

MICROSOFT/ACTIVISION BLIZZARD

**SONY INTERACTIVE ENTERTAINMENT
OBSERVATIONS ON THE CMA'S ISSUES STATEMENT**

**CONFIDENTIAL
CONTAINS BUSINESS SECRETS**

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Microsoft/Activision Blizzard

Sony Interactive Entertainment's Observations on the CMA's Issues Statement

1. Sony Interactive Entertainment (“SIE”) welcomes the opportunity to comment on the CMA’s Issues Statement (“IS”) of October 14, 2022, concerning the *Microsoft/Activision Blizzard* transaction (the “Transaction”).

Executive Summary

2. The IS closely follows the CMA’s Phase 1 decision (the “Decision”), which explained why and how the Transaction would harm competition in gaming consoles, multi-game subscription services, and cloud gaming. The Decision is based on compelling and extensive evidence, including Microsoft’s, SIE’s, and Activision’s internal documents; independent surveys; engagement, spend, and share data; multiple third-party views; Microsoft’s own public statements; and a thorough analysis of Microsoft’s past conduct.
3. SIE agrees with the Decision’s findings. It believes strongly that the Transaction will harm competition, industry participants, innovation, and consumers. In summary:
 - **The Transaction is a game-changer that poses a threat to an industry enjoyed by hundreds of millions of consumers.** Activision’s content – in particular its blockbuster franchise *Call of Duty*, one of the most successful franchises of all time that for 20 years has consistently been “*the largest annualized AAA premium franchise in the games market*”¹ – is irreplaceable for gaming platforms. As the Decision found, it is “*especially important for attracting gamers to the platform*” and its importance “*cannot be captured by market shares alone*” (Decision, para. 151). The Transaction would put this content under Microsoft’s sole control, giving it an unprecedented content advantage, at a point when the industry is at a critical “*inflection point*” in its evolution (Decision, para. 59).
 - **Post-Transaction, Microsoft would have the ability and incentive to exclude or restrict rivals, including PlayStation and PlayStation Plus, from having access to *Call of Duty*.** The Decision identifies five recent Microsoft acquisitions of games studios where, shortly after the acquisition in question, Microsoft changed the business model of the acquired studios and withdrew new titles from competing platforms. As the CMA found, Microsoft “*has a pattern*” of acquiring development studios “*and making their upcoming games exclusive to Xbox*” (Decision, para. 192). Given the significance of Activision’s titles, Microsoft would have an “*even stronger incentive*” to make them exclusive to Xbox and Game Pass post-Transaction (Decision, para. 194). In fact, Microsoft does not contest that it intends making Activision content exclusive to Game Pass and denying PlayStation Plus access to that content (Decision, para. 226).

¹ IDG Consulting Inc., 2021 Console Gaming Report (June 25, 2021).

- **The Transaction’s effect in consoles and multi-game subscription services would cause significant harm to consumers, competition, and developers.**
 - **Consumers would be harmed.** In the short-term, PlayStation users would no longer have access to *Call of Duty* or would be forced to spend £450 on an equivalent Xbox to play this hugely popular game on their less preferred device. In the mid-term, a significant number of PlayStation users would likely switch to Xbox and/or Game Pass. Faced with weaker competition, Microsoft would be able to: increase console and game prices for Xbox users (including those that had switched from PlayStation); increase the price of Game Pass; and reduce innovation and quality. These harms would be amplified by the direct and indirect network effects at play in the industry, allowing Microsoft to further raise prices or reduce quality once its position has become even more entrenched.
 - **Competition would be harmed.** PlayStation’s and Xbox’s incentives to invest in innovation and quality improvements depend on the number of customers that competition can attract. Microsoft’s foreclosure strategy would lock in many consumers to Xbox, including existing Xbox users who play *Call of Duty* and those switching from PlayStation to play *Call of Duty*. These locked-in users would become less likely to switch in response to any procompetitive actions on SIE’s part. This would effectively prevent SIE from competing for the business of a large portion of console gamers, reducing its incentives to invest. In this way, as the Decision found, Microsoft’s strategy would “*materially affect Sony’s ability to compete*” (Decision, para. 204).
 - **Independent developers would be harmed.** Independent developers today have two principal options: PlayStation/PlayStation Plus and Xbox/Game Pass. By making *Call of Duty* exclusive to Xbox/Game Pass, the Transaction would tip demand for multi-game subscription services towards Xbox/Game Pass. As Microsoft foreclosed PlayStation/PlayStation Plus, it would likely become a critical distribution channel for independent developers. In that weakened negotiating position, independent developers would likely receive worse terms for their content from Microsoft or even be required to promise exclusivity in return for distribution, thereby diminishing independent developers’ ability and incentive to invest in high-quality new games. This, in turn, would also harm consumers even further.
- **The Transaction would harm nascent competition in cloud gaming.** The Decision cogently explains how the Transaction would allow Microsoft to use Activision’s irreplaceable content to leverage Microsoft’s “*ecosystem advantages*” and thereby foreclose cloud gaming at a critical point of its evolution. Microsoft views “*content, community and cloud*”² – areas where Microsoft have unique advantages via its leading cloud platform (Azure); its highly-successful gaming system (Xbox) and leading multi-game subscription service (Game Pass); and its dominant PC OS (Windows) – as the future of gaming. As the Decision explains,

² New York Times, [To Understand the Metaverse, Look to Video Games](#) (January 10, 2022).

by leveraging its unique combination of capabilities across these areas, Microsoft would “*strengthen network effects, raise barriers to entry, and hence foreclose rivals in cloud gaming services*” (Decision, para. 239; IS, para. 39). SIE agrees.

