

## ANTICIPATED ACQUISITION OF ACTIVISION BLIZZARD, INC BY MICROSOFT CORPORATION

### Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups<sup>1</sup>

#### Introduction

1. On 15 September 2022, the Competition and Markets Authority (**CMA**), in exercise of its duty under section 33(1) of the Enterprise Act 2002 (the **Act**), referred the anticipated acquisition of Activision Blizzard, Inc by Microsoft Corporation (**Microsoft**) (the **Merger**), for further investigation and report by a group of CMA panel members (the **Inquiry Group**).
2. In its provisional findings on the reference notified to Microsoft Corporation and Activision Blizzard, Inc (the **Parties**) on **8 February 2023** (the **Provisional Findings Report**), the Inquiry Group, among other things, provisionally concluded that the Merger would result in the creation of a relevant merger situation, and that the creation of that situation may be expected to result in a substantial lessening of competition (**SLC**) in:
  - (a) console gaming in the UK due to vertical effects resulting from input foreclosure; and
  - (b) cloud gaming services in the UK due to vertical effects resulting from input foreclosure.
3. The CMA's analysis provisionally indicates that the SLCs identified may be expected to result in adverse effects, for example in the form of reduced choice, increased price, lower quality and/or reduced innovation compared to what would otherwise be the case absent the Merger.
4. This notice sets out the actions which the Inquiry Group considers it might take for the purpose of remedying the SLCs and/or any resulting adverse effects identified in the Provisional Findings Report<sup>2</sup> (the **Remedies Notice**). This notice of possible remedies is intended as a starting point for discussion with the Parties and third parties, including customers and competitors.<sup>3</sup> A

---

<sup>1</sup> CMA Rules of Procedure for Merger, Market and Special Reference Groups ([CMA17](#), 2014).

<sup>2</sup> Provisional Findings Report [here](#).

<sup>3</sup> [Merger Remedies: CMA87](#) (December 2018), paragraph 4.56.

remedies working paper, containing a detailed assessment of the different remedies options and setting out the Inquiry Group's provisional decision on remedies, will be sent to the merger parties for comment (but not published) at a later date in the investigation.<sup>4</sup>

5. The CMA invites comments on possible remedies by 17:00 hours (UK time) on **22 February 2023**.

### **Criteria**

6. In deciding on a remedy, the CMA shall in particular have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it.<sup>5</sup>
7. To this end, the CMA will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will select the least costly and intrusive remedy that it considers to be effective.
8. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.<sup>6</sup>

### **The Provisional SLC**

9. We have provisionally identified two SLCs in relation to this merger:
  - (a) an SLC in gaming consoles in the UK, as a result of vertical effects in the form of input foreclosure; and
  - (b) an SLC in the supply of cloud gaming services in the UK due to vertical effects resulting from input foreclosure.
10. Further detail on the provisional SLCs is set out within the Provisional Findings Report.

### **Possible remedies on which views are sought**

11. In determining an appropriate remedy, the CMA will consider the extent to which different remedy options would be effective in remedying, mitigating or preventing the SLC or any resulting adverse effects that have been provisionally identified.

---

<sup>4</sup> [Merger Remedies: CMA87](#) (December 2018), paragraph 4.64.

<sup>5</sup> Sections 35(4) and 36(3) of the Act.

<sup>6</sup> [Merger Remedies: CMA87](#) (December 2018), paragraph 3.3 and 3.4.

