game subscriptions services at launch for the foreseeable future. This reflects Activision’s view that even if the segment were to grow, [X]. This has been a fundamental impediment to publishers more generally agreeing to place their content on subscription services, a stance which is not going to change in the future. The Phase 1 Decision only speculates and asserts that this may happen – it does not provide any evidence or substantiate how this could be the case.
- 4.28 Activision has decided not to make its games available on multi-game subscription services, except in rare cases when Activision has made years-old “back catalogue” content available for limited periods of time (e.g., 30 days), in part because Activision understands that multigame subscription sales would cannibalize its buy-to-play sales. Buy-to-play sales are a key source and driver of revenue for Activision and Activision

²⁷³ See “2022 Business Segment Briefings – Sony Group Corporation”, 26.05.2022, slide 9 (link available [here](#)).

²⁷⁴ Phase 1 Decision, paragraph 220.

²⁷⁵ Issues Statement, paragraph 35(a).

believes that [REDACTED].²⁷⁶ In the rare cases where Activision has contemplated placing its content on multigame subscription services, its ordinary course documents (as discussed below) consistently reflect Activision’s view that multigame subscriptions, regardless of platform, severely cannibalize buy-to-play sales, particularly in the case of newer releases.

- 4.29 Similarly, Activision content would not be available via cloud-based game streaming absent the Merger. The evidence shows that Activision does not consider that cloud-based game streaming constitutes a good value proposition as it has major reservations about [REDACTED]. Instead, Activision has a strategy focussed on delivering its content locally to gamers on their devices.
- 4.30 The Phase 1 Decision suggests nonetheless that multi-game subscription services may be growing to a “*point where game publishers will eventually find it sufficiently attractive to make their best content available on them*”.²⁷⁷ By citing Ubisoft as an example, the Phase 1 Decision suggests that Activision might indeed become attracted to the subscription model. However, [REDACTED].²⁷⁸
- 4.31 Publishers’ incentives to offer their titles on subscription services depend on the trade-off between cannibalization of traditional sales and the increased engagement with the wider portfolio of games they make available on the subscription service, which drives increased monetization primarily through post sale monetization. Hence, gaming companies (consoles and/or platforms) who can offer a wide array of content and games that can drive engagement beyond their main titles (increasing overall monetization) are more likely to be incentivised to offer their titles on subscription services. This is why publishers with wide portfolio of games and franchises like Ubisoft (*Assassin’s Creed, Far Cry, Just Dance, Tom Clancy’s, Rayman, Watch Dogs, Driver, Prince of Persia, For Honor*, and others) and EA (*Star Wars, FIFA, Madden, NHL, Mass Effect, Dragon Age, Battlefield, Crysis, Dead Space, Need for Speed, The Sims, Titanfall, Burnout, Mirror’s Edge*, and others) have opted to offer their own subscription service.
- 4.32 Unlike these publishers, however, 82% of Activision’s revenue is generated from just three titles (*Call of Duty, World of Warcraft* – which is only available on PC – and *Candy Crush* – not available on consoles). Activision does not have a wide portfolio of games to leverage. It cannot use its main franchise on console to attract gamers that it can monetize on other titles, simply because it does not have other titles to benefit from.
- 4.33 Further, this revenue concentration makes it equally unattractive for Activision to offer its games on third-party subscription services. Again, the Phase 1 Decision reference to Ubisoft is not a basis from which the CMA should reach wider conclusions about the likely prospects of the gaming industry. Ubisoft’s wide portfolio of titles allows the company to differentiate its monetization models. In any event, Ubisoft uses game

²⁷⁶ [REDACTED].

²⁷⁷ Phase 1 Decision, paragraph 220.

²⁷⁸ [REDACTED].

subscription services primarily to monetize back-catalogue titles while focusing on traditional buy-to-play sales for newer releases.²⁷⁹

- 4.34 Put simply, Activision has more revenue at risk through making its leading titles available via subscription than other publishers. As explained below, this stance would not change in the counterfactual.
- 4.35 Although some of Activision’s titles have featured on Sony’s subscription service PlayStation Plus (“PS+”) in the past, these titles have always been older releases that have been provided to PS+ years after their initial release via buy-to-play. Likewise, Activision actively pulled its content from NVIDIA GeForce NOW following the ending of its beta period and no Activision content has been reinstated on the platform.²⁸⁰ Activision has never published any newer content on multi-game subscription services and has no intention to do so in the future.
- 4.36 This stance is reflected in statements made by Activision’s senior leadership, who in recent Investigational Hearings with the FTC in relation to the Merger have stated on the record that [REDACTED]. The Parties specifically note that:
- (a) Bobby Kotick, CEO of Activision stated that [REDACTED]. Specifically, Mr. Kotick stated that [REDACTED].²⁸¹ Mr. Kotick was even more unequivocal in his position on cloud streaming, calling it [REDACTED].²⁸² Regarding the technical requirements, Mr. Kotick stated that even if latency and control issues could be improved, he considered that game developers were [REDACTED].²⁸³ Likewise, Mr. Kotick stated [REDACTED].²⁸⁴ For the reasons stated above, Mr. Kotick considered cloud-based game streaming to be [REDACTED].²⁸⁵
 - (b) Mr. Kotick’s position has been reiterated by numerous other senior leadership figures in Activision. Mike Ybarra, President of Blizzard Entertainment, stated that [REDACTED].²⁸⁶ Additionally, Mike confirmed that [REDACTED].²⁸⁷ Moreover, with regards to cloud-based game streaming, Mr. Ybarra stated that [REDACTED].²⁸⁸ Mr. Ybarra stated that [REDACTED].²⁸⁹ Mr. Ybarra has stated his view that [REDACTED].²⁹⁰
 - (c) Likewise Chris Schnakenberg, Senior Vice President of Global Platform Strategy and Partner Relations for Activision stated [REDACTED].²⁹¹ Mr. Schnakenberg

279 For example *Assassin’s Creed Odyssey* available through Game Pass was released in 2018, and pre-dates the latest release *Assassin’s Creed Valhalla* released in 2020, not available on Game Pass as of October 2022.

280 Eurogamer, “*GeForce Now has pulled Activision Blizzard games because they weren’t supposed to be there in the first place*”, 16.02.2020 (link available [here](#)).

281 [REDACTED].
282 [REDACTED].
283 [REDACTED].
284 [REDACTED].
285 [REDACTED].
286 [REDACTED].
287 [REDACTED].
288 [REDACTED].
289 [REDACTED].
290 [REDACTED].
291 [REDACTED].

stated that [REDACTED].²⁹² In relation to cloud-based game streaming, Mr. Schnakenberg similarly stated that [REDACTED].²⁹³

- (d) Armin Zerza, Activision's CFO, confirmed that Activision had [REDACTED].²⁹⁴ Similarly, in relation to cloud-based game streaming, Mr. Zerza stated that [REDACTED].²⁹⁵ Mr. Zerza stated that [REDACTED].²⁹⁶

4.37 The fact that Activision would not have placed its newer content on multi-game subscription services absent the Merger is also reflected in the company's internal documents:

- (a) For instance, internal assessments of [REDACTED].²⁹⁷ Another internal document reported [REDACTED].²⁹⁸ Activision has also considered that, [REDACTED].²⁹⁹ Notably, [REDACTED].
- (b) Ordinary course documents also evidence [REDACTED].³⁰⁰ Further, Activision's internal discussions regarding [REDACTED]. For example, one document assessing [REDACTED].³⁰¹
- (c) Activision's projected cannibalization rates were [REDACTED].³⁰² [REDACTED].³⁰³
- (d) More generally, in respect of any third party subscription services, Activision has noted that [REDACTED], again emphasizing that from Activision's perspective, it would not make financial or business sense to place its content on a third party subscription service.³⁰⁴
- (e) In another document, Activision recommends to [REDACTED].³⁰⁵ Similarly Activision has in the past noted that [REDACTED].³⁰⁶

4.38 In addition, Activision's existing agreements with Sony [REDACTED].³⁰⁷ Accordingly, even in the highly unlikely scenario in which (contrary to current management sentiment) Activision did decide to make its content available via subscription, [REDACTED].³⁰⁸ The CMA cannot simply assume and/or assert that Activision content would be made available on subscriptions on multiple platforms.

4.39 In light of the above, there is no counterfactual available to the CMA where Activision content (specifically *Call of Duty*) would be widely available via multiple subscription

292 [REDACTED].

293 [REDACTED].

294 [REDACTED].

295 [REDACTED].

296 [REDACTED].

297 [REDACTED], at -547 ("[REDACTED]"); [REDACTED] ("[REDACTED]").

298 [REDACTED], at -959; *see also* [REDACTED].

299 [REDACTED].

300 [REDACTED].

301 [REDACTED].

302 [REDACTED].

303 [REDACTED].

304 [REDACTED].

305 [REDACTED].

306 [REDACTED].

307 [REDACTED].

308 This is further evidence that Sony believes subscription competes directly with its full game console game sales (since it is not placing these games on its subscription services).

services. Against this counterfactual, it is not credible to maintain any theory of harm predicated on the *withholding* of Activision content from rival platforms to Game Pass.

Activision does not have upstream market power

- 4.40 No evidence has been provided to explain how *Call of Duty* (or any other Activision content) is or could become an input that “*plays an important role in shaping downstream competition*” in relation to multi-game subscription services.³⁰⁹ Theory of Harm 2 therefore operates under the premise that rivals, who so far have not been able to rely on Activision content to establish their subscription services, would somehow be unable to compete effectively because they cannot rely on content they currently do not have (and cannot count on having). It also does not account for any investments or improvement in rivals service or content offerings in response to increased competition from Game Pass. Such a theory of harm cannot be credibly sustained without addressing these critical points. While the CMA is entitled to take potential future effects of the Merger into account, there needs to be at least a well-founded basis to assume that the future would be one in which Activision content, specifically *Call of Duty*, would be key to the competitiveness of multiple multi-game subscription services. There is no such evidence at present.
- 4.41 As explained above, *Call of Duty* is not an important input to console. This is equally the case in relation to multi-game subscription services. Any “foreclosure” concern, full or partial, requires as a basic condition that there is strong market power in the product in question that can be leveraged into creating market power elsewhere. *Call of Duty* does not have that level of upstream market power (as discussed above in relation to Theory of Harm 1). Even focussing only on the PC game publishing segment, Activision’s shares are well below any level associated with strong market power ([5-10]% globally / [5-10]% in the UK in 2021).³¹⁰
- 4.42 More generally, there is nothing unique about Activision content that cannot be replicated by including other popular titles in a subscription bundle, nor has any evidence been provided to suggest otherwise.
- 4.43 Indeed, a number of subscription services, including Game Pass and Sony’s PS+, have emerged successfully to date without meaningful access to Activision content.³¹¹ This clearly suggests it is in no way an important input to the competitive viability of subscription services. To the contrary, as described below in relation to the assessment of effect, there are many popular franchises and titles on competing subscription services that currently compete with Game Pass. Further, there is no evidence to suggest that rival services would not be able to invest in or improve the content on their own subscription services and, that even with the addition of such content, they would not be able to maintain their competitive viability.

³⁰⁹ Merger Assessment Guidelines, paragraph 7.14(b).

³¹⁰ A large component of Activision’s share of PC game publishing is due to *World of Warcraft*, a single-game subscription title that is not part of any multi-game subscription service and would be technically very challenging to integrate into a multi-game subscription service.

³¹¹ At the same time, there are there are non-subscription platforms that have seen massive success without *Call of Duty*. These include, for example, Nintendo, Steam, and the Epic Games Store.

B. No incentive to foreclose rival multi-game subscription services

4.44 The Issues Statement sets out the CMA’s intention to assess Microsoft’s incentives to foreclose rival multi-game subscription services.³¹² [§<].

4.45 [§<].

4.46 [§<].

4.47 Notwithstanding the above, Microsoft notes that there are key elements in the Issues Statement, drawn from the Phase 1 Decision in relation to its hypothetical incentive to foreclose rival subscription services that do not accurately reflect the evidence provided.

Microsoft’s internal documents do not evidence any intent to foreclose rivals of multi-game subscription services.

4.48 In response to the internal documents noted in the Issues Statement cited as evidence of Microsoft’s intention to foreclose rivals in multi-game subscription services, Microsoft observes the following.

(a) Paragraph 228(a) of the Phase 1 Decision cites a Microsoft document [§<].³¹³

This simply reflects the fact that gamers need to be convinced of the merits of subscription. Microsoft hopes that offering additional attractive games from Activision will help develop its subscription offering, increasing competition and choice and appealing to gamers for whom the high upfront cost of outright purchasing games and console equipment is prohibitive. For Game Pass to continue to attract and engage gamers, it needs to be able to offer gamers fresh and differentiated first- and third-party content. Microsoft’s intention is that all future Activision titles will be made available on Game Pass on the day of release (subject to any existing contractual obligations restricting Activision’s ability to do so, which will be honored), increasing Game Pass’ attractiveness to gamers and providing a benefit to gamers that could not be achieved without the Merger. The CMA has overlooked the fact that Activision’s most popular content is currently available only as ‘buy-to-play’, therefore including it in *any* subscription service is beneficial to consumers.