4. Microsoft’s response to the Decision claims that the CMA’s case rests on “*self-serving*” statements by SIE (Microsoft, para. 1.3(d)).³ SIE’s statements are not self-serving. They reflect genuine and evidenced concerns about a Tech Titan buying up irreplaceable content at incontestable prices (\$68.7 billion) to tip competition to itself. The Decision does not rest only on statements made by SIE, but rather on a wide body of evidence – from other third parties, internal documents, business data, economic analysis, and Microsoft’s own conduct – that explains Microsoft’s strategy and the anti-competitive effects that the Transaction would have. To take just one example, the Decision identifies multiple Microsoft documents “*highlight[ing] its incentives to foreclose rivals*” (Decision, para. 36(d)).
5. Instead of engaging with the Decision’s careful and thorough assessment, Microsoft’s core argument is that the Transaction cannot harm competition because PlayStation is currently more popular than Xbox. This contention is misconceived.
 - First, the circumstance that, in the recent console generation, Microsoft is somewhat behind SIE does not mean that the Transaction cannot harm competition. Foreclosure of an important competitor still constitutes anti-competitive conduct and, in the present case, would have anti-competitive effects. To the extent that SIE has achieved a lead, this has been driven by its investments in the quality of its platform and competition on the merits. A foreclosure strategy that significantly restricted SIE’s ability to compete would not result in a level playing field and would have been achieved only by harming competition and consumers.
 - Second, Microsoft’s argument is particularly misplaced when looking beyond consoles and considering the impact of the Transaction on the two other areas assessed by the Decision: multi-game subscription services (where Microsoft leads) and cloud gaming (where Microsoft has a well-established position). Multi-game subscription and cloud gaming are “*at an early stage of its development*” and Microsoft’s conduct “*could affect all current and potential rivals*” (IS, para. 44).
 - Third, the Decision and the IS do not (and should not) rest on a static assessment based on current or past shares in consoles. Rather, the CMA’s analysis rests on a more sophisticated approach that considers dynamic and future competition (Decision, paras. 61, 80, 120, 178, 224). The Decision’s framework is consistent with the case law of the CAT in its recent *Facebook/Giphy* judgment, which emphasises the importance of a dynamic assessment.⁴ A proper dynamic assessment reveals the serious short and long-term harm that would arise from allowing the Transaction to proceed and permitting Microsoft to execute a

³ Microsoft’s response to the CMA’s reference decision (October 11, 2022).

⁴ “[D]ynamic competition involves a far greater consideration of innovation and invention” ([2022] CAT 26, para. 35).

foreclosure strategy in consoles, multi-game subscription services, and cloud gaming.

6. SIE is confident that the CMA’s Phase 2 inquiry will confirm that the Transaction is likely to substantially lessen competition and should be prohibited. In the remainder of these Observations, SIE addresses the IS’s three theories of harm.

I. Theory of Harm 1: Input Foreclosure of Rival Gaming Platforms (Excluding Multi-Game Subscription Services)

7. Under Theory of Harm 1 (“ToH 1”), the IS and Decision explain that Microsoft would have the ability and incentive to withhold or degrade rival consoles’ access to Activision’s gaming content.⁵ The IS explains that, post-Transaction, Microsoft would have “*significant upstream market power*” (IS, para. 30a) and the incentive to engage in foreclosure. The CMA’s thorough review of the evidence revealed that “*Microsoft has shown itself willing to make losses in the short term in order to build scale and increase its user base*” (Decision, para. 190).
8. On effects, the Decision stresses that it has “*focused on the impact of the Merger on competition [...] not just its impact on any specific competitor*” (IS, para. 32). Because of the importance of *Call of Duty* content, the structure of the hardware market (where PlayStation and Xbox compete closely head-to-head), and the presence of both indirect and direct network effects, the Decision found that a “*material impact on Sony’s ability to compete would have a detrimental impact on the overall competition in the market and ultimately harm consumers*” (IS, para. 32).
9. SIE agrees with these findings and the framework for the assessment set out in the Decision and IS. The Decision reached its conclusions based on a consistent, convincing, and compelling body of evidence, including: Microsoft’s and Activision’s internal documents;⁶ views from multiple third parties;⁷ revenue and user engagement data from Microsoft (showing Activision’s and Microsoft’s titles account for 30-40% of minutes played on consoles in the UK);⁸ economic analysis and financial modelling;⁹ and Microsoft’s past business practices.¹⁰
10. Faced with this evidence, Microsoft retreats to three main points. It argues that: Activision content is not particularly important (Microsoft, paras. 3.16-21); Microsoft has promised to make its content available on PlayStation post-Transaction (Microsoft, para. 1.3(e)); and anti-competitive effects are not possible because PlayStation today is more popular than Xbox (Microsoft, paras. 3.6-3.10). Microsoft’s arguments lack merit, as shown in the following sections.

⁵ Decision, paras. 152-201; IS, paras. 29-31.

⁶ Decision, paras. 161-165.

⁷ Decision, paras. 166-172.

⁸ Decision, para. 173.

⁹ Decision, paras. 179-190.

¹⁰ Decision, paras. 191-194.

A. The CMA's Quantitative And Qualitative Assessment Confirmed The Importance of Activision's Content For Attracting And Retaining Gamers

11. Despite planning to spend \$68.7 billion to acquire Activision, Microsoft's first argument on ToH1 is that the CMA "*overstates the importance of [Activision's] content*" (Microsoft, para. 1.3(a)). SIE disagrees. The CMA conducted a detailed qualitative and quantitative assessment based on third-party evidence, engagement data, surveys on awareness, user numbers, gaming revenues, comparisons with rival franchises, and Microsoft's and Activision's internal documents (Decision, para. 151, 173). The evidence unearthed by the CMA unequivocally attests that Activision content is "*especially important*" for attracting gamers to a platform (Decision, para. 151).
12. In response, Microsoft argues, by reference to redacted Xbox usage data, that *Call of Duty* gamers "*cannot be considered 'special' or 'unique'*" (Microsoft, para. 3.15). This is incorrect and disproven by the available data. What matters is the importance of the content that Microsoft would control post-Transaction compared to its competitors and how this would affect competitive dynamics over time. The reality is that the Transaction would give Microsoft control of irreplaceable content that could, in turn, confer an extraordinary advantage and allow it to foreclose rivals.
- **Microsoft would control irreplaceable content that drives user engagement.** Post-Transaction, Microsoft would control Activision content that drives [REDACTED] times as much user engagement on PlayStation than all of SIE's best performing first-party titles put together.¹¹ [REDACTED] of that user engagement is driven by *Call of Duty* alone.
 - ***Call of Duty* gamers are exceptionally important to PlayStation.** In 2021, [REDACTED] million PlayStation users played *Call of Duty*, accounting for around [REDACTED] % of the PlayStation user base and spending [REDACTED] billion on *Call of Duty* titles and associated game add-ons. More importantly, these users generated estimated annual platform spending of around [REDACTED] billion on hardware, peripherals, subscriptions, games, and other PlayStation services. This represents around [REDACTED] % of total spending on hardware, peripherals, subscriptions, games, and other PlayStation services.
 - ***Call of Duty* is different – and more important to gaming platforms – than the other games Microsoft mentions.** *Call of Duty* is different to the other games that Microsoft mentions, such as *Rocket League*, *NBA 2K*, *Minecraft*, and *GTA* (Microsoft, para. 3.15(a)). *Call of Duty* has the highest number of MAUs among the top 10 gaming franchises in 2020 and 2021; it has a relentless release cycle, with multiple studios with thousands of game developers "*working on different versions of CoD at any one time to maintain yearly releases*" (Decision, para. 151(e)); and it is unique among AAA games because of its popularity, loyalty, and the enormous resources Activision commits to developing the franchise (each release takes around 3-5 years to develop with budgets of over \$300 million).