12. As set out in published remedies guidance, in merger inquiries the CMA prefers structural remedies, such as divestiture or prohibition, over behavioural remedies, because:
- (a) structural remedies are more likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;
  - (b) behavioural remedies are less likely to have an effective impact on the SLC and its resulting adverse effects, and are more likely to create significant costly distortions in market outcomes; and
  - (c) structural remedies rarely require monitoring and enforcement once implemented.<sup>7</sup>
13. The CMA will also consider whether a combination of measures is required to achieve a comprehensive solution – for example whether any behavioural remedies would be required in a supporting role to safeguard the effectiveness of any structural remedies. The CMA will evaluate the impact of any such combination of measures on the SLC or any resulting adverse effects.
14. At this stage, the CMA has identified the following possible structural remedies:
- (a) Requiring a partial divestiture of Activision Blizzard, Inc. This may be:
    - (i) Divestiture of the business associated with *Call of Duty*;
    - (ii) Divestiture of the Activision segment of Activision Blizzard, Inc. (the **Activision segment**), which would include the business associated with *Call of Duty*;
    - (iii) Divestiture of the Activision segment and the Blizzard segment (the **Blizzard segment**) of Activision Blizzard, Inc., which would include the business associated with *Call of Duty* and *World of Warcraft*, among other titles.
  - (b) Prohibition of the merger.
15. Behavioural remedies are designed to address an SLC and/or its adverse effects by regulating the ongoing conduct of parties following a merger. The

---

<sup>7</sup> [Merger Remedies: CMA87](#) (December 2018), paragraph 3.46.

CMA will generally only use behavioural remedies as the primary source of remedial action where:

- (a) divestiture and/or prohibition is not feasible, or the relevant costs of any feasible structural remedy far exceed the scale of the adverse effects of the SLC;
  - (b) the SLC is expected to have a short duration; or
  - (c) behavioural measures will preserve substantial relevant customer benefits (**RCBs**) that would be largely removed by structural remedies.<sup>8</sup>
16. At this stage, the CMA considers that certain divestitures and/or prohibition are, in principle, feasible remedies in this case. The provisional SLCs are not time-limited, and while RCBs have not yet been assessed in detail, evidence on efficiencies received to date does not suggest that RCBs might be substantial.
17. In most CMA merger investigations, the detailed assessment of remedies begins only after the Provisional Findings – where the CMA provisionally concludes that a Merger gives rise to an SLC (or SLCs). While the CMA’s guidance notes that merging parties have the option to engage in discussions about potential remedies before the Provisional Findings (‘without prejudice’ to the question of whether the Merger gives rise to an SLC),<sup>9</sup> there is no requirement for merging parties to do so – and the Parties in this case have not yet proposed any potential remedies to the CMA.
18. Microsoft has, however, informed us of existing and potential contractual arrangements with third-party platforms relating to access to Call of Duty. Accordingly, while none of the circumstances in which the CMA would select a behavioural remedy as the primary source of remedial action in a merger investigation (as summarised in paragraph 15 above) appear to be present, the CMA will also consider a behavioural access remedy as a possible remedy.
19. Access remedies are a form of behavioural remedy which seek to maintain or restore competition by enabling competitors to have access on appropriate terms to the products and facilities of a merger entity that they require to remain competitive. Access remedies normally require an access commitment which is set out in significant detail so that both customers and monitoring

---

<sup>8</sup> [Merger Remedies: CMA87](#) (December 2018), paragraph 7.1 and 7.2 and paragraph 3.48.

<sup>9</sup> [Mergers: Guidance on the CMA’s jurisdiction and procedure: CMA2 revised](#) (January 2021 as amended on 4 January 2022), paragraph 12.14.

agencies can enforce compliance effectively.<sup>10</sup> In this case, an access remedy would look to ensure third party access to Activision Blizzard, Inc's content that is necessary to remedy the provisional SLCs.

20. We consider in further detail below each of the possible remedies on which views are sought. More generally, the CMA will consider any other practicable remedies that the Parties, or any interested third parties, may propose that could be effective in addressing the SLCs and/or any resulting adverse effects.

### ***Prohibition***

21. Prohibition of the Merger would prevent the provisional SLCs from arising in any relevant market. The CMA therefore takes the provisional view that full prohibition would represent a comprehensive solution to all aspects of the SLCs it has provisionally found (and consequently any resulting adverse effects) and that the risks in terms of its effectiveness are very low.