(b) Paragraph 228(b) of the Phase 1 Decision cites another Microsoft document, noting: [§<].³¹⁴

The CMA has considered only part of the quote in the internal document.³¹⁵ Microsoft agrees that content is an important factor (*albeit* not the only factor) in driving the value of game streaming services. There is no defined list of ‘must-have’ content which is necessary to generate value and, for the reasons described above, no evidence has been provided as to why Activision content

³¹² Issues Statement, paragraph 37.

³¹³ [§<].

³¹⁴ [§<].

³¹⁵ The complete quote reads: [§<].

would meet this criteria. For example, PlayStation’s PS+ service has launched without the latest Activision content and has been scored higher on content than Game Pass by reviewers.³¹⁶ PS+ had reached 50 million members (almost double the number of subscribers to Game Pass), with Sony marketing itself as having “*built the world’s largest game subscription service*”.³¹⁷

- (c) Paragraph 228(c) of the Phase 1 Decision cites a Microsoft document, noting: [REDACTED].³¹⁸ The CMA’s assessment does not acknowledge that the [REDACTED].
- (d) Paragraph 228(d) of the Phase 1 Decision cites a Microsoft internal document, noting: [REDACTED].³¹⁹ Exclusive content is a traditional feature of competition in gaming. Console platforms – and in particular Sony PlayStation and Nintendo – have invested heavily into developing and distributing first-party exclusive content to attract gamers. But not all first-party content is made exclusive – certainly not Microsoft’s – [REDACTED]. The CMA seems to miss that platform competition hinges on differentiation – it is inevitable that this would be reflected in Microsoft’s internal documents.
- (e) Paragraph 228(e) of the Phase 1 Decision, cites a Microsoft internal document, noting: [REDACTED].³²⁰

No ZeniMax content has been made exclusive to Game Pass. [REDACTED].

- (f) Paragraph 228(f) of the Phase 1 Decision notes: ‘*Microsoft also recognises the value of ABK’s content specifically to grow its XGP platform. For example, [REDACTED].*’³²¹

While it is indeed true that Activision’s [REDACTED]. As such, it is not correct to assume that Activision’s content provides any ‘special’ advantage to increase the growth of PC Game Pass. In any case, irrespective of any hypothetical growth of PC Game Pass, Microsoft would remain a small player in PC gaming.

- (g) Paragraph 229(g) of the Phase 1 Decision notes: ‘*The Parties’ internal documents also show the importance of [REDACTED], demonstrating an incentive to engage in partial foreclosure strategies such as timed exclusivity. Microsoft recognises, in particular, the value of new releases for attracting users to XGP. One Microsoft internal document explains, for example, that [REDACTED].*’³²²

The CMA seems to have misunderstood the relevance of ‘day one’ releases. [REDACTED]. For example, even though Sony’s multi-game subscription service has already surpassed Game Pass in terms of subscriber numbers, Sony could further

³¹⁶ Aroged, “PS+ beats Game Pass (and beyond) in the US, according to a survey”, 31.07.2022 (link available [here](#)).
³¹⁷ PlayStation Blog, “All-new PS+ arrives in select markets in Asia — Japan, North and South America, Europe, Australia, and New Zealand launches to follow”, 23.05.22 (link available [here](#)); Dual Shockers, “Xbox Game Pass Has Half Subscribers Of PS+, Despite Its Offerings”, 07.04.2022 (link available [here](#)).
³¹⁸ [REDACTED].
³¹⁹ [REDACTED].
³²⁰ [REDACTED].
³²¹ [REDACTED].
³²² [REDACTED].

enhance PS+ by launching new first-party titles on a ‘day and date’ basis.³²³ However, Sony has publicly stated that, unlike Microsoft, it does not intend to do so, due to potential cannibalisation of its buy-to-play sales. Sony’s CEO, Jim Ryan, attested to this as recently as March 2022, stating that “[in terms of] putting our own games into [PS+], or any of our services, upon their release... as you well know, this is not a road that we’ve gone down in the past. And it’s not a road that we’re going to go down with this new service”.³²⁴ This aligns with statements made by Mr. Ryan two years prior, where he explained that “putting [games] into a subscription model on day one, for us, just doesn’t make any sense”.³²⁵ He goes on, “for others in a different situation, it might well make sense, but for us it doesn’t. We want to expand and grow our existing ecosystem, and putting new games into a subscription model just doesn’t sit with that” (emphasis added).³²⁶ As such, this is a commercial choice made by companies, based on their priorities and economic assessments and by adopting this policy, Microsoft does not procure an added advantage not available to others. In fact, Sony’s position proves that Sony does not believe that gaming companies ought to embrace this alternative pricing model – and hence it does not believe that multi-game subscription services will become the predominant monetization model in the gaming space.³²⁷

The Issues Statement incorrectly characterizes Microsoft’s conduct in relation to past acquisitions

- 4.49 In setting out its assessment of incentives under Theory of Harm 2, the Issues Statement also incorrectly asserts the views of a third party that “Microsoft did not uphold its promise to continue making Bethesda content available on multiple stores and platforms”.³²⁸ This is simply incorrect. As explained above in relation to Theory of Harm 1, this statement does not accurately reflect Microsoft’s past conduct and should not inform the Panel’s views on Microsoft’s future incentives in relation to Game Pass.

C. No anticompetitive effect in relation to multi-game subscription services

- 4.50 The Issues Statement suggests that a hypothetical foreclosure strategy in multi-game subscription services could give rise to anticompetitive effects based on the view that: (i) Game Pass already holds a strong position in multi-game subscription services pre-Merger and most of its competitors are significantly smaller in terms of user base and revenues; (ii) most Game Pass rivals lack the popularity and range of content that Game Pass would own post-Merger and, given the importance of Activision’s content, current and future rivals could be affected by any foreclosure strategies using that content; and (iii) multi-game subscription services is a nascent market that exhibits both direct and indirect network effects. The Issues Statement further suggests that combining Game

³²³ In May 2022, Sony announced that PS+ had 47.4 million users, prior to the launch of its new and improved PS+ offering.
³²⁴ Games Industry.biz, “PlayStation’s Jim Ryan: Our games could suffer if they went straight into PS Plus - The platform holder’s CEO discusses the potential for games subscription services”, 29.03.2022 (link available [here](#)).
³²⁵ Games Industry.biz “PlayStation’s Jim Ryan: “We want to give gamers certainty that they’re buying a true next-generation console”, 17.09.2020 (link available [here](#)).
³²⁶ Games Industry.biz “PlayStation’s Jim Ryan: “We want to give gamers certainty that they’re buying a true next-generation console”, 17.09.2020 (link available [here](#)).
³²⁷ Response to Issues Letter, paragraphs 6.29 and 6.30.
³²⁸ Issues Statement, paragraph 36(e).

Pass, as the strongest incumbent, with Activision’s important gaming catalogue could substantially reduce competition as a result of total or partial foreclosure or a combination of both, potentially raise barriers to entry, reduce the number of competitors to one or only a few providers, and significantly increase Microsoft’s market power.³²⁹ The Issues Statement also states that the Merger may cause this effect, or at least accelerate this process, thereby depriving consumers of a longer period of competition between platforms.

- 4.51 The CMA is required to prove that any hypothetical withholding of Activision content will result in “*substantial harm to overall competition in the downstream market*”. As the CMA itself notes, this is only likely to arise if “*one of the merger firms has a degree of pre-existing market power in the downstream market, and already faced limited constraints pre-merger*”.³³⁰ As discussed below, these conditions are not met today and the available evidence clearly demonstrates that this is unlikely to be the case in the future when taking into account the continuing constraint of buy-to-play and the likely competitive response from rival subscription services.

Game Pass does not have any market power

- 4.52 The Issues Statement identifies Game Pass as having a “*strong position in multi-game subscription services*”. This statement overstates the current strength of Game Pass. As explained above, Game Pass is one aspect of Microsoft’s strategy to reach gamers outside of the traditional confines of consoles and buy-to-play. It is intended to offer gamers an additional option to be able to discover and consume games but it has nothing that could be described as market power today. Not least because it does not operate on a separate “market”.
- 4.53 Game Pass accounted for less than [0-5]% by value of digital distribution of gaming content globally ([0-5]% in the UK). Even just looking at multi-game subscription services alone, it is *Sony* which if anything is larger in revenues today ([30-40]% compared to [30-40]%).
- 4.54 Since its launch in 2017, Game Pass has gradually grown to approximately 25 million subscribers. As above, this is 10 million fewer subscribers (28%) than what was forecasted for Fiscal Year 2022.³³¹ Much of the growth so far has come from [X]. [X] Xbox console users account for approximately [X]% of subscribers across all Game Pass tiers. Over the period July 2019-July 2022, [X]% of Game Pass Ultimate subscribers (who are entitled to play both the Game Pass console and PC catalogue) accessed Game Pass through a PC, and [X] ([X]% in total) accessed Game Pass Ultimate via xCloud.
- 4.55 The reality is that Game Pass has no market power today. The CMA would need to show that: (a) not only is Activision content, specifically *Call of Duty*, important to subscription services (where it currently isn’t offered to any material degree) - but this has enough market power to “power up” Game Pass and accelerate its growth way beyond anything that Game Pass has been able to achieve to date; and (b) that this alone will undermine and weaken all other subscription services that either do not exist yet or

³²⁹ Issues Statement, paragraph 37.

³³⁰ Merger Assessment Guidelines, paragraph 7.21.

³³¹ FMN, Figure 10.

currently do not rely on Activision content for *any* of their offerings. This is extremely implausible.

Microsoft does not expect the Merger to cannibalize sales on rival platforms

4.56 [X]. In modelling the Merger, Microsoft has assumed that [X]. This confirms that: [X].³³² [X], and has not seen any material change in console shares following that deal. Microsoft’s intention is to continue to offer Activision content on other console platforms to purchase.³³³

4.57 Microsoft’s internal documents also do not suggest that [X].³³⁴

Figure 52: [X]

[X]

Source: FMN, Annex 002.3 - [X].

4.58 [X].³³⁵ Rather, Game Pass is an opportunity for Microsoft to offer increased value to gamers and the inclusion of Activision content (*Call of Duty* in particular) to this service helps differentiate Game Pass from other rival services. However, this subscription service is only one aspect of Microsoft’ gamer-centric strategy and, as explained above, the available evidence indicates that gamers will continue to choose between different payment options when accessing content. There is no supporting evidence to indicate that subscription will become the predominant monetization model or, crucially, that the availability of *Call of Duty* on Game Pass will be the reason for that change.

Game Pass cannot foreclose services available on platforms that do not offer Game Pass

4.59 A fundamental flaw in Theory of Harm 2 is that it considers multi-game subscription services as an *alternative platform* available across devices that compete directly with one another for users. This is factually incorrect.

4.60 Game Pass is currently available exclusively on Xbox and Windows PC. On Xbox, Game Pass is an alternative payment model for a smaller set of the same games that are featured already to buy on the console. The Game Pass catalogue is offered for a lower price than the collective price of games it contains and offers games under a temporary entitlement as opposed to a “perpetual purchase” – *i.e.*, gamers have access to games as they are subscribers and do not make a permanent purchase.

4.61 At the same time, a number of other subscription services are available for gamers to access beyond Microsoft’s platforms. The largest subscription service on consoles, PS+, and the equivalent Nintendo service, Nintendo Switch Online, are only available on Sony and Nintendo’s respective consoles (and in the case of PS+, on PC via streaming). Any hypothetical foreclosure concerns could relate only to Xbox, as Game Pass is not available on PlayStation or Nintendo. It is therefore simply wrong to

³³² [X].

³³³ [X]. Gamers compare the different payment options available to them and a multi-game subscription is not a payment option that appeals to all gamers. As such, even for those gamers who multi-home and subscribe to Game Pass, a proportion may choose to continue to purchase Activision games to play on their primary PlayStation console (and Microsoft expects such gamers to continue to have both options).

³³⁴ FMN, Annex 6.3 – [X].

³³⁵ See also [X].

postulate that Game Pass could foreclose other subscription services when these are available on platforms that are more than double the size of Xbox's user base.

- 4.62 Besides, Microsoft welcomes additional subscription services on the Xbox. EA Play is available on Xbox – and can be purchased either as part of the Xbox Game Pass Ultimate subscription or on a standalone basis. EA Play is also available on PlayStation. Microsoft is also working to bring a new multi-game Ubisoft offering to the Xbox in coming months. The expectation that Microsoft would have the incentive to foreclose rival subscription services is entirely at odds with the fact that Microsoft is working to foster entry on console of one of these services.