¹¹ [REDACTED]

- **SIE’s, Microsoft’s, and Activision’s documents attest to the importance of *Call of Duty*.** SIE’s internal documents make clear that *Call of Duty* generates a stronger connection with gamers than any other FPS game.¹² It has the highest awareness of any third-party video game franchise.¹³ The franchise [REDACTED]
[REDACTED]¹⁴ An SIE survey conducted in the normal course of business finds that *Call of Duty* has the highest gamer familiarity ([REDACTED]%), awareness ([REDACTED]%), and ownership ([REDACTED]%) of all third-party video game franchises globally.¹⁵ Likewise, as the CMA has found, Microsoft’s and Activision’s documents discussed in the Decision attest to the importance of *Call of Duty* (Decision, paras. 142-144).
- ***Call of Duty* is not replicable.** *Call of Duty* is too entrenched for any rival, no matter how well equipped, to catch up. It has been the top-selling game for almost every year in the last decade and, in the first-person shooter (“FPS”) genre, it is overwhelmingly the top-selling game.¹⁶ Other publishers do not have the resources or expertise to match its success. To give a concrete example, Electronic Arts – one of the largest third-party developers after Activision – has tried for many years to produce a rival to *Call of Duty* with its *Battlefield* series.¹⁷ Despite the similarities between *Call of Duty* and *Battlefield*¹⁸ – and despite EA’s track record in developing other successful AAA franchises (such as *FIFA*, *Mass Effect*, *Need for Speed*, and *Star Wars: Battlefront*) – the *Battlefield* franchise cannot keep up. As of August 2021, more than 400 million *Call of Duty* games had been sold, while *Battlefield* had sold just 88.7 million copies.¹⁹

13. Ignoring these facts, Microsoft argues that Nintendo has been successful without access to *Call of Duty* (Microsoft, para. 3.22-3.24). This misses the point. The Decision identifies a wide body of evidence showing that Nintendo offers a differentiated experience to Xbox and PlayStation because it is focused on family-friendly games that are very different from PEGI 18 FPS games like *Call of Duty* (Decision, para. 168; IS, para. 30(d)). This is supported by Microsoft’s internal documents, which, so the CMA found, show that: “*In general, Microsoft’s internal documents track PlayStation more*

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 Guinness World Records, [Best-selling first-person shooter \(FPS\) videogame series](#) (April 21, 2021).

17 See Geekwire, [Gaming giant Electronic Arts hires ‘Halo’ co-creator as director for new Seattle studio](#) (October 21, 2021) (“Electronic Arts, founded in 1982, might be best known by its initials. It’s currently the second largest third-party developer in the modern video game industry, behind *Call of Duty* publisher ActivisionBlizzard”).

18 Like *Call of Duty*, *Battlefield* is set in both WWII and the modern era; it contains story-driven campaigns with rich cinematics; and it includes large-scale multiplayer modes with similar game types (e.g., “team deathmatch” and “capture the flag”), progression systems, and unlocks.

19 Stealth Optional, [Call of Duty vs Battlefield sales: Which FPS game has sold more units?](#) (August 9, 2021).

closely than Nintendo, with Nintendo often being absent from any internal competitive assessment” (Decision, para. 163).²⁰

14. Microsoft claims that Nintendo’s differentiated model demonstrates that PlayStation does not need *Call of Duty* to compete effectively (Microsoft, para. 3.24). But this reveals Microsoft’s true strategy. Microsoft wants PlayStation to become like Nintendo, so that it would be a less close and less effective competitor to Xbox. Post-Transaction, Xbox would become the one-stop-shop for all the best-selling shooter franchises on console (*Call of Duty*, *Halo*, *Gears of War*, *Doom*, *Overwatch*), as the Decision explains (Decision, para. 151(f)), and it would then be free from serious competitive pressure.
15. In short, Activision’s games, in particular, *Call of Duty*, are critical to PlayStation. The franchise is firmly entrenched in gamers’ psyche: every instalment since *Call of Duty* was first released back in 2003 has consistently topped the charts. *Call of Duty* has become synonymous with the FPS category and is the benchmark against which all other FPS games are measured. Through its 20-year existence, no game has managed to rival *Call of Duty*’s brand loyalty and network. Nothing uncovered by the CMA during its thorough Phase 1 review suggests that this is likely to change in the future.

B. Microsoft Has Not Committed To Continue Making *Call of Duty* Available On PlayStation and PlayStation Plus

16. Microsoft’s second argument on ToH1 is that Microsoft has “*offered Sony a contractual commitment to keep supplying it with Call of Duty, including new releases with feature and content parity*” (Microsoft, para. 1.3(e)). But no contractual protections can ever provide proper protections against a foreclosure strategy, and this is why the CMA’s Guidelines emphasise that the CMA should “*not ... place material weight on contractual protections*” in a foreclosure case (Decision, para. 175).²¹ Besides, Microsoft has badly mischaracterised its offer. Microsoft’s proposal has three significant shortcomings.²²

- **Parity.** Microsoft [REDACTED]
[REDACTED] A commitment to equal treatment on PlayStation and Xbox is essential to maintain effective competition and ensure a level playing field.
- **Multi-game subscription services.** Microsoft has not agreed to make *Call of Duty* and other Activision titles available on SIE’s PlayStation Plus, much less on terms that would be fair and competitive. On the contrary, they have made clear publicly that they intend to make *Call of Duty* available only on Game Pass, and have said that, if SIE is concerned, it should permit Game Pass on PlayStation consoles. Because SIE’s multi-game subscription service is critical to its future

²⁰ In a similar vein, Microsoft’s Lori Wright noted in her testimony in *Epic v Apple* that Microsoft’s “*most direct competitor for hardware sales [is] the Sony PlayStation ... There is Nintendo Switch but to a much lesser extent*”. See *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898 (N.D. Cal. 2021), Reporter’s Transcript of Proceedings, May 5, 2021, [537:14-21]; [538:8-12]; [638:15-19].

²¹ *Merger Assessment Guidelines*, para. 7.15.

²² Decision, para. 175.

competitiveness, access to *Call of Duty* on PlayStation Plus is essential. Likewise, other multi-game subscription services require *Call of Duty* to compete effectively.

