

**MICROSOFT/ACTIVISION BLIZZARD**

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**SONY INTERACTIVE ENTERTAINMENT  
OBSERVATIONS ON THE CMA'S PROVISIONAL FINDINGS**

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*Microsoft/Activision Blizzard*

**SIE's Observations on the CMA's Provisional Findings**

1. Sony Interactive Entertainment (“SIE”) welcomes the opportunity to comment on the CMA’s Provisional Findings of February 8, 2023 (“PFs”), concerning the *Microsoft/Activision Blizzard* transaction (the “Transaction”).
2. The PFs corroborate the concerns of SIE and others that the Transaction would likely result in a substantial lessening of competition (“SLC”) in the gaming industry in the UK. In particular, the PFs preliminarily find that the Transaction would lead to SLCs in consoles (including multi-game subscription services) and cloud gaming because Microsoft would have both the ability and incentive to withhold or degrade access to Activision content, in particular *Call of Duty*, from its competitors. This, in turn, would cause harm to consumers and competition.
3. The PFs are based on a cogent, consistent, and convincing body of evidence, including 3 million Microsoft and Activision documents (covering “*key strategy documents*”), over 50 requests for information, more than 2,100 emails from the public, responses from industry participants (and their internal documents), interviews with Microsoft and Activision senior executives, and multiple categories of economic data.
4. SIE agrees with the findings set out in the PFs. This paper does not intend to comment on all of the CMA’s findings, but instead focuses on and supplements the core points the CMA makes in reaching its preliminary conclusions. **Sections I-III** discuss competition in consoles addressing, in turn, Microsoft’s ability to foreclose, its incentive, and anticompetitive effects. **Section IV** discusses cloud gaming. **Section V** concludes.

**I. Microsoft Would Have The Ability To Foreclose By Withholding *Call Of Duty***

5. The PFs conclude that Microsoft “*would have the ability to foreclose PlayStation, including its distribution storefront and subscription services,*” because *Call of Duty* is “*an important component of PlayStation’s range of game offerings,*” “*contributes a significant share of PlayStation’s revenue and gameplay,*” and “*is important in driving console sales*” (PFs, para. 7.267(a)). SIE welcomes the CMA’s comprehensive review of the evidence in reaching this conclusion. It agrees with the CMA’s findings.
6. Microsoft has sought to challenge the importance of *Call of Duty* and content more generally by arguing that the most critical factor for consumers in choosing a console is price (PFs, para. 7.132). But the CMA rightly recognises that content plays an essential role in the success of gaming platforms, and it finds that *Call of Duty*, more specifically, is an important input for console gaming.
7. The CMA makes that assessment based on an impressive body of evidence. This includes: size and engagement data (PFs, paras. 7.161-7.164), spend and gameplay data (PFs, paras. 7.166-7.170), survey evidence (PFs, paras. 7.171-7.178), console adoption data (PFs, paras. 7.179-7.186), the success and longevity of the franchise (PFs, paras. 7.187-7.191), internal documents (PFs, paras. 7.192-7.197), third-party views (PFs, para. 7.198), industry reports (PFs, para. 7.199), Activision’s ability to negotiate better revenue

shares (PFs, paras. 7.200-7.202), and Microsoft's valuation model for the Transaction (PFs, paras. 7.203-7.208).