Sony runs the largest multi-game subscription service in the world, PS+

- 4.63 As noted above, Sony has established itself as the largest player in a hypothetical sub-segment for multi-game subscriptions and has a global share of this segment exceeding that of Game Pass, both on console and across all platforms. Sony recently overhauled its PS+ offering in June 2022 – the Premium tier of this service includes the ability to stream certain games from the cloud to PlayStation consoles and PCs.
- 4.64 The first-party and third-party Sony titles included in the PS+ Premium tier will include successful hits (exclusive to PlayStation) like *Final Fantasy VII Remake*, *God of War*, *Ghost of Tsushima: Director's Cut*, *Horizon Zero Dawn*, *Marvel's Spider-Man*, *Marvel's Spider-Man: Miles Morales*, *Demon's Souls*, *Returnal*, *Bloodborne* and *Days Gone*. Even before the launch of the new tiers, PS+ had reached 50 million members (almost double the number of subscribers to Game Pass), with Sony marketing itself as having “built the world's largest game subscription service”.³³⁶ Given the abundance of first-party and third-party content currently available to PS+, it is not credible that the competitive viability of Sony's service would be at risk as a result of any hypothetical withholding of Activision content (especially when Game Pass is not available on PlayStation).
- 4.65 Put differently, in order for this theory of harm to be proven, the CMA would need sufficient evidence to show that all of the content currently available on PS+ would not, either individually or in aggregate, be enough to replace one single franchise that PS+ currently does not have. Moreover, this should be considered in the context where PlayStation leads Xbox by more than 2-to-1 in installed base, also as a result of its content portfolio.
- 4.66 Further, even if Microsoft succeeds in growing Game Pass with the addition of *Call of Duty*, the CMA also would have to satisfy itself that Sony could not respond through innovation, investments or other improvements to its service. At a minimum, Sony could include additional first- and third-party releases in PS+ day and date beyond those currently on PS+.³³⁷ This would be beneficial for gamers. At the same time, Sony can easily increase its marketing investments in *FIFA*, *Grand Theft Auto*, another shooter franchise like *Battlefield* or *Destiny* (developed by Bungie, which Sony has acquired),

³³⁶ PlayStation Blog, “All-new PS+ arrives in select markets in Asia — Japan, North and South America, Europe, Australia, and New Zealand launches to follow”, 23.05.22 (link available [here](#)); Dual Shockers, “Xbox Game Pass Has Half Subscribers Of PS+, Despite Its Offerings”, 07.04.2022 (link available [here](#)).

³³⁷ Sony's first-party exclusives not currently included in PS+ include prominent titles such as *The Last of Us*, *God of War*, *Spiderman* and the *Final Fantasy VII* remaster.

or any other popular title to attract further subscribers to PS+. It is clear that Sony has a range of options to maintain or improve the competitive position of PS+ if hypothetically required, including strategies it is already pursuing (e.g., increased investment in live services games, which Sony CEO Jim Ryan believes will foster sustained engagement more effectively than subscription regardless).³³⁸

- 4.67 Any potential growth of Game Pass, whether or not it elicits competitive response from Sony, would only be beneficial to gamers. For completeness, Microsoft is aware that Sony has secured contractual rights to prevent games from a number of publishers from being included on Game Pass.³³⁹ Sony engages in conduct today which is reflective of its market power in multi-game subscriptions, including charging a significant pricing premium for its subscription services without fear of losing share in either subscriptions or consoles, as well as restrictive provisions in its agreements with publishers.³⁴⁰ Accordingly, any concerns raised by Sony in relation to the potential impact of the Merger on multi-game subscription services must acknowledge this conduct, which suggests that Sony has prioritised its own profits, rather than benefits to gamers.

There are other established multi-game subscription services

- 4.68 There are other established and prominent subscription services from gaming companies with significant and popular first-party content on both console and PC. Each of these services has a diversified content offering that has proven attractive to gamers and, as noted above, has achieved this without access to Activision content. Given this range of competitors and the abundance of content available through their services, it is difficult to understand how the withholding of content not available on these services could substantially reduce competition. These competitors are described below – as can be seen, each of these competitors can leverage a wide catalogue of content to compete with Game Pass.

- (a) **Amazon Luna.** Launched in the United States in March 2022, Amazon Luna is a cloud gaming platform that is split into multiple optional segments, or “Channels”. Most of these Channels are pay to access, with the exception of one for Amazon Prime members. Channel choices include the Retro Channel, Family Channel, Jackbox Games Channel, Ubisoft+, Luna+, and finally the Prime Gaming Channel. The Prime Gaming Channel is particularly notable because it offers Amazon Prime members a selection of free games to play on Luna that rotate each month.³⁴¹ Depending on the specific Channel a subscriber chooses, Luna has approximately 150 games available, including *Assassins Creed Valhalla*, *Tom Clancy’s Ghost Recon*, *Metro Exodus* and *Control*. Amazon also received critics and gamers’ attention with its very first two first-party releases (*New World* – which achieved 500,000 concurrent players in

³³⁸ GamesIndustry.biz, “PlayStation’s Jim Ryan: Our games could suffer if they went straight into PS Plus”, 29.03.2022 (link available [here](#)) (“I think that trend towards live services will continue, and if you look for a model in our category of entertainment, which supports sustained engagement over a long period of time, live services games arguably fit that bill better than a subscription service.”).

³³⁹ For example, Microsoft understands that [redacted].

³⁴⁰ In particular, the medium tier of Sony’s PS+ subscription service (PS+ Extra) which provides access to its game catalogue, costs £10.99/month, compared to £7.99/month for a Xbox Game Pass subscription. Sony’s top tier (PS+ Premium) – which includes cloud gaming – costs £13.49/month, compared to £10.99 for Xbox Game Pass Ultimate.

³⁴¹ IGN, “What is Amazon Luna? Understanding Amazon’s New Prime Benefit”, 02.03.2022 (link available [here](#)).

September 2021³⁴² – and *Lost Ark* – which broke various records on Steam on the first week after release in early 2022).³⁴³

As the service launched in March of this year, Amazon has not published its number of users, but the service continues to undertake promotional strategies including its partnership with Google’s new gaming Chromebooks, whereby it offers a three free month trial of Amazon Luna+ for purchasers of the new gaming Chromebooks, as well as offering one month of Luna+ subscription to anyone who purchases the discounted Amazon Luna controller.³⁴⁴

- (b) **Apple Arcade.** Launched in September 2019, Apple Arcade is a subscription service that gives subscribers access to over 250 games to play across Apple devices (iPhone, iPad, iPod Touch, Mac, Apple TV). The service includes exclusive games only available via Apple Arcade, as well as third-party titles that are available for purchase on other platforms. Some of its biggest games includes *NBA 2k21 Pocket Edition*, *Fruit Ninja Classic* and *Monument Valley*. As part of their its acquisition strategy, Apple offers 3 months of Apple Arcade free to the purchaser of any new Apple iPhone, iPad, Apple TV or Mac.³⁴⁵ While Apple has not published the number of subscribers for Apple Arcade, industry analysts have predicted that Apple will have 70 million subscribers for Apple Arcade by 2025.³⁴⁶
- (c) **EA Play.** Originally launched as Origin Access on Xbox and PlayStation and Origin Access on PC in 2014, EA Play provides subscribers with access to download EA games via two separate tiers of subscription: EA Play; and EA Play Pro. EA Play provides subscribers with “the Play List”, EA’s back catalogue of 71 games including *FIFA 22*, *Sims 4*, *Madden 23* and *Crysis Remastered*. EA Play Pro also provides subscribers access to the Play List, as well as instant access to premium versions of EA’s latest games including *Battlefield 2042* and *FIFA 23*. In February 2021, EA reported 13 million paying subscribers reached by its EA Play Service.³⁴⁷
- (d) **Nintendo Switch Online.** Initially launched in September 2018, Nintendo Switch Online enables its Nintendo users to enjoy online play on Nintendo Switch games as well as access to a selection of classic Nintendo Entertainment System games and Super Nintendo Entertainment System games. In October 2021, Nintendo subsequently launched the Nintendo Switch Online Expansion Pack add-on subscription, which provides additional benefits in the form of free DLC such as *Animal Crossing: New Horizons – Happy Home Paradise*, *Mario Kart 8 Deluxe – Booster Course Pass* and *Splatoon 2: Octo Expansion*. In addition, the Expansion Pack also provides access to 26 classic SEGA Mega Drive games and 16 classic Nintendo 64 games with industry speculation that

³⁴² Eurogamer, “*New World is Amazon’s first video game hit with half a million concurrent players on Steam*”, 28.09.2021 (link available [here](#)).

³⁴³ Geekwire, “*Amazon-published video game ‘Lost Ark’ sets Steam records in first week after release*”, 17.02.2022 (link available [here](#)).

³⁴⁴ Google, “*Introducing the world’s first laptops built for cloud gaming*”, 11.10.2022 (link available [here](#)); Tweet from Amazon Luna, 03.10.2022 (link available [here](#)).

³⁴⁵ See Apple Arcade (link available [here](#)).

³⁴⁶ SeekingAlpha, “*Apple may have a secret weapon with its Arcade gaming service*”, 10.06.2022 (link available [here](#)).

³⁴⁷ EA, “*Prepared remarks Q3 Fiscal 2021*”, 03.02.2021 (link available [here](#)).

Nintendo will add Game Boy console games to the Switch in the future.³⁴⁸ Though the Parties do not know the of the exact number of the registered users, Nintendo announced in May 2022 that its subscriber numbers had increased since its previously reported subscriber numbers of 32 million in September 2021.³⁴⁹

- (e) **NVIDIA GeForce NOW.** Officially launched in September 2015, GeForce NOW is a cloud-based game streaming platform that connects to the subscriber’s store accounts (including Steam, Epic Games Store, GOG and Ubisoft Connect) and allows the subscriber to stream their own library of games or play their favourite free-to-play games. GeForce NOW boasts the ability to stream over 1,400 games such as *Destiny 2*, *Counter Strike: Global Offensive*, *Cyberpunk 2077*, as well as over 90 of the most popular free-to-play games including *Apex Legends*, *WarFrame*, *Genshin Impact*, *Tom Clancy’s Rainbow Six Siege* and *Fortnite*. In addition, GeForce NOW also offers cloud saves for supported games, allowing subscribers to pick up the game where they left off, on any supported device, wherever they are. As of August 2022, GeForce NOW had over 20 million registered members.³⁵⁰
- (f) **Ubisoft+.** Launched in September 2019, Ubisoft+ grants subscribers with unlimited access to more than 100 Ubisoft games, including brand-new releases (the upcoming *Assassin’s Creed Mirage* and *Skull and Bones* will release day one on Ubisoft+) and premium editions of Ubisoft games, including *Assassin’s Creed Valhalla*, *Far Cry 6*, *For Honor* and *Riders Republic*. Ubisoft + is also available on PC and also via streaming on Amazon Luna, as well as certain “Ubisoft+ Classics” being available on PS+ Extra and Premium.³⁵¹
- (g) Other established competitors and recent entrants in multi-game game subscription services include: Blacknut, Google Play Pass, Humble Bundle, Netboom, Netflix, PlayKey, Shadow, Utomik and Vortex. All have entered this segment without access to Activision content.

4.69 Along with their content catalogues, certain gaming companies and prospective entrants can leverage various assets to power their own multi-game subscription services. For example, Sony and Nintendo can leverage their existing gamer base – which in the case of Sony lead Microsoft’s by more than 2-to-1 – while new entrants like Amazon and

³⁴⁸ Metro, “*Nintendo Switch Online Game Boy and GBA support leaks with 40 games*” 19.06.2022 (link available [here](#)).
³⁴⁹ Video Games Chronicle, “*Nintendo says it will continue to expand Switch Online ‘throughout this year’*” 11.05.2022 (link available [here](#)).
³⁵⁰ PC Mag, “*Nvidia’s GeForce Now Game-Streaming Service Tops 20 Million Users*”, 25.08.2022 (link available [here](#)).
³⁵¹ PlayStation, “*Introducing the all-new PS+*” (link available [here](#)).

Netflix can leverage the existing user bases – such as bundling a multi-game subscription to their existing Amazon Prime and Netflix subscriptions.³⁵²

- 4.70 These factors become even more compelling when considering that subscribers in the video industry multi-home extensively across services – third-party research suggests that the average US household subscribes to more than four video streaming services as of Q4 2021.³⁵³ Likewise in the UK, Ofcom has reported that 13.2 million households accessed at least two of Netflix, Disney + or Amazon Prime in Q1 2022.³⁵⁴ Microsoft believes the future of gaming subscriptions is likely to feature similar multi-homing rates. The more gamers multi-home across subscriptions, the easier it will be for rival services to scale regardless of the attractiveness of Game Pass, and the harder it would be for Microsoft to “marginalize” competitors.
- 4.71 The above demonstrates that there will remain a significant number of effective constraints for multi-game subscription services post-Merger. All of these competitors have been able to establish a presence in this segment without access to Activision content. Moreover, the above also demonstrates that there are numerous services through which gamers are able to access content and through which publishers are able to make their games available. To date, there has been no evidence provided as to how the hypothetical withholding of one piece of content, which is not currently available on any of these services, could alter this competitive landscape and result in harm to gamers.