- **Duration.** Microsoft has offered to continue making Activision’s games available on PlayStation only until 2027 (Microsoft, para. 3.27). Likewise, in public comments just on October 26, Microsoft said that it plans to offer *Call of Duty* on PlayStation only “*as long as that makes sense.*”²³ A period until 2027 – or some other (possibly shorter) time that Microsoft unilaterally determines “*makes sense*” to Microsoft – is badly inadequate. By the time SIE launched the next generation of its PlayStation console (which is likely to occur around [REDACTED]), it would have lost access to *Call of Duty* and other Activision titles, making it extremely vulnerable to consumer switching and subsequent degradation in its competitiveness. Even assuming that SIE had the ability and resources to develop a similarly successful franchise to *Call of Duty*, it would take many, many years and billions of dollars to create a challenger to *Call of Duty* – and the example of EA’s *Battlefield* shows that any such efforts would more than likely be unsuccessful.

17. More generally, Microsoft’s past conduct shows that its public utterances should be treated with extreme scepticism. The Decision identifies five separate transactions – ZeniMax, Obsidian, inXile, Ninja Theory, Compulsion – where Microsoft acquired games studios and then made their upcoming games exclusive to Xbox (para. 192). This conduct occurred despite Microsoft’s assurances to the public and regulators that it would not make ZeniMax content exclusive.²⁴ Microsoft’s CEO of Gaming, Phil Spencer, publicly explained the rationale for Microsoft’s bait-and-switch as follows:²⁵

“...[T]his is about delivering great exclusive games for [Xbox customers] that ship on platforms where Game Pass exists. That’s our goal, that’s why we’re doing this, that’s the root of this partnership that we’re building.”

18. Phil Spencer’s comments about Microsoft’s exclusive strategy for Bethesda’s content are powerful evidence that Microsoft has the same playbook in mind for Activision. In fact, the Decision finds that Microsoft pursued its exclusivity strategy with “*content that is far less valuable*” than Activision’s. The Decision explains that this means Microsoft would have an “*even stronger incentive*” to make its content exclusive post-Transaction (Decision, para. 194). This is a compelling point that Microsoft does not address.
19. In response to the CMA’s analysis of its past conduct, Microsoft points to a single example – from almost a decade ago – of an acquired game that it did not make exclusive: *Minecraft* (Microsoft, para. 3.32). But *Minecraft* is a completely different proposition to

²³ The Wall Street Journal, [Xbox Boss Phil Spencer Wants to Sever Apple-Google ‘Duopoly’ in Mobile Games](#), October 26, 2022.

²⁴ At the time, Microsoft told investors that it “*highly encouraged cross-platform play*” and that it did not have any intention “*of just pulling all of Bethesda content out of [SIE]*” See [Seeking Alpha, Microsoft Corporation \(MSFT\) Management Presents at Jefferies Interactive Entertainment Virtual Conference \(Transcript\)](#) (November 12, 2020). Microsoft told the European Commission at the time that it “*would not have the incentive to cease or limit making [Bethesda] games available for purchase on rival consoles*” (Microsoft/ZeniMax, Case COMP/M.10001, Commission decision of March 5, 2021, para 113).

²⁵ Xbox, [Bethesda Joins Xbox – Roundtable](#) (March 11, 2021), at 9:35 - 9:58.; [GQ, How Xbox outgrew the console: inside Phil Spencer’s multi-billion dollar gamble](#) (November 15, 2021).

Call of Duty: it is a single release, virtually infinite game world that uses blocky graphics, has no required goals, and is already in users' hands. As a comparison of the difference in scope, to acquire *Minecraft*, Microsoft paid less than 5% of the price that Microsoft is offering to buy Activision. Microsoft's conduct with *Minecraft* says nothing about its strategy with future versions of *Call of Duty*.

20. For completeness, the Decision reached its findings on Microsoft's incentives without placing significant weight on the economic incentives analysis developed by Cornerstone Research and RBB Economics (Decision, para. 194). That analysis, based on data of annual spending of *Call of Duty* players on PlayStation, confirms and corroborates the CMA's findings on Microsoft's incentives.²⁶ If anything, this is conservative because it finds a significantly lower critical switch rate (the share of users that would make a foreclosure strategy profitable) for the Bethesda transaction than for *Call of Duty* in circumstances where Microsoft did in fact withhold future key Bethesda titles from PlayStation.

C. The Circumstance That, In The Recent Console Generation, Microsoft Is Somewhat Behind SIE Does Not Prevent Anti-competitive Effects From Arising

21. Microsoft's third argument on ToH1 is that "*Sony is not vulnerable to a hypothetical foreclosure strategy*" because "*PlayStation has been the largest console platform for over 20 years*" (Microsoft, para. 1.3(a)). The circumstance that Microsoft is currently somewhat behind SIE in console sales does not mean that the Transaction cannot harm competition and consumers.²⁷ In reality, competition and consumers would be harmed in the short-term and long-term.
22. First, PlayStation users would be immediately and seriously harmed by Microsoft's foreclosure strategy. Specifically, PlayStation users who prefer playing *Call of Duty* on PlayStation would be harmed by being denied the opportunity to play *Call of Duty* on their device of choice. They would face two options: either to not play *Call of Duty* or to incur a cost of £450 to buy an equivalent Xbox console and play *Call of Duty* on a less preferred device at a similar quality to the level they currently enjoy. In the former case, consumers would self-evidently lose the opportunity to play one of their favourite games. In the latter case, in addition to paying for a new console that they would not otherwise have bought,²⁸ those PlayStation users who sold their consoles in the process of switching would lose access to their current PlayStation content library, causing further consumer

²⁶ Cornerstone Research Submission (October 21, 2022).

²⁷ Microsoft's historic view is, in any event, an incorrect characterisation of how the industry looks today. For example, the Xbox Series X has outsold PS5 for significant periods in the US. *See, e.g., Game Central, Xbox Series X Has Outsold PS5 for Three Quarters in a Row in US Says Microsoft*, Metro (July 27, 2022). Xbox also outsold PlayStation in the UK in critical time periods, and indeed PlayStation was the third place console (behind both Xbox and the Nintendo Switch) last holiday season. *See, e.g., Josh Coulson, Despite Having Its Second Best Ever Month in the UK, PS5 Sales Were Behind Switch and Xbox in December*, The Gamer (January 12, 2022)

²⁸ The incidence of multi-homing is low. *See* Cornerstone Research Submission (October 21, 2022), footnote 2.

harm. Either way, consumer choice would be restricted and the result would be direct consumer harm.