8. The CMA also carefully considers alternatives to *Call of Duty*, including alternative shooter games *Fortnite*, *Battlefield*, and *Apex Legends*. Based on the evidence, the CMA finds that “*the extent of differentiation ... of Call of Duty’s closest alternatives means that any foreclosure strategy will significantly impact PlayStation’s ability to offer more ... games by contributing to a worse range and less consumer choice*” (PFs, para. 7.252), and that *Call of Duty* is “*one of a small number of large and consistently successful game franchises available to gamers for many years*” (PFs, para. 7.188).
9. SIE agrees. *Call of Duty* is a critical franchise for PlayStation by virtually any metric:<sup>1</sup>
  - *Call of Duty* has been the top-selling game on PlayStation for 9 of the last 10 years. (In the one year that it was not, it was #█, with *Vanguard*.) More than █ of PlayStation’s █ million users played *Call of Duty* in 2021.
  - Between 2017-2022 *Call of Duty* was consistently ranked in the █ in terms of PlayStation MAUs, and in 2020 and 2021 it was ranked #█.
  - In 2021, *Call of Duty* was █ in terms of positive gameplay, exceeding other popular franchises such as *Fortnite*, *GTA*, and *FIFA*.
  - In 2021, *Call of Duty* players spent \$█ billion on PlayStation, accounting for █ of overall PlayStation platform spend. This figure is consistent with the PFs’ finding that “*PlayStation is likely to lose a significant share of its spend and gametime based on CoD gamers switching away from it*” (PFs, para. 7.178).
  - *Call of Duty* is a significant driver of console sales, being █ on the first day of gameplay on a new PlayStation console in 2021 (played on █ of all new devices), ahead of *FIFA* and *Fortnite* at █. This metric, in the CMA’s words, “[*indicates*] that *CoD is a key driver of platform adoption*” (PFs, para. 7.182).
  - New releases of *Call of Duty* see significantly more engagement than new releases of other franchises. Between 2017-2021 there were █ billion PlayStation gameplay hours on new *Call of Duty* titles in the first four weeks of release compared to only █ billion for *FIFA* (#█).
  - *Call of Duty*’s best days are ahead. The latest title, *Modern Warfare II*, had “*huge success*” (PFs, para. 7.189), generating revenues over \$1 billion in just 10 days, becoming the fastest-selling game in the franchise’s history.<sup>2</sup>
10. Microsoft has advanced three main arguments to dispute the importance of *Call of Duty* as an input for consoles. None is sound.

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<sup>1</sup> █

<sup>2</sup> Activision, [Activision Blizzard Announces Third Quarter 2022 Financial Results](#) (November 7, 2022).

11. First, Microsoft argues that it would not have upstream market power because of Activision’s low shares in an overall market for game publishing or the “*narrower segment of shooter games for consoles*” (PFs, para. 7.145). But, rightly, the PFs do not rely solely on shares of supply to assess ability. Rather, the PFs consider a range of evidence sources in the round, consistent with the CMA’s Merger Assessment Guidelines (the “Guidelines”).<sup>3</sup> The PFs establish, based on that evidence, that *Call of Duty* is an important input for competing in consoles.
12. Second, Microsoft has argued that *Call of Duty* is just a “*single game*” among hundreds, and that other popular games exist (PFs, para. 7.146). But, as the PFs explain, “*the observation that other franchises and games exist*” does not contradict the evidence on the importance of *Call of Duty*: “*more than one input can be important to the competitiveness of a rival*” (PFs, para. 7.368). Besides, SIE’s data and documents attest that the reason *Call of Duty* is so important is because of its pre-eminence across so many different metrics.<sup>4</sup>
13. Third, Microsoft argues that “*SIE has a strong catalogue of first and third party exclusive games,*” as if this somehow contradicts the evidence of the importance of *Call of Duty* (PFs, para. 7.245). But SIE having a strong catalogue of first-party games says nothing about the importance specifically of *Call of Duty* as an input, given the differentiation in games. In any event, the data show that *Call of Duty*, alone, stands far above SIE’s entire first-party catalogue:
  - *Call of Duty* drives nearly ██████████ as much engagement as all SIE’s top first-party games combined.
  - Post-Transaction, Microsoft’s catalogue of games would account for ██████████ as much engagement as all SIE’s top first-party games.<sup>5</sup>
  - For perspective, *Destiny*, Sony’s main active first-person shooter franchise, has less than ██████ of *Call of Duty*’s gameplay and game spend on PlayStation.
14. In these circumstances, Microsoft’s contention that *Call of Duty* is simply one among many comparable games cannot survive critical scrutiny.