No foreclosure of PC multi-game subscription services

- 4.72 The Merger is equally unlikely to result in any anticompetitive effect in relation to PC multi-game subscription services. Despite Activision’s reluctance to make its own content available through subscription services, this has not deterred several companies from launching PC multi-game subscription services in recent years. This includes Microsoft, Sony, Ubisoft, Amazon, Google, Meta, EA, Apple, Nvidia and many others. It is therefore entirely unclear how including into Game Pass content that is not currently distributed on these services could marginalise or foreclose them going forward.
- 4.73 As further evidence that Activision content is not key content for PC gaming, Steam is the clear market leader in PC digital distribution but did not distribute *Call of Duty* or other Activision games between 2018 and 2022. In 2018 Activision opted to not release *Call of Duty Black Ops 4* on Steam. However, following three years of exclusive PC

³⁵² [3<]. These other industries have themselves undergone significant changes in the past three years. While Netflix and Spotify have succeeded in growing their user base (as new entrants with no pre-existing content advantages), it is certainly not the case that they have “won the market” in the sense of foreclosing others, as both continue to face ever-intensifying competition, including from other firms who subsequently launched streaming services. Rather the success of trailblazers with new business models quickly attracts equally or more successful rivals. Netflix has a share of subscription video-on-demand services in Europe of ca. 35% and faces competition from Amazon, Apple, Disney, Viaplay, Comcast, Discovery, Bertelsmann, Telecom Italia, Orange and Vivendi, among many others. Spotify has a share of ca. 31% of music streaming, with strong competition from Apple Music, Amazon Music, Tencent Music, YouTube Music, NetEase, Deezer, Yandex and many others. Please see, The Verge, “*Disney inks a huge Sony deal to bring Spider-Man and other films to Disney Plus and Hulu*”, 21.04.2021 (link available [here](#)); European Audiovisual Observatory, “*Top players in the European AV industry: Ownership and concentration*”, January 2022, slide 18 (link available [here](#)) and The Music Network, “*Spotify on top as music streaming market diversifies at rapid rate*”, 24.01.2022 (link available [here](#)).

³⁵³ Kantar, “*85% of US households have a video subscription service*”, 26.01.2022 (link available [here](#)).

³⁵⁴ Ofcom, *Media Nations: UK 2022*, page 15.

distribution on Battle.net, Activision will release its latest *Call of Duty*, *Call of Duty Modern Warfare 2* on Steam on 28 October 2022. This period without *Call of Duty* has not hindered the success of Steam, clearly indicating that *World of Warcraft* and *Call of Duty* are not indispensable or important inputs for gaming companies that intend to expand on PC.³⁵⁵

- 4.74 Similar to console, the content available through subscription services on PC is equally available on a buy-to-play basis for purchase and gamers see subscription services as one of the many ways in which gamers pay for content. The analysis presented above on the interplay between subscriptions and buy-to-play, although based on Xbox telemetry data which relate to console gamers, also applies more generally. PC game subscriptions are not a separate “market” from which competitors can be excluded or marginalized. This is even more the case when considering that revenue from subscription services on PC account for only a minimal share of the overall revenue from game publishing.
- 4.75 While Microsoft’s share of revenue generated by multi-game subscriptions services on PC is [X] than the Parties’ share of game publishing on PC, these should not be taken as an indication that anticompetitive effects are likely to arise from any strategy involving the withholding of Activision’s games from rival services. It is not appropriate to sub-segment the PC gaming segment and carve out subscription services. As explained, these are just another means of paying for gaming content and do not represent a meaningfully different offering from a demand-side perspective. Game Pass’ share is miniscule on PC: the overall revenue from subscription services on PC accounts for less than [X]% of the global PC gaming segment and [X]% in the UK. The beta for PC Game Pass was only launched in June 2019 and Microsoft has not seen any evidence of a cannibalisation effect in PC gaming to date. Microsoft notes that its share of distribution in PC games is limited in any event (ca. [X]% in the UK in 2021).³⁵⁶

Any hypothetical partial foreclosure strategy equally will not result in anticompetitive effects

- 4.76 Any hypothetical “partial” foreclosure strategy whereby post-Merger Microsoft offered Activision content on competing subscription services with lower quality (e.g., only including back catalogue titles, or excluding certain content from rival subscription services) is equally bound to lead to no anti-competitive effects. This is because, as is the case with Theory of Harm 1, foreclosure effects in this industry are only likely to arise as a result of Microsoft gaining a larger gamer base as a result of direct diversion from rival platforms. That is, for example, Sony can only be foreclosed if, as a direct consequence of Microsoft’s hypothetical partial foreclosure strategy, enough Sony PS+ subscribers leave the service to join Xbox Game Pass. As (and for the reasons described above) rival subscription services cannot be foreclosed by “total” withholding of

³⁵⁵ Steam has not carried any Activision games for the last three years following Activision’s commercial decision to only sell its PC games on Battle.net. At the time of that decision, Activision [X]. With 132 million MAUs on the Steam digital storefront in 2021, Activision considers that [X] [40-50]%. It also shows that Steam has retained its leading position over the past three years without any Activision content. In PC gaming distribution, Steam will always be a preferred channel for both gamers and publishers – even for those publishers which have their own platform to hypothetically favour.

³⁵⁶ FMN, Table 35, page 124.

content, it is even less credible that they could be marginalized as a result of partial foreclosure strategies.

D. Conclusion on Theory of Harm 2

4.77 For the reasons set out above, it is not plausible that the potential inclusion of Activision content to Game Pass could result in the foreclosure of Microsoft's rivals in multi-game subscription services. Activision content currently is not available on such services (except in a very minor way on Sony, for old content) and no evidence exists to demonstrate how it could become an important input in relation to the competitive viability of these services. Moreover, any hypothetical exclusivity strategy in relation to Game Pass is incapable of giving rise to any anti-competitive effect given the constraint on subscription services posed by buy-to-play, as well as the presence of effective competitors in this segment, capable of responding to any improvement in Game Pass' offering to gamers.

5. Theory of Harm 3 – No prospect of a substantial lessening of competition through foreclosure of cloud gaming services

5.1 The Issues Statement suggests that:

- (a) Cloud gaming is a nascent and rapidly developing market that is expected to grow significantly in the future;
- (b) Microsoft already has an advantage over rivals by having a broad multi-product ecosystem, including a leading cloud platform and PC OS; and
- (c) Microsoft could leverage this ecosystem together with Activision's gaming content to strengthen network effects, raise barriers to entry, and hence foreclose rivals in cloud gaming services.³⁵⁷

5.2 The Issues Statement fails to recognise that the Merger aims to facilitate the adoption of innovative services (including cloud gaming) for which there is currently no proven consumer demand. Given the challenges involved in bringing cloud gaming to market, there is no evidence to suggest that cloud gaming will develop into a reliable game delivery channel that is on par with mobile devices, consoles, and PC. As such, there is no credible basis to conclude that the Merger would result in any competitive harm with respect to cloud gaming. To the contrary, the Merged Entity will have every incentive to promote the development of cloud gaming, as a means of growing the overall gaming market and increasing competition in mobile gaming.

A. Cloud gaming is a new and unproven technology

5.3 Cloud gaming allows gamers to stream games from a remote server to any device (*e.g.*, mobile, PC, console, smart TV) over the internet. The key attraction of cloud gaming is that it allows gamers to play technologically complex games on less powerful devices, such as mobile phones, that would otherwise lack the computing power or storage to support them. Cloud gaming currently accounts for a *de minimis* proportion

³⁵⁷ Phase 1 Decision, paragraph 239.

of consumer spend on gaming: just [3<] % in 2021. Consumer adoption is uncertain and expected to be limited for the reasons set out below.

(i) The growth of cloud gaming on console and PC is expected to be limited

- 5.4 Downloading remains the most common form of distribution of games in digital form. Once downloaded, games are stored, run, processed, and displayed locally on the gamer's device.³⁵⁸ One of the benefits of running a game locally is that it minimises latency – the amount of time between a user's action (e.g., the pressing of a button on a controller) and the realization of that action within the game. Another benefit is that a gamer can continue to play the game even when they are not connected to the internet, or if their broadband connection is interrupted.
- 5.5 Higher latency (i.e., slow reaction time) is inherent in cloud gaming given the need to send data to, and run computations in, remote cloud servers rather than the player's local device. Minimising latency is critical to the gamer experience and high latency can have a significant detrimental effect on the quality of gameplay, particularly for competitive multiplayer gameplay. In competitive multiplayer scenarios, the lag inherent in cloud gaming places players playing over a cloud streaming service at a disadvantage compared to players who are playing on their local devices.
- 5.6 While cloud gaming may be offered as an additional feature on console and PC, downloading and playing games locally is expected to continue to be the norm for the foreseeable future (i.e., as this guarantees higher and more stable performance). Cloud gaming may provide gamers with certain (more limited) benefits. For example, downloading a game to a device can take some time (even with faster broadband speeds). Cloud gaming may give gamers the option to start playing games they have purchased immediately, even before the download has completed. However, Microsoft, Activision and many industry experts expect that gamers will continue to download the vast majority of the games they play on PC and console.³⁵⁹

(ii) Cloud gaming is a means of accessing games, not a market

- 5.7 The Phase 1 Decision finds a separate product market for cloud gaming services. However, for the reasons set out above, cloud gaming is merely a delivery mechanism and does not provide different gaming content to what is available to download. Rather than a distinct product or market, cloud gaming is a feature that provides an alternative way for gamers to access content that is not tied to a specific device. It should not be considered separately from the other ways of accessing and playing games (at least on console and PC).
- 5.8 Gamers choose a gaming experience based on whether it provides enjoyment at an attractive price point. Gamers are not motivated by the location of the content or means of delivery (e.g., whether they are using computing power locally or in the cloud). Rather, gamers care about subject matter, storylines, graphical performance, speed (e.g., loading times and latencies), mechanics, game selection, and game cost. That is true across all gaming scenarios, with streaming being no exception. Streaming

³⁵⁸ However, even with game downloads, some elements of the game will be processed in and delivered via the cloud, such as multi-player elements.

³⁵⁹ By 2025, Xbox expects cloud gaming to account for only [3<] % of the total consumer spend on gaming.

services therefore need to compete effectively with downloadable gaming options across these metrics if they are to grow.

5.9 The Phase 1 Decision rejects Microsoft’s submissions on the basis that they “fail to recognise the impact of cloud gaming services on demand for consoles, PCs, and games”, arguing that “cloud gaming services can be seen as an alternative for gamers to owning a console or PC”. The CMA’s rejoinder vastly overstates the relevance and importance of cloud gaming services in the gaming space at present and over the medium term. Microsoft agrees that, in the long-term, cloud gaming services may render hardware distinctions less important. However, the reality is that today cloud gaming remains unproven as a consumer proposition and the available evidence does not indicate in any manner that this is likely to change anytime soon.³⁶⁰ Evidence from Microsoft’s internal documents, data and third-party reports shows that cloud gaming services are not relevant in any meaningful way to gamers’ “demand for consoles, PCs, and games”, nor is this expected to change in next few years.³⁶¹

(iii) The potential opportunity for cloud gaming on mobile devices

5.10 The vast majority of mobile games are downloaded from mobile app stores and run locally (or “natively”) on a mobile device. Consumers overwhelmingly use mobile app stores to discover and purchase new games. For Apple devices, the Apple App Store is pre-installed and is the *de facto* method of delivery of native mobile games to Apple’s iOS devices.³⁶² The Google Play Store is the predominant app store on Android devices and faces only limited constraint from alternative Android app stores.³⁶³ Gaming is an important part of mobile app store revenues, accounting for more than 60% of total app store revenues for both Apple and Google in 2021.³⁶⁴

5.11 There are two challenges with delivering technologically complex games to mobile devices. First, the current generation of mobile devices have less computing power and memory than consoles and PCs. This is, however, changing rapidly with new mobile devices having more memory and better processors, such that they are increasingly on par with consoles and PCs. Second, the Apple App Store and Google Play Store rules limit the types of native apps which can be distributed through the stores.³⁶⁵ In particular:

³⁶⁰ In December 2021, there were only around [§<] million MAUs on xCloud worldwide, representing [§<]% of total Xbox MAUs in the same period. These proportions are even smaller if one considers the percentage of game time: the total game-time on xCloud is only [§<]% of the total game-time on Xbox console in 2021, and only [§<]% in 2022. Over January - March 2022 the average share of xCloud MAUs to Xbox MAUs was [§<]%. [§<].

³⁶¹ As the CMA has acknowledged elsewhere, one of the reasons for this is the restrictions Apple has placed on such services on iOS devices. CMA, *Mobile ecosystems Market Study Final Report*, 10.06.2022, section 6(link available [here](#)).