23. Second, Microsoft's foreclosure strategy would prevent SIE from competing for a large portion of console gamers, reducing incentives to invest in innovation. PlayStation's and Xbox's incentives to invest in innovation and quality improvements depend on the number of customers that competition can attract. Microsoft's foreclosure strategy may "lock in" many consumers to Xbox, including existing Xbox users who play *Call of Duty* and those switching from PlayStation due to *Call of Duty*. These locked-in users would become less likely to switch in response to any procompetitive actions on SIE's part. This would effectively prevent SIE from competing for the business of a large portion of console gamers:²⁹
- While SIE could today hope to attract Xbox users who play *Call of Duty*, these consumers are unlikely to switch if *Call of Duty* becomes exclusive to Xbox. That may represent [REDACTED] million consumers, or about [REDACTED]%–[REDACTED]% of Xbox's existing user base.
 - Conservative estimates suggest that [REDACTED]% of PlayStation users would switch to Xbox in the short to medium term if *Call of Duty* is made exclusive to Xbox. These PlayStation switchers would represent an increase of [REDACTED] million consumers to the current Xbox user base, or about a [REDACTED]% increase.
24. Between them, PlayStation and Xbox have approximately 205.1 million total users. Even without considering those Xbox users who may be unlikely to switch for other reasons (e.g., users heavily engaged with *Halo* or other existing or upcoming Microsoft exclusives), the two *Call of Duty*-driven effects described above would potentially put as many as [REDACTED] million users, or [REDACTED]% of the total across PlayStation and Xbox, out of SIE's reach. Then, with its closest competitor significantly weakened, and having captured a substantial proportion of console users, Microsoft would have the ability to increase prices or otherwise reduce the quality of its offering.
25. Third, direct and indirect network effects would exacerbate the anti-competitive effects of Microsoft's foreclosure strategy. The IS and Decision identify "*strong direct and indirect network effects*": gaming platforms become more attractive to gamers the more other gamers are on them. Accordingly, the loss of a substantial number of *Call of Duty* players would be likely to induce further switching to Xbox by users who want to continue playing with their friends (either *Call of Duty* or another title).
26. In addition, without *Call of Duty* users, the potential audience for PlayStation games would be irreparably reduced, and the potential returns for developers of PlayStation games would be greatly diminished. This, in turn, would reduce the incentives for these third-party developers to develop new titles for PlayStation, further reducing its quality *vis-à-vis* Xbox, thereby inducing further switching away from PlayStation by users, and thereby making the platform even less attractive to developers.

²⁹ [REDACTED]

27. Fourth, Microsoft’s foreclosure strategy would cause SIE to lose significant revenues, diminishing its ability to fund further investment. PlayStation users that play *Call of Duty* generated around █% of total spending (around █ billion) on hardware, peripherals, subscriptions, games, and other PlayStation services. The loss of all or a significant proportion of these users, together with their associated revenues and profits, would severely diminish SIE’s ability and incentive to invest in future hardware innovation and gaming technologies. Cornerstone Research and RBB Economics estimate that switching rates of █% could lead to a █% reduction in SIE’s profits.³⁰ This would, in turn, also reduce the potential return on producing innovative first-party games, thereby diminishing SIE’s ability and incentive to invest in new games.
28. Fifth, Microsoft’s statements on user numbers are unreliable. For completeness, Microsoft cites inaccurate figures on the relative positions of PlayStation and Xbox. Microsoft claims that even if all of PlayStation’s MAUs that play *Call of Duty* left PlayStation, PlayStation would still be left with “*significantly more*” MAUs than Xbox (Microsoft, para. 3.19). This does not accord with SIE data. In 2021, there were, on average, █ million MAUs of *Call of Duty* (and █ million accounts that played *Call of Duty* during the year). Based on these figures, if the █ million MAUs switched to Xbox, PlayStation would be left with far fewer MAUs than Xbox,³¹ before taking into account the direct and indirect network effects that would exacerbate switching (Decision, para. 203(a); IS, para. 32).
29. Finally, Microsoft seeks to distract from its foreclosure strategy by suggesting that SIE “*engages in conduct which is reflective of its market power*” because SIE recently increased the price of PlayStation consoles (Microsoft, para. 1.3(c), second bullet). SIE strongly disputes this claim. SIE’s decision to increase the recommended retail price of PlayStation 5 reflected adverse currency trends, supply shortages, and global inflation.³² Microsoft, for its part, has recently hinted at upcoming price increases for Xbox consoles and Game Pass.³³

II. Theory of Harm 2: Input Foreclosure of Rival Multi-game Subscription Services

30. Under Theory of Harm 2 (“ToH 2”), the IS and Decision explain that Microsoft would have the ability and incentive to lessen current and future competition in multi-game subscription services (Decision, paras. 213-234; IS, paras. 35-36).

³⁰ █

³¹ In 2021, Microsoft’s Satya Nadella said “*We are gaining console share, as gamers recognize the value of our broader ecosystem. Xbox Live has more than 100 million monthly active users, while Game Pass now has 18 million subscribers.*” As of January 2021, Microsoft had seen “*record engagement and monetization across [its] platform, as well as console demand that significantly exceeded supply.*” See [Microsoft FY21 Second Quarter Earnings Conference Call](#), pp. 6, 8.

³² PlayStation Blog, PS5 price to increase in select markets due to global economic environment, including high inflation rates (August 25, 2022).

³³ Speaking at the Wall Street Journal’s Tech Live Conference, Phil Spencer said: “*We’ve held price on our console, we’ve held price on games and our subscription. I don’t think we’ll be able to do that forever... I do think at some point we’ll have to raise some prices on certain things.*” See The Verge, [Microsoft says Xbox Game Pass is profitable as it sees subscription growth slow](#) (October 26, 2022).

31. The basis of this theory of harm is as follows: Activision’s content is “*equally important*” to multi-game subscription services as it is to consoles (Decision, paras. 214, 216, 219). While Activision’s content is not available today on multi-game subscription services, as demand grows, Activision would likely make that content available on multiple multi-game subscription services, absent the Transaction (Decision, para. 214). Post-Transaction, however, the Decision finds that Microsoft would have the ability and the incentive to make Activision’s content exclusive to Game Pass and not release it on other multi-game subscription services (Decision, para. 226). Microsoft does not contest these findings in its response to the Decision.
32. On the contrary, Microsoft has publicly made clear that one of its main rationales for the Transaction is to differentiate Game Pass from rival multi-game subscription services by making Activision’s content available on Game Pass and no other multi-game subscription service, including PlayStation Plus (Decision, para. 226; IS, para. 36(b)).³⁴ The anti-competitive effect of this strategy would be profound. Game Pass already “*holds a strong position*” in multi-game subscription services, with its competitors “*significantly smaller,*” lacking the “*popularity and range of content that [Game Pass] would own post-Merger*” (Decision, para. 223). Multi-game subscription services are a “*nascent market,*” exhibiting “*both direct and indirect network effects.*” Combining Game Pass, the leading incumbent, with Activision’s “*important gaming catalogue*” could, in the Decision’s words, “*substantially reduce competition [...], raise barriers to entry, reduce the number of competitors to only one or a few providers, and significantly increase Microsoft’s market power.*” The Transaction would thereby deprive consumers of strong competition in multi-game subscription services that would have played out absent Microsoft’s foreclosure strategy (Decision, para. 234; IS, para. 37).
33. SIE agrees with the Decision’s findings, which are based on a cogent and compelling body of evidence that rests on the principle set out in the CMA’s Guidelines and recent case law that particular care is needed to protect nascent competition.³⁵ SIE notes the following:
- **Game Pass leads PlayStation Plus significantly.** Microsoft already has a substantial lead in multi-game subscription services. Game Pass has 29 million subscribers to Xbox Game Pass Console and Xbox Game Pass Ultimate, and is expected to grow substantially in the future. The multi-game subscription tiers of PlayStation Plus considerably lag, with fewer than [REDACTED] the number of subscribers.³⁶
 - **SIE’s documents attest to the danger of *Call of Duty* becoming exclusive to Game Pass.** SIE’s contemporaneous documents corroborate the Decision’s analysis of the danger of Activision content becoming exclusive to Game Pass. A February 2022 document states that [REDACTED]