### ***Divestiture***

22. In evaluating possible divestitures as a remedy to the provisional SLCs it has found, the CMA will consider the likelihood of achieving a successful divestiture and the associated risks. In reaching its view, the CMA will have regard to the following critical elements of the design of divestiture remedies (which are considered in the following sections):
  - (a) the scope of the divestiture package;
  - (b) identification of a suitable purchaser; and
  - (c) the effectiveness of the divestiture process.
23. In this case, the Merger is anticipated which means that we would expect the divestiture of the relevant part of Activision Blizzard, Inc's business to be substantially completed prior to completion of the Merger.

#### ***The scope of the divestiture package***

24. To be effective in remedying the provisional SLCs, any partial divestiture package would need to be appropriately configured to address all the provisional SLCs, to be attractive to potential purchasers and to enable the purchaser to operate effectively as an independent competitor and restore the

---

<sup>10</sup> [Merger Remedies: CMA87](#) (December 2018), paragraphs 7.17-7.23.

competitive constraint imposed by Activision Blizzard, Inc that would be lost under the Merger.

25. In defining the scope of a divestiture package that will address any SLCs, the CMA will normally seek to identify the smallest viable, stand-alone business that can compete successfully on an ongoing basis and that includes all the relevant operations pertinent to the area of competitive overlap.<sup>11</sup> The CMA will generally prefer the divestiture of an existing business, which can compete effectively on a stand-alone basis, to the divestiture of part of a business or a collection of assets. This is because divestiture of a complete business is less likely to be subject to purchaser and composition risk and can generally be achieved with greater speed.<sup>12</sup>
26. The SLCs we have provisionally found do not relate to the entirety of Activision Blizzard, Inc's business. Therefore, in principle, remedying these SLCs may be achieved by divesting a part of Activision Blizzard, Inc's activities. Partial divestiture would involve splitting up Activision Blizzard, Inc's business and divesting a package of assets relating to the provisional SLCs.
27. To ensure that the remedy is comprehensive, the divestiture package would need to be capable of competing effectively under separate ownership. The CMA would therefore need to be confident that the divestiture package contained all the assets necessary to be able to continue to compete effectively, and that the process of carving out these assets from Activision Blizzard, Inc's business would not risk materially impairing the competitive capabilities of the divested business.
28. As set out in paragraph 14, the CMA is considering the effectiveness of three different partial divestiture packages:
  - (a) the business associated with *Call of Duty*;
  - (b) the Activision segment; or
  - (c) the Activision segment and the Blizzard segment.
29. As set out in paragraph 25, the CMA generally prefers divestiture of an existing business that has the ability to compete on a stand-alone basis. We are of the initial view that the partial divestiture packages may not have

---

<sup>11</sup> [Merger Remedies: CMA87](#) (December 2018), paragraph 5.7.

<sup>12</sup> Purchaser risk refers to the risks that a suitable purchaser is not available or that the merger parties will dispose to a weak or otherwise inappropriate purchaser; composition risk refers to the risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market; [Merger Remedies: CMA87](#) (December 2018), paragraph 5.3 and 5.12.

sufficient assets and resources to operate as an independent entity. In addition, there may be significant risks relating to identification, allocation and transfer of assets arising from the carve-out of the divestiture package. These factors may present an unacceptably high level of composition risk. We invite the Parties to provide evidence on how this risk may be adequately mitigated.

30. The CMA invites views on whether a structural divestiture short of prohibition would be effective, as well as:
- (a) The scope and configuration of the package of assets to be divested. This scope must be sufficient to address the provisional SLCs and any adverse effects. In addition, the divested business must be configured so that customers and suppliers do not bear significant risks that the remedy does not achieve its desired effect. This may involve inclusion of additional assets in the divestiture package. We invite views on the appropriateness of each potential partial divestiture package, whether divestiture of additional assets or staff would be necessary, and how risks concerning identification, allocation and transfer of suitable assets to a divestiture package could be managed.
  - (b) Whether there are risks that a suitable purchaser is not available or that the Parties will divest to a weak or otherwise inappropriate purchaser.
  - (c) Whether there are risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture.
  - (d) Any other elements that may be required.