³⁶² CMA, *Mobile Ecosystems: Market Study Final Report*, 10.06.2022, paragraphs 4.5, 4.7 and 4.56 (link available [here](#)).

³⁶³ CMA, *Mobile Ecosystems: Market Study Final Report*, 10.06.2022, paragraphs 4.5, 4.8, 4.60-64 and 4.70-4.100 (link available [here](#)).

³⁶⁴ Statista, “*Mobile app revenues for mobile apps and games worldwide in 2021*”, 22.09.2022 (link available [here](#)). Apple and Google generate more revenues from game distribution than game developers, including Microsoft, do from subscriptions and sales of the games themselves. FMN, **Annex 002.1** [§<].

³⁶⁵ FMN, paragraph 2.19.

- Apple’s rules prevent multi-game cloud gaming apps, such as Game Pass Ultimate, from being distributed as a native app in the App Store. iOS device users can only access Game Pass Ultimate through a browser-based web app.³⁶⁶
- 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.³⁶⁷
- Both Apple and Google direct users to their respective app store, and not to the browser, when users search for applications and in marketing promotions on Apple and Google devices.³⁶⁸

5.12 In order to address these challenges, gaming companies have adopted a variety of strategies.

- **Native mobile versions of console games:** Activision has developed native mobile versions of its console games, such as *Call of Duty: Mobile*. Since its launch in 2019, *Call of Duty: Mobile* has been extremely successful and has MAUs of ca. [X]. million, ca. [X]% of the total MAUs of the franchise. *Call of Duty: Mobile* is available via the App Store and Google Play Store.
- **Streaming of console games via the mobile browser:** Xbox has explored whether it is possible to stream console games to mobile phones using cloud gaming. This has been much less successful, as it involves a new and immature technology which faces significant challenges on mobile devices, as “users may be unaware of the choices available to them or find it difficult to access a provider’s services since web apps are not currently discoverable on, or distributed by, the App Store, which is how users are accustomed to discovering apps”.³⁶⁹

(iv) Xbox’s experience with Fortnite highlights the challenges

5.13 While cloud gaming on mobile may grow, adoption is not expected to be rapid as it requires a significant change in consumer behaviour. Research published by the CMA shows that, both worldwide and in the UK, where cloud gaming app users had a choice between a provider’s native or web app on Android, around 99% of users used the native app, with 1% using either the web app or a combination of the web and native app.³⁷⁰ Microsoft’s experience with adding *Fortnite* on Xbox Cloud Gaming illustrates these challenges.

³⁶⁶ Microsoft has tried for several years to get Apple and Google to agree to add Game Pass to the Apple App Store and Google Play Store respectively as a fully functional native app, however these negotiations have been unsuccessful. Apple has only agreed to a browser-based app. Google only supports monetization in-app through the Google Play Store, which Microsoft is not able to integrate with. The Google Play Store Game Pass app is therefore “consumption-only”.

³⁶⁷ FMN, paragraph 2.19. CMA, *Mobile Ecosystems: Market Study Final Report*, 10.06.2022, paragraph 6.124 (link available [here](#)).

³⁶⁸ FMN, paragraph 2.19. As an alternative to including Game Pass as a native mobile app in the Apple App Store and Google Play Store, FMN, **Annex 002.17** [X].

³⁶⁹ CMA, *Mobile ecosystems Market Study Final Report*, 10.06.2022, paragraph 6.233 (link available [here](#)).

³⁷⁰ CMA, *Mobile ecosystems Market Study Final Report*, 10.06.2022, paragraph 6.234 (link available [here](#)).

- (a) Microsoft added cloud gaming as a feature of its top-tier subscription service offer, Game Pass Ultimate (which also includes the multi-player functionality of Xbox Live Gold) in September 2020.³⁷¹ Yet, more than two years later, Xbox Cloud Gaming is still available as a “beta”, meaning that it is still in second-stage testing.³⁷²
- (b) At launch, Microsoft was hopeful that [REDACTED].³⁷³ But even then, Microsoft understood [REDACTED].³⁷⁴ The ‘market signal’ Microsoft received, [REDACTED].
- (c) *Fortnite* was launched as a free-to-play game on Xbox Cloud Gaming in May 2022.³⁷⁵ As the game was free-to-play and available separately from Game Pass, Microsoft was relatively optimistic as to the number of potential users of the service. [REDACTED].³⁷⁶
- (d) As shown by Figure 53 below, the number of players on *Fortnite* on Xbox Cloud Gaming [REDACTED].³⁷⁷

Figure 53: [REDACTED]

[REDACTED]

Source: [REDACTED]

- (e) [REDACTED],³⁷⁸ there were significant issues with gamers being able to discover and access the game, particularly on mobile devices. The key issues with attracting gamers to *Fortnite* on Xbox Cloud Gaming are:
 - *Fortnite* on Xbox Cloud Gaming is not available in the Apple App Store or Google Play Store. If gamers search for *Fortnite* on these stores, the search results refer to other games and not to the fact that *Fortnite* is available via the mobile browser on these devices;
 - Searches for *Fortnite* on the Google search engine do not bring up Xbox Cloud Gaming as a leading search result; and
 - Gamers looking to play *Fortnite* on a mobile device have to figure out for themselves that they need to go to the Xbox website Xbox.com/play. Gamers then need to know that they have to locate and download Xbox’s web-app in order to have full screen rendering of the game. However, the web-app can only be pinned to the gamer’s home screen in the Safari browser on iOS devices (but not in Chrome, FireFox or Edge). As is

³⁷¹ FMN, paragraph 2.11. “*Cloud Gaming with Xbox Game Pass Ultimate Launches with More Than 150 Games*”, Kareem Choudhry, Corporate Vice President, Cloud Gaming, Microsoft, 14.09.2020 (link available [here](#)).

³⁷² First stage testing took place as part of the Project xCloud (Preview) program.

³⁷³ FMN, **Annex 002.16** – [REDACTED].

³⁷⁴ FMN, **Annex 002.16** – [REDACTED].

³⁷⁵ Epic Games, “*Fortnite now available through Xbox Cloud Gaming – Play via browser on mobile and PC with Xbox Cloud Gaming for Free!*”, 11.05.2022 (link available [here](#)) and “*Fortnite GeForce Now FAQ – Play Fortnite via the Cloud on PC, mobile and more!*”, 25.05.2022 (link available [here](#)).

³⁷⁶ **Annex ISR004** – [REDACTED].

³⁷⁷ [REDACTED]. **Annex ISR005** – [REDACTED]. **Annex ISR006** – [REDACTED]. **Annex ISR007** – [REDACTED].

³⁷⁸ [REDACTED].

evident, this is a very involved process that most gamers will not be aware of, much less undertake.

- (f) An additional challenge facing demand for cloud gaming is that console games do not play well on mobile devices due to differences in screen size and touch *versus* controller controls. Even though it streams the console version of the game, Xbox Cloud Gaming accounts for [REDACTED]% of game play hours of *Fortnite* on Xbox, with console accounting for [REDACTED]% of game play hours.³⁷⁹
- (g) Furthermore, [REDACTED].
- (v) **Microsoft does [REDACTED]**

5.14 The table below shows the latest data on revenue and cost per hour for *Fortnite* on Xbox Cloud Gaming. As of October 2022, Microsoft estimated the exact cost-to-serve per hour to be USD [REDACTED] – comprised of the various cost items included in the table below. At the same time, Microsoft’s agreement with Epic is such that the revenue from any in-game purchase taking place during an Xbox Cloud Gaming session of *Fortnite* are [REDACTED].

Table 10: [REDACTED]

[REDACTED]

Source: [REDACTED]

- 5.15 Given the costs associated with Xbox Cloud Gaming and the [REDACTED] using Azure IaaS, [REDACTED].³⁸⁰
- 5.16 In August 2022, the Microsoft Gaming organization put [REDACTED].³⁸¹ [REDACTED].³⁸² [REDACTED].

B. No pre-existing advantage for Microsoft across its ‘ecosystem’

5.17 The Issues Statement does not recognise the lack of proven demand for cloud gaming. Instead, the Issues Statement takes a “mix-and-match” approach to suggest that Microsoft has “*pre-existing strengths*” across its “*broad multi-product ecosystem*” due to having “*a leading gaming console, a leading cloud platform, and the leading PC OS*”.³⁸³ This theory does not make sense technically or commercially. While the Issues Statement lists a number of products, these products are not linked and cannot be used in combination in a manner that could cause the market to “tip”.³⁸⁴

(i) An “ecosystem” cannot simply be a list of assets

5.18 Both the Issues Statement and the Phase 1 Decision use the term “ecosystem” liberally without providing a definition. It is, however, clear that a collection of owned assets does not create an ecosystem – let alone one that can be leveraged to “tip” a market.

379 [REDACTED].

380 [REDACTED].

381 [REDACTED].

382 [REDACTED].

383 Issues Statement, paragraph 39.

384 Issues Statement, paragraph 44.

The Issues Statement accepts this and refers to the need for the Merger to “*significantly strengthen [Microsoft’s] integrated offering*” (emphasis added).³⁸⁵

5.19 In Phase 2, the Panel must consider the extent to which the assets listed in the Issues Statement do, in fact, amount to an integrated offering. Microsoft strongly believes that they do not – and that there are, in fact, no linkages between the products listed in the Issues Statement which could give rise to a risk of market foreclosure. A theory of harm which simply lists a number of products, but fails to describe any linkages or leveraging mechanisms between them does not reflect the conclusions of the Furman report that most acquisitions by digital companies are not anti-competitive.³⁸⁶ A theory of harm that simply equates size or number of products with market power would represent a significant lowering of the intervention threshold in digital mergers by the backdoor - contrary to government policy.³⁸⁷

5.20 The Issues Statement takes a “mix-and-match” approach to suggest that – on the one hand - alleged console game content advantages and – on the other hand – Windows PC game streaming infrastructure can form a single multi-product ecosystem. This is misguided as the two are not an “integrated offering”. As explained below:

- bespoke Xbox console infrastructure is used to stream Xbox console games;
- servers running Windows can be used to stream Windows PC games – though this is not done by Xbox; and
- these are two separate offerings – and are not “integrated”.

(ii) Xbox uses bespoke console infrastructure to stream Xbox console games

5.21 As acknowledged in the Issues Statement, Xbox Cloud Gaming is provided on dedicated Xbox consoles located in Microsoft data centres, streaming console games running on the Xbox operating system.³⁸⁸ The infrastructure used to provide Xbox Cloud Gaming has evolved from consoles racked in data centres to console motherboards mounted in blades that are racked in data centres. This is shown in Figures 54 and 55 below.³⁸⁹ Xbox Cloud Gaming therefore does not benefit from any Azure-related or Windows-related advantages.

Figure 54: [REDACTED]

[REDACTED]

Source: [REDACTED]

Figure 55: [REDACTED]

[REDACTED]

³⁸⁵ Issues Statement, paragraph 41.

³⁸⁶ Issues Statement, paragraph 41.

³⁸⁷ While the legislative proposals for the Digital Markets Unit have not been finalised, Microsoft notes the Government’s conclusion that the Phase 2 merger intervention threshold should remain the same for digital mergers on the basis that the Government does “*not believe there is sufficient evidence to take forward these changes at this time*”. HM Government, *Government response to the consultation on a new pro-competition regime for digital markets*, May 2022, page 34 (link available [here](#)).

³⁸⁸ Issues Statement, paragraph 7(c); Phase 1 Decision, paragraph 256.

³⁸⁹ [REDACTED].

Source: [redacted]

As Xbox only uses the Xbox console platform for cloud streaming, Xbox cannot derive an advantage from assets that it does not use

5.22 As shown by Figure 56 below, Xbox Cloud Gaming only makes use of the Xbox console platform. In particular, Xbox Cloud Gaming:

- (a) **Streams Xbox console games:** Whatever device a gamer uses to access the game via Xbox Cloud Gaming, the console version of the game is streamed from the data centre. Xbox Cloud Gaming does not stream Windows PC games.
- (b) **Uses the Xbox user experience:** A gamer who uses Xbox Cloud Gaming to access a game receives the same user experience (e.g., in terms of their gamer identity, entitlements and achievements) as a gamer who downloads and plays a game on their console.
- (c) **Uses Xbox consoles which run the Xbox operating system:** The Xbox consoles in the data centres run games using the Xbox operating system. Xbox Cloud Gaming does not use Azure IaaS nor does it use the Windows operating system.