³⁴ See also Microsoft’s response, para. 4.2, fourth bullet.

³⁵ CMA Merger Assessment Guidelines, para. 1.8; 1429/4/12/21 Meta Platforms, Inc. v Competition and Markets Authority, [2022] CAT 26.

³⁶ Ampere Analysis, [Games Subscriptions: Is the ‘Netflix of Games’ Inevitable and What Does it Mean for Developers?](#) (March 2022), p.8, [REDACTED]

██████████³⁷ Industry sources have also recognized that “[w]ith Activision, Microsoft is one gigantic step closer to game subscription dominance.”³⁸

- **Independent surveys confirm the profound effect of *Call of Duty* being included on Game Pass:** An independent YouGov survey from January 2022 found that including *Call of Duty* on *Game Pass* would have a profound impact on gamer preferences for multi-game subscription services: 46% of PlayStation gamers in the U.S. indicated that if *Call of Duty* were available on *Game Pass*, they would consider subscribing to *Game Pass*.³⁹
 - **Developers would also be harmed by unequal access to *Call of Duty* on multi-game subscription services.** Excluding access to *Call of Duty* on PlayStation Plus would also negatively impact independent game developers. Independent developers would likely receive worse terms for their content from Microsoft once Microsoft had become the dominant multi-game subscription service. 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, less immersive, and driven by disruptive in-app purchases. This, in turn, would harm consumers yet further.
34. In response to the CMA’s evidence, Microsoft advances three main arguments. None is persuasive.
35. First, Microsoft argues that multi-game subscription services are not a “market” but a “means of payment” (Microsoft, para. 4.5). This misses the point. Multi-game subscription services are more than a mere “means of payment”: they are an alternative to “buy to play” that allow consumers to access a broad library of video game content through a different payment model.⁴⁰ They can also influence consumers’ choice of hardware and cloud gaming service where the multi-game subscription service in question is compatible with only certain hardware or other services (as is the case with *Game Pass* and each of Xbox and Azure).
36. Accordingly, there is competitive interaction between “buy to play” and multi-game subscription services and a competitive relationship between a consumer’s decision to subscribe to a given multi-game subscription service and his or her choice of console, mobile device, PC, and/or cloud gaming service. Both relationships and sets of effects merit review. SIE therefore considers it appropriate for the CMA to examine the effect of the Transaction on multi-game subscription services separately from its assessment of the Transaction’s effect on consoles and cloud gaming.

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³⁸ The Verge, [With Activision, Microsoft is one gigantic step closer to game subscription dominance](#) (January 19, 2022).

³⁹ YouGov, [How many users could the Microsoft/Activision deal bring to Xbox Game Pass?](#) (January 1, 2022), included in **Annex 1**.

⁴⁰ See also Decision, para. 226; IS, para. 36(b).

37. Second, Microsoft claims that “*there are not facts-anywhere-to support [the] assertion*” that Activision’s content strategy – under which no multi-game subscription service receives preferential treatment – would change post-Transaction (Microsoft, para. 1.3(g)). Microsoft may claim there are no “*facts,*” but the CMA finds that its internal documents tell a different story. The Decision cites multiple Microsoft documents “*highlighting incentives to foreclose competitors*” (Decision, para. 228). The CMA’s characterization of these documents suggests they are consistent with the economic incentives analysis undertaken by Cornerstone Research and RBB Economics.
38. Microsoft’s argument that Activision’s content does not “*feature today in multi-game subscription services*” is misconceived (Microsoft, para. 4.12). Today, no multi-game subscription service has an advantage by being able to offer Activision’s irreplaceable content because Activision has not made it available in any multi-game subscription service. While that might change in the future as multi-subscription services grow, it would change based on competition on the merits rather than an anti-competitive acquisition – and (based on Activision’s past conduct) it would change on an equal basis, with Activision’s content being available on parity on all multi-game subscription services (as the Decision finds, para. 214) consistent with its current multi-platform approach for “buy-to-play” content. The Transaction would also prevent Activision from developing a console-agnostic multi-game subscription service⁴¹ as certain other developers (e.g., EA, Ubisoft) have done, thereby removing a potential competitive constraint on Game Pass.
39. If there was any doubt as to Microsoft’s intentions, Microsoft has made clear that it plans to differentiate Game Pass from rival multi-game subscription services by “*not making [Activision’s games] available in the same manner or at the same time on other subscription services*” (Microsoft, para. 4.2).⁴² Giving Game Pass exclusive access to *Call of Duty* and other Activision games would tilt demand for multi-game subscription services irreparably in Microsoft’s favour. For this reason alone, the Transaction should be challenged.
40. Third, Microsoft argues that demand for multi-game subscription services would not tip towards Game Pass because Microsoft would also make Game Pass available on PlayStation (Microsoft, para. 1.3(g)). But the wider availability of the leading provider (Game Pass), now endowed with exclusive irreplaceable content, and protected by direct and indirect network effects, would make it harder – not easier – for rival multi-game subscription services to compete. Microsoft’s stance that Game Pass availability on PlayStation would be a panacea for the harm from this Transaction rings particularly hollow given that Microsoft does not permit PlayStation Plus to be available on Xbox.

⁴¹ Activision is rumoured to have been preparing to launch its own console-agnostic multi-game subscription service centered around *Call of Duty* content. See GameRant, [Rumor: Call of Duty Could be Launching Its Own Subscription Service](#) (March 29, 2022).

⁴² See also Decision, para. 226; IS, para. 36(b).