## **II. Microsoft Would Have The Incentive To Withhold Access To *Call of Duty***

15. The CMA’s determination that Microsoft has the incentive to foreclose access to *Call of Duty* is based on quantitative and qualitative evidence.<sup>6</sup> This includes: Microsoft’s behaviour following past acquisitions (PFs, paras. 7.283-7.291), Microsoft’s long-term strategy (including plans to expand Game Pass), other financial benefits that would accrue to Microsoft (PFs, paras. 7.292-7.317), quantitative modelling of switching rates

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<sup>3</sup> The Guidelines, para. 7.14(a). *See also* PFs, para. 7.144.

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<sup>6</sup> The Guidelines, para. 7.18 (“*the assessment of incentives typically involves a combination of quantitative and qualitative evidence*”). *See also* PFs, para. 7.272.

(PFs, paras. 7.317-7.340), and existing and potential contractual arrangements regarding access to *Call of Duty* (PFs, paras. 7.341-7.349). Given the PFs' thorough assessment of incentive (which SIE agrees with), SIE makes just five short observations.

16. First, Microsoft argues that “*its past business practices are consistent with its stated position*” that it does not intend to remove *Call of Duty* from PlayStation (or degrade access to it) (PFs, para. 7.276(a)). This is difficult to square with what has actually happened. The CMA “*reviewed Microsoft's strategy following its previous acquisitions*” and found that Microsoft “*typically makes games exclusive to Xbox*” (PFs, para. 7.286). Microsoft has never disputed this.
17. Microsoft is fond of arguing that, with its prior acquisitions, it did not make the existing, already released games it acquired exclusive to Xbox. But the foreclosure concern in this case is not about past releases of *Call of Duty*. It is about the impact of Microsoft making new *Call of Duty* releases (which are launched every year) exclusive, as it has done for the new releases of *Starfield and Elder Scrolls* following the acquisition of ZeniMax in 2021. As the PFs explain, these releases were announced in 2018 and were not expected at that time to be Xbox exclusives.<sup>7</sup> It was only after acquiring ZeniMax that Microsoft's Phil Spencer revealed that, all along, the deal had been about “*delivering great exclusive games*” for Xbox.<sup>8</sup>
18. Second, Microsoft points to *Minecraft* as an example of an acquisition where it did not pursue exclusivity. But this example is not relevant to an exclusivity strategy regarding future releases of *Call of Duty*. *Minecraft* is a single release game that is already in users' hands: unlike *Call of Duty*, there are no future releases of *Minecraft*. The CMA correctly points out that *Minecraft's* “*legacy monetisation model of a one-time fee for lifetime access and updates...differs significantly from Call of Duty, where users buy the new premium iteration of the game every year for a higher fee*” (PFs, para. 7.285). SIE therefore agrees with the PFs that the more relevant indicator of Microsoft's intentions on exclusivity for *Call of Duty* is the ZeniMax deal.
19. Third, Microsoft submits that Activision's existing contractual arrangements with SIE and Microsoft's offer to SIE to keep *Call of Duty* on PlayStation post-Transaction limit Microsoft's incentives to foreclose. But the Guidelines explain that no contractual arrangement can ever provide complete protection against a foreclosure strategy, especially in a complex and dynamic industry like gaming.<sup>9</sup> Any protection that may exist in SIE's current agreement with Activision is not, in the CMA's words, “*of a sufficient duration to have a material impact on [the] competitive assessment, which considers potential concerns with a longer time horizon*” (PFs, para. 7.348). Nor would

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<sup>7</sup> PFs, para. 7.287.

<sup>8</sup> The Verge, [Xbox boss says Microsoft's Bethesda deal was all about exclusive games for Game Pass](#) (March 11, 2021).