Figure 56: Assets used by Xbox Cloud Gaming – and those it does not use

Assets		Xbox Cloud Gaming uses	Xbox Cloud Gaming does <u>not</u> use
Content		Xbox console games	Windows PC games
User experience		Xbox console user experience	Windows PC user experience
Infrastructure	PaaS	Xbox console streaming platform & OS	Windows OS
	IaaS	Xbox consoles	Azure IaaS

Source: Microsoft

5.23 Xbox Cloud Gaming uses the Xbox console platform and assets (and not Azure IaaS or the Windows OS). Sony has taken a similar approach and uses the PlayStation console platform and assets to deliver its own cloud gaming functionality as a feature of the premium tier of PlayStation+.³⁹⁰ Nintendo works with a third-party, Ubitus, to stream games on the Nintendo platform.³⁹¹

Xbox has [redacted]

5.24 Xbox has considered [redacted].

³⁹⁰ Microsoft's response to section 109 notice dated 26 September 2022, paragraph 59.20.

³⁹¹ Microsoft's response to section 109 notice dated 26 September 2022, paragraph 59.8.

- (a) [REDACTED].³⁹² [REDACTED].³⁹³
- (b) [REDACTED].³⁹⁴ [REDACTED].³⁹⁵
- (c) [REDACTED].³⁹⁶ [REDACTED].³⁹⁷ [REDACTED].

[REDACTED]

5.25 Since data has become available on the performance of *Fortnite* on Xbox Cloud Gaming over the summer months, Microsoft has learned lessons [REDACTED]. Specifically:

- **Gamer usage of Xbox Cloud Gaming [REDACTED]:** Even following the launch of *Fortnite*, Xbox Cloud Gaming’s MAU is only [REDACTED] million worldwide (and [REDACTED] in the UK) in September 2022.³⁹⁸
- [REDACTED].³⁹⁹ [REDACTED].⁴⁰⁰
- [REDACTED].⁴⁰¹

[REDACTED]

5.26 Given the [REDACTED].⁴⁰² [REDACTED].⁴⁰³ [REDACTED].⁴⁰⁴ Microsoft will maintain its Xbox Cloud Gaming service, and will continue to support and promote it as it exists today.

C. The Merged Entity will not have the ability to foreclose

5.27 The Issues Statement suggests that the Merger may significantly strengthen the Merged Entity’s “integrated offering”. Absent the Merger, rivals could still hope to compete against Microsoft by offering a different value proposition whereas following the Merger, it may be significantly more difficult for rivals to compete against Microsoft on any parameter of competition, as Microsoft would have by far the strongest integrated offering across cloud, computer OSs, and gaming content.⁴⁰⁵ This is clearly incorrect as: (i) cloud gaming will reduce network effects and barriers to entry; (ii) the Merged Entity would have no material content advantages if it chose to use Azure IaaS and Windows OS and stream PC games; (iii) PC game content is available to cloud gaming rivals from a broad range of publishers and also via partnerships with PC digital storefronts.

392 Microsoft’s response to section 109 notice dated 26 September 2022, paragraph 59.21.
393 Microsoft’s response to section 109 notice dated 26 September 2022, paragraph 61.3.
394 Microsoft’s response to section 109 notice dated 26 September 2022, paragraphs 61.3-61.4.
395 Microsoft’s response to section 109 notice dated 26 September 2022, paragraph 61.4.
396 Microsoft’s response to section 109 notice dated 26 September 2022, paragraph 58.7.
397 Microsoft’s response to section 109 notice dated 26 September 2022, paragraph 58.6.
398 [REDACTED].
399 Microsoft’s response to section 109 notice dated 26 September 2022, paragraph 58.9. [REDACTED].
400 [REDACTED].
401 [REDACTED].
402 Microsoft’s response to section 109 notice dated 26 September 2022, paragraph 58.10. [REDACTED].
403 Microsoft’s response to section 109 notice dated 26 September 2022, paragraph 58.10. [REDACTED].
404 [REDACTED].
405 Issues Statement, paragraph 41.

(i) Cloud gaming will reduce network effects and barriers to entry

- 5.28 In applying its novel “multi-product ecosystem theory of harm”, the CMA fails to consider that the Merger is aimed at bringing innovative services (including cloud gaming) more quickly to market. The CMA does not cite, or appear to have considered, the work of its own Mobile Ecosystem Market Study which recognises that cloud gaming “*could provide benefits to consumers and developers, as well as increasing the level of competition between operating systems*”.⁴⁰⁶
- 5.29 The CMA also fails to recognise that by promoting cloud gaming, the Merger would lower barriers to entry and reduce network effects. The Phase 1 Decision states that cloud gaming “*means that gamers can access games that were previously available only on console through a wider range of less powerful devices (e.g. smart TVs, mobiles)*” and that “*cloud gaming services could be attractive to a different pool of customers who do not have access to the current hardware*”.⁴⁰⁷ However, as cloud gaming is effectively device-agnostic and does not require investment in hardware, gamers can easily switch and multi-home across services regardless of the device they choose to play on.
- 5.30 There is substantial evidence from the video streaming industry that consumers multi-home and subscribe to many services at the same time, thereby reducing the importance of network effects (as smaller platforms can still attract content creators to distribute on their services) and barriers to entry (as users are not “captive” and are willing to try new services). Data published by Ofcom confirms that multi-homing is widespread among subscription video-on-demand (“SVOD”) users with 13.2 million UK households (46%) subscribing to two or more video on demand services and 5.2 million households subscribing to Netflix, Amazon Prime Video and Disney+.⁴⁰⁸
- 5.31 As noted in the economic literature on multi-product ecosystems “*[i]n general, the more multi-homing users there are, the easier it will be for multiple platforms to co-exist in a market, and the less ‘tippy’ the market will be*”.⁴⁰⁹ This is particularly the case for gaming as evidenced by the economics and business literature.⁴¹⁰ By promoting the take-up of cloud gaming, the Merger would make it easier for gamers to multi-home and lower barriers to entry and network effects, to the benefit of competition and consumers.

(ii) The Merged Entity would have no material content advantages if it chose to use Azure IaaS and/or the Windows OS

- 5.32 As noted above, the CMA cannot take a “mix-and-match” approach to suggest that alleged console game “content advantages” and Windows PC game streaming

⁴⁰⁶ CMA, *Mobile Ecosystems: Market Study Final Report*, 10.06.2022, paragraph 6.223 (link available [here](#)).

⁴⁰⁷ Phase 1 Decision, paragraph 81.

⁴⁰⁸ Ofcom Media Nations Report, page 15.

⁴⁰⁹ OECD, *Digital competition policy: Are ecosystems different? – Note by Amelia Fletcher Hearing on Competition Economics of Digital Ecosystems*, 3 December 2020, paragraph 12 (link available [here](#)).

⁴¹⁰ See for example: Robin Lee, *American Economic Review, Vertical Integration and Exclusivity in Platform and Two-Sided Markets*, 2013 (link available [here](#)) and, M. Iansiti and F. Zhu, *Harvard business review, Why some platforms thrive and others don't*, 2019 (link available [here](#)).

infrastructure can form a single multi-product ecosystem. The two are not an “integrated offering”.

- 5.33 Azure IaaS and Windows OS can be used to stream PC games. Both Parties are small players in PC game publishing, with no material content advantages pre- or post-Merger. Activision’s share of PC game publishing is only [5-10]% worldwide ([5-10]% in the UK) with a combined share of [0-10]% ([10-20]% in the UK).⁴¹¹ Even looking at PC and console game publishing combined, Activision’s share is only [5-10]% worldwide ([5-10]% in the UK), with a combined share of [10-20]% worldwide ([10-20]% in the UK).

(iii) A wide variety of PC content will be available for rival providers

- 5.34 Given the Merged Entity’s limited share of PC game publishing, even if it were to withhold its content from rival cloud gaming providers (*quod non*), a vast range of content (accounting for over [85-95]% of PC game publishing revenue) would remain potentially available to stream. It is simply not plausible that the Merged Entity could foreclose entry with only a [10-20]% market share in the relevant upstream market. Rival cloud gaming providers are also successfully developing their own first-party content. Amazon Games publishes PC games developed by its three game development studios and third-party studios, with recent titles including *The Grand Tour Game*, *New World* and *Lost Ark*.⁴¹² Netflix has announced that it is seriously exploring a cloud gaming offering and is expanding into PC game development, with 5 game development studios.⁴¹³ Facebook also offers Android and Windows cloud gaming⁴¹⁴ and recently launched *Crayta* as a free-to-play cloud-streamed platform on Facebook Gaming.⁴¹⁵ *Crayta* launched on Google Stadia in 2020 and the Epic Games Store on PC in 2021. A collaborative game-building platform that lets players create, share, and play games with friends, *Crayta* features a library of thousands of player-made games that users can browse or add to with their own creations.
- 5.35 In any event, many providers of cloud partner with PC digital storefronts. This includes the largest cloud gaming provider, Nvidia GeForce Now, which has partnered with multiple PC digital storefronts, including Steam, Epic Games Store, GOG.com and

⁴¹¹ FMN, Tables 12 and 13.

⁴¹² Amazon Games website (link available [here](#)). See Amazon’s announcement “‘Lost Ark’ shatters records at launch”, 18.02.2022 (link available [here](#)) which states that “Less than a week after launch, Lost Ark has become Steam’s highest-played MMORPG ever”, and The Washington Post, “Amazon Games execs explain how past failures helped fuel ‘Lost Ark’s success”, 08.03.2022 (link available [here](#)) refers to the game as “one of the most successful game launches in history”.

⁴¹³ TechCrunch Disrupt 2022, “Netflix to expand into cloud gaming, opens new studio in Southern California”, 18.10.2022 (link available [here](#)); The Verge, “Netflix is ‘seriously exploring’ a cloud gaming service”, 18.10.2022 (link available [here](#)); Financial Times, “Netflix buys Next Games for €65mn”, 02.03.2022 (link available [here](#)); Netflix, “Let the Games Begin: A New Way to Experience Entertainment on Mobile”, 02.11.2021 (link available [here](#)) and “Developing Games Around the World: Netflix to Acquire Next Games”, 02.03.2022 (link available [here](#)); Night School, “We are joining the Netflix team”, 28.09.2021 (link available [here](#)); GamesIndustry.biz, “Netflix hires VP of game studios”, 23.11.2021 (link available [here](#)) and “Netflix names Roberto Barrera as new head of gaming strategy”, 08.03.2022 (link available [here](#)).

⁴¹⁴ Facebook Gaming, Cloud Games (link available [here](#)).

⁴¹⁵ Facebook Gaming, “Welcome Unit 2 Games to Facebook Gaming”, 04.06.2021 (link available [here](#)). Facebook Gaming, “Game making made easy on Facebook Gaming”, 09.06.2022 (link available [here](#)); The Verge, “Facebook Gaming brings Crayta’s user-generated games to its cloud platform”, 08.06.2022 (link available [here](#)).

Ubisoft Connect.⁴¹⁶ The service “has Steam and other stores installed, and every compatible game is already installed on a network drive that your virtual machine connects to. Nvidia has done a lot of custom work to build GeForce Now into a tailored game playing service. That’s a major selling point”.⁴¹⁷ New games are added on a weekly basis to keep GeForce Now’s catalogue fresh and to maintain user interest. In this way, Nvidia brings new games in front of its users and prompts purchases in the supported digital storefronts. Even though GeForce Now is not a storefront, members can still buy Steam games while in the app.⁴¹⁸ In addition, GeForce Now’s free version allows gamers access to nearly 100 free-to-play games, including successful franchises such as *Fortnite*, *Destiny 2* and *League of Legends*.⁴¹⁹ Nvidia GeForce Now has been able to compete successfully without acquiring content.⁴²⁰

5.36 Other providers which allow gamers to ‘bring their own games’ include Boosteroid, Blade Shadow and Rainway.⁴²¹ Given the highly fragmented nature of PC game distribution, there are a range of competing digital storefronts. The combined share of the Merged Entity in PC game distribution is only [10-20]% worldwide ([10-20]% in the UK).

D. No ability to foreclose rivals through foreclosure of gaming content

5.37 The Issues Statement suggests that the Merged Entity may have greater ability to engage in total or partial foreclosure strategies using the Merged Entity’s gaming content (as set out in Theories of Harm 1 and 2).⁴²² As set out in above, it is not credible that the Merged Entity could foreclose rivals in console and multi-game subscription services through total or partial foreclosure of Activision content. The same is true of rival cloud gaming services.

(i) Activision has not distributed its content on cloud gaming services [X]

5.38 Activision has chosen not to distribute its content on any cloud gaming service [X]. Activision believes that cloud gaming technology [X]⁴²³[X]. Industry analysts have noted that Activision has “sat out the cloud developments”.⁴²⁴

5.39 Activision has [X].⁴²⁵ For instance, in late 2019 and early 2020, Activision considered and participated in a closed environment beta test of Nvidia’s GeForce Now cloud

⁴¹⁶ This is achieved via account binding, with gamers logging in to their digital storefront accounts and playing with GeForce Now. Pocket-lint, “What is Nvidia GeForce Now, is it free and what devices does it work with?”, 13.05.22 (link available [here](#)).

⁴¹⁷ PC Gamer, “The controversy over GeForce Now, explained”, 04.3.2020 (link available [here](#)).