III. Theory of Harm 3: Foreclosure of Cloud-Gaming Service Providers Through Leveraging Microsoft's Ecosystem

41. Under ToH3, the Decision found that Microsoft would leverage its broad multi-product ecosystem – including its leading cloud platform (Azure); its leading gaming system (Xbox); and its dominant PC OS (Windows) – together with Activision's gaming content to “*strengthen network effects, raise barriers to entry, and hence foreclose rivals in cloud gaming services*” (Decision, para. 239; IS, para. 39). The Decision further found that Microsoft would have the ability and incentive to engage in a variety of foreclosure strategies, including: withholding Activision's content; denying or degrading rival cloud gaming providers' access to Azure; and denying or degrading rivals' access to Windows (Decision, para. 275).
42. Microsoft has a structural advantage in cloud-computing services because of its deep and broad ecosystem advantages. Microsoft's success with Azure and Windows (the dominant PC operating system on which the vast majority of PC games are played) will give it opportunities to undercut SIE on cloud streaming for console and PC. Microsoft has already publicly trumpeted its advantages in cloud gaming. As Phil Spencer remarked: “*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.*”⁴³ Since then, Google has announced that it is closing its cloud gaming service, Stadia, including because of an absence of critical content.⁴⁴ Amazon, for its part, has struggled to gain traction in cloud gaming.⁴⁵
43. The effects of a Microsoft foreclosure strategy in cloud gaming would harm consumers and game publishers. Cloud gaming is “*at an early stage of its development*” and strengthening network effects and raising barriers to entry “*could affect all current and potential rivals*” (IS, para. 44). This would deny customers the benefit of competition between cloud gaming platforms or, at the very least, “*a longer period of competition between platforms vying to be the 'winning platform' in these markets*” (IS, para. 44). For game publishers, the CMA explained that if Microsoft were to become a gatekeeper between publishers and gamers, that would ultimately give Microsoft the ability to “*control access to gamers, charge high fees for game distribution, and manipulate game rankings*” (Decision, para. 293).
44. SIE agrees with the thorough analysis in the Decision and the framework for assessment set out in the IS. If consummated, the Transaction would give Microsoft a unique position in the industry, as the only company with sole control over such a large library

⁴³ 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*.

⁴⁴ Google, [A message about Stadia and our long term streaming strategy](#) (September 29, 2022). See also Open Critic, [Opinion – Why Google Stadia Failed](#) (September 29, 2022) which concludes that Stadia's lack of “*compelling content offerings*” and its “*surprising decision ... to launch without first-party content*” were reasons for its failure.

⁴⁵ See Den of Geek, [Why Google Stadia and Amazon Games Seem Doomed to Fail](#) (February 1, 2021).

of popular games and the levers to determine how competition plays out in this nascent space, thanks to its Windows OS and Azure platform. As SIE's contemporaneous documents explain, [REDACTED]

[REDACTED]⁴⁶ Likewise, Phil Spencer has publicly explained that “*content, community and cloud*” are the future of gaming; post-Transaction, Microsoft would have unique strength in all of these three elements.⁴⁷

45. In response to the Decision's analysis, Microsoft raises four main points. None is sound.
46. First, Microsoft argues (tautologically) that the CMA's theory of harm is “*novel and without precedent*” (Microsoft, para. 1.3(h)). But there is nothing novel about a leveraging theory of harm whereby a digital platform uses existing advantages in one area to harm competition in a nascent space.⁴⁸ Microsoft's claims of novelty are particularly misplaced given that Microsoft is presently under investigation for leveraging practices involving Azure and Windows, and Microsoft's President, Brad Smith, has recognized the legitimacy of certain of these concerns and pledged to address them.⁴⁹ In the same vein, Microsoft documents unearthed by the CMA identify an anti-competitive strategy to leverage Activision's content to advantage Microsoft in cloud gaming (Decision, para. 287).
47. Second, Microsoft argues that “*consumer adoption of cloud gaming remains low*” (Microsoft, para. 1.3(i)). That is beside the point. Nascent competition is just as worthy of protection as competition among services that already enjoy substantial usage, as Microsoft well knows. Indeed, the CMA has announced it is opening a Market Investigation into cloud gaming services precisely because cloud gaming is “*a developing innovation*” and competition in this space (while nascent) should be protected.⁵⁰
48. Third, Microsoft argues that, in the counterfactual, Activision content would not be available on cloud gaming services. This is misconceived. As with multi-game subscription services, Activision content in the counterfactual might become available to cloud gaming services in the future and on equal terms. Under the Transaction, however, Microsoft will have the ability and incentive to keep that content exclusively to itself.

⁴⁶ [REDACTED]

⁴⁷ New York Times, [To Understand the Metaverse, Look to Video Games](#) (January 10, 2022).

⁴⁸ See CMA's Merger Assessment Guidelines, paras. 7.7, 7.30-7.37, fn. 118. See also *Facebook/Kustomer*, where the CMA emphasized that Facebook could leverage its ecosystem of complementary products and services into adjacent markets (paras. 283-284); *Facebook/Giphy*, where the CMA recognized that “*Given Facebook's significant market power in social media ... Facebook [could] disadvantage its rivals strategically as it limits the ability of existing or emerging rivals to innovate with GIPHY's GIF as an input*” (para. 8.154(a)); and *Microsoft/LinkedIn*, where the EC noted that “*foreclosure effects may arise when the combination of products in related markets may confer on the merged entity the ability and incentive to leverage a strong market position from one market to another closely related market*” (para. 185).

⁴⁹ Microsoft, [Microsoft responds to European Cloud Provider feedback with new programs and principles](#) (May 18, 2022).

⁵⁰ [CMA plans Market Investigation into mobile browsers and cloud gaming](#) (June 10, 2022).

49. Fourth, Microsoft argues that “*it does not have a market-leading position in gaming to protect*” (Microsoft, para. 1.3(j)). But this theory of harm is about Microsoft using its leading position in PC OSs, cloud platform services, and gaming content (via the acquired Activision content) to foreclose competition in cloud gaming. There is no requirement in such a leveraging theory for there to be market power in the foreclosed product, as Microsoft well knows. Microsoft has publicly explained the link between “*content, community, and cloud.*”⁵¹ Microsoft already has the community (via Xbox, Windows, and LinkedIn) and the cloud (via Azure), and, through the Transaction, it would add Activision’s vast content to its existing proprietary games, giving it everything it would need to tip demand in its favour and foreclose actual or potential rivals.