<sup>9</sup> The Guidelines, para. 7.15 .

any contractual arrangement be able to predict the myriad foreclosure strategies available to Microsoft.<sup>10</sup>

20. Fourth, the CMA conducted its own quantitative assessment of Microsoft's incentives, based on Microsoft's ordinary course lifetime value for Xbox users (PFs, paras. 7.321(c), 7.332). That assessment included adopting several of Microsoft's assumptions about what the analysis should look like (including accounting for multi-homing and PlayStation user and revenue growth over time),<sup>11</sup> yet still finds an incentive to foreclose with some reasonable corrections to Microsoft's analysis.
21. Fifth, the PFs "*focus much of their quantitative assessment on the gains and losses that would arise out of a total foreclosure strategy,*" while recognising that "*the choice between partial and total foreclosure strategies is not a binary one*" (PFs, para. 7.273). In SIE's view, as well as a total foreclosure, Microsoft would also have the incentive to engage in one or more of the following partial foreclosure strategies:
  - raising the price of *Call of Duty* on PlayStation;
  - degrading the quality and performance of *Call of Duty* on PlayStation compared to Xbox;
  - restricting, degrading, or not prioritising investment in the multiplayer experience on PlayStation; or
  - making *Call of Duty* available on multi-game subscription services ("MGS") only on Game Pass or providing *Call of Duty* on PlayStation Plus at a commercially unviable price, thereby making it *de facto* exclusive.<sup>12</sup>
22. Partial foreclosure could arise even without an active decision on Microsoft's part to degrade *Call of Duty* on PlayStation. Instead, partial foreclosure could result simply from Microsoft's differing incentives post-Transaction as compared to an independent Activision. Post-Transaction, Microsoft will need to make choices about the support it will provide to develop any PlayStation version of *Call of Duty*. Even if Microsoft operated in good faith, it would be incentivised to support and prioritise development of the Xbox version of the game, such as by using its best engineers and more of its resources.
23. As the PFs note, Microsoft may have even more incentive to engage in such partial foreclosure strategies because they would be more profitable in the short term (as Microsoft would still recoup some sales of *Call of Duty* on PlayStation), while still

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<sup>10</sup> [REDACTED] These arguments are equally applicable to any behavioural remedies that may be proposed, as discussed in [REDACTED]

<sup>11</sup> For example, the assumption that PlayStation will continue growing at the same rate ignores the potential effects of foreclosure and Microsoft's ability to arrest or reverse PlayStation's growth.

<sup>12</sup> [REDACTED]

leading to the same long-term result, namely foreclosure of PlayStation (PFs, paras. 7.336-7.337).

### III. Microsoft Withholding *Call Of Duty* Would Substantially Lessen Competition

24. The PFs find that Microsoft withholding *Call of Duty* would foreclose PlayStation. This, in turn, this would have knock-on, harmful effects for competition and consumers (PFs, paras. 7.364-7.369). To refute the anticompetitive effects of the Transaction, Microsoft has consistently relied on PlayStation shares of supply in a downstream console gaming services market. The PFs carefully evaluate Microsoft's argument and find that it does not preclude anticompetitive effects:
- As a matter of fact, Microsoft tends to skew the evidence when it presents shares of supply. The PFs find that “*the difference between the shares of Microsoft and SIE, both in the UK and globally, is significantly smaller than suggested by the Parties*” (PFs, para. 7.46). And when it comes to MGS, it is beyond doubt that Game Pass is far ahead of PlayStation Plus.
  - As a matter of law, nothing precludes vertical foreclosure of a leading player by depriving it of an important input, so long as the merged entity has the necessary ability and incentive to translate into anticompetitive effects. The PFs persuasively make that case by considering a wide base of evidence, rather than myopically focusing on historic market shares.
  - As a matter of economics, “catching up” via an anticompetitive merger does not represent competition on the merits and results in harm to consumers and competition. Foreclosure would “lock in” a large number of gamers (those for whom *Call of Duty* is must-have) into Xbox, effectively preventing SIE from competing for a large portion of console gamers, and reducing in turn its incentives to invest in innovation.
25. The PFs summarise the position well: “*PlayStation’s competitive offering makes it necessary for Xbox to compete hard to attract users, including on price and through the quality of its console, games, and multi-game subscription offering*” (PFs Summary, para. 73). In a market where there are two main providers of console gaming, each hold the other accountable to maintain effective competition. That competition has incentivised PlayStation and Xbox to strive to improve – and Activision's long-standing position in offering *Call of Duty* to both facilitated and strengthened that competition. The competitive dynamic – the defining characteristic of the games industry over the last 20 years – has fuelled innovation, driven the industry's dynamism, benefitted gamers and developers, and contributed to a thriving game industry.
26. But the Transaction would change that dynamic, not as a result of competition on the merits, but simply because Microsoft built up a war chest via its other activities that allows it to engage in multi-billion dollar acquisitions. The result would be weakened competition between Xbox and PlayStation that, as the PFs explain, would come at the expense of consumers.
27. For completeness, SIE makes the following additional observations on the anticompetitive effects of the Transaction:

- **The Transaction will harm consumers by restricting choice.** Since 2003, Activision has released each *Call of Duty* game at the same time on multiple platforms. If *Call of Duty* became exclusive to Xbox, consumers would lose the ability to choose on which platform they want to play the game. In terms of PlayStation users, they would be faced with an untenable choice: either stop playing their favourite game, or invest in a new Xbox console for £500 to keep playing. As the CMA recognises, the reduction in the offering of PlayStation’s range without *Call of Duty* “*would be significant when accounting for how gamers actually spend their time when given a free choice of games to buy and play*” (PFs, para. 7.367).
- **The Transaction will harm consumers by increasing prices.** Without the “*binding competitive constraint on Microsoft*” (PFs, para. 7.128) posed by PlayStation, Microsoft would be able to increase the price of *Call of Duty* on buy-to-play, or increase the subscription price of its leading MGS service, Game Pass. Consumers would be forced to pay a higher price to access *Call of Duty*, and have no alternative of a cheaper offering on another platform like PlayStation. Even if *Call of Duty* remained available on PlayStation, Microsoft could manipulate prices of its licence to weaken PlayStation or PlayStation Plus. Xbox users (including those that switch from PlayStation) would pay higher prices once Microsoft had marginalised PlayStation and others.
- **The Transaction would harm independent developers.** The Transaction would substantially improve Microsoft’s bargaining position with independent developers. The competition between Microsoft and SIE allows independent developers to extract better terms and conditions from both platforms. Once SIE is foreclosed, independent developers would likely receive worse terms for their content from Microsoft than they do today. These reduced returns could, in turn, diminish independent developers’ ability and incentive to invest in high-quality new games, causing video games to become lower-quality and less immersive, harming consumers further.
- **SIE cannot protect against the loss of *Call of Duty*.** Given the importance of *Call of Duty*, SIE cannot effectively protect against a Microsoft foreclosure strategy. In particular:
  - SIE’s recent development experience of shooter/battle royale games is limited and its main active shooter franchise is significantly less impactful than *Call of Duty*. *Destiny*, SIE’s main active first-person shooter franchise, had only ■■■ of the gameplay hours and ■■■ of the game spend of *Call of Duty* in 2021.
  - While there may be a wide range of studios that may help SIE produce hit titles, producing one as durable and successful as *Call of Duty* would be close to impossible. As the CMA notes, “*there are few franchises as enduring and as significant in terms of PlayStation’s revenue and gameplay time*” and that new titles have “*a low chance of success*” (PFs, para. 7.235).
  - Even for its most important first-party titles, SIE’s development costs are small in comparison to *Call of Duty*. *God of War: Ragnarök*, SIE’s biggest



ever first-party title, had a total development cost of \$[REDACTED] million spread over [REDACTED] years (with an average annual investment of \$[REDACTED] million). More generally, across its nine most recently released and upcoming first-party titles (which have either sold or are expected to sell more than [REDACTED] million copies in aggregate) the average annual development cost was around \$[REDACTED] million. By contrast, Activision has reportedly spent around \$300 million on each annual release of *Call of Duty*.<sup>13</sup>