*Identification of a suitable purchaser*

31. The CMA would wish to be satisfied that a prospective purchaser:
- (a) is independent of the Parties;
  - (b) has the necessary capability to compete;
  - (c) is committed to competing in the relevant markets (as identified in paragraph 2); and
  - (d) will not create further competition concerns.<sup>13</sup>

---

<sup>13</sup> [Merger Remedies: CMA87](#) (December 2018), paragraph 5.20 and 5.21.

32. The CMA invites views on whether there are any specific factors to which we should pay particular regard in assessing purchaser suitability in this case.

### *Effective divestiture process*

33. The CMA invites views on the appropriate timescale for achieving a divestiture.
34. The CMA will consider what, if any, procedural safeguards may be required to minimise the risks associated with this divestiture.
35. At this stage, given the nature of the partial divestiture and the potential for deterioration during any divestiture period, we expect that it would be necessary to require an up-front buyer. This means that a suitable purchaser would need to be identified and any divestiture would need to be substantially completed before the Merger is allowed to proceed.
36. The CMA invites views on whether Microsoft should be required to appoint a monitoring trustee to oversee the divestiture(s) and to ensure that the business to be divested is maintained during the course of the process.
37. The CMA will also have the power to mandate an independent divestiture trustee to dispose of the divestiture package if:
- (a) the Parties fail to procure divestiture to a suitable purchaser within the initial divestiture period; or
  - (b) the CMA has reason to expect that the Parties will not procure divestiture to a suitable purchaser within the initial divestiture period.
38. In unusual cases, the CMA may require that a divestiture trustee is appointed at the outset of the divestiture process. The CMA invites views on whether the circumstances of this Merger necessitate such an approach.

### *Behavioural remedy options*

39. Behavioural remedies seek to change aspects of business conduct from what might be expected after the Merger, based on the Parties' incentives and resources, to create a competitive environment similar to that expected in the absence of the Merger. A behavioural remedy would involve Microsoft and Activision agreeing to take certain action(s) post-Merger, for example making *Call of Duty* and other games available to other platforms, in order to remedy the SLCs.



40. For a behavioural remedy to be effective, the CMA would need to be confident that it would address any SLC comprehensively, both now and in the future as the market and competitive conditions change and develop. The CMA would also need to be confident that the remedy was capable of effective implementation, monitoring and enforcement.
41. The design of behavioural remedies should seek to avoid four key risks in order to ensure they are as effective as possible:
- (a) Specification risk: the risk that it may not be possible to specify the form of conduct required in sufficient detail and clarity. This is more likely in cases where the market is prone to change.
  - (b) Circumvention risk: the risk that other forms of adverse behaviour may arise if certain forms of behaviour are restricted. For example, where pricing is restricted, quality may be degraded.
  - (c) Distortion risk: the risk of market distortions arising from the remedy overriding market signals or encouraging circumvention behaviour.
  - (d) Monitoring and enforcement risk: the risk that behavioural remedies cannot be appropriately monitored or enforced, for example as a result of volume and complexity of information required, information asymmetry, or ongoing changes in the market.<sup>14</sup>
42. The CMA may also use behavioural measures as an adjunct to structural measures.<sup>15</sup>
43. As set out in paragraph 15, the CMA is seeking views on the effectiveness of an access or other behavioural remedy in addressing the SLCs provisionally identified, and on the key components that may be required to ensure that it is appropriately specified to address the SLCs.
44. As noted above, the circumstances in which the CMA might select a behavioural remedy as the primary source of remedial action are not present in this case. The two markets in which the CMA has provisionally found SLCs are multi-faceted and continue to develop. This is particularly the case in cloud gaming, where the customer offerings and business models of market participants are evolving rapidly. We are of the initial view that any behavioural remedy in this case is likely to present material effectiveness

---

<sup>14</sup> [Merger Remedies: CMA87](#) (December 2018), paragraph 7.4.

<sup>15</sup> [Merger Remedies: CMA87](#) (December 2018), paragraph 7.3.

risks. We invite the Parties to provide evidence on how these risks could be appropriately managed to ensure that any behavioural remedy is effective.