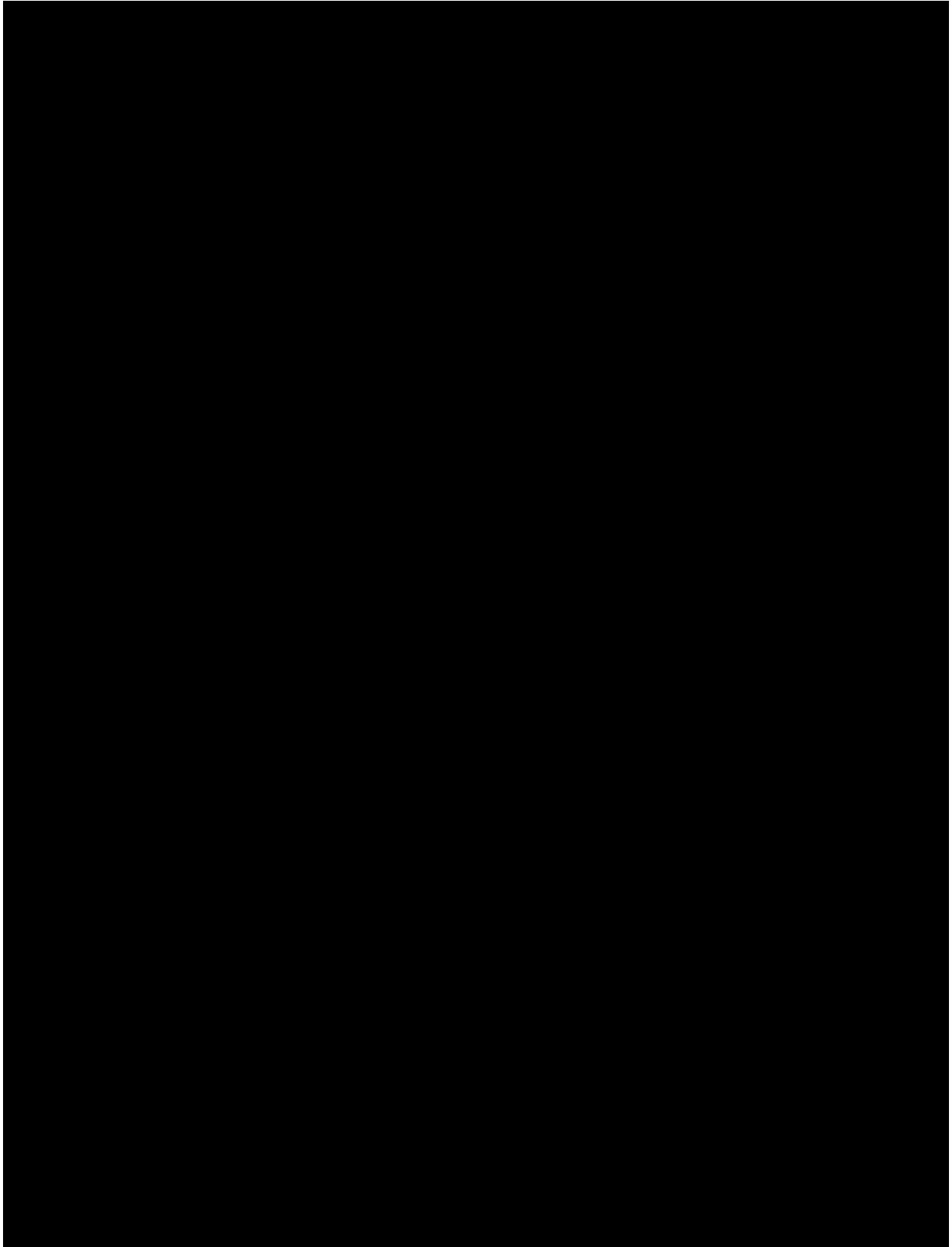
Conclusion

50. The Transaction threatens the gaming ecosystem at a critical moment. It would take an irreplaceable gaming franchise, *Call of Duty*, out of independent hands and combine it with Microsoft’s highly-successful gaming system (Xbox), leading multi-game subscription service (Game Pass), dominant PC OS (Windows), and leading cloud platform (Azure). The only way to preserve robust competition and protect consumers and independent developers is to ensure that Activision remains independently owned and controlled.

⁵¹ New York Times, [To Understand the Metaverse, Look to Video Games](#) (January 10, 2022).

Annex 1

Supporting Materials from SIE Internal Documents

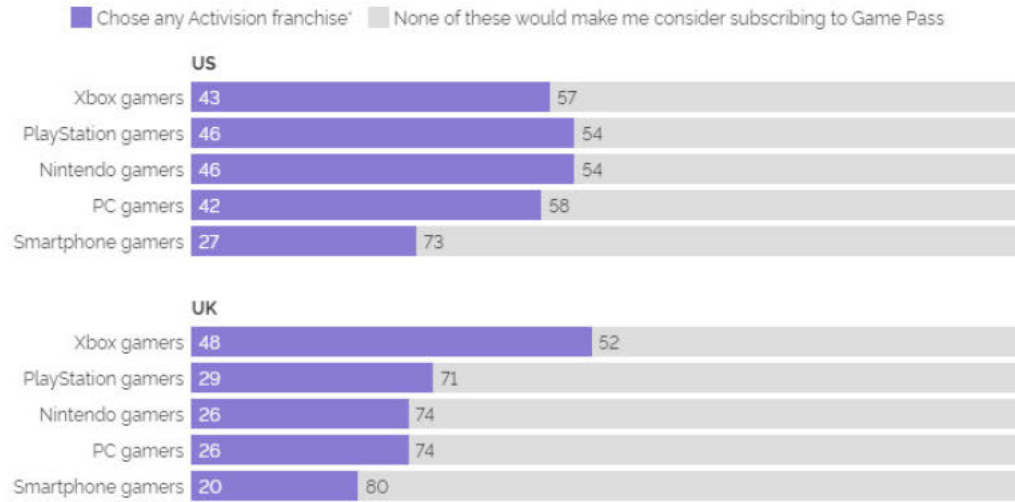


[REDACTED]

[REDACTED]

46% of PlayStation gamers in the US indicated the inclusion of Activision titles in Game Pass would make them consider subscribing to the Xbox subscription service

Xbox Game Pass is a subscription service where users pay a monthly fee between \$9.99 and \$14.99 to gain access to a large library of games. The inclusion of which one of the following video game franchises in Game Pass would MOST make you consider subscribing to Game Pass? (% of US gamers who do not subscribe to Xbox Game Pass)



Options presented to respondents were: Call of Duty, Crash Bandicoot, Guitar Hero, Skylanders, Spyro the Dragon, Tony Hawk Pro Skater, Diablo, Overwatch, StarCraft, Warcraft

YouGov

January 19, 2022

Source: YouGov, How many users could Microsoft/Activision deal bring to Xbox Game Pass? (January 1, 2022).