⁴¹⁸ Nvidia, “How to Build Your Game Library in the Cloud”, 09.03.2021 (link available [here](#)).

⁴¹⁹ As Nvidia notes, gamers “won’t need to make a single purchase to start playing today”. Nvidia (link available [here](#)).

⁴²⁰ Game Spot, “The Best Gaming Subscription Services In 2022”, 07.09.2022 (link available [here](#)). Wired, “Too Many Game Subscription Services? Here’s How to Choose”, 11.04.2022 (link available [here](#)). Gaming Scan, “Best Gaming Subscription Services 2022”, 04.01.2022 (link available [here](#)). Nvidia, “Gamers, Creators, Drivers Feel GeForce RTX, NVIDIA AI Everywhere”, 04.01.2022 (link available [here](#)) and “NVIDIA Partners With Electronic Arts to Bring Hit Games to GeForce NOW”, 30.09.2021 (link available [here](#)).

⁴²¹ The Rainway website states “You can play any PC game that you own. Additionally, you don’t need to access different launchers to play your games. Rainway will pull games in from Steam, Origin, or Epic and so much more. With Rainway, you can play your games in just one click.” (link available [here](#)).

⁴²² Issues Letter, paragraph 42(a).

⁴²³ [X].

⁴²⁴ FMN, **Annex 002.68** – “2021 Newzoo Global Cloud Gaming Report”, page 87.

⁴²⁵ [X].

gaming service, but Nvidia made Activision's content available on Nvidia's live platform without ABK's consent. Activision swiftly determined that Nvidia's actions [redacted] the terms of their agreement and promptly demanded that Nvidia remove access to Activision's content for failure to seek permission.⁴²⁶ Nvidia complied and issued a public statement confirming that they had removed all Activision games from the service. Nvidia was not foreclosed by the withdrawal of Activision titles and instead pointed customers to the wide array of alternative content available on its service – “we have over 1,500 games that developers have asked to be on-boarded to the service. Look for weekly updates as to new games we are adding”.⁴²⁷ Similarly, Activision [redacted].

5.40 As such, Activision content cannot be considered an important input which would drive cloud gaming developments absent the Merger. Nor could any decision by Microsoft not to make Activision content available to rival cloud gaming services have a foreclosure effect. Indeed, Activision's reluctance to make its content available through cloud gaming services has not deterred several companies from launching cloud gaming services in recent years.

(ii) A wide variety of PC content will be available for rival providers

5.41 As noted above, there is a vast array of gaming content available to cloud gaming providers to distribute. The Merged Entity's share of PC game publishing is [0-10]% worldwide ([10-20]% in the UK). As such, even if the Merged Entity were to withhold its content (*quod non*), a vast range of other content (accounting for over [80-90]% of PC game publishing revenue) would remain potentially available to stream. Rival cloud gaming providers are also successfully developing their own first-party content. There is no suggestion that *Call of Duty* is seen as “unique” or “special” amongst Windows PC games. As the CMA notes, cloud gaming technology will “become feasible for most game titles in the foreseeable future”.⁴²⁸ There is, therefore, no evidence to suggest that such providers could be foreclosed due to lack of available streaming content.

(iii) Call of Duty is [redacted]

5.42 As outlined above, Activision has developed a native mobile version, *Call of Duty: Mobile*. Since its launch in 2019, *Call of Duty: Mobile* has been extremely successful and has MAUs of ca. [redacted] million, ca. [redacted]% of the total MAUs of the franchise. *Call of Duty: Mobile* is available via the App Store and Google Play Store. Because of the success of *Call of Duty: Mobile*, the inclusion of *Call of Duty* on Xbox Cloud Gaming would be likely to cause consumer confusion and damage the *Call of Duty: Mobile* brand (particularly as the user experience and game-play would be different between the two versions).

5.43 Even if Microsoft were to be looking to drive streaming on PC ([redacted]), *Call of Duty* has an even lower share on PC than on console. Even looking narrowly at a hypothetical ‘shooter’ segment on PC, Activision's share is only [5-10]% worldwide ([5-10]% in the

⁴²⁶ [redacted].

⁴²⁷ Nvidia GFN Announcement, “Activision Blizzard games on GeForce NOW”, 12.02.2022 (link available [here](#)).

⁴²⁸ Phase 1 Decision, paragraph 59.

UK).⁴²⁹ This reflects the fact that there is even more competition in this segment on PC, with PC-only games such as *Counter Strike* and *Half Life*, published by Valve, having a significant following and accounting for ca. [X]% of the revenues from this segment in the UK.⁴³⁰ There is no suggestion that *Call of Duty* is in anyway “uniquely placed” to drive cloud gaming on PC.

5.44 [X]. As noted above, minimising latency is critical to the gamer experience and high latency can have a significant detrimental effect on the quality of gameplay, particularly for competitive multiplayer gameplay – a central element of the appeal of *Call of Duty*. [X].⁴³¹ As such, if *Call of Duty* were offered over a cloud streaming service, players would [X] particularly given the success of *Call of Duty: Mobile* (i.e., the native mobile version of the game).

E. No ability or incentive to foreclose access to cloud infrastructure to cloud gaming rivals

5.45 The Issues Letter suggests that the Merged Entity may have the ability and incentive to deny access to Microsoft’s cloud platform to rival cloud gaming services providers (or offering it on worse terms, including price, location, and/or processing power).⁴³² This does not reflect market reality.

(a) **Azure only supplies IaaS for cloud gaming and faces strong competition:** All providers of cloud computing services offer IaaS which is suitable for cloud gaming, as well as a range of other workloads. Cloud gaming requires virtual machines running on hardware with powerful graphical processing units (“GPUs”). Companies offering such virtual machines in the UK include Amazon⁴³³, Google⁴³⁴, Alibaba⁴³⁵, Huawei⁴³⁶, IBM⁴³⁷, Oracle⁴³⁸, Tencent⁴³⁹, and many others.⁴⁴⁰

(b) **IaaS is standardised, commoditised, and competitive:** All providers source GPUs from the same third-party suppliers (e.g., AMD and Nvidia). All major IaaS providers supply comparable configurations of virtual machines. Azure’s competitors have already launched IaaS for cloud gaming. This is reflected in Microsoft’s internal documents, including:

⁴²⁹ The combined share of the Merged Entity is [0-10]% worldwide ([0-10]% in the UK).

⁴³⁰ Parties’ response to RFI dated 26 May 2022, Tables 7.18 and 7.19.

⁴³¹ [X].

⁴³² Issues Letter, paragraph 42(b).

⁴³³ Amazon, “*Amazon EC2 G4 Instances: Customer stories*” (link available [here](#)); Amazon, “*Amazon EC2 On-Demand Pricing*” (link available [here](#)).

⁴³⁴ Google, “*GPU regions and zones availability*” (link available [here](#)).

⁴³⁵ Alibaba Cloud, “*Alibaba Cloud’s Global Infrastructure*” (link available [here](#)). PR Newswire, “*Alibaba Cloud and Ubitus Build Strategic Partnership to Launch Global Public Cloud Gaming Total Solution*” 26.09.2019 (link available [here](#)).

⁴³⁶ [X]; Huawei, “*Boosteroid Advances Cloud Gaming Experience for Everyone with Huawei Solutions*” (link available [here](#)); Huawei, “*Pushing Cloud Gaming to the Next Level*,” (link available [here](#)).

⁴³⁷ IBM, “*Bare Metal Server for Classic*” (link available [here](#)); IBM, “*Virtual Server for VPC*” (link available [here](#));

IBM, “*Skyegrid: IBM Cloud supports innovative, local cloud gaming platform*” (link available [here](#)).

⁴³⁸ Oracle, “*Graphics Processing Unit (GPU) Instances*” (link available [here](#)); Oracle, “*OCI Data Regions*” (link available [here](#)).

⁴³⁹ Tencent, “*Regions and Availability Zones*” (link available [here](#)).

⁴⁴⁰ Microsoft’s response to section 109 notice dated 26 October 2022, paragraph 111.1-111.3.

- [REDACTED].⁴⁴¹
- [REDACTED].⁴⁴²
- [REDACTED].⁴⁴³
- [REDACTED].⁴⁴⁴

(c) **Azure has a limited market share in IaaS and in the gaming industry more generally:** According to Gartner, Microsoft’s share of IaaS public cloud services is 21.1% in 2021.⁴⁴⁵ Microsoft estimates that its share of cloud computing services in the gaming industry is less than [5-10]%.⁴⁴⁶ Azure does not offer a platform as a service (“PaaS”) for cloud gaming.

(d) **Azure has a limited number of data centres in the UK:** Azure provides IaaS from a limited number of [REDACTED] data centres in the UK. The locations of Azure’s data centres are optimized for enterprise customers, not gaming customers. Azure GPU optimised servers suitable for cloud gaming are located at third-party data centres in London. Azure does not, therefore, offer a broader footprint in the UK than its competitors.

(e) [REDACTED].

- [REDACTED].⁴⁴⁷
- [REDACTED].⁴⁴⁸
- [REDACTED].⁴⁴⁹
- [REDACTED].⁴⁵⁰

(f) **Azure has [REDACTED] cloud gaming customers for IaaS:** Azure has [REDACTED] number of IaaS customers which Azure is aware use its infrastructure for cloud gaming. These are: [REDACTED]. Each of these are providers of PaaS for cloud gaming (which Microsoft does not provide). Each of these customers multi-source their IaaS or in part self-supply their own infrastructure.⁴⁵¹ For example, Ubitus uses IaaS provided by a number of cloud providers, including AWS, GCP, Azure and

441 [REDACTED].

442 [REDACTED].

443 [REDACTED].

444 Huawei, “*Boosteroid Advances Cloud Gaming Experience for Everyone with Huawei Solutions*” (link available [here](#)). [REDACTED].

445 Gartner, “*Gartner Says Worldwide IaaS Public Cloud Services Market Grew 41.4% in 2021*”, 02.06.2022 (link available [here](#)).

446 Response to Issues Letter, paragraph 7.56(c).

447 Microsoft’s response to section 109 notice dated 26 September 2022, paragraph 59.21.

448 Microsoft’s response to section 109 notice dated 26 September 2022, paragraph 59.18.

449 Microsoft’s response to section 109 notice dated 26 September 2022, paragraph 59.23.

450 Microsoft’s response to section 109 notice dated 26 September 2022, paragraph 59.24.

451 Microsoft’s response to section 109 notice dated 26 September 2022, paragraph 59.4

Tencent. Ubitus also has a partnership with Alibaba Cloud.⁴⁵² [REDACTED].⁴⁵³ Ubitus has intentionally pursued a multi-cloud strategy to take advantage of the strengths of different cloud providers.⁴⁵⁴

(g) **Most IaaS customers multi-home:** The vast majority of customers electing to rely upon multiple different cloud vendors to provide cloud computing services. A 2022 Foundry survey found that only 16% of organizations rely upon a single cloud provider for their public cloud deployments.⁴⁵⁵ On average organizations leverage “5 different cloud platforms”.⁴⁵⁶ Most gaming companies also multi-home, including in relation to IaaS for game streaming. For example, Ubitus uses multiple cloud providers, including AWS, Google, Azure, Tencent and Alibaba Cloud.

(h) **Azure has broader relationships with cloud gaming providers:** Customers of IaaS are sophisticated users of computing services. In the entertainment industry, for example, few of the leading video streaming providers have their own clouds. Instead, companies such as Netflix and Disney, rely on the cloud infrastructure offered by Amazon to provide video on demand services to consumers.⁴⁵⁷ Azure provides a range of different services to companies such as Amazon, Google, Intel, Meta, Nintendo, Nvidia, Sony and others. These broader commercial relationships would be threatened if Microsoft sought to withhold or degrade Azure services from Microsoft’s gaming competitors.

(i) **Microsoft’s internal documents evidence an incentive and intention to offer IaaS for cloud gaming to third parties:**

- [REDACTED].⁴⁵⁸
- [REDACTED].⁴⁵⁹
- [REDACTED].⁴⁶⁰
- [REDACTED].⁴⁶¹
- [REDACTED].⁴⁶² [REDACTED].⁴⁶³

(j) **IaaS relies on economies of scope and scale:** Most cloud providers have a pricing structure based on a pay-as-you-go model, also referred to as pay-per-use. To make the rental model attractive to customers, cloud providers offer a

⁴⁵² Ubitus, “Alibaba Cloud and Ubitus Build Strategic Partnership to Launch Global Public Cloud Gaming Total Solution”, 26.09.2019 (link available [here](#)); “Ubitus user in the cloud game era”, 17.03.2021 (link available [here](#)).

⁴⁵³ [REDACTED].

⁴⁵⁴ [REDACTED].

⁴⁵⁵ Foundry, Cloud Computing Study 2022, 04.06.2022 (Link available [here](#)).