### ***Other possible remedies to address the provisional SLCs***

45. The CMA will consider any other practicable remedies – whether structural or behavioural in nature – that the Parties, or any interested third parties, may propose that could be effective in comprehensively addressing the provisional SLCs the CMA has found in this case and any resulting adverse effects.
46. Where the Parties propose remedy options for the CMA's consideration, engagement by the CMA on remedies with limited prospect of being effective can reduce the CMA's ability to engage on remedies that have a greater prospect of being effective. Therefore, in keeping with the CMA's guidance on remedies, and in view of the statutory deadline for the CMA to publish its final decision on any SLCs and remedies, the CMA will not conduct a detailed consideration of the Parties' proposed remedies unless the Parties demonstrate that their proposed remedy options will address effectively all of the provisional SLCs and their resulting adverse effects identified in the Provisional Findings.<sup>16</sup>

### **Cost of remedies and proportionality**

47. In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, that it considers will be effective. The CMA will also seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. Between two remedies that the CMA considers equally effective, it will choose that which imposes the least cost or restriction.
48. When considering relevant costs, the CMA's considerations may include (but are not limited to):<sup>17</sup>
  - (a) distortions in market outcomes;
  - (b) compliance and monitoring costs incurred by the Parties, third parties, or the CMA; and
  - (c) the loss of any RCBs that may arise from the Merger which are foregone as a result of the remedy.

---

<sup>16</sup> [Merger Remedies: CMA87](#) (December 2018), paragraph 4.57.

<sup>17</sup> [Merger Remedies: CMA87](#) (December 2018), paragraph 3.10.

49. In deciding the question of remedies, the CMA may have regard to the effects of any remedial action on any RCBs in relation to the creation of the relevant merger situation concerned.<sup>18</sup>
50. RCBs are limited by the Act to benefits to customers in the form of:
- (a) 'lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom (whether or not in the market(s) in which the SLC has occurred or may occur) or
  - (b) greater innovation in relation to such goods or services.'<sup>19</sup>
51. The Act provides that a benefit is only an RCB if:
- (a) it accrues or may be expected to accrue to relevant customers within the UK within a reasonable period from the creation of the relevant merger situation and as a result of the creation of that situation; and
  - (b) it was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.<sup>20</sup>
52. **Invitation for views on the costs of remedies:**
- (a) The CMA invites views on what relevant costs are likely to arise (if any) in implementing the different possible remedy options the CMA is considering, or any remedies you wish to put forward for the CMA's consideration.
  - (b) The CMA invites views on the nature of any RCBs and on the scale and likelihood of such benefits and the extent (if any) to which these are affected by the different possible remedy options we are considering, or any remedies you wish to put forward for the CMA's consideration.

## Next steps

53. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the CMA to consider, by **17:00 UK time on 22 February 2023** (see Note (i)). Comments should be made by email to [MS.Activision-PFsresponses@cma.gov.uk](mailto:MS.Activision-PFsresponses@cma.gov.uk).

---

<sup>18</sup> Section 36(4) of the Act; see also [Merger Remedies: CMA87](#) (December 2018), paragraph 3.15 and 3.16.

<sup>19</sup> Section 30(1)(a) of the Act; see also [Merger Remedies: CMA87](#) (December 2018), paragraph 3.17.

<sup>20</sup> Section 30(3) of the Act; see also [Merger Remedies: CMA87](#) (December 2018), paragraph 3.19.

54. A copy of this notice will be posted on the CMA [case page](#).

(signed)

Martin Coleman

Inquiry Group Chair

8 February 2023

*Note*

- (i) This notice of possible actions to remedy, mitigate or prevent the SLC or any resulting adverse effects is made having regard to the provisional findings report announced on 8 February 2023. The main parties have until 1 March 2023 to respond to the provisional findings report. The CMA's findings may alter in response to comments it receives on its provisional findings report, in which case the CMA may consider other possible remedies, if appropriate.