28. The PFs correctly recognise that the strong network effects inherent to gaming would exacerbate the harm from a Microsoft foreclosure strategy. The PFs note that *Call of Duty* has “a high level of awareness among gamers and brand loyalty, and is a multiplayer game with a social component which induces network effects” (PFs, para. 7.211). If *Call of Duty* became exclusive to Xbox, not only would PlayStation users switch to Xbox to play their favourite game, but they would do so in order to play the game with their friends. As the PFs conclude, any foreclosure strategy is therefore “likely to induce further diversion due to the presence of strong direct network effects” (PFs, para. 7.267(a)).
29. Finally, for completeness, the PFs find that while indirect network effects exist in gaming, “at present indirect network effects do not represent an obstacle to attracting content” because both Xbox and PlayStation are, today, able to attract good content (PFs, para. 7.28). While that may be the case today, it would not be the case in the face of a successful foreclosure strategy executed by Microsoft.

#### **IV. The Transaction Would Harm Competition In Nascent Cloud Gaming**

30. Based on its analysis of Microsoft’s internal documents and third-party evidence, the CMA finds that “cloud gaming will continue to grow and is likely to become profitable in the next five years” (PFs, para. 8.46).
31. Other market participants agree. The PFs cite rivals who submitted, among other things, that as “technological barriers to streaming...were quickly dropping,” they “expected cloud gaming to increase substantially and ultimately replace consoles,” and that “many users would switch to cloud gaming” (PFs, paras. 8.38-8.42). The PFs also refer to market analysts who support the conclusion that cloud gaming is expected to grow, with some estimates forecasting “an increase in almost triple in terms of user base...and more than quadruple in terms of spending” as soon as 2024 (PFs, para. 8.45).
32. The PFs find that Microsoft making Activision content exclusive to its cloud gaming service would harm competition by foreclosing cloud gaming rivals, where “there are significant barriers to entry and expansion” (PFs, para. 68). The PFs explain that the harm the Transaction would cause is exacerbated by the fact that Microsoft is “in a uniquely strong position in the market for cloud gaming services.” Microsoft has a structural and cost advantage “arising from its ownership of Windows, Azure, and the Xbox gaming catalogue combined” and because of its deep and broad ecosystem advantages, which “none of [its] rivals can match” (PFs, para. 8.197).

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<sup>13</sup> Essentially Sports, [Call of Duty 2022 Title’s Massive Budget Reportedly Leaked Amidst Eager Anticipation](#) (August 2, 2022).

33. Microsoft has already publicly acknowledged its advantages in cloud gaming: “*When you talk about Nintendo and SIE, we have a ton of respect for them, but we see Amazon and Google as the main competitors going forward... That’s not to disrespect Nintendo and SIE, but the traditional gaming companies are somewhat out of position.*”<sup>14</sup> Industry analysts expect Xbox Cloud to lead against competitors well into 2026.<sup>15</sup>

**V. Conclusion**

34. SIE agrees with the PFs’ conclusion that the Transaction is likely to lead to an SLC. *Call of Duty*’s importance would give Microsoft the ability to foreclose its rivals. Microsoft’s previous acquisitions and strategic rationale indicate its incentives to foreclose. Foreclosure will cause irreparable harm to the console and cloud gaming industry, to the detriment of gamers and competition. The way to prevent that harm is for the Transaction to be blocked.

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<sup>14</sup> Video Game Chronicle, [Xbox boss Phil Spencer says he spends ‘zero energy’ on console wars](#) (December 7, 2021). See also The Verge, [Microsoft says more than 20 million people have used Xbox Cloud Gaming](#) (October 25, 2022), which reports that Xbox Cloud Gaming has doubled its number of users since starting to offer *Fortnite*.

<sup>15</sup> CMA’s Provisional Findings Report of February 8, 2023 in *Microsoft/Activision*, para. 8.76.