⁴⁵⁶ See <https://webtribunal.net/blog/cloud-adoption-statistics/>

⁴⁵⁷ ComputerWeekly.com, “Walt Disney Company confirms AWS as preferred cloud partner for Disney+ streaming service”, 29.04.2021 (link available [here](#)); Netflix on AWS (link available [here](#)).

⁴⁵⁸ [REDACTED].

⁴⁵⁹ [REDACTED].

⁴⁶⁰ [REDACTED].

⁴⁶¹ [REDACTED].

⁴⁶² [REDACTED].

⁴⁶³ [REDACTED].

server fleet that can run multiple workloads for multiple tenants (referred to as “multi-tenancy”). Specifically in relation to IaaS for cloud gaming, all cloud providers are seeking to lower compute cost by distributing workloads across shared hardware and increasing economies of scale. By targeting workloads across time of day, Azure (and other cloud providers) can increase utilization throughout the day and bring down its operation cost (and therefore the cost for its customers).

Figure 57: [REDACTED]⁴⁶⁴

[REDACTED]

Source: [REDACTED]

- (k) **Microsoft’s commercial incentives – like any cloud provider – are to drive workload volumes on Azure to achieve economies of scale and scope and reduce costs:** Azure’s pricing structures (in line with industry practice) are not end-use specific. Microsoft’s entire corporate focus is on the opportunity to drive down the cost of cloud services overall to attract more customers to those services, which would be undermined by pursuing any discriminatory strategy aimed at indirectly favouring Microsoft’s own cloud gaming service. Any such strategy would be highly unlikely to be successful, particularly in the presence of credible cloud infrastructure alternatives which Microsoft’s cloud gaming rivals could turn to, while putting at risk billions of dollars of revenue from Microsoft’s wider cloud computing business.

F. No ability or incentive to disadvantage cloud gaming rivals through Windows licensing policies

5.46 The Issues Letter suggests that the Merged Entity may have the ability and incentive to deny access to a Windows OS licence (or offering it on worse terms, including price).⁴⁶⁵ This is incorrect. Microsoft’s licensing program for Windows OS is well-established, with terms and prices that do not vary based on use-case or industry.

- (a) **Microsoft predominantly licenses Windows to cloud computing providers through resellers via its Services Provider Licensing Agreement (“SPLA”) program:** Microsoft has [REDACTED] SPLA partners who are licensed through resellers and does not as a rule manage these relationships. Resellers active in the UK include: AWS, Unmatched Partners, Telefonica, OVH Cloud and CGI Group. Microsoft does not control the pricing offered by resellers, nor does it receive details of all their customers. Microsoft could not require its resellers to foreclose or worsen the terms of access of competing cloud gaming providers, nor would they agree to do so.
- (b) **SPLA terms and pricing do not vary based on use-case or industry:** Microsoft does not alter its pricing to resellers or customers based on the type of use-case a service provider serves to its end customers. SPLA partners are not required to inform Microsoft of the services which they offer using the licensed software, meaning Microsoft has no way of selectively charging more

⁴⁶⁴ [REDACTED].

⁴⁶⁵ Issues Letter, paragraph 42(c).

for cloud gaming use. Microsoft’s Windows licensing policy is not gaming-related and will not change as a result of the Merger.

- (c) **Microsoft has no history of using Windows OS to target cloud gaming providers:** Cloud gaming providers such as Amazon, Google and Nvidia have been SPLA partners for many years. Microsoft has not withheld access to the SPLA program, nor has it degraded access to Windows Server under SPLA in the past. The revenue Microsoft receives from licensing Windows Server via SPLA is substantial at ca. USD [X] billion [X] (equating to approximately [X]% of SPLA revenues) and it is not credible that Microsoft would forgo this revenue in order to protect its position in cloud gaming which does not generate material revenues and is loss-making.⁴⁶⁶
- (d) **Amazon announced its cloud-based game streaming service, Luna, in September 2020.** [X].⁴⁶⁷ [X].
- (e) **Compatibility tools, including Proton and WINE and Proton, allow companies to run Windows PC games on Linux operating systems:** WINE is an open-source compatibility layer that allows Windows programs to run on Linux and MacOS.⁴⁶⁸ There are thousands of games available in the WINE database.⁴⁶⁹ Proton is a fork of WINE developed by Valve. The large majority of the best-selling Windows PC games can be run on Proton, and it is highly rated by gamers.⁴⁷⁰
 - Valve is a long-standing supporter of Linux.⁴⁷¹ Valve’s successful new Steam Deck console, launched in 2022, has a Linux operating system and uses Proton to make Windows PC games available on the device (in addition to Linux games). Currently over 75% of the top 1,000 Windows PC games on Steam are able to run on the Steam Deck, without using Windows. See Figure 58 below.

Figure 58 – Steam Deck with Linux OS and access to Windows PC games (via Proton)

⁴⁶⁶ Response to Supplementary Issues Letter, paragraph 5.16.

⁴⁶⁷ Response to Supplementary Issues Letter, paragraph 5.17. CMA RFI 3, paragraph 5.12.

⁴⁶⁸ Linux Foundation. “Classic SysAdmin: How to Install and Use Wine to Run Windows Applications on Linux”, 30.04.2022 (link available [here](#)).

⁴⁶⁹ Wine Database (link available [here](#)).

⁴⁷⁰ Boiling Steam, “Proton vs native: is there really a difference?”, 09.02.22 (link available [here](#)).

⁴⁷¹ Microsoft’s response to section 109 notice dated 26 September 2022, paragraph 76.1

STEAMOS AND PROTON

Steam Deck is a PC, but it doesn't come with Windows. Instead it runs SteamOS, a Linux-based operating system developed by Valve. We made this decision in order to optimize the Steam Deck experience in many ways, specifically for gaming. For example, the Sleep / Wake functionality built into Steam Deck is tailored specifically for gaming. It allows you to instantaneously pause a running game and put the Steam Deck to sleep, then come back hours later with the game reliably in the exact same spot. This required custom work on the hardware, firmware, OS, and software.

We'll soon be shipping a general Installer for SteamOS, enabling any PC to take advantage of all of its features. In addition, we'll soon be making SteamOS available for other manufacturers who wish to make a gaming device of their own.

The Proton translation layer allows most Windows games to run with equal or better performance on SteamOS, without requiring game developers to do any heavy porting work to get their games running.



- Acer has announced three gaming focused Chromebooks and identifies using Steam as a way to play PC games on its Chromebook. This is also accomplished through the use of Proton and is evidence of bigger companies like Acer and Google incorporating Proton as a selling feature for devices that do not run on Windows.⁴⁷²

Figure 59 – Acer Chromebooks with access to Steam (via Proton)

Steam on Chromebook
Play PC games through Steam³ on ChromeOS Alpha using this Chromebook. Featuring a fast SSD with ample storage space of up to 256 GB³ and up to a top-of-the-line 12th Gen Intel[®] Core™ i7 P-series processor³, this device is your best Chromebook for gaming.



- Maximum Settings is a cloud gaming provider founded in 2019 in Canada that offers gamers the ability to access Linux virtual machines configured for gaming and running Proton and WINE compatibility layers.⁴⁷³

Figure 60 – Cloud gaming service using Linux servers to offer Windows PC games

⁴⁷² Acer Chromebook 516 GE, “*Chrome Gaming Unleashed*” (link available [here](#)).

⁴⁷³ Maximum Settings website (link available [here](#)).



- Microsoft understands that Amazon may be making plans to move Luna from Windows to Proton for cloud gaming. Amazon has established a Luna Proton Team and is hiring engineers with “*Experience in open source Wine/Proton and code contributions to the same*”.⁴⁷⁴ The team’s mission is to “*deliver the best game streaming product to customers*” and it is “*working on the frontier of cloud gaming technology*”. Using Proton would mean that Amazon could run Windows games in Luna without having to port games and without having to license or use Windows.

5.47 As such, Microsoft has no ability to foreclose cloud gaming rivals by denying access to Windows OS licenses, given the alternatives available to them. It equally has no incentive to compromise its Windows OS licensing system (which is core to the Microsoft business) in a vain attempt to foreclose a niche cloud gaming segment.

G. No incentive to foreclose cloud gaming

5.48 The Issues Statement suggests that Activision’s content could change Microsoft’s incentive to engage in foreclosure strategies using its ecosystem. Acquiring Activision’s attractive gaming content could allow Microsoft to attract more users to its cloud gaming services platform. Given the strength of network effects in this market, this could make a foreclosure strategy using Microsoft’s broader ecosystem more effective, thereby increasing Microsoft’s incentive to engage in the foreclosure strategies described above (in circumstances where it may not have had the incentive to do so absent the Merger).⁴⁷⁵

5.49 This is not plausible. Cloud gaming is part of Microsoft’s gamer-centric strategy to deliver console games to a broader range of devices, particularly mobile devices. Cloud gaming is [§<], where downloads are expected to continue to dominate the market (as downloading games delivers a better quality and more consistent gaming experience, reduces latency and the risk of network interruptions). Nor is cloud gaming expected to replace native mobile games purchased through mobile app stores. Given the [§<]

⁴⁷⁴ Amazon Jobs, “Software Development Engineer (L4), Luna Proton Team”, Job ID: 2023677, Amazon.com Services LLC.

⁴⁷⁵ Issues Statement, paragraph 43.

demand for cloud gaming, it is not in Microsoft's interest to harm the consumer experience of a rival cloud gaming provider.

H. No anti-competitive effect

- 5.50 The Issues Statement suggests that strengthening network effects and raising barriers to entry could affect all current and potential rivals in cloud gaming services. In particular, it could make it very difficult for new and recent entrants without the required technological capabilities and gaming content to compete effectively against Microsoft. The CMA found that, absent the Merger, either these competition concerns would not materialise, or customers would at least benefit from a longer period of competition between platforms vying to be the 'winning platform' in these markets prior to any tipping occurring.⁴⁷⁶
- 5.51 This is patently incorrect. Cloud gaming involves a **reduction** in barriers to entry and network effects. Cloud gaming "*means that gamers can access games that were previously available only on console through a wider range of less powerful devices (e.g. smart TVs, mobiles)*" and that "*cloud gaming services could be attractive to a different pool of customers who do not have access to the current hardware*".⁴⁷⁷ As cloud gaming is effectively device-agnostic and does not require investment in hardware, gamers can easily switch and multi-home across services regardless of the device they choose to play on.
- 5.52 Evidence from video streaming is that consumers multi-home and subscribe to many services at the same time, thereby reducing the importance of network effects (as smaller platforms can still attract content creators to distribute on their services) and decreasing barriers to entry (as users are not "captive" and are willing to try new services).⁴⁷⁸ As noted in the economic literature on multi-product ecosystems "*[i]n general, the more multi-homing users there are, the easier it will be for multiple platforms to co-exist in a market, and the less 'tippy' the market will be*".⁴⁷⁹

I. No risk of the Merged Entity becoming a *de facto* gatekeeper

- 5.53 The Issues Statement suggests that the competition concerns identified in this theory of harm could have consequences for the game publishing market. If Microsoft were to acquire significant market power in cloud gaming services, it could become a *de facto* gatekeeper between game publishers and gamers. This could have knock-on effects on independent game developers and publishers who compete against Microsoft's own gaming portfolio, ultimately giving it the ability to control access to gamers, charge high fees for game distribution, and manipulate game rankings.⁴⁸⁰
- 5.54 This is patently incorrect. Cloud gaming services will co-exist alongside (and compete with) other forms of access to the same gaming content for the foreseeable future and game publishers will therefore have multiple avenues by which to deliver their content to gamers. It also fails to recognise that cloud gaming lowers barriers to entry and

⁴⁷⁶ Issues Statement, paragraph 44.

⁴⁷⁷ Phase 1 Decision, paragraph 81.

⁴⁷⁸ Ofcom Media Nations Report, page 15.

⁴⁷⁹ OECD, *Digital competition policy: Are ecosystems different? – Note by Amelia Fletcher Hearing on Competition Economics of Digital Ecosystems*, 3 December 2020, paragraph 12 (link available [here](#)).

⁴⁸⁰ Issues Statement, paragraph 45.

network effects. As cloud gaming is effectively device-agnostic and does not require investment in hardware, gamers can easily switch and multi-home across services regardless of the device they choose to play on.

6. Conclusion

- 6.1 Microsoft has engaged constructively with the CMA throughout pre-notification and the Phase 1 process. Microsoft appreciates the fact that the Panel will take a fresh look at the evidence in this case. Microsoft looks forward to continuing to engage with the Panel through the Phase 2 process, to explain the benefits that the Merger will bring to gamers, developers and the gaming industry more broadly.
- 6.2 For the reasons set out in this response, the theories of harm and evidence summarised in the Issues Statement do not provide any plausible basis on which it could be found that the Merger will give rise to a substantial lessening of competition. Certainly, the CMA cannot find that this would be the case to the requisite standard at Phase 2.⁴⁸¹

⁴⁸¹ Merger Assessment Guidelines, paragraph 2.